



Arbitration and Dispute Resolution Bulletin

CIETAC - world's major commercial arbitration commission

Arbitration law in China

The first Arbitration Act in the history of the People's Republic of China (the "PRC"), which is influenced by the United Nations Commission on International Trade Law, was enacted in August 1994. The Arbitration Law lays down the basic principles of arbitration in China and in doing so, reflects many of the fundamental principles of modern international arbitration.

Recognition of CIETAC

In China, the most important international arbitration commission is the China International Economic and Trade Arbitration Commission ("CIETAC"), while there are over 140 local arbitration commissions which are seldom chosen by international parties. CIETAC is headquartered in Beijing with a sub-commission in both Shanghai and Shenzhen, the three centers comprising one organization. There are parties from 45 countries and regions other than China involved in CIETAC arbitration cases. CIETAC awards are accepted as fair and impartial both at home and abroad and are recognized and enforced in more than 140 countries and regions.

Scope of accepting cases

CIETAC independently and impartially resolves, by means of arbitration, disputes arising from economic and trade transactions, contractual or non-contractual. The disputes include: (1) international or foreign-related disputes; (2) disputes related to the Hong Kong SAR, Macao or Taiwan regions; (3) disputes between the enterprises with foreign investment and disputes between an enterprise with foreign investment and another Chinese legal person, physical person and/or economic organization; (4) disputes arising from project financing, invitation for tender, bidding, construction and other activities conducted by Chinese legal persons, physical persons and/or other economic organizations through utilizing the capital, technology or service from foreign countries, international organizations or from the Hong Kong SAR, Macao and Taiwan regions; and (5) disputes that may be taken cognizance of by the Arbitration Commission in accordance with special provisions of or upon special authorization from the law or administrative regulations of the People's Republic of China; (6) any other domestic disputes that the parties have agreed to arbitrate by the Arbitration Commission.

Decision-making by a CIETAC arbitral tribunal

CIETAC has a Panel of Arbitrators (the "Panel") consisting of persons with professional knowledge and practical experience in the fields of law, economics and trade, science and technology. Article 10 of the CIETAC Rules allows for foreign persons as well as Chinese persons to comprise the Panel of Arbitrators established by CIETAC. CIETAC's website presently reports that from the total Panel of nearly 500 arbitrators, 158 are from either Hong Kong or other countries. The current CIETAC Rules concerning the appointment of a tribunal specify that each of the parties shall appoint one arbitrator from the Panel of Arbitrators provided by CIETAC or entrust the Chairman of the Arbitration Commission to make such appointment. The third arbitrator is appointed either by the parties or by the Chairman of the Arbitration Commission upon the parties' joint authorization. Alternatively, the parties are able to jointly appoint or jointly authorize the Chairman of the Arbitration Commission to appoint a sole arbitrator to hear the case alone.

Recent developments of CIETAC

In 2000, CIETAC also established a Domain Name Dispute Resolution Centre which is authorized to resolve disputes involving Internet domain names. Finally, in 2003 CIETAC adopted specialized arbitration rules for the resolution of financial disputes. These new rules impose stricter time deadlines than the ordinary CIETAC Rules and in theory, a financial dispute can be resolved by arbitration within 45 days of the formation of the arbitral tribunal (as opposed to the nine months usually required to complete an arbitration under the CIETAC Rules).

Enforcement in China of arbitral awards issued by non-Chinese arbitral agencies

Article 269 of the Civil Procedure Law is concerned with the enforcement in China of arbitral awards issued by foreign arbitration institutions. It states as follows: "If an award made by a foreign arbitration agency requires the recognition and enforcement by a People's Court of the People's Republic of China, the party concerned shall directly apply to the intermediate People's Court in the place where the subject of execution has its domicile or where its property is located. The People's Court shall deal with the matter in accordance with the relevant provisions of the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity". China is a signatory to the New York Convention, albeit subject to the reciprocity principle and the commercial reservation. In accordance with Article 269 of the Civil Procedure Law, the intermediate People's Court through which enforcement is sought must base any decision to refuse to enforce an award only on the provisions of Article V, sections 1 or 2, of the New York Convention.

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CONTENTS:

CIETAC - world's major commercial arbitration commission	1
19 years of Dutch arbitration law: Time for a change	2
New Austrian arbitration law	2
English focus: Online alternative dispute resolution (ODR) - the way forward?	3



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19 years of Dutch arbitration law: Time for a Change

Arbitration is a commonly accepted form of Alternative Dispute Resolution in the Netherlands. More legal provisions are contained in this procedure than any other method of Dispute Resolution. Arbitration is currently governed by Book 4 of the Dutch Code of Civil Procedure (hereafter referred to as, "the Law") and has been in existence since 1986.

Due to the development of Arbitration as a mode of Dispute Resolution, in the Netherlands and surrounding countries, the Law is now subject to possible reform. Suggestions for changes in Arbitration were discussed at a symposium in May 2005. The two main points have been summarised below.

A. Arbitration – current Dutch law

Current law states that Arbitration must be by agreement of the parties to the dispute. Cases of public order are therefore not determined in Arbitration proceedings.

Arbitration in the Netherlands has very few restrictions to its use as a mode of Dispute Resolution. Arbitration can be used as the forum for settling a dispute in cases including, but not limited to, 'the establishment of the quality or condition of an object, the establishment of damages or an amount due, or the supplementation or change in the legal relationship.'

Article 17 of the Dutch Constitution states that, no person can be prevented from having a case heard before a Court Judge (as opposed to an Arbitrator) when the law provides him with that option.

This is the fundamental reason that all parties have to explicitly agree with Arbitration as the means to settle any dispute which may arise. This agreement can take place either before there is an actual dispute (for example, an arbitration clause can be inserted as one of the terms in a contract) or, when the dispute has already begun, (for example, in an instrument of compromise agreed between the parties).

Arbitration clauses are often common practice in certain business sectors, (for example, in the construction sector), in the general terms and conditions of a contract, and in statutes or regulations. Certain industries often have their own Arbitration Tribunals and procedure.

The choice of procedure for Dispute Resolution is also open for agreement between the parties. Dutch law has only a few provisions to decide the

forum to have cases heard, if for example, the parties cannot agree on a chosen procedure. In any event, if Arbitration is chosen as the forum to hear a particular dispute, the Law imposes some guarantees which the parties must observe.

One of these provisions is that the Arbitration Tribunal should reach its decisions based on existing legal principles. However, the Arbitrator may deviate from the regulatory law, if it is necessary to do so.

The verdict has to be filed at the Office of the District Court where the Arbitration was held. The Arbitration Award does not provide an automatic right to Enforcement. It does however provide the opportunity to apply to the District Court Judge for an Enforcement Order.

From the above, one can see that the Dutch Arbitration Regulations mainly consist of directory law. This could be because the Legislator wanted to provide a few guarantees for Arbitration to be considered as an established method of dispute resolution. At the same time the Legislator has not intruded on the party's freedom to choose a system which is suitable for a particular type of case.

The Minister of Justice views Arbitration as a practical and desirable procedural alternative which lowers the workload of the judicial office. Currently, it has not yet been used as widely as it could be. Perhaps this is one of the reasons why there is now a demand for reviewing the current Arbitration Regulations.

B. The proposals for change in Dutch arbitration law

The proposals described below could have the effect of increasing the use of Arbitration and would therefore enjoy the Minister's support.

One of the proposals is to include the Arbitration clause in the blacklist of Article 6:236 (under n) of the Dutch Civil Code. This blacklist covers clauses that are considered unreasonably onerous in consumer contracts. This can be considered as contradictory to the aforementioned goal. After all, the majority of resolutions through Arbitration are based on an Arbitration clause. However, this blacklist only deals with consumer issues. The Arbitration clause can therefore still exist in non-consumer contracts. Another advantage of blacklisting the Arbitration clause is that it will enable competition with traditional legal procedures and as a result, will benefit the quality of the arbitration process. If and when this happens, then this procedure will become more popular by itself.

Another proposal is to abolish the obligation to file the verdict at the Office of the District Court. The reason for this is self-evident: Right now the costs of arbitration are still a huge obstacle to choosing this forum. This proposal will however save about 95 euros each time. It will also lead to a lower workload at the Office of the District Court and help assure the confidentiality of the Arbitration Award. The main purpose of this obligation was to have a secure date when the order of the Arbitrators ends and other periods start. In the proposal, this date will be set by the date of receipt of the Arbitration Award.

Presently, it is yet to be determined whether these proposals will form part of the Law and the current Dutch Law as set out above applies.

Sources:
Kamerstukken II, 2004/05, 29 528 en 29 279, nr. 4

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Tijdschrift voor Arbitrage 2005 Special over de voorstellen Herziening Arbitragerecht.

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New Austrian arbitration law

On December 6, 2005 the draft of the new Austrian arbitration law (Schiedsrechts-Änderungsgesetz 2006, Austrian Law Gazette I 7/2006) which generally follows the UNCITRAL Model Law on International Commercial Arbitration passed the Austrian Parliament. The new law shall come into force on July 1, 2006. Any arbitration agreement concluded and any arbitration procedure initiated after that date shall be governed by the new regulations.

The following will only present some of the modifications that merit attention:

Arbitrability

The law defines arbitrability. Any claim involving an economic interest is arbitrable as well as any other claim to the extent that the parties are entitled to conclude a settlement on the issue in dispute. However, restrictions on arbitrability with respect to certain claims involving family, tenancy or freehold flat law remain unaffected.

Form of the arbitration agreement

The law follows Article 7 (2) of the UNCITRAL Model Law. A valid arbitration agreement can not only be contained in a written document signed by the parties, but also in documents exchanged by the parties.

An authorization to conclude an arbitration agreement still needs to be in the form of a written special power of attorney (pertaining to this single matter). By amending the Austrian commercial code it is intended to ease this form requirement with respect to entrepreneurs. However, this facilitation will not come into force before January 1, 2007.

Composition of the arbitral tribunal

Unlike the UNCITRAL Model Law, the law does not allow for an even number of arbitrators. This does not mean that the parties cannot agree on an even number. However, in this case, the parties shall appoint an additional person as the president.

Multi-party arbitrations

If several persons who together must appoint one or more arbitrators cannot agree on the appointments within four weeks of receipt of a written notice, the law provides that the Austrian court is competent for the nomination unless otherwise agreed.

Interim measures of protection

The law makes clear that the arbitral tribunal may order a party – after having heard this party - to take interim measures of protection. *Ex parte* measures will not be enforced by Austrian courts. The court's jurisdiction to grant interim measures even while arbitral proceedings are pending remains unaffected.

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English focus: Online alternative dispute resolution (ODR) – the way forward?

The increasing use of the Internet has led to a rise in the number of disputes arising from e-commerce. The development of e-commerce has in turn made online ADR systems (ODR) possible. These systems aim to resolve Internet online disputes and facilitate a mechanism to resolve disputes. Is ODR therefore the way forward? Is it to be considered another acceptable method of Alternative Dispute Resolution?

The types of disputes which are being handled via online systems include arbitration (document submissions), automated negotiation (blind bidding), case appraisal, complaint handling, mediation via e-mail or secure login sites,

facilitated negotiation and systems enabling the manipulation of different negotiation scenarios.

A new online arbitration, mediation and conciliation service is on trial at several hospitals in the UK to assist with claim resolution. The e-Dispute system has been successfully piloted at the European Court of Arbitration and the Emilia-Romagna Chamber of Commerce in Italy. Parties forward their case to an independent online arbitrator who reviews it before arranging an online meeting between the parties via chatrooms and video conferencing. The system claims to create a forum, which is convenient, accessible to both parties and provides a quicker, simpler and lower cost method of ADR.

There are other areas in which ODR is becoming more common. As society becomes more akin to using the Internet, disputes which occur on the Internet can be dealt with online. It has become necessary to design effective mechanisms for resolving Internet disputes because traditional methods, such as litigation, can be time-consuming, expensive and raise jurisdictional problems. Offline disputes, which have up until now been addressed with traditional dispute resolution mechanisms, are increasingly being supplemented with online technology.

As with any dispute resolution system, there are a number of advantages and disadvantages to current ODR procedures. The Internet enables parties to communicate and engage in transactions at great distance and among many people, relatively easily. ODR therefore effectively disposes of the need for travelling across the globe and enables the parties to avoid, or at least cut down, the number of face-to-face meetings. The use of the Internet as the medium for dispute resolution ought to, in theory, increase the speed at which the dispute resolution process can be conducted and reduce the costs to an affordable level. ODR can also reduce bias based on physical appearances and may be less emotionally charged due to the physical distance between the parties.

ODR can be asynchronous (not at the same time) or synchronous (in real-time) and as advances in technology continue, there will be improvements in the mediums for ODR. Currently, some of the most popular methods involve e-mail (asynchronous), chat rooms, discussion boards, instant messaging, streaming video, secure site logins and video conferencing. ODR data and information can also be captured and archived for future reference.

But is online arbitration a feasible option?

When considering ODR some questions arise: are both parties technologically aware and do they both have access to the World Wide Web? Do the parties have comparable Internet connections? What effect will the response time (for asynchronous communications) have on the outcome of the decision? Is ODR the most cost effective alternative for this dispute? In some cases, meeting face-to-face either at a hearing or at a meeting can actually be advantageous to resolution of a particular type of dispute.

ODR has yet to revolutionise the conduct of ADR. One explanation for this is the continuing conflict between the impersonal environment of the Internet and the personal world of ADR. Moreover, ODR's cost-saving benefits have yet to have a significant effect on large-scale, high value commercial arbitration.

The delay in uptake may also be due to the slow development of trust in online security and

online systems technology. Indeed new technologies will only be accepted once users have become sufficiently comfortable and competent in making use of their potential. These are of course issues which can be addressed and it may only be a matter of time before the use of ODR becomes main-stream and one of the more acceptable forums to decide commercial disputes.

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The website can be found at www.plg.eu.com and offers a range of information about PLG and its members, together with up to date bulletins on legal issues.

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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of law relating to arbitration and dispute resolution which is of general interest to all of our clients. It is jointly written and produced by PLG's Litigation Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution Bulletin. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution Bulletin is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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