

# Resolving trade disputes with China

by Anthony Connerty



Anthony Connerty

Anthony Connerty, barrister and member of several international arbitration panels considers the advantages of arbitration in the resolution of disputes arising under international trading contracts.

This article seeks to consider why companies should include provision for dispute resolution in their international trading contracts and why that dispute resolution process should be arbitration. Its particular emphasis is on cross-border trading between British and Chinese parties. The article therefore looks at:

- why businessmen should choose arbitration as a means of resolving their disputes;
- arbitration under the rules of some of the major world arbitration bodies: the International Chamber of Commerce (the ICC); the London Court of International Arbitration (the LCIA); the China International Economic and Trade Arbitration Commission (CIETAC); and the China Maritime Arbitration Commission (CMAC);
- the New York Convention: this convention provides the means of enforcing arbitration awards worldwide in convention countries. For example, an LCIA arbitration award made in England against a Chinese party and in favour of a UK party can be enforced in China. Indeed, it can be enforced by the UK party in any convention country in the world in which the Chinese party has assets.

## WHY CHOOSE ARBITRATION?

When a businessman enters into a contract, his main reaction will doubtless be satisfaction at having concluded the deal. He will probably spend little time thinking about the prospect of the contract going wrong. Most business

transactions are in fact carried through without any problem, but in some cases difficulties do arise.

Should the contract include provision for the resolution of disputes? If no provision is made, then any disputes arising out of the contract (which cannot be resolved by negotiation between the parties) are likely to have to be dealt with in the national courts. If the contract is with a Chinese party, that may mean the Chinese courts. That may not appeal to the UK party. Equally, the Chinese party may be faced with having to sue in the UK courts. In each case, one party will be faced with having to resolve disputes in a foreign country under a foreign legal system and in a foreign language.

Is there an alternative? One possibility is arbitration. The parties can agree that, instead of their disputes being dealt with in the national courts, any disputes will be heard by an arbitral tribunal. Because arbitration is a consensual process, the parties can decide who will resolve their disputes, in which country the arbitration should take place, what law should be applied to the resolution of that dispute and which language shall be used for the purposes of the dispute hearing.

The parties can also choose the rules to be applied for resolving the dispute. Additionally, arbitration being a *private* dispute resolution process, the parties will know that the proceedings will be confidential.

Arbitration may – indeed in many cases should – prove to be a quicker and cheaper means of resolving disputes than the national courts.

Many commercial contracts in which the parties have agreed to have their disputes resolved by arbitration will specify one of the well-known international arbitral bodies such as the International Chamber of Commerce in Paris or the London Court of International Arbitration.

The importance of the parties specifying in their arbitration agreement (which will usually be a clause contained within the commercial contract) the place, law and language can be seen from the provisions of the LCIA's Model Clause:

*'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*

*The number of arbitrators shall be [one/three].*

*The place of arbitration shall be [City and/or Country]*

*The language to be used in the arbitration shall be [ ... ]*

*The governing law of the contract shall be the substantive law of [ ... ]'*

#### **BENEFITS OF ARBITRATION**

International commercial arbitration – as a means of resolving cross-border trading disputes – has much to offer the business community in terms of speed, cost, efficiency and confidentiality.

#### **POSITION OF A UK COMPANY**

Given the choice, a British company might well provide in the trading contract for any disputes which arise under that contract to be resolved in the UK by the UK courts. But if the UK company is not able to impose those conditions upon the Chinese party, the next stage may be for it to resist an attempt on the part of the Chinese party to provide in the contract for dispute resolution in China: that would mean a hearing before the Chinese courts, applying Chinese law in proceedings to be conducted in the Chinese language.

How is the UK party to resist this attempt on the part of the Chinese party? One obvious way is to propose that there be provision for a truly 'neutral' dispute resolution process. The obvious – and commonly adopted solution – is to make provision for disputes to be resolved by one of the well-known international arbitral bodies such as the ICC or the LCIA.

#### **ARBITRATION UNDER INTERNATIONAL ARBITRAL RULES**

International arbitral bodies such as the ICC, the LCIA, CIETAC and CMAC, must operate within the context of

national laws and, on an international basis, with an eye to the New York Convention.

As to national laws, it is clear that arbitration – as a private dispute resolution system separate from the litigation systems of the national courts – can only operate with the agreement of national governments. Broadly speaking, national governments support arbitration as a private system principally in two ways. First, by staying litigation in the national courts in circumstances where the parties have agreed to arbitrate. Secondly, by enforcing in the national courts the awards made by arbitral tribunals. In addition, the state courts may aid the arbitral process by, say, granting injunctions. But in return the state expects to exercise a degree of control over the arbitral process by, for example, allowing appeals in certain circumstances to the state courts against arbitration awards.

ICC and LCIA arbitrations taking place in England are subject to the mandatory provisions of the English Arbitration Act of 1996. Similarly, CIETAC and CMAC arbitrations are subject to (and are supported by) the provisions of the Arbitration Law of the People's Republic of China and other PRC Laws and Regulations.

#### **ICC Arbitration**

The International Chamber of Commerce (ICC) is not simply an arbitral institution. It is probably the major world business organisation. It has members in more than 130 countries. It has drawn up codes relating to documentary credits, demand guarantees and the like which can be incorporated wholesale into contractual documents.

As an arbitral body, the ICC is amongst the world's foremost arbitral institutions. Its revised arbitration rules came into force in 1998. The rules deal with the commencement of the arbitration; the appointment of and challenge to arbitrators; the service of the claimant's request and the respondent's answer; provisions as to the place of the arbitration, the language of the arbitration and the procedures to be followed at the arbitration hearing; and the provisions relating to the award and scrutiny of that award by the ICC Court in Paris.

#### **LCIA arbitration**

Like the ICC, the London Court of International Arbitration (LCIA) is a truly international organisation. It will arrange and administer arbitrations under any system of law in any part of the world. It will do so either under its own rules or under the UNCITRAL (United Nations Commission on International Trade Law) Rules. There is no more need for an LCIA arbitration to be conducted in London than there is for an ICC arbitration to be conducted in Paris. The LCIA's own rules have been translated into many languages, including Chinese.

The former president of the LCIA (now honorary president), Sir Michael Kerr, has said that:

*'There are grounds for thinking that LCIA arbitration clauses are nowadays increasingly incorporated into contracts. The new 1985 LCIA Rules are being used worldwide and appear to have achieved worldwide renown.'*

The LCIA Rules have been revised from time to time, the most recent revision taking account of the new English Arbitration Act which came into force in January 1997. The current rules, which follow a recognisable international pattern, took effect from January 1998 and contain provisions dealing with:

- (1) The claimant's request for arbitration and the respondent's response.
- (2) The formation of the arbitral tribunal and the removal and replacement of arbitrators. Article 12 contains provisions for a 'truncated' tribunal in circumstances where one arbitrator on a three-member tribunal refuses to participate in the arbitration.
- (3) Communications between the parties and the tribunal and the conduct of the arbitral hearing.
- (4) The submission of written statements and documents.
- (5) The 'seat' of the arbitration: this is a matter of considerable importance and is dealt with in art. 16. The seat is the 'legal place' of the arbitration and is to be the place chosen by the parties (failing which it shall be London). Hearings and meetings can be heard at 'any convenient geographical place', but such hearings are deemed to take place at the seat and any award is likewise deemed to have been made at the seat. Those provisions in the rules, providing for a constant seat but making provision for hearings to take place elsewhere, and the deeming of the award to be made at the seat, follow the new English Act.
- (6) The language of the arbitration: this is to be that of the arbitration agreement unless the parties decide otherwise.
- (7) Representation by lawyers.
- (8) The hearing, witnesses and experts appointed by the tribunal.
- (9) Additional powers of the tribunal: the art. 22 provisions include powers relating to the applicable law. Unless the parties have agreed otherwise the tribunal is to determine the law(s) or rules of law applicable to the arbitration agreement and the arbitration. In addition, the tribunal is to decide the dispute 'in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of

their dispute'. But the tribunal '*... shall only apply to the merits of the dispute other principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" where the parties have so agreed expressly in writing*'.

- (10) Jurisdiction of the arbitral tribunal: this includes the power to rule on its own jurisdiction.
- (11) Deposits and security.
- (12) The award: it is to be in writing and contain reasons. The decision is to be by majority. Article 26.7 contains the important provisions that, in the event of a settlement, the tribunal may render an award recording that settlement if so requested.
- (13) Powers to correct the award and to make additional awards.
- (14) Costs, decisions of the LCIA Court, confidentiality, the exclusion of liability and general rules.

The new rules, recommended clauses, schedules of costs and other information concerning the LCIA are available on its website: <http://www.lcia-arbitration.com>.

#### **CIETAC arbitration**

There are two circumstances in which, whether the UK party likes it or not, disputes may have to be resolved under Chinese law and possibly at a hearing taking place in China: the first, and obvious circumstance, is where the Chinese party has (for whatever reason) the stronger hand in the commercial transaction and can therefore dictate terms; second, where the transaction is such that, under Chinese law, the law of China must be applied. In those circumstances, the choice of arbitration is probably far preferable to litigation in the Chinese courts; and, if there has to be arbitration in China, it is advisable that the UK party insist that such arbitration be under the China International Economic and Trade Arbitration Commission (CIETAC) Rules.

#### **PRUDENT PRACTICE**

It is prudent practice to include provision for dispute resolution in international trading contracts. In the absence of such provision, a likely outcome is that differences will have to be fought out in the national courts: and that may mean the Chinese courts. The option for the Chinese party may be equally unpalatable: litigation in the UK courts.

#### **CASE LOAD**

Internationally, CIETAC is highly regarded. It is probably now the world's busiest international commercial arbitral institution. The number of cases admitted by CIETAC has risen from 27 in the 20-year period 1956–1976 to 778 in 1996. The types of dispute

dealt with by CIETAC included general sale of goods, joint ventures and construction projects. Parties involved in CIETAC arbitrations have come from over 40 countries and regions including the US, the UK, Russia and Japan. The type and scope of disputes have become progressively more extensive and the sums claimed have increased; for example, the 1997 claims amounted to approximately US\$500 billion.

## NATIONAL LAW

In China as in the UK there are two matters to be considered in relation to international commercial arbitration: first, the national law and, secondly, the arbitration rules.

The new Arbitration Law of the PRC of China came into force on 1 September 1995. It comprises 80 articles and is divided into 8 parts. Like its English counterpart, the new 1996 Arbitration Act, the Chinese Arbitration Law is based to some extent upon the UNCITRAL Model Law:

- Part One contains general provisions;
- Part Two deals with arbitration Commissions in China;
- Part Three is concerned with the arbitration agreement and contains provisions dealing with autonomy;
- Part Four deals with the formation of the arbitral tribunal, the arbitration hearing and the arbitral award;
- Part Five deals with challenges to the award;
- Part Six is concerned with enforcement of that award;
- Part Seven contains provisions relating to international arbitration ('foreign related arbitration').

## CIETAC RULES

The CIETAC Arbitration Rules were revised in the light of the new Chinese Arbitration Law. The present rules came into force as from 1 October 1995.

The CIETAC headquarters are in Beijing and there are sub-commissions in Shanghai and Shenzhen. CIETAC has produced a booklet which lists its facilities and services.

The CIETAC Rules follow a pattern which is similar to those of other international arbitral institutions:

- (1) The arbitration agreement: this is to be in writing. CIETAC recommend a Model Clause (similar to those recommended by the LCIA and the ICC) for inclusion in the contractual arbitration:

*'Any dispute arising from or in connection with this contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's Arbitration Rules*

*in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties'.*

- (2) Commencement of the arbitration: provision is made for the commencement of the arbitration and for the service of claims, defences and counterclaims.
- (3) Arbitrators: the claimant and respondent may appoint an arbitrator from amongst CIETAC's panel of arbitrators. The present panel of some 300 arbitrators includes 80 foreign nationals, many of whom are prominent international practitioners.
- (4) Arbitration procedure: provisions are made for:
  - the place of arbitration: this is either Beijing, Shanghai or Shenzhen, although art. 35 provides that approval can be given for the hearings to be held in other places;
  - evidence;
  - experts/appraisers to be consulted or appointed by the tribunal;
  - settlement/conciliation: if the parties themselves reach a settlement they can request the tribunal to make an award in accordance with that settlement. In addition, the parties may ask the tribunal to act as conciliators. Again, if an agreement is reached, an arbitral award can be made in the form of any settlement;

## on the internet

<http://www.lcia-arbitration.com>

Information about the London Court of Arbitration (LCIA), including its new rules and schedules of costs, is available on this website.

- (5) Interim protective measures: the Commission submits an application to the Intermediate People's Court, either in the place where the property is located or in the place of residence of the party against which the application is made
- (6) Applicable law: there is no express provision in the rules dealing with the applicable law, although the effect of art. 53 would seem to be that a law chosen by the parties would be used by the tribunal. However, it is clear that in relation to certain types of subject matter, Chinese law would be applied: for example, in relation to joint venture contracts and agreements to exploit natural resources in China.
- (7) Language: the language to be used is Chinese, although the parties may agree otherwise.
- (8) Awards: provision is made for the making of final and interlocutory awards.
- (9) Finality of the award: art. 60 of the rules provides that the arbitral award is to be final and binding: 'Neither party may bring a suit before a law court or make a request to any other organisation for revising the arbitral award'. That provision is consistent with

international thinking in relation to the finality of arbitration awards.

(10) Summary procedure: rules contain provision for a fast-track 'summary procedure'. This is simpler and quicker than a full-scale arbitration. It is intended to produce a rapid resolution to disputes and can be used either where the claim is less than 500,000 Yuan or where both parties agree to the use of the simplified system. The time limits for the various stages of a full-scale arbitration are considerably reduced, and the award is to be made within 30 days of an oral hearing; or, in the case of documents-only arbitration, within 90 days from the formation of the tribunal.

(11) Costs: the rules contain a fee schedule which is based upon a sliding scale.

### CMAC

The China Maritime Arbitration Commission (CMAC) is a permanent international commercial arbitration body which was established in accordance with a decision of the State Council of the People's Republic of China in November 1958. Originally known as the Maritime Arbitration Commission, the decision provided that the Commission could deal with disputes relating to salvage services, collisions, chartering, affreightment and the like. In 1982 the scope was extended to cover maritime cases which the parties concerned agreed to submit to arbitration. In 1988 it was renamed the China Maritime Arbitration Commission.

Three sets of rules have been produced by the Commission: the original in 1959 and a second set in 1989. The current rules came into effect from October 1995. It is understood that the present rules may shortly be revised.

CMAC, like its sister organisation, CIETAC, has one chairman, several vice-chairmen and about 50 commission members. It maintains a panel of arbitrators which include both Chinese and non-Chinese members. The CMAC headquarters are in Beijing, and new offices have recently been opened in Dalian, Shanghai and Guanzhou.

The CMAC Rules follow a similar pattern to that of CIETAC.

### THE NEW YORK CONVENTION

One of the great benefits of international commercial arbitration as a means of dispute resolution is that, under the New York Convention, awards made in one convention country can be enforced in another.

Both Britain and China – indeed most of the world's trading nations – have ratified the New York Convention. The object of the UN's New York Convention (or, to give

it its full title, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York in 1958), is to provide for the mutual recognition and enforcement of arbitral awards made in countries which are parties to that convention.

Provided the necessary conditions are satisfied, an international commercial arbitral award made in China can be enforced in England. Likewise, a New York Convention award made in England can be enforced in China. The New York Convention is said to be:

*'... the most important international treaty relating to international commercial arbitration and has been a significant factor in the growth of arbitration as a means of resolving international commercial disputes.'* (Redfern and Hunter, *International Commercial Arbitration*)

### Recognition and enforcement of CIETAC awards

A CIETAC award made in China is enforceable in China in an intermediate level People's Court. It is not a New York Convention award since such an award cannot be enforced in the same country in which it was made. However, a CIETAC award made in China can be enforced as a New York Convention award in any convention country other than China.

The same position would apply in England: for example, an LCIA award made in England can be enforced as a New York Convention award in any convention country other than England: art. 1 of the New York Convention provides that the convention shall apply:

*'... to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...'*

### Place of arbitration

As mentioned earlier, one of the matters which the parties should provide for in the arbitration clause in their trading contract is the place of arbitration. This is particularly important in relation to the New York Convention: the contractual documentation must specify as a place of arbitration only a country which has ratified the convention.

### CONCLUSION

It is prudent practice to include provision for dispute resolution in international trading contracts. In the absence of such provision, a likely outcome is that differences will have to be fought out in the national courts: and that may mean the Chinese courts. The option for the Chinese party may be equally unpalatable: litigation in the UK courts.

Many international trading and commercial contracts make provision for dispute resolution to take place before international arbitral tribunals rather than in the national courts.

Experience has shown that many businesses appreciate the following advantages of arbitration over litigation:

- arbitration is a confidential process (unlike the public forum of the national courts);
- the parties can choose their tribunal (i.e. where the arbitration will take place, which law shall apply and in which language the arbitration will be heard);
- the arbitration process should be quicker and cheaper than litigation in the national courts.

International commercial contracts tend to provide for arbitration under the rules of major international arbitral bodies such as the ICC in Paris or the LCIA in London. Under such bodies, the arbitration would (subject to the parties' agreement) be held in a neutral country before a neutral tribunal.

Enforcement of an arbitral award made by an international arbitral tribunal can be carried out under the New York Convention. So, for example, an arbitral award made in favour of a UK party by an LCIA tribunal sitting in, say, Paris could be enforced in China against the Chinese party. Furthermore, the award can be enforced in any other convention country in which the Chinese party has assets.

International commercial arbitration – as a means of resolving cross-border trading disputes – has much to offer the business community in terms of speed, cost, efficiency and confidentiality. 

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**FURTHER INFORMATION**

Information on CIETAC and CMAC can be obtained from: Madame Zhu Yuefang, China Council for the Promotion of International Trade, 40/41 Pall Mall, London SW1Y 5JQ (tel: 020 7321 2044, fax: 020 7321 2055) and CIETAC/CMAC, 6/F Golden Land Building, 32 Liang Ma Qiao Road, Chaoyang District, Beijing 100016, China (tel: (86-10) 6464 6688, fax: (86-10) 6464 3500 IV).



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