

# China

## ICC arbitration in China

by Anthony Connerty

One of the few international commercial arbitration hearings to be held in China under the Rules of the International Chamber of Commerce took place in Beijing in February 1999.

### BACKGROUND

The 'seat' of the arbitration was London and the first hearing had taken place in London. The second hearing was concerned mainly with the taking of evidence from witnesses based in Beijing, and the operation of the contracts in question took place in China. Beijing was therefore an obvious venue for the second hearing. The new English Arbitration Act provides for a specific 'juridical seat' but gives power for hearings to take place at some different location (*Arbitration Act 1996*, s. 3 and 34(2)(a)).

### FROM ARBITRATION TO MEDIATION

The idea of switching from arbitration to mediation (which must always involve the prospect of the mediator having to revert to the role of arbitrator) may be difficult for many Western lawyers and arbitrators to accept. However, this approach seems perfectly natural to the Chinese.

Both the arbitrator and one of the counsel in the case were panel members of the China International Economic and Trade Arbitration Commission ('CIETAC'). The proposal that the hearing should take place at CIETAC's headquarters in Beijing was welcomed by two of CIETAC's Vice-Chairmen, Professor Tang Houzhi and Mr Wang Sheng Chang. This was the first occasion on which CIETAC had 'hosted' a hearing under the rules of a foreign international arbitral institution.

### ARBITRATION/MEDIATION

The hearing in Beijing was unusual in that, as agreed between the arbitrator and counsel for the parties, the Beijing hearing switched from arbitration to mediation at a specific stage, the arbitrator acting as mediator.

CIETAC had arranged for the necessary facilities to be available for both the arbitration (all the CIETAC arbitration rooms are provided with recording equipment) and the mediation: one large hearing room for the plenary sessions of the mediation and two smaller rooms for each of the parties, enabling the mediator to hold 'caucus' sessions in private with each party.

The idea of switching from arbitration to mediation (which must always involve the prospect of the mediator having to revert to the role of arbitrator) may be difficult for many Western lawyers and arbitrators to accept. However, this approach seems perfectly natural to the Chinese. Indeed,

provision is made in CIETAC's own Arbitration Rules for the arbitration tribunal to 'conciliate the case under its cognisance in the process of the arbitration'. This can only be done by agreement. The tribunal may then conciliate the case in whatever manner it deems appropriate. However, the tribunal is to terminate the conciliation and continue with the arbitration in circumstances where one of the parties requests an end to the conciliation or when the tribunal itself 'believes that further efforts to conciliate will be futile'. If agreement is reached an arbitration award is made in accordance with the contents of the settlement agreement, unless the parties have agreed otherwise (art. 45–49, CIETAC Arbitration Rules 1998).

According to the CIETAC publication, *An Introduction to China's International Economic & Trade Arbitration Commission*:

'... many years' practice has proved that the "combination of Arbitration with Conciliation" may give full play to both arbitration and conciliation, whereby it may facilitate a speedier and less expensive settlement of disputes and help the parties maintain and develop their friendly business relations and co-operation. This Chinese method of joining arbitration and conciliation together has drawn world-wide attention'.

### ENFORCEABILITY OF SETTLEMENT AGREEMENT AWARDS

If arbitration rules make provision for conciliation to take place during the course of the arbitral process and for any settlement reached to be made the subject of an arbitral award, are such awards enforceable under the New York Convention?

'A narrow interpretation of the New York Convention would suggest not: the provisions of the Convention envisage that the arbitral tribunal reaches a decision on the issues. A broad interpretation of the Convention would suggest otherwise. For example, in England a settlement reached by the parties can be made a subject of a judgment of a court. Article 30(1) of the UNCITRAL Model Law makes provision for the settlement of disputes during the course of arbitral proceedings: if that happens the parties may request the arbitral tribunal to "... record the settlement in the form of an arbitral award on agreed terms". Article 30(2) states that: "Such an award has the same status and effect as any other award on the merits of the case".' (Arbitration in China' by Anthony Connerty: 1995–1997 Year Book – *China International Commercial Arbitration*, pp. 104–110)

### BENEFITS

The benefits of a hearing being held in China are obvious where, for example, there is a need to take evidence from witnesses there, or to view land, buildings, plant and machinery or other evidence which is situated in China.

Section 51 of the English Arbitration Act now makes specific provision for settlements reached during the course of arbitral

proceedings to be recorded in the form of an award 'if so requested by the parties and not objected to by the tribunal'.

Similar provisions are contained in art. 26.8 of the London Court of International Arbitration's 1998 Arbitration Rules and art. 26 of the Arbitration Rules of the International Chamber of Commerce 1998.

### CIETAC

The China International Economic and Trade Arbitration Commission now has one of the busiest (if not the busiest) case loads of the major international commercial arbitral bodies. From 1995 to 1997 CIETAC had 2,404 cases and concluded 2,301.

CIETAC's headquarters are in Beijing. In addition there are sub-commissions at Shanghai and Shenzhen. Of CIETAC's 723 cases admitted in 1997, 490 related to Beijing, 110 to Shanghai and 123 to Shenzhen. Of the 1997 total, 387 cases related to general sale of goods, 245 concerned disputes arising from equity and contractual joint ventures and the remainder concerned such matters as leasing transactions, real estate, construction contracts, intellectual property and agency disputes. The parties to these disputes came from over 40 countries and regions including the USA, the UK, Canada, Russia, Germany, Japan, South Korea, Hong Kong and Singapore.

The CIETAC Panel of Arbitrators totals in excess of 400, of whom 281 are Chinese arbitrators and 137 are from Hong Kong and foreign countries.

*'There are a certain number of cases of which the Arbitral Tribunal was constituted with foreign or Hong Kong arbitrators ... Some of them were chosen as the presiding arbitrators of the Arbitration Tribunal. We believe that more and more foreign arbitrators or arbitrators from Hong Kong region will be appointed as an arbitrator to hear cases admitted*

*by CIETAC in the future.'* ('Working Report of the 13th Committee of CIETAC' by Cheng Dejun, a Vice Chairman of CIETAC: 1997-1998 Year Book - China International Commercial Arbitration, p. 90)

### BENEFITS OF A HEARING IN CHINA

The benefits of a hearing being held in China are obvious where, for example, there is a need to take evidence from witnesses there, or to view land, buildings, plant and machinery or other evidence which is situated in China. Add to this the availability of premises and professional back-up from an experienced international commercial arbitral body such as CIETAC, and the benefits could be considerable.

*Information on CIETAC and the facilities which it can provide in China for arbitration hearings and the like can be obtained from Professor Tang Houzhi or Mr Wang Sheng Chang at the Commission's headquarters at 6/F Golden Land Building, 32 Liang Ma Qiao Road, Beijing 100016, China. (Fax: (86-10) 6464 3500). ☎*

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