CHINESE ARBITRATION AS A FORUM FOR THE
SETTLEMENT OF INTERNATIONAL CONSTRUCTION
AND ENGINEERING DISPUTES

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CHINESE ARBITRATION AS A FORUM FOR THE SETTLEMENT OF INTERNATIONAL CONSTRUCTION AND ENGINEERING DISPUTES

KEY WORDS

Alternative Disputes Resolution Enforcement
Arbitration Evidence
Award Litigation
Conciliation Mediation
Construction Settlement
Contract Statutes
CPR Tribunal
Dispute

ABSTRACT

This dissertation relates to arbitration under the auspices of China International Economic and Trade Arbitration Commission, in particular its relevance to resolution of international construction and engineering disputes. CIETAC arbitration is set in the context of developments in the Chinese economy and the statutory framework relating to international arbitration in China. Where appropriate a comparative approach is taken, with other institutional rules and jurisdictions. Conclusions reached include that CIETAC, in many aspects, achieves the same result arbitration under other rules and that the demand for CIETAC construction and engineering arbitrations will increase due to China’s WTO entry.
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GLOSSARY OF ABBREVIATIONS

ADR  Alternative Disputes Resolution
AL  Arbitration Law of the PRC 1994
CCP  Chinese Communist Party
CIETAC  China International Economic and Trade Arbitration Commission
CL  Contract Law of the PRC 1999
CMAC  China Maritime Arbitration Commission
CPL  Civil Procedure Law of PRC 1991
CPR  (English) Civil Procedure Rules
DAC  Departmental Advisory Committee
FIE  Foreign Invested Enterprises
ICC  International Chamber of Commerce
LCIA  London Court of International Arbitration
PRC  People’s Republic of China
SCC  Stockholm Chamber of Commerce
SOE  State Owned Enterprise
UNCITRAL  United Nations Commission On International Trade Law
WTO  World Trade Organisation

PRONUNCIATION OF CHINESE NAMES

Whilst it will not make the reader fluent in Mandarin Chinese, the following guidance may help overcome some of the most common problems encountered in reading pin
and it is hoped, make for easier reading of the Chinese names which are quoted as sources.

C pronounced tz
Q pronounced ch
X pronounced sh
Z pronounced dz
Zh pronounced j

For example then, Mr. Xian Chu Zhang is pronounced, Shee’an Choo Jang.

\footnote{System of Romanisation of Chinese written characters as officially recognised in P.R. China since 1958.}
INTRODUCTION

Introduction

The main forum for international arbitration in China is the China International Economic and Trade Arbitration Commission, CIETAC.

So, why study Chinese arbitration?:

“[j]ust a few years ago CIETAC and CIETAC arbitration attracted little attention in international arbitration circles. Moreover, CIETAC was enshrouded with a good deal of mystery. Little was known about CIETAC and, most probably, even less was thought about it.

Today, however, this picture has changed dramatically. This is no doubt due in large part to the tremendous increase in CIETAC’s case load in recent years, which has catapulted CIETAC into the ranks of the most important arbitration bodies in the world.”

And, why is Chinese arbitration relevant to construction and engineering?:

“The Chinese construction industry is presently the world’s 2nd largest after the US, with totals output value of...US$151 billion... in 2000. Based on internal estimates, China’s construction output is expected to increase to about...US$700 billion...by 2015, overtaking the US construction market to become the world’s No.1”

It strikes me therefore, that the question might be why would one not study arbitration under the auspices of one of the largest international arbitral institutions in the second largest, set to be the largest, construction industry in the world?

The increased workload and consequent interest in CIETAC as noted by Moser, has not simply just happened, it is a result of the increased economic activity since the opening up of the Chinese market over the past twenty-five years. Consideration of CIETAC arbitration cannot, therefore, be undertaken in isolation from the historical background to developments in the Chinese economy which have, in turn, shaped CIETAC from being what was an administrative appendage of the State to one of the World’s foremost arbitral institutions, and that of the legal framework under which it operates.

The first part of this dissertation therefore focuses on the historical growth of the Chinese market economy and the prospects for its further expansion with the

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significant development in 2001 of China joining the World Trade Organisation (WTO). Particular attention is paid of the effect this will have on international construction and engineering firms doing, or planning to do, business in China. The narrative will seek to demonstrate that there will be an increase in the activity of such firms in the Chinese market and that this will inevitably lead them into contact with Chinese arbitration under CIETAC Rules.

The second part of the dissertation deals with the Chinese legislative framework under which Chinese arbitration operates. Choice of CIETAC rules will mean that, absent agreement to the contrary, Chinese will be the curial law of an arbitration under CIETAC. It is therefore important to have an understanding of these laws and of some particular pitfalls which await the unwary.

Rather than a blow-by-blow account of the CIETAC Rules, the third part of this dissertation centres on some of the areas of Chinese arbitration which have either attracted some of the most controversy or are sufficiently different from the way that things are done elsewhere to attract closer analysis. These include the alleged impartiality and protectionism of Chinese arbitration and the habitual combination of arbitration with conciliation under the Chinese model.

The fourth part takes a close look at the current relevance, if any, of Chinese arbitration to the resolution of international construction and engineering disputes and the preparations that CIETAC need to make if they are to meet demand for the projected increase in such disputes in the coming years.

In approaching these subjects I have, as far as possible, tried to maintain a balance which seems to be sadly lacking in much of the learned ‘western’ writing on the subject, where there is generally an automatic assumption that the Chinese approach.

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3 For example Professor Frankie Fook-lun Leung (whom, despite the oriental name is a US writer), writes:

“It is submitted that foreign influences have positive effect on the development of China’s legal system because China does not have a legal tradition and has to learn from the outside world’s experiences.”


Such a culturally imperialist view belies the fact the China has a legal tradition pre-dating that of the common law or Romano civil law traditions and suggests that the learning process is entirely a one-way-street.

4 With some notable exceptions.
is at best naïve and at worst downright crooked. In pursuit of this balance, in many instances, I have taken a comparative approach, looking at how other arbitral institutions and jurisdictions deal with particular matters, and that how, in many cases the result would not be far different from that under the Chinese system.

**Research Carried Out For This Dissertation**

In an effort to establish how some of the aspects of Chinese arbitration work ‘on the ground’, I have undertaken research for this dissertation which comprised two exercises.

The first exercise was to obtain feedback on the reaction of those directly involved in CIETAC arbitration as users. Approaching companies doing business in China directly would have been a very hit-and-miss affair, I therefore considered that a preferable methodology was to approach those to whom such trading firms would turn to as and when they became involved in a dispute involving their Chinese contracts. To this end approaches were made to legal practitioners dealing with ‘foreign related’ matters in China⁵.

The approach comprised the sending of a questionnaire, a blank copy of which is attached at Appendix B hereto. In all 59 questionnaires were sent, of which 10 replies were received, a return rate of 17%. Whilst the absolute number of replies is not that great, it is submitted that the return rate is very healthy for such surveys. In addition, the number of practices approached denotes a very high percentage of the total available sample, i.e. law firms dealing with foreign-related cases in China, and as such is representative, particularly so on some issues where all responses were unanimous.

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⁵ In recent years China has allowed foreign law firms to set up offices in China, many of the big name law firms as well as some with a niche interest in China have availed themselves of this opportunity. For no other reason than ease of obtaining information and communicating with such firms the approaches tended to be to these foreign law firms, and so to that extent any results obtained could be skewed towards a ‘foreign-viewed’ perspective.

That said, some local Chinese law firms were also contacted and answers received, in addition to which many of the foreign law firms noted above have Chinese nationals at senior levels in their China offices and some of the replies were received from such persons. As an overall observation, there was little discernable difference in the types of answers received to the survey, be they from foreign or local Chinese practitioners.
Rather than set out the results of the survey separately here, reference is made to the findings so that they can be considered in context of the discussions under the sections to which they relate below.

The second exercise related to the use, if any, being made of CIETAC arbitration for the resolution of disputes in construction and engineering cases. I approached CIETAC listed arbitrators who expressed their specialisation as being either construction or engineering, to see whether or not they had actually been called to sit on CIETAC tribunals. Whilst such research would not necessarily be conclusive, in the absence of any published information in this respect, it would give an indication of the extent to which CIETAC is being used in such cases. Further details of the research undertaken is set out in the section relating to construction and engineering disputes under CIETAC below.

At this juncture I would like to acknowledge the assistance provided by my supervisor, Teresa Cheng SC. I would like to thank those who took the trouble to respond to my enquiries during the research for this dissertation. Mainly, my thanks are due to my wife, Yawei, for her forbearance generally and in particular her encouragement in the past two years whilst I was undertaking the MSc at King’s. Also to my parents who’s love and support over the years is so valued. A debt of gratitude is also owed to some of my fellow students with whom I have found that adversity makes a firm bond.

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6 CIETAC operates a closed list system, from among whom parties must select to sit on the tribunal in their case. The list system, and the criticism made of it is examined in further detail in the relevant sections below.

7 To an extent this exercise was superseded by information received by the writer directly from CIETAC in the period soon before the final drafting of this dissertation. The CIETAC information gave precise numbers of construction and engineering disputes carried out under CIETAC in recent years, information found not to be available from an extensive search of other sources. Nevertheless, the original research proved very useful in the discussion related to the resources which CIETAC has available for a potentially significant increase in the numbers of construction and engineering cases in the coming years.
PART 1 - CIETAC IN CONTEXT 1 - HISTORY AND THE CHINESE ECONOMY

Some Historic Background To The Emergence Of The Chinese Market Economy

China’s emergence on to the global economic stage is well documented, in 1978 Deng Xiaoping led the move away from a socialist planned economy towards market reforms, famously pronouncing that it did not matter whether the cat was black or white, so long as it caught mice, it was a good cat. This decision followed years of stagnation and isolationism and the realisation that the communist model had failed to provide any improvement in the living standards of Chinese people and that it had little prospect of doing do.

In 1949, following victory, ‘Liberation’, by the Chinese Communist Party (CCP) over the Kuomintang in the civil war fought since 1945, the first ‘Five Year Plan’ galvanised the Chinese people into improving economic production and repair of the country’s infrastructure which had been devastated by successive years of war. The achievements of these early years of communist rule were impressive, but development was from a rock bottom base.

The second five year plan, known as ‘The Great Leap Forward’. The aim was to catapult the Chinese economy to first-world standards. One benchmark was to match the UK in steel production, together with mass mobilisation of the population on huge public works schemes. The plan reflected the belief by Mao Zedong that there was nothing that couldn’t be achieved by the will of the people directed by revolutionary zeal. The plan was a catastrophic failure, the fixation with steel production and the diversion of resources elsewhere led to a drop in agricultural production, natural disasters in 1959 and 1960 led to famine in many areas on a scale little appreciated outside China.

These failures left Mao politically weakened. In an effort to cling to power he instigated the ‘Cultural Revolution’ (now known in China as the ‘Red Disaster’), a philosophical movement, nominally from the grass roots but actually orchestrated by the Maoist faction of the Chinese Communist Party (CCP). The Cultural Revolution was typified by the persecution of intellectuals, the rejection of old norms and a

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8 Deng Xiaoping’s speech to the third plenum of the 11th CCP Central Committee.
disregard for the rule of law. It is images from this era of the ‘little red book’ which persist in the minds of many westerners.

Again, this red movement was a massive retrograde step for China’s economy, with people busy making ‘revolution’ no economic progress was possible. The situation eventually stabilised but by this time Mao’s health was failing and the CCP was left deeply factionalised

Mao died in 1976. Following a power struggle and the purge of the ‘Gang of Four’ Deng Xiaoping came to power in 1977, his first priority was the stabilisation of his own political position, following which he turned his attention to economic matters and began the market reforms mentioned above. In the subsequent 25 years these reforms have continued and accelerated.

As a measure of the impact of these market reforms, in the twenty years from 1978 to 1998 Chinese agricultural output grew by three-and-a-half times, whilst during the same period industrial output increased by a staggering fourteen times, posting an average annual growth of 9.8%\(^9\). The market reforms have encouraged foreign companies and investors to move into the Chinese market, foreign investment over the same twenty year period amounted to US$240 billion\(^{10}\), this figure is set to increase rapidly with the accession of China to the World Trade Organisation (WTO), (dealt with in more detail below).

The economic reforms set in train by Deng are irreversible and China is set to continue this pattern of economic development. The graph below shows that whilst China currently still lags far behind the two largest economies in the World, USA and Japan, a sustained level of growth in excess of each of those latter two countries over the next twenty years, will see the gap in GDP being closed, at least in respect of China’s geographical neighbour, Japan.

\(^{9}\) Though official figures are usually thought to be over-stated.

\(^{10}\) All figures from, ‘China’s Automotive Market: The Next Decade’, Standard & Poor’s DRI, (December 1998), p.13
China’s Entry Into The WTO

A major step on the road to China’s further economic development was taken at the end of 2001 when, after protracted negotiations, China acceded to the World Trade Organisation. Membership is anticipated to bring widespread benefits to the Chinese economy, allowing China to trade as freely as any other member country, though it is true that there will be medium-term detrimental effects to the Chinese economy arising out of the restructuring of State Owned Enterprises (SOE’s) that will be necessary as a result of WTO membership.

Luke Filei of CMS Cameron McKenna summarises the up-side of China’s WTO membership succinctly as follows:

‘What do members of WTO agree to?

- Legal ground rules for international commerce
- Provision for trade to flow as freely as possible
- Reduction of trade tariffs
- Equal treatment between trading partners
- Equal treatment between local and foreign produced goods and services
- Redress through WTO’s dispute resolution mechanism

How does membership immediately affect what happens in China?

- Empowers those in China’s leadership to make faster moves towards a more open economic environment
- Requires certain long discussed changes to the Chinese regulatory system
The following looks at the likely effect of WTO membership on the Chinese economy generally, then looks in a little more detail at how WTO entry will impact on construction and engineering related sectors.

General Affects Of WTO Membership

Agreement has been reached on a programme of tariff reductions over a wide range of industrial sectors as well as the relaxation on the restrictions of inward investment into China, for foreign investment there is great interest in sectors such as telecommunications and automotive where foreign technology is more advanced than that available locally, banking and insurance will also become more liberalised allowing penetration of these sectors by foreign companies. From the Chinese perspective, due to lower tariffs in consumer countries, membership will assist its export of textile and electronic goods for which China has become a major producer due to its low unit labour costs.

The reduced barriers to inward investment yield a projected consequent increase in the involvement of foreign companies doing business in China; in turn, it is submitted that this will lead to an increase contracting activity between Chinese and foreign parties, many of whom will include CIETAC arbitration as their method of dispute resolution.

A second tier effect of WTO entry will be an improvement of the economy in general, with a general improvement in people’s living standards and aspirations, which in turn, will make them net consumers with the development of a Chinese middle class. This is the ‘holy grail’ for which many foreign companies have endured years of what can often be a very frustrating trading environment to reach.

As noted, membership will not be without its downside, there is still the unresolved problem of restructuring SOE’s, many of which are fundamentally uneconomic and chronically over-manned. Many business failures are likely with consequent social repercussions, short term increases in unemployment and the need to separate social

responsibilities from work units, which in the planned economy model, provide schools, hospitals, pensions and welfare.

Another headache for the Chinese leadership is the disparity between city and country, as well as differing levels of regional development. Cities such as Shanghai are vibrant and modern, living standards there and in the Special Economic Zones\textsuperscript{12} are relatively high. By way of example, it is said that China now has 1 million US$ millionaires. The contrast with the countryside can be stark, life for the peasantry is still hard with per capita incomes a fraction of their city-dwelling compatriots, restrictions on the free movement of labour mean that migration to the cities to share in the improvements in living standards there is not an option\textsuperscript{13}. However, it is the peasantry that makes up approximately 70\% of the 1.3 billion population and as successive Chinese governments have known any economic reforms must demonstrate benefit to this group.

These are as yet unresolved issues, so enthusiasm at WTO entry needs to be tempered with caution that there are still many problems to be overcome in the Chinese economy and these will not be solved overnight.

**Affect Of WTO Membership On International Construction and Engineering Sectors**

Turning now to the likely benefit of Chinese WTO membership for foreign construction and engineering sectors.

The accession treaty deals specifically with three areas of particular interest to the subject of this dissertation, construction services; architectural, engineering and urban planning services and construction equipment.

\textsuperscript{12} Places such as Shenzhen; areas under the direct control of central government with favourable economic and tax environments, typically in China’s coastal regions. It was realised that is was not possible to develop market reform evenly over such a vast country, these areas were therefore selected for special treatment, and became the powerhouses of the growth in the economy. Following the success in these areas the next stage of development was the provision of primary infrastructure in the interior provinces with the hope of encouraging market led development of these areas. Growth in these hinterland areas, as a result of these policies has not been so marked as in the Special Economic Zones, thus highlighting the problem of two-speed development which needs to be managed by the Chinese government.

\textsuperscript{13} There is however much unofficial internal migration which causes its own ‘problems’ of unregistered workers feeding a vibrant grey economy.
Construction Services

Prior to WTO entry, unless working on a Government designated scheme, foreign contractors needed a majority shareholding Chinese joint venture partner. The WTO treaty provisions now permits foreign majority ownership, and, by 11 December 2004, wholly foreign owned construction enterprises will be permitted.

There will, however, remain restrictions on the types of project that such wholly owned entities can undertake, the restrictions being linked to the amount of foreign investment or foreign sourced loans in the project, which must be more than 50% of the total investment. Where foreign investment is less than 50% a wholly foreign owned construction enterprise can undertake the work if the project is difficult to be implemented by Chinese enterprises alone and finally, wholly Chinese invested projects where it is difficult for Chinese enterprises to implement alone, with government approval at Provincial level\textsuperscript{14}.

Whilst restrictions obviously remain, it is submitted that there is sufficient scope within these restrictions for foreign contractors to increase their market share in China compared with the pre-WTO regime. The involvement of a local Chinese partner can be a mixed blessing, of course there are advantages of local knowledge and provisions of labour resources that a local partner can resolve, often however, these arrangements are a marriage of convenience fraught with mistrust and conflicting agendas. At least under the new regime a foreign contracting organisation will have the choice of the model under which it prefers to operate.

Architectural, Engineering and Urban Planning Services

The pre-WTO situation was that foreign involvement was allowed only on a minority shareholding basis, following accession foreign majority shareholding is permitted with wholly foreign owned enterprises being permitted by 11 December 2006. Service suppliers though, must be registered practitioners of their relevant field in their home country\textsuperscript{15}.

This sector is currently dominated by state owned ‘design institutes’, any joint venture with foreign designers is likely to be with one of these entities. The design institutes will have licences to officially ‘approve’ drawings, it is difficult for foreign firms to obtain such licences\textsuperscript{16}. This restrictive practice is a matter which needs to be addressed, the licensing of individuals rather than firms would allow foreign designers to take on such qualified staff without having to rely on joint venturing with the design institutes.

\textit{Construction Equipment}

Imported construction equipment is much prized by Chinese construction firms, however this does not necessarily lead to greater efficiency, whereas prior to acquisition it would take twenty men to do a job, once the new equipment has been procured two men operate it and 18 watch\textsuperscript{17}. However it is submitted that drives for greater efficiency which will be required as a result of the dismantling of SOE’s, demand for foreign construction equipment will increase steadily.

Following WTO accession the tariffs on imported construction equipment will be progressively reduced from 10.5% to 6.5% by 1 January 2004. Restrictions on the companies with rights to import equipment will be lifted, as will restrictions on distribution and servicing networks and the issuing of import licences\textsuperscript{18}.

China will also eliminate subsidies on its home produced construction equipment. This though, it is submitted, will be of little immediate impact on the importation of construction equipment, the technology of Chinese produced equipment is far inferior to its foreign counterparts, it will be many years before local produced equipment is able to compete on an equal technological footing.

\textit{Other Affects of WTO Membership on Construction}

Problems of dismantling SOE’s will be as acute in the Chinese construction industry as anywhere. The industry is notoriously labour intensive, and the state sector accounts for the vast majority of activity in it. Anyone who has worked in

\textsuperscript{17} The writer’s own experience.
construction in China will have encountered the myriad construction bureaux of various ministries, Ministry of Construction, Ministry of Railways, Ministry of Water Resources each bureau manned by tens of thousands of workers, technicians and engineers.

Liberalisation of the rules relating to foreign financing, such as foreign banks now being able to lend in Renminbi, will reduce the current reliance of foreign contractors on financing for projects from e.g. World Bank and Asia Development Bank for doing business in China. Foreign private banks will therefore eventually have more scope for involvement in the financing of such projects, with attendant opportunities for foreign contractors with whom such foreign financiers would be familiar.

**Beijing Olympics 2008**

The other event which in recent times is often mentioned in the same breath as WTO accession is the decision to hold the 2008 Olympic Games in Beijing.

Whilst the Beijing Municipal Government and Chinese central government have pledged more than a US$ 20 billion investment in the games\(^\text{19}\) much of this will spent on works undertaken by local Chinese firms. It is likely though that foreign designers and suppliers of higher technology construction components can find opportunities for introducing innovations for which their Chinese counterparts do not have the necessary experience, it is these sectors, with perhaps the involvement of foreign project management techniques which will see the greatest benefit in respect of foreign involvement.

The Olympics may not therefore be the bonanza for foreign construction firms that is predicted in some quarters, however firms that do get involved can use the experience to gain a greater foothold in the Chinese market.

It is not necessarily the Olympics themselves which will create long-term opportunities for foreign companies but the “Olympic Quality” standards of design and construction expected to be deployed there can serve as a model for other developments and urban renewal throughout the country, as well as breaking the


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mould of the setting of references prices by local municipalities which currently reflect the lowest construction standards. 20

**Impact Of Market Reforms On Chinese Commercial Law and International Commercial Arbitration**

The above narrative relates to the subject matter of this dissertation in that it serves as the backdrop for an analysis of the development of international commercial arbitration in China and the attendant legal infrastructure. Before the instigation of market reform there was little call for an effective system of international arbitration because foreign trade was at such a low level, and as noted, in any case, the rule of law was virtually ignored during the Cultural Revolution.

The growth in the market economy has brought about many and frequent changes in Chinese law as it relates to commercial activity. In tandem, CIETAC has made several and frequent changes to its Rules, six since 1956, four of those since 1994. 21 However, neither the current laws nor Rules can be seen as the end of the story, there are still major problems to be overcome in the Chinese economy, not least being the dismantling of the monolithic SOE’s and further integration into the world economy following China’s accession to the WTO. It is likely that these further developments will see more changes in the laws and Rules, in many cases drawing from international norms and experiences. This dissertation will highlight some of the areas where China has yet to achieve ‘international’ standards.

By the same token, China’s arbitral community cannot have gone through so much change without challenging some of its fundamental assumptions, a process which


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<th>Date</th>
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<tr>
<td>1 Oct 2000</td>
<td>Per Jingzhou Tao</td>
<td>Latest published version, see Appendix A</td>
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<td>10 May 1998</td>
<td>Per Jingzhou Tao</td>
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<td>4 Sept 1995</td>
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<td>12 Sept 1988</td>
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<td>1980</td>
<td>Per Wang Shengchang</td>
<td>As Foreign Economic and Trade Arbitration Commission - FETAC</td>
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<td>6 May 1956</td>
<td>Per Wang Shengchang</td>
<td>As Foreign Trade Arbitration Commission - FTAC</td>
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many more ‘internationalised’ economies and arbitral institutions may have had the luxury not to endure, it may therefore be that lessons can be drawn from the Chinese experience to the benefit of the wider international arbitral community.
PART 2 - CIETAC IN CONTEXT 2 - CHINESE LEGAL FRAMEWORK AS IT RELATES TO ARBITRATION

Set our below is a brief commentary on Chinese statutes which have the most direct impact on arbitration in China.

Arbitration Law Of The P.R.C.

The Arbitration Law (AL) was the first statute in China to deal exclusively and comprehensively with arbitration, it replaced and consolidated arbitration provisions which thereto had been contained in 14 laws, 80 administrative regulations and nearly 200 local regulations\(^\text{22}\). It was promulgated on 31 August 1994 and came into effect as of 1 September 1995, it comprises 8 chapters containing 80 articles.

Although there is a special section (Chapter 7) dealing with foreign-related disputes the remaining provisions will impact on both on domestic and foreign-related arbitrations alike\(^\text{23}\). Detailed provisions of the AL will be dealt with when relevant to the various discussions below, however, some points are worthy of separate note here\(^\text{24}\):

- A general recognition of the doctrine of party autonomy.  
- Article 9 recognises the finality of arbitral awards following which no other arbitration commission or People’s Court will accept the case.  
- Article 15 endorses the doctrine of separability of the arbitration agreement.  
- Articles 49 to 52 allows for the conduct of conciliation within the arbitration process.  
- Articles 58 and 70, contain a ‘two-speed’ mechanism dealing with the recognition and enforcement issues depending on whether domestic or foreign-related respectively. The latter broadly accord with the recognition and enforcement provisions of the New York Convention 1958\(^\text{25}\).


\(^{25}\) Dealt with in further detail below.
The AL has however, met with criticism, for example Andrew Shields\textsuperscript{26} concentrates on the fact that China did not adopt the UNCITRAL Model Law and that the AL does not allow the degree of party autonomy provided for by the Model Law. Beaumont et al, whilst not so judgemental also note that:

\textit{“The law has long been anticipated. It was hoped by many of the scholars and senior officials of the PRC that this Law will encapsulate much of the UNCITRAL Model Law in order to enhance the international acceptability of the Law. However, ... the Law itself does not encapsulate all of the tenets of the UNCITRAL Model Law. The advantages and disadvantages of unifying the domestic arbitration system and the international arbitration system have also been hotly debated. The outcome of the debates is that this Law is a compromise between two different factions, one favouring the adoption of the UNCITRAL Model Law and the other seeking a modest reform of the already well accepted domestic regime.”}\textsuperscript{27}

By way of comparison, it is submitted that these comments could be mistaken as having been made about the Departmental Advisory Committee (DAC) during the drafting of the English Arbitration Act 1996. In particular ss.85 to 87 of the 1996 Act relating to the differential treatment of domestic arbitration, was just such a compromise\textsuperscript{28}, albeit that it was, in the eventuality not brought into force\textsuperscript{29}.

China is therefore not alone in enacting arbitration legislation which falls short of some practitioners’ expectations of what constitutes the best practice in international commercial arbitration. In China however the rationale for the differential treatment of domestic and foreign related disputes was that not to do so would have been detrimental to foreign-related arbitration\textsuperscript{30}.

\textbf{Civil Procedure Law of the P.R. China}

Promulgated in 1991, the Civil Procedure Law (CPL) sets out the rules for taking civil action in China, mostly the provisions relate to actions in the People’s Court, but there is a section dealing with arbitration and the priority that it will take over actions in the


\textsuperscript{28} See DAC Report, (1996), 327 to 331


\textsuperscript{30} The Legislative Affairs Commission Of The People’s Republic Of China, ‘Arbitration Laws In China’, Sweet & Maxwell Asia, (1997), at p. 87, para. 4
People’s Court so long as there is a valid arbitration agreement. The other sections of the CPL are pertinent insofar as they will impact on parties wishing to avoid a case being seized by the People’s Court and in proceedings in the People’s Court for the recognition or enforcement of an arbitral award.

The CPL takes precedence over the Arbitration Law and the AL is deemed to give effect to the CPL31, indeed, as will be seen the AL makes direct reference to the CPL in matters of enforcement and recognition of arbitral awards.

Some salient provisions of the CPL as they relate to arbitration or recognition and enforcement proceedings are set out below:

**Article 5.** States that foreigners shall have the same litigation rights as litigants from the PRC, so long as the foreign party’s own country does not restrict the litigation rights of PRC citizens.

**Article 111 (2)** “When two parties concerned are no longer permitted by law to start an action with the People's Court because they have already voluntarily reached a written agreement on settling their contract dispute through arbitration by an arbitrator, the litigant shall be informed to make the arbitration request;...”

**Article 217** Relates to the court enforcement of arbitral awards and for the setting aside of such awards in domestic cases, (for foreign related cases see Article 270 below).

**Article 238.** Contains an interesting provision whereby international treaties to which China is a party take priority over the CPL. This may have particular impact of the provisions of the WTO accession treaty upon interpretation of Chinese law32.

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31 “[t]he hierarchy of international arbitration in China appears to be as follows: the provisions of the Arbitration Law have the highest priority, and prevail over conflicting rules and agreements of the parties; the relevant provisions of the Chinese Civil Procedure Law are given effect by the Arbitration Law, and likewise prevail over the arbitration rules; the CIETAC Rules apply to the extent that they are not inconsistent with either the arbitration Law or the Civil Procedure Law”31


Article 241. Provides that foreign parties must have Chinese lawyers to represent them in court proceedings.

Chapter XXVIII. comprising Articles 257 to 261 (inclusive) This chapter deals specifically with arbitration and comes within Part 4 of the CPL which are the special provisions for foreigners, thus these articles deal only with foreign related arbitrations.

Article 257 bars the starting of a lawsuit if a contract contains a valid arbitration clause or if the parties have reached an arbitration agreement for the settlement of their dispute.

Article 258 gives court supportive powers for the preservation of property.

Article 259 provides for the recognition and enforcement of arbitral awards by the people’s court in foreign-related cases.

Article 260 provides for the setting aside of arbitral awards in foreign-related cases.

New Contract Law

1 October 1999 saw the implementation of the much heralded new Contract Law (CL) of the People’s Republic of China. As the largest piece of legislation ever enacted in China\(^{33}\) the CL represents a major step towards the continued economic development and movement towards the rule of law as outlined previously. The CL replaces three previous attempts at regulating contracts\(^{34}\) which resulted in a haphazard framework, and codifies, consolidates and improves upon its predecessors. Additionally the CL can be seen as a pointer to the future direction of Chinese law as it can be seen as tending towards a civil law system\(^{35}\).

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Whilst the new Contract will have wide ranging implications for any business wishing to do business in China its impact upon international arbitration in China will mainly be restricted to considerations and interpretation of an underlying contract which is the subject matter of a dispute rather than having any direct effect upon the process and procedure of arbitration itself which is the main concern of this dissertation.

There are however some points of general interest as they relate to foreign businesses operating in China which are worth noting as well as some directly affecting the arbitral process in that they confirm points of Chinese law which hitherto had been the subject of debate.

Points of general interest:

There is no reference to foreign entities having any separate legal status, indeed, Article 3 states, “Contract parties enjoy equal standing and neither party may impose its will on the other party.”

Article 126 begins well by giving freedom of selection of choice of law and provides for ‘closest connection’ where no specific choice is made, but then from the perspective of many construction and engineering businesses, goes downhill fast, with the mandatory application of Chinese law to; Sino-foreign Equity Joint Venture Enterprise Contracts, Sino-foreign Cooperative Joint Venture Contracts and Contracts for Sino-foreign Joint Exploration and Development of Natural Resources. It is submitted than many construction and engineering businesses will find themselves in one of these categories and therefore deprived of the freedom of contract allowed in other spheres.

Points directly affecting arbitration are:

Article 128 provides that parties may resolve their disputes by arbitration, though resolution through settlement or mediation are mentioned first there is no suggestion that these steps are condition precedent to going to arbitration. The wording of Article 128 however does persist the Chinese fixation with institutional arbitration, dealt with later when the status of ad hoc arbitrations is discussed in further detail.
Two further matters as highlighted by Zhu and Liu\textsuperscript{36} as follows:

**Contracts in writing**

Arbitration Law Article 16 required that arbitration agreements be in writing, however no definition had been set out so that in the past this provision has been strictly interpreted. The stipulation at Article 10 of the Contract Law allowed a contract to be formed in writing, orally or other forms, thus creating divergence between the general rules of the CL relating to contract formation and specific rules in the AL relating to arbitration agreements. Zhu and Chen argue that the influence of the less restrictive CL will influence the interpretation of ‘in writing’ as it relates to arbitration agreements to bring it more in line with a more lenient approach to ‘in writing’ taken in other jurisdictions, e.g. as contained in the English Arbitration Act 1996 at s.5.

**Separability**

Article 57 of the CL finally settles the question on the severability of an arbitration agreement, whilst Article 19 of the AL provides that they exist independently of the underlying contract, there remained one nagging doubt arising out of Article 59 of the General Principles of Civil Law (GPCL) wherein it was unclear whether arbitration clauses in voidable contracts survived setting aside of the underlying contract.

Following enactment of the CL, “\textquote{[i]t is now safe to say that the principle of separability of arbitration agreements is fully settled under Chinese law.}”\textsuperscript{37}

\textsuperscript{36} From Zhu Jianlin and Liu Yuwu, (2000)
\textsuperscript{37} Zhu Jianlin and Liu Yuwu, (2000), at 160, para. 3
PART 3 - ANALYSIS OF ISSUES RELATING TO INTERNATIONAL ARBITRATION IN CHINA

‘Foreign-Related Matters’

Differential Treatment

As can be seen from the extracts to the AL and CPL and as noted previously, whilst foreign parties are afforded equal litigation rights there persists in Chinese law a differential treatment of matters depending on whether they are domestic or foreign-related insofar as they relate to setting-aside, recognition and enforcement of arbitral awards. Arbitration Law Article 58 provides for the setting aside and Article 63 refusal of enforcement of an arbitral award in domestic cases, Articles 70 and 71 dealing with these respective matters in ‘foreign-related’ cases.

So what is meant by ‘foreign-related’ and what effect can this have on entities wishing to arbitrate or seek recognition or enforcement of arbitral awards in China?

Analysis Of The Legal Provisions

A good place to begin this analysis is to examine the link between the Arbitration Law and the Civil Procedure Law in respect of setting aside and, recognition and enforcement. AL Article 63 links with CPL Article 217 in respect of domestic matters\(^{38}\) and likewise AL Articles 70 and 71, link with CPL Article 260 in foreign-related matters.

The following sets out the above noted relationships in tabular form:

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<tr>
<th>Setting Aside:</th>
<th>Arbitration Law</th>
<th>Links To Civil Procedure Law</th>
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<tr>
<td>Domestic</td>
<td>Article 58</td>
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<tr>
<td>Foreign-Related</td>
<td>Article 70</td>
<td>Article 260</td>
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<td>Refusal Of Enforcement:</td>
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<tr>
<td>Domestic</td>
<td>Article 63</td>
<td>Article 217</td>
</tr>
<tr>
<td>Foreign-Related</td>
<td>Article 71</td>
<td>Article 260</td>
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\(^{38}\) It should be noted that whilst, this dissertation is primarily concerned with the international aspects of Chinese arbitration, as will be shown, the analysis of the domestic aspects can become very relevant to a foreign entity if it is found that they are in fact a Chinese legal person.
As can be seen AL Article 58 is a stand-alone provision, although the grounds for domestic setting-aside are similar to those for domestic refusal of enforcement at CPL Article 217, they are not exactly the same. A comparison of the grounds for setting aside under AL Article 58 and refusal of enforcement under CPL Article 217 shows that under the former the forging of evidence and the withholding of evidence sufficient to affect the impartiality of the arbitration will permit setting aside, whereas in the latter insufficiency of crucial evidence, will permit refusal of enforcement. It is submitted that former is a higher threshold requiring demonstration of wilful acts of forgery or withholding, consequently for domestic arbitrations it is easier to obtain a refusal of enforcement than to have an award set aside.

By comparison, setting aside and refusal of enforcement of foreign-related arbitration awards share a common standard, that of CPL Article 260, which in turn is a higher threshold than either AL Article 58 or CPL Article 217 in the domestic regime. Commentators note that CPL Article 260 mirrors the provisions allowing the setting aside an arbitral award contained in Article V of the New York Convention 1958, reflecting a pro-enforcement bias in the intentions of Chinese legislation. The implementation of recognition and enforcement does not always reflect this pro-enforcement bias and this is an area of some of the heaviest criticism of the arbitral regime in P.R. China, some aspects of this recognition and enforcement regime will be analysed in further detail later.

Justification For Two-Tier Treatment

The justification for the two-tier thresholds in relation to domestic and international arbitration is that CIETAC has earned a reputation for the competent and impartial handling of international disputes, whilst the domestic arbitration commissions cannot yet be trusted to the same degree and should therefore be more readily subjected to judicial intervention.

"Nevertheless, there is still a considerable difference between arbitration of domestic disputes and arbitration of disputes involving foreign elements. If,

\[\text{References}\]

39 As noted by Dr. John Mo, ‘Dilemma of “foreign related arbitration” in PRC’, ADRLJ [1999] nr. 4, pp.257-264, at 263, para. 2
40 For example Katherine Lynch, (2000), at p.118, para. 2
Parallels for this reasoning can be drawn with the situation in England whereby there is a de-facto differential treatment between the Commercial Court and the Technology and Construction Court in the handling of appeals on a point of law under the English Arbitration Act 1996, s.69. The unwritten policy being that construction arbitrators cannot yet be trusted to dispense civil justice to the exclusion of the courts. At least in this respect China’s policy is more overtly expressed in its legislation.

Meaning Of ‘Foreign-Related’

So it can be seen that foreign parties have an advantage over their domestic counterparts when it comes to recognition and enforcement of their awards, however what constitutes ‘foreign’ may not be so clear cut and it would not be too difficult for a foreign company to end up in the domestic regime as will now be explained further.

The term “foreign-related” has not been too well defined in the Chinese statues. In a sale of goods contract for example, where the seller is Chinese and the buyer say French, the distinction is quite clear. Now, consider the situation where a foreign company sets up as joint venture with a local Chinese partner, such that the joint venture entity is a Chinese legal person, the joint venture enters into a contract with a wholly owned Chinese company for supply of goods, the contract contains an arbitration clause and a matter of dispute arises. Does the fact that the only foreign element is the inward investment into the joint venture make that a foreign-related arbitration matter?

The joint venture in this scenario is what is known as a Foreign Invested Enterprise (FIE), and the treatment of FIE’s has been the subject of judicial intervention by the People’s Courts; the subject of no little confusion and something of a battle of wills between the Chinese courts and legislature, and CIETAC. The question of CIETAC jurisdiction to deal with disputes involving FIE’s is particularly pertinent to construction companies, consultants and investors in construction and engineering

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42 ‘Arbitration Laws in China’, Edited by The legislative Affairs Commission of the Congress of the People’s Republic of China, (1997), at p.87, para. 4
projects. It is very likely that such organisations will be involved in a locally registered joint venture, in effect, they will be FIE’s.

**Beijing Lido Case**

This is illustrated by the renowned construction case of *China International Engineering Consultancy Company v Lido Hotel of Beijing (1992)*. It should be noted that the case post dates the CPL (1991) but pre-dates the AL (1994).

Lido was a joint venture company FIE, with inward investment from Hong Kong. China International Consultancy was a wholly owned Chinese company. The parties entered into a construction contract, disputes arose over the quality of work, the dispute was submitted to arbitration under CIETAC Rules. CIETAC took the arbitration understanding there to be a foreign element. The CIETAC arbitration found in favour of China International Consultancy who sought enforcement in the People’s Court. The People’s Court found that both Lido and China International Consultancy were Chinese legal persons and that consequently there was no foreign element which gave CIETAC and the CIETAC tribunal jurisdiction over the dispute.

In response to the Beijing Lido case CIETAC changed its Rules in 1993 so that they specifically encompassed disputes involving FIE’s.

However, a further twist in the Beijing Lido story, is that whilst they found no foreign element, the People’s Court refused enforcement under the ‘foreign-related’ Article 260 of the CPL, *not* the ‘domestic’ Article 63. Their rationale for doing so was that despite the fact they found no foreign element, the arbitral award had been made under the auspices of a ‘foreign-related arbitration institution’ i.e. CIETAC. Thus reflecting a difference between CIETAC and the courts as to what constitutes ‘foreign-related’, CIETAC looking to the nature of the dispute, the courts looking to the nature of the institution under which the arbitration was conducted.

**Arbitration Law 1995 and The 1996 Notice**

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44 Dr. John Mo, (1999), at 258  
45 Dr. John Mo, (1999), at 262, para. 3  
46 See CIETAC Rules, (2000), Article 2 (3)
This dichotomy persisted in the drafting of the AL 1995, wherein, as previously noted, Chapter 7 deals with arbitrations with a foreign element and provides specifically for the establishment of a ‘foreign-related’ arbitration commissions\(^{47}\), i.e. CIETAC\(^{48}\). What the AL did not make clear, was whether ‘commissions’, in the plural meant that the domestic arbitral commissions set up under other provisions of the AL\(^{49}\) also had jurisdiction to handle foreign cases.

This confusion was supposedly (see later) resolved in 1996 by the issue of a Notice by the Office of the State Council dated 8 June 1996\(^{50}\) (hereinafter referred to as the 1996 Notice), which confirmed that domestic arbitration commissions did indeed have jurisdiction to handle foreign-related cases if the parties so chose. This Notice had significant impact on CIETAC by effectively abolishing the monopoly it had enjoyed up to that point in dealing with foreign-related arbitrations.

However, doubts have been expressed whether the State Council in fact has the authority to resolve such issues\(^{51}\) \(^{52}\), nevertheless the 1996 Notice will be enforced by the courts unless and until a successful challenge to its constitutionality is made.

**Changes To CIETAC Rules**

In a direct response to the 1996 Notice, in the 1998 revision, CIETAC amended its own Rules\(^{53}\) so that it now has jurisdiction to hear domestic as well as foreign-related cases\(^{54}\). The distinction drawn by the People’s Court in *Lido* by looking to nature of

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\(^{47}\) AL Article 66

\(^{48}\) And CIETAC’s maritime alter-ego, CEMAC

\(^{49}\) One of the main purposes of the AL was the abolition of domestic arbitration bodies which had thereto been extensions of the State administrative apparatus and replacing them with arbitration commissions which are independent of the State, a very significant development in the domestic arbitration regime in PR China, but not one which is central to the subject matter of this dissertation.

\(^{50}\) Dr. John Mo, (1999), at 259, para.3

\(^{51}\) “Contrary to some misunderstanding of the law-making power of the State Council, the Office of the State Council, by issuing the Notice, did not make a new law. Nor has it the power to make a new law. It only confirms or clarifies what has been implied in the Arbitration Law. Although it may be argued whether or not the Office of the State Council actually has the power to interpret the Arbitration Law, the Notice of the Office of the State Council must be enforced by the court unless a challenge to the constitutionality of the Notice has been made by someone who has the right to sue under Chinese law.”, Dr. John Mo, (1999), at p.260.

\(^{52}\) See also Zee and Ho, *Dispute Resolution In China*, (Sep 2000), at http://www.bakerinfo.com/BakerNet/Places?AsiaPacific/China/Publications/Pubs+Prac+Hitlist-html/, accessed 30 August 2002, wherein, at p. 1, they state that it is the National People’s Congress that is empowered to interpret statute, the State Council can issue administrative regulations implementing laws passed by the NPC.

\(^{53}\) Tao Jingzhou, (1999), p.394, at 394

\(^{54}\) The 1998 changes were themselves still not as clear as they might have been in allowing the handling of domestic arbitrations by CIETAC, further revisions in 2000 now make this crystal clear, “The
the arbitral institute, not the nature of the dispute has therefore been blurred, CIETAC can now take domestic cases and domestic institutions can now take international cases. The question as to which setting aside, recognition and enforcement thresholds apply in these circumstances, domestic or foreign-related, is still an open one.

The problem as encountered in *Lido* was adequately addressed by CIETAC clarifying that they can seize cases involving FIE’s. It is therefore, difficult to see that by going further and taking on all domestic disputes, is anything other than a tit-for-tat move on the part of CIETAC, in that it does little to secure their pre-eminent position in respect of foreign-related arbitrations and, if anything dilutes their perceived expertise in this arena.

**Conclusion**

So, on the one hand, the changes made by CIETAC in response to the 1996 Notice can be seen as a ‘turf war’ for the right to handle international cases, it could however, be seen as a measure of CIETAC’s independence from the legislature and judiciary, which has been criticised in some quarters. What remains however, is the confusion arising from a combination of, the reasons for the People’s Court in reaching its decision in *Lido*; the ambiguity in the AL 1996 and the uncertain status of the 1996 Notice, all as set out previously, which serves to detracts from any stability of Chinese law in this respect.

This uncertainty will continue to undermine the confidence of foreign parties in Chinese arbitration and the good work done by CIETAC in other areas. The lead for resolving this confusion needs to come from the Chinese legislature by providing that the CPL Article 260 threshold will apply to setting aside, recognition and enforcement of an award involving any foreign party, regardless of the nature of the arbitral institution under which the award was made.

It is respectfully submitted that the decision to take on domestic as well as ‘foreign-related’ arbitrations was a retrograde step for CIETAC. Given the remaining suspicion

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55 In information received from CIETAC as part of the research for this dissertation, it seems that there have been no similar challenges to CIETAC’s jurisdiction over FIE’s since the amendments to the Rules. Per Mr. Li Hu, Deputy Director CIETAC Arbitration Research Centre

56 For example, Andrew Shields, (1998), at p.82, para. 4
of many non-Chinese users, by dealing only with international cases CIETAC projected an image of internationalism, by now dealing with domestic cases as well, CIETAC has blurred the focus which could lead to confusion between CIETAC and the newly autonomous domestic arbitral institutes. This can only be to the detriment of the reputation which CIETAC has worked hard to build up. It is akin to a marketing strategy, find what is your niche market and work hard at building your brand within the niche before diversifying, it may be that CIETAC has diversified too soon.

**Kompetenz-Kompetenz**

Despite taking on board many other features prevalent in other international arbitral rules CIETAC and the Chinese legislature seems to have resisted the movement towards kompetenz-kompetenz. According to CIETAC Rules (2000)Article 4 and AL 1994, Article 20, jurisdictional questions are left to be decided by the Commission or, if only one party requests, a ruling by the People’s Court then the matter will be decided in that latter forum. In addition, there is a procedural trap for the unwary at AL 1994, Article 26 which provides that if a party does seek the intervention of the People’s Court and the other party does not object before the first hearing of the court proceedings, then the People’s court will be deemed to be seized of the case. Presumably this is just the forum that a non-Chinese party would have wanted to avoid by accepting CIETAC arbitration in the first place.

It would appear however, that the Rules are not the complete picture and that in practice if a jurisdictional challenge made after formation of the tribunal then any decision on jurisdiction will still be made by the Commission but this will be in consultation with the tribunal, so not quite kompetenz-kompetenz but some way towards it.

That said, the CIETAC Rules do not compare so unfavourably in this respect with for example the ICC Rules, where it is the International Court of Arbitration which decides on the admissibility or merits of any challenge for ‘lack of independence or otherwise’, or otherwise encompassing jurisdictional challenges. The ICC Rules do

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57 As noted by Andrew Shields, (1998), at 74
58 As noted by Andrew Shields, (1998), at 80.
60 International Court of Arbitration, Rules of Arbitration, In Force as From 1 January 1998
however use the different device, at Article 18, of ‘Terms of Reference’, thereby effectively re-establishing the jurisdiction of the tribunal on agreed common ground, thereby minimising jurisdictional challenges.

Likewise, arbitration under the Stockholm Chamber of Commerce rules can have the question of jurisdiction to be decided by the SCC Institute, this however relates to when it is ‘clear’ that the SCC Institute lacks jurisdiction. It is submitted by Wang that where the question is unclear the practice is to have the matter decided by the tribunal, like CIETAC this is a half-way-house not fully reflected on the face of the rules.

Neither is resort to the courts uncommon under other arbitral rules or in other jurisdictions. The English Arbitration Act 1996, whilst paying lip-service to the theory of kompetenz-kompetenz allows for fairly ready access to the courts on matters of jurisdiction, if such a challenge is made promptly at the outset of proceedings, or in any event upon issue of the award.

From the survey carried out for this dissertation there was no experience of the practitioners of any court intervention during arbitral proceedings.

**Ad Hoc Arbitrations**

In China, the debate about the relative advantages and disadvantages of institutional versus ad hoc arbitration is a rather stale one.

The Arbitration Law 1994 at Article 16 (3) states that among others, an arbitration agreement shall particularise a designated arbitration commission, and further at Article 18 that failing agreement of the parties, “concerning the matters for arbitration or the selection of arbitration commission”, then the arbitration agreement shall be void. Although for parties who do not include an arbitration agreement in

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62 Wang Shengchang, (1992), at p.105, para.3
63 English Arbitration Act 1996, s.30
64 English Arbitration Act 1996, s.32
65 English Arbitration Act 1996, s.67
their contract, AL Article 18 also provides that the parties can reach a supplementary agreement to arbitrate which will be recognised\textsuperscript{66}.

As noted by Zhu and Liu\textsuperscript{67}, the position is further reinforced at CL 1999, Article 128 which sets out a hierarchy of dispute resolution which again stresses that parties should apply to an arbitration institution, albeit that where the contract is foreign-related the institution need not be Chinese. The line therefore seems firm that parties who try to ‘go it alone’ will not have a valid arbitration agreement under Chinese law.

Parties who do attempt institution-less arbitration under a Chinese law governed contract will fair little better when it comes to recognition and enforcement in other New York Convention jurisdiction. NYC 1958, Article V (a) says, “\textit{[o]r the said agreement is not valid under the law to which the parties have subjected it, or failing any indications thereon, under the law of the country where the award was made…}”

In effect, unless the parties have expressly chosen a curial law other than Chinese then an ad hoc agreement would also be invalid for the purposes of recognition and enforcement even outside P.R. China.

But what of ad hoc arbitration awards from abroad being enforced in China? Would such an award fall foul of the Chinese law on this matter? Opinion seems to be divided:

Zee and Ho say:

\begin{quote}
“In practice, many contracts governed by PRC law frequently contain ad hoc arbitration clauses, even contacts drafted by state-owned PRC bodies. However, such arbitration is usually outside the PRC. Nevertheless, such clauses may be the subject of attack in the event enforcement of the award is sought in the People’s Courts within China. Thus, an award made in an ad hoc arbitration may be refused enforcement or set-aside under relevant provisions of the Arbitration Law”\textsuperscript{68}
\end{quote}

Zhu and Liu say otherwise:

\begin{quote}
\end{quote}

\textsuperscript{66} Zhong and Williams, (1998), at 256, para.3
\textsuperscript{67} Zhu Jianlin and Liu Yuwu, (2000), at 158, para. 4
\textsuperscript{68} Zee and Ho, ‘Dispute Resolution In China’, Sept 2001, <\url{www.bakerinfo.com/BakerNet/Places/Asia+Pacific/China/Publications/Pubs+HitList.htm#}>, accessed 30 August 2002, at p.12, para. 4
Nevertheless, according to Chinese practice, ad hoc arbitration awards rendered abroad are recognisable and enforceable in China.69

Neither provides any further elucidation of their reasons for holding their respective views nor cite any particular instances where enforcement has been upheld or denied. The fact remains that no matter what steps CIETAC and legislature take to enhance the reputation of China as a venue for international arbitration, the refusal to recognise ad hoc arbitrations is a stumbling block to China taking its full seat at that table.

Evidence

There is still wide discretion for the tribunal to conduct its own investigations and collect evidence itself, Andrew Shields suggests that this is relic from ancient China where the local magistrate also acted as local detective70.

Whether this is true or not there does seem to have been a reluctance on the part of CIETAC to relinquish this power on behalf of the tribunal, the current Rules do contain the provision that the tribunal is to inform the parties that investigation or the collection of evidence is going to take place, this however is still qualified at Article 38 by, ‘if it [the tribunal] considers necessary’. A wide discretion is therefore still left with the tribunal.

This contrasts with for example the serious irregularity cases in England such as Fox v Welfare71, where a similar approach to that taken by a CIETAC tribunal would lead to setting aside of the award. It is also submitted that when it comes to recognition and enforcement outside of China, if a party is unable to examine the evidence adduced in an award against it may fall foul of NYC 1958 Article V(b) which provides that, “The party against whom the award is invoked...was otherwise unable to present its case...”.

This is an area to which CIETAC still needs to give further careful consideration to bring its Rules further into line with international arbitral practice, such changes would enhance transparency and deflect criticism.

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69 Zhu Jianlin and Liu Yuwu, (2000), at 158, para. 5
70 As noted by Andrew Shields (1998), at p.76, para. 2
71 [1981] 2 Lloyd's Rep 514
Confidentiality

The relatively recent Swedish case of *A.I. Trade Finance v Bulbank* has brought the matter of confidentiality in arbitral proceedings to the fore. The Swedish Court Of Appeal held that there was no fundamental right of confidentiality, so that, as noted by the Fulbright & Jaworski article, “the scope of confidentiality afforded by arbitration depends on local law and arbitration rules., Parties are advised to consider drafting confidentiality provisions in their arbitration agreement.”

CIETAC contains robust provisions on confidentiality, Article 36 explicitly provides that all participants, parties, representatives and arbitrators, shall not disclose either substantive or procedural matters to outsiders. It is submitted that disclosure by a winning party would have adverse effects on the enforceability of such an award. Similarly all CIETAC staff are bound to confidentiality.

The provisions on confidentiality are an area which can be used to demonstrate just how far CIETAC has travelled from their original position where it was compulsory to hold hearings in public.

By contrast the SCC Rules requires confidentiality only of the Institute and of the tribunal, there is no express duty of confidentiality on the part of the parties or their representatives. The ICC Rules, likewise have confidentiality provisions less robust than CIETAC. The ICC Rules, expect the tribunal to take measures to protect trade secrets and confidential information and for the Court to conduct itself so as to maintain confidentiality. Again however, there is no express, automatic duty of confidentiality on the parties or their representatives.

Confidentiality is one of the hallmarks of choosing arbitration in preference to litigation for the resolution of commercial disputes. It increases the chances of a continued business relationship following a dispute. As highlighted by the *Bulbank*.

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73 Fulbright & Jaworski, (2000), at p. 10
74 As noted by Andrew Shields, (1998), at p.75, para. 4
75 SCC Rules (1999), Article 9
76 SCC Rules (1999), Article 20 (3)
77 ICC Rules (1998), Article 20 (7)
78 Statutes Of The International Court Of Arbitration, Article 6
case above, there is a need for institutional rules to provide robust confidentiality provisions within their rules. It is submitted that CIETAC are ahead of other arbitral institutions in this respect and the CIETAC Rules can provide an example for other institutes to follow.

Impartiality

A particular criticism of Chinese arbitration over the years is the partiality of its arbitral procedures, tribunals, and People’s Courts when it comes to enforcement, in short the system is charged that there is rampant protectionism and that the chances of a foreign party obtaining a fair hearing and ready enforcement are slim.

To make any judgement on this aspect of Chinese arbitration is difficult, a review of the learned articles in arbitration and legal journals seems to leave opinion divided into two camps, it has to be said that those who say that impartiality is suspect tend to have western names and those that say Chinese arbitration has gained a reputation for fairness and impartiality tend to have Chinese names.

From the research conducted for this dissertation, among Chinese and non-Chinese alike, insofar as their answers related to the arbitration (as opposed to enforcement), none of the respondents expressed dissatisfaction with either the tribunal or CIETAC’s handling of cases that they were involved in. It is submitted that had any of the respondents found impartiality in the proceedings then they had ample opportunity to express this dissatisfaction.

What is apparent is that CIETAC is very sensitive to any such criticism and has made strenuous efforts over the years to promote transparency and to see that their system is fair and that it is seen to be fair. These include:

Language

Since the 1995 revision to the Rules a language other than Chinese is allowed to be used in the arbitration if that is what the parties agree. However, whilst the Rules do

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79 For example, “... (CIETAC) and argue that while this system has been continually modified so that it is now a more user friendly system, it is still missing the essential ingredients of neutrality and impartiality that are essential...”. Andrew Shields, (1998), at 67, para. 1

80 Andrew Shields, (1998), at p.75, para. 2
give sufficient latitude for non-Chinese languages to be used, the impression given is that Chinese is still the language of choice; correspondence with the CIETAC Secretariat still has to be in Chinese and documents may need to be translated into Chinese if the tribunal or secretariat so request. This is borne out by the results of the survey carried out for this dissertation where it was found that the experience of virtually 100% of the practitioners was that hearings were carried out in Chinese, usually with translation in English. Only one practitioner had one experience of the hearing being conducted with English as its first language.

CIETAC has not yet reached the internationalism of the ICC in this respect, but it is submitted that this has more to do with the practicalities of resourcing the Secretariat with personnel sufficiently proficient in other languages, than any insistence on the use of the Chinese.

**List System**

Criticism has been levelled at CIETAC’s system of a closed list of arbitrators from among whom the parties must choose to hear their case\(^{82}\). The implication, and in some cases open censure, is that there is a limited number of arbitrators who have an unhealthy reliance on being selected to sit on CIETAC tribunals, presumably, the criticism noted above by western writers does not apply to the non-Chinese persons listed by CIETAC.

CIETAC’s justification for the list system is that all arbitrators are vetted thus assuring minimum standards of proficiency are maintained. This is achieved by a number of factors as follows:

- To be included on the list persons must be examined by CIETAC’s Qualification Examination Committee\(^{83}\), final approval is made only after examination by the Chairman of the Arbitration Commission.
- Listed persons are subject to the “CIETAC Ethical Rules for Arbitration”.
- CIETAC holds seminars and training programmes for its listed arbitrators, impartiality is matter addressed at these seminars\(^{84}\).

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\(^{81}\) CIETAC Rules (2000), Article 85

\(^{82}\) “Nevertheless, it is to be regretted that parties still do not have the freedom to choose any arbitrator they want.” Yan and Kuner, Arbitration International, Vol. 11, No.2, p. 183, at p. 188, para. 1

\(^{83}\) Zhu Jianlin, (1998), at G22, para. 5

\(^{84}\)
• CIETAC listed arbitrators have a three year tenure, after which time the arbitrators performance is reviewed by the Qualification Examination Committee. It should be noted that like ICC awards, CIETAC awards are scrutinised at draft stage by the Arbitration Commission, the scrutiny relates to the form of the award, however, “[C]IETAC often brings to the tribunal’s attention if the reasoning of the award seems confusing and insufficient…” As well as enhancing the enforceability of issued awards, such scrutiny, it is submitted, also affords ample opportunity to monitor whether listed arbitrators’ performance is coming up to scratch.

Measures Within The Rules Ensuring Impartiality

The CIETAC Rules themselves contain provisions which guard against impartiality, these are:

• Articles 16 and 24 of the 2000 CIETAC Rules provide that each side shall choose one arbitrator from the list, a third, presiding, arbitrator can be jointly appointed by the parties, such appointment is made under the auspices of the Chairman of the Arbitration Commission. Only upon the failure of any party to exercise its right to select from the list will it result in the Chairman of the Arbitration Commission making their selection in default.

• Article 28 provides that any arbitrator finding they have an interest in the case must declare so and resign from the tribunal.

• Article 29 provides that any party that has a reasonable suspicion of impartiality on the part of a member of the tribunal can appeal to the Arbitration Commission.

84 Zhu Jianlin, (1998), at G22, para. 6
87 CIETAC Rules (2000), Article 56
88 Zhu Jianlin, (1998), at G26, para. 5
89 The CIETAC rules do provide for a single person tribunal, such appointment will be made by the Chairman of the Arbitration Commission. However, under CIETAC arbitration a three person tribunal is the norm.
91 CIETAC Rules, (2000), Article 26 in respect of the ‘party selected’ arbitrator, Article 24 in the case of the third (presiding) arbitrator.
• “In practice, CIETAC attaches great importance to their arbitrators’ neutrality and independence. Whenever the independence and impartiality of an arbitrator is challenged, CIETAC will take it seriously and look into the matter carefully. If the facts prove that the arbitrator has shown his personal interest in the case, he will be removed…”

Non-Chinese Listed Arbitrators

With the greatest respect to the listed Chinese arbitrators, from the perspective of a non-Chinese party the inability to select a tribunal composed of other than Chinese arbitrators is a recipe guaranteed to make that party feel that they are at an automatic disadvantage. For many years this was precisely the situation under the CIETAC Rules until CIETAC themselves found that for an organisation charged (at that time) exclusively with settling disputes from around the World, to have arbitrators from only one country was untenable.

This is a problem which CIETAC has made great strides in addressing. From a base of zero in 1988\(^93\), and as recently as 1992 when a mere five foreign nationals plus eight Hong Kong citizens were listed\(^94\), the list has grown rapidly so that, as at 1 September 2001, the CIETAC list comprises some 517 names, of these 174, one third, are non-Chinese, (i.e. not citizens of PR China).

To its credit, in selecting non-Chinese persons to be listed CIETAC has assembled a formidable array of talent in this field. A perusal of the list of the names of non-Chinese listed arbitrators\(^95\) reads like a ‘Who’s Who’ of international commercial arbitrators, it is submitted that if one were looking for a list of some of the most eminent practitioners in this sphere, one would have to look no further than the CIETAC list.

Having admitted non-Chinese arbitrators in the first place, the next line of criticism of the list system and CIETAC practice was that even when a non-Chinese arbitrator was selected to sit on a tribunal, he/she was always in a minority in terms of nationality. It is probably true to say that it may once have been the case that the intervention of the

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\(^{92}\) Zhu Jianlin, (1998), at G22, para. 4
\(^{93}\) Michael J Moser, (1998)
\(^{94}\) Wang Shengchang, (1992), at 107, para. 1
Arbitration Commission in the selection of a third presiding arbitrator meant that the constitution of a majority non-Chinese tribunal did not occur. However, 1995 saw the first instance of a majority non-Chinese tribunal in a CIETAC arbitration and it is now clear that CIETAC will honour arbitration agreements which stipulate that the third member of an arbitration panel should be from a third country, “The days when two PRC arbitrators dominated all CIETAC arbitration tribunals are gone”.

The fact that non-Chinese are now prevalent in CIETAC arbitrations is confirmed by the survey carried out for this dissertation where it was found that 50% of the practitioners had experience of a non-Chinese person sitting on the tribunal, however only one of the practitioners had experience of a majority non-Chinese tribunal. This low take-up may reflect the way in which arbitration clauses are drafted and perhaps reveals a lack of awareness of the new readiness with which CIETAC will honour agreements calling for composition of non-Chinese majority tribunal or neutral third country nationals as presiding arbitrator. That said, the lack of non-Chinese majority tribunals did not, in any case, seem to have an effect on the outcome of the arbitration, the experience of those surveyed was that either the non-Chinese party had won the arbitration or that a range cases in which they had been involved went 50/50 as between Chinese and non-Chinese parties.

So, whilst it is true that the choice of arbitrators is restricted to the list, the CIETAC Rules do allow a degree of party autonomy in selection, arbitrators are not imposed to any much greater degree than they are under other arbitral regimes in the event that parties fail to agree on appointments or the instigation of arbitration is met with a recalcitrant party.

It is submitted that the CIETAC list system is no more unfair than say arbitration agreements which rely on the involvement of an appointing body when the parties fail to agree on the appointment of the tribunal among themselves, for example in the UK; ICE, RICS or CIArb. Those bodies also hold lists of persons they deem suitable to be

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97 Roger Best, ‘The Resolution of China Disputes’, A.L.R. 2000, 3(1), 1-6, at p. 4, para. 6
98 However, further consideration is given in the chapter on construction and engineering arbitrations under CIETAC, to restrictions of the list system as it relates to choice of persons with specialisations being appointed to a tribunal.
appointed, they too exercise control and maintain standards as to whom can be included on the list in a similar manner to CIETAC.

Admittedly, compared with ICC where the parties have a completely free choice\(^{99}\) as to whom they name as arbitrator, the list system appears more restrictive. However as noted, the CIETAC list contains the names of some internationally recognised and respected international commercial arbitrators, whom in many instances would be selected by a party even given a completely free choice. It is submitted that, at least in respect of selection of the non-Chinese component of the tribunal under CIETAC, whether a person is selected freely or from a list, the result would be the same and it would be one of the ‘usual suspects’ which is appointed to the tribunal, whether that in itself is a healthy thing is beyond the scope of this dissertation.

Whilst CIETAC has therefore, addressed many of the general criticisms in this respect, the list system still causes problems when it comes to having a sufficient range of nationalities in given disciplines, this aspect is discussed in further detail in the section on construction and engineering arbitrations under CIETAC below.

**Impartiality Of Enforcement Proceedings In China**

Enforcement proceedings are a different matter. Whilst CIETAC is very alive to the danger that can be done to its reputation from any such adverse publicity, People’s Courts, at local and municipal level may well be constrained by considerations other than China’s reputation as a venue for international arbitration.

This attitude is normally characterised as protectionist and parochial\(^{100}\), arising out of nepotism and corruption, at first glance it may be difficult to characterise refusal of recognition and enforcement on flimsy grounds in any other way. However, more charitably, such protectionism may not purely relate to corruption, other factors may cause tension in relation to enforcement of awards, as Beaumont et al point out\(^{101}\) there may be social considerations which weigh heavily on a local judge about to make a hefty award against an enterprise in his jurisdiction, thereby causing the

\(^{100}\) For example see Roger Best,( 2000), at p. 1, para. 5
\(^{101}\) Beaumont et al, (1995) at pp.2-3
insolvency of a generally uneconomic entity and genuine hardship to ordinary workers, not to mention the danger of ensuing social unrest.

This does not make things any more palatable for the foreign party seeking enforcement, whom, after all, has been through the due process resulting in a perfectly legal award in their favour.

That said, problems with enforcement may be more apparent than real, even Moser, who is somewhat critical of the enforcement regime, cites evidence from figures of which he had sight which show that of 164 applications for enforcement at the level of Intermediate People’s Courts, 127 had been granted and 37 denied\(^\text{102}\). Moser is unclear as to precisely when the period of time that these figures relate to begins, but they pertain to a period to the end of 1996. Whilst a 22.5% failure rate of those enforcement proceedings applied to the People’s Court makes sober reading for any prospective foreign party to a CIETAC arbitration, Moser concludes that when the number of enforcements is compared to the total number of arbitrations handled by CIETAC over the same period, being 3,500, gives a very respectable ‘failure’ rate of less than 2%.

A similar contradictory approach is taken by Lynch, who highlights disquiet about recognition and enforcement whilst at the same time citing figures which she then describes as ‘apparently encouraging’\(^\text{103}\).

From the survey carried out for this dissertation, practitioners experiences also showed that enforcement was not such an issue with none of them saying that they had failed to obtain enforcement, though the complications and length of time taken to achieve enforcement was highlighted in some of the answers.

Tensions related to enforcement of arbitral awards in China, have not gone unnoticed by the senior Chinese judiciary\(^\text{104}\) who have put in place procedures reflecting a strong pro-enforcement bias. A recent example is that the Supreme People's Court

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\(^\text{102}\) Michael J. Moser, (1998), at p.34, para.2

\(^\text{103}\) Katherine Lynch, (2000)

\(^\text{104}\) President of the Supreme People’s Court Xiao Yang himself has commented, “...judicial function has been localized under heavy local protectionism, which has seriously damaged the unity of the socialist legal system of the nation and its authority.”, per Xian Chu Zhang, ‘The Agreement Between Mainland China and the Hong Kong SAR On Mutual Enforcement of Arbitral Awards: Problems and Prospects’, 29 Hong Kong LJ 463, at 481, para. 1
issued, “Regulation on Several Issues Concerning the Jurisdiction over Foreign-Related Civil and Commercial Actions”, dated 25 February 2002. The regulations restrict the numbers of courts authorised to deal with enforcement of foreign arbitral awards, thereby centralising jurisdiction\(^{105}\).

These 2002 regulations reinforce existing regulations of the Supreme People’s Court issued in 1995\(^{106}\), which put in place a pre-reporting system for courts involved in enforcement proceedings with a foreign element. These earlier regulations in effect do not allow the issue of a judgment refusing enforcement without the matter having first been reported through the courts to the Supreme People’s Court.

As Liu notes in respect of the 2002 Regulations:

\[\text{"The Supreme People's Court hopes that a centralised jurisdiction created by the new Regulation, together with a more professional judiciary in these courts, will help to improve the quality of adjudication in foreign-related cases and to meet China's commitments under the WTO Agreements which include an undertaking to administer its laws and regulations in a uniform, impartial and reasonable manner.\"}^{107}\]

These are robust provisions and must go some way to answering the critics that, at the most senior levels, the Chinese judiciary is serious about repairing its tarnished reputation on enforcement, whether the tarnish was fully justified or not in the first place.

**Conclusion**

It may well be that Chinese arbitration and enforcement thereof suffers from, “give a dog a bad name” syndrome, i.e. it easier to gain a bad reputation than to lose it. The above noted measures being taken by both CIETAC and the Chinese judiciary at the highest level demonstrates that both are acutely aware of the reputation and are actively taking steps to promote impartiality. At this point, most learned articles on the subject of Chinese arbitral impartiality finish with a ‘time will tell’ conclusion. The conclusion here takes encouragement for something more positive from a source which has a balance of both Chinese and non-Chinese names:

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107 Liu Yuwu, (2002), at N26
“[C]hina’s legal system has developed rapidly over the last three years and arbitrators and judges, particularly in the large cities, are far more likely to have a law degree and be impartial.”

The Combining of Arbitration With Conciliation

Overview

Conciliation\textsuperscript{109} is a traditional method Chinese of settling disputes\textsuperscript{110}, a consensual facilitated resolution is still thought to preferable to the imposition of a ruling against a party arising out of litigation or arbitration. According to Chinese culture such solutions are considered to be at best indelicate\textsuperscript{111}.

Conciliation can have particular application to construction and engineering contracts, where by their long-term nature, the consensual resolution of disputes can assist in the preservation of the business relationship for the remainder of the project duration, even more so in the case of DBFO arrangements and the like.

This conciliatory approach can be seen in the drafting of arbitration agreements in Chinese contracts, which will often call for any disputes, in the first place, to be resolved literally by ‘friendly negotiation’, only thereafter resorting to arbitration. Even in these days of partnering and co-operative working, the use of the term ‘friendly’ anything would look very odd in for example a UK construction contract.

The prevalence of conciliation for the settlement of international commercial disputes can be seen by the establishment in 1987 of the Beijing Conciliation Centre and the Beijing-Hamburg Conciliation Centre, demonstrating that China was ahead of other jurisdictions in this regard, for example as will be seen below, in Sweden the Stockholm Chamber of Commerce in 1999 established a Mediation Institute.

\textsuperscript{108} Vout, Ye and Yi, ‘China Contract Handbook’, Sweet & Maxwell Asia, (2000), at p.18, para. 1
\textsuperscript{109} For the purposes of this discussion the term conciliation is interchangeable with the term mediation.
\textsuperscript{110} For an in-depth exposition of the historical and cultural roots of this tradition see Bobby K Y Wong, ‘Chinese Law: Traditional Chinese Philosophy and Dispute Resolution’, 30 Hong Kong L.J. 304.
\textsuperscript{111} “Anyone who disturbs social tranquillity by calling in a state court and trying to put the fellow citizen publicly in the wrong is regarded a disruptive, boorish and uncultivated individual who lacks the cardinal virtues of modesty and readiness to compromise”, Johannes Trappe, ‘Conciliation in the Far East’, Arbitration International
Combining arbitration with conciliation within the same proceedings is a particular feature of the CIETC rules and of the Chinese arbitral regime generally. Put simply, the parties begin their arbitration, at a certain stage the tribunal can stop acting as arbitrator and attempt to conciliate the dispute. If the conciliation is successful, fine, if not the tribunal reverts to arbitration and renders its award in the normal manner.

Such ‘arb-con’, as we shall term it for the purposes of this discussion, is an aspect of their Rules which CIETAC believe to be unique and of which they are unashamed, despite much criticism of such techniques.

Although it had been used in practice previously, CIETAC’s 1989 revision was the first to incorporate arb-con as a defined provision of its Rules. The implementation of arb-con can be found in the current 2000 rules at Articles 45 to 50, from where it can be seen that the proceedings cannot move to a conciliation phase without the agreement of both parties, although apparently it is not unknown for the tribunal to ask the parties if they wish to move to a conciliation phase. Conciliation will continue until there is a conciliated settlement or one of the parties requests termination, or the tribunal (acting as conciliator) believes further efforts at conciliation are futile. Should the conciliation phase reach an agreement then, so long as the parties agree, the settlement can be issued as a CIETAC arbitration award of the tribunal.

The combination method is also given support in Chinese legislation, the Arbitration Law Article 51 allows for the conduct of conciliation within the arbitration process, but again is dependent upon party agreement.

Information obtained from CIETAC during the research for this dissertation show that around 20-25% of CIETAC arbitrations are settled using arb-con, this is less than the 50% as reported by some writers, and lower than the experience of the practitioners responding to the survey carried out for this dissertation where 40% have

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112 “Indeed, CIETAC spokespersons frequently refer to the Com-Arb-Con as a special characteristic or unique feature of CIETAC proceedings....”, Wang Shengchang, (1992), at p. 114, para. 1
113 For example, Michael J. Moser, (1998), at p.33. Whilst Moser does not directly criticise the practice himself he highlights the concerns voiced generally; Andrew Shields, (1998), at 77, para 2.
114 Wang Shengchang, (1992), at p.99, para. 3
115 CIETAC Rules (2000), Article 45
116 CIETAC Rules (2000), Article 47
117 CIETAC Rules (2000), Article 49
118 Mr. Li Hu, Deputy Director CIETAC Arbitration Research Institute.
119 Michael J. Moser, (1998), at p.32, para. 6
had experience of tribunal led conciliation during arbitration. However, from the survey, of the remainder a further 10% cited experience of a settlement made between the parties themselves being embodied in a settlement award, this latter procedure though would be common practice under most arbitration fora.\footnote{See English Arbitration Act 1996, s. 51(2).}

**Advantages And Disadvantages**

Before making a comparison of the CIETAC combination proceedings with other arbitral institutions a reminder of the relative advantages and disadvantages of using arb-med are as follows:

Perceived advantages of combination proceedings generally, and in China in particular, are summarised as follows:

- Early settlement reduces parties costs and the risks if an adverse award of costs is made. However, CIETAC’s arbitration fees will have to be paid in full, these will be based on a proportion of the total amount in dispute at the outset.\footnote{Although some abatement can be sought under CIETAC Rules (2000), Article 88.}

- Starting with a new tribunal will mean that familiarity with the facts and issues of the case gained during the conciliation process will be lost when the arbitration is commenced. Combination proceedings mean that there is no loss of ‘learning curve’ when switching between conciliation and arbitration.

- Preservation of business relationship, which as noted previously, can be very important in construction and engineering contracts which will typically have an extended duration of ‘delivery’, particularly so in arrangements such as BOT. Disputes arising during the currency of project can be settled without undue detriment to the relationship required for completion of the remainder.

- Who ‘owns’ a dispute is a topic of research outside the scope of this dissertation. However, conciliation is a method of dispute resolution which
gives parties far more control over the way their dispute is resolved than litigation or arbitration\textsuperscript{122}. It is submitted that CIETAC con-arb gives ownership of the dispute back to the parties to achieve a facilitated as opposed to imposed resolution of their dispute.

- Of particular comfort to a non-Chinese party obtaining a settlement which involves recovery of damages from a Chinese party with its assets in China is that the Chinese courts will readily enforce a conciliated arbitral award. In fact there is specific judicial provision provided for same in the ‘\textit{Notice on the Enforcement of Settlement Agreements of Mediation Certified by an Arbitration Institute}’, as issued by the National Supreme Court, dated 20 August 1986\textsuperscript{123}.

Perceived \textit{disadvantages} of combination proceedings generally, and in China in particular, are summarised as follows:

- Once the proceedings reverted to arbitration, the tribunal would not be able to ‘un-remember’ matters disclosed during the conciliation phase, perhaps in confidence, by one of the parties. And that these disclosures will have at least a subliminal influence on the deliberations of the tribunal when reaching its arbitral award, rather than on the facts and evidence adduced during the arbitral (as opposed to during the conciliation) phase of proceedings.

- Critics point to the fact that the above amounts to the taking of secret evidence and thereby offence natural justice in that an arbitrator may rely on or be influenced by, something disclosed by a party during plenary sessions without the other party having had an opportunity to refute the point.

- The previous point leads to the question of procedural fairness and due process when it comes to the recognition and enforcement of a CIETAC

\textsuperscript{122} “\textit{Litigation is like dancing with a gorilla - you only stop when the gorilla wants to stop.}”, Robert Fenwick Elliott, \textit{Building Contract Disputes: Practice and Precedents}, (2001), Sweet & Maxwell, at 4-2

arb-con award in a non-Chinese jurisdiction. Pursuant to Article 5(b) the New York Convention recognition and enforcement may be refused on the grounds that, ‘The party against whom the award is invoked... was otherwise unable to present his case...’. Anthony Connerty, however, submits that NYC enforcement of awards arising out of combination proceedings is possible, and cites situations where arbitrator can issue a consent award, UNCITRAL Model Law Article 30(1), English Arbitration Act s.51, ICC Rules Article 26 and LCIA Rules Article 26.8. It is submitted that the answer to this problem lies in the pro-enforcement bias or otherwise of the jurisdiction where enforcement is sought and the judiciary there exercising the latitude allowed under the NYC.

Within it Rules, CIETAC goes some way to addressing some these perceived disadvantages. Article 50 specifically excludes the tribunal relying on opinions, views or proposals made during the conciliation phase in arriving to their award. This combined with the fact Article 55 calls for a reasoned award should give a measure of transparency to whether or not such opinions, views or proposals have in fact been relied on. Scrutiny of awards by the Arbitration Commission will also provide a measure of protection from falling into the secret evidence ‘trap’.

Comparison Of CIETAC Approach With Other Rules and Jurisdiction

With the advent of growing interest internationally in such combination methods of dispute resolution, it is now questionable as to just how ‘unique’ CIETAC and the Chinese arbitral regime actually are in this respect.

For example in England the Civil Procedure Rules contain court encouraged ADR before a case is brought to a full hearing; Additionally, the introduction of Pre-Action Protocols, means that parties must meet at least once before proceeding to court, this can be seen as a quasi-conciliation which if it does not achieve settlement is intended to at least narrow the issues in dispute. Parties who do not ‘buy in’ to

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124 The New York Convention On The Recognition And Enforcement Of foreign Arbitral Awards 1958
125 Anthony Connerty, (1999), at 166, para. 1
126 CIETAC Rules (2000), Article 56
127 CPR 1.1, 1.4, 26.4, PD26.3.1, per John Kendall, Lecture ‘Mediation In Construction’, KCL 13 March 2002
attempting ADR may have costs awarded against them even though they ‘win’ the case\textsuperscript{128}.

It is also interesting to compare the rules of other arbitration institutes to see how they deal with combination proceedings. At first sight it may appear that their provisions specifically exclude arb-con or the like, in the main by stating in their conciliation rules that a person who has acted as conciliator (or the equivalent under the various rules) is barred from acting as arbitrator in any subsequent arbitration. However, as the following analysis shows, given a degree of party autonomy, the results under other institutes rules may not be that far different from those under CIETAC arb-con.

\textit{International Chamber of Commerce}

Previous versions of the ICC might have suggested that the link between conciliation was stronger than it actually was. In force from 1 January 1988 they were entitled “\textit{ICC Rules Of Conciliation and Arbitration}”, however the ‘Rules Of Optional Conciliation’ were entirely voluntary and did not provide for combination proceedings in the same sense as provided for under the CIETAC Rules. Article 10 of the of the optional rules provided that absent the parties’ agreement the conciliator could not act in judicial or arbitral proceedings in the same dispute\textsuperscript{129}.

The 1998 revision of the ICC Rules left out references to conciliation so that they related only to arbitral proceedings. The conciliation element was overhauled; the ‘conciliation’ tag was dumped and resurrected as the ICC ‘ADR Rules’, effective from 1 July 2001.

These revised rules leaves the actual method of ADR up to the parties after discussion with what is termed the ‘Neutral’\textsuperscript{130}, failing agreement the ADR method defaults to Mediation\textsuperscript{131, 132}.


\textsuperscript{129} Craig, Park and Paulsson, ‘\textit{International Chamber Of commerce Arbitration}’, 2\textsuperscript{nd} Ed., (1990), Oceana Publications inc., at Appendix II

\textsuperscript{130} ICC ADR Rules, Article 5(1)

\textsuperscript{131} ICC ADR Rules, Article 5(2)

\textsuperscript{132} As previously noted, for the purposes of this discussion, ‘mediation’ and ‘conciliation’ are interchangeable terms.
Article 7(3) maintains the provision from the previous optional rules, that *absent agreement* of all the parties a Neutral shall not act in any judicial, arbitration or similar proceedings, nor in any expert or advisory capacity in such proceedings.

The ICC ADR Rules are silent as to the appointment of the Neutral as arbitrator to issue an arbitral award for a settlement agreement, but presumably it is implicit in Article 7(3) that this could happen with the parties’ agreement.

**Stockholm Chamber of Commerce**

As noted previously the Stockholm Chamber of Commerce have taken a different approach and in 1999 set up separate body, the Stockholm Chamber of Commerce Mediation Institute which have issued the ‘Rules Of The Stockholm Chamber Of Commerce Mediation Institute’.

Like the ICC ADR Rules the SCC Mediation Rules provide little by way of prescription as to how the proceedings should be conducted, presumably giving as much latitude to the parties and the mediator as possible, the SCC Rules though do allow the mediator to suggest other methods of ADR if appears that mediation will not achieve a resolution\(^\text{133}\).

At Article 1(2), the rules state that the mediator cannot act as arbitrator in respect of the same subject matter, *unless the parties agree otherwise*.

Article 12 *specifically* provides that, with the approval of the Mediator, he/ she can be appointed as arbitrator to give effect to a settlement award, again this can occur *only with the parties agreement*. This SCC provision can be compared to CIETAC Rules Article 44 which provides that parties which are not involved in an ongoing CIETAC arbitration can apply to CIETAC for the appointment of a sole arbitrator to render an arbitration award reflecting their amicable agreement or the results of a ‘non-CIETAC arb-con’ conciliation settlement\(^\text{134}\), e.g. a Beijing-Hamburg Conciliation Centre brokered settlement.

\(^{133}\) SCC Mediation Rules, Article 10(3)

The LCIA Mediation Procedure is, in its way, the closest of the international institutions ADR procedures to that of CIETAC arb-con. For instance, the Procedure is silent as regards the Mediator acting as arbitrator in the same dispute, and, most interestingly, Article 10 can only be construed as contemplating concurrent mediation and arbitral proceedings.

“Unless they have agreed otherwise, and notwithstanding the mediation, the parties may initiate or continue arbitration or judicial proceedings in respect of the dispute which is the subject of the mediation.”

Therefore, putting the silence as noted, together with Article 10 and a measure of party autonomy there is nothing in the LCIA Mediation Procedure or the Arbitration Rules to stop the same tribunal acting as both arbitrator and mediator, giving one a model of arb-med very close to that of CIETAC arb-con.

Under LCIA, binding force can be given to an arb-med settlement by Article 26.8 of the Arbitration Rules which provides for the issue of a consent award, the tribunal therefore takes off its mediator hat, puts on its arbitrator hat and issues an arbitral award.

Comparison

So it can be seen that by ‘contracting out’ under CIETAC arbitration; ‘contracting in’ under ICC ADR and SCC Mediation Rules and using the LCIA Mediation Procedure as it is, the result can be the same, i.e. by the exercise of the party autonomy which is allowed under all the rules analysed above, it is the parties free choice whether or not they wish to take part in combination proceedings.135

The difference, at least in respect of ICC and SCC, lies in the sequencing, under these rules ADR/ mediation is likely to precede arbitration, whereas under LCIA and CIETAC there is ample provision that the horse can be changed in mid-stream and

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back again. Given the above analysis and of the LCIA provisions in particular, CIETAC’s claim of uniqueness in respect of combination proceedings is now doubtful, however, their use will certainly be more prevalent under CIETAC.

On this analysis it is difficult to sustain one of the major criticisms which has been levelled particularly at CIETAC for allowing arb-con, that a conciliator turned arbitrator will be unduly influenced by matters disclosed to them during the conciliation phase. Given the above possibility of combination proceedings under all the above rules this is a criticism which should not be made against CIETAC alone, whether the criticism is valid, *per se*, depends on the weight given to the relative advantages and disadvantages of combination proceedings as set out above.

So, ICC, SCC and most notably LCIA, in a way, are following the lead set by CIETAC, though none has been able to bring itself to actually incorporate conciliation rules into the body of their arbitration rules. In the end it probably comes down to the preference of the users. Users of the non-CIETAC rules noted above, will tend to be those practitioners who would normally consider combination procedures anathema. CIETAC (Chinese) users will be more comfortable with such measures, the challenge for CIETAC is convincing non-Chinese users that combination procedures can produce ‘good’ results and getting the message across that in any case such proceedings are in no way compulsory.

An illustration of the Chinese influence on the cross fertilisation of ideas in respect of combining ‘ADR’ with arbitration is the case identified by Anthony Connerty. In February 1999 an arbitration under ICC rules with its ‘seat’ in London, for convenience of taking evidence, held a hearing in Beijing, the first such instance of an ICC hearing being held in China. The hearing was ‘hosted’ and had the full co-operation of CIETAC, an interesting development in itself. However, in respect of the current discussion, the interest lies in the fact that:

“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.”

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136 In fact, as noted, ICC has moved in the opposite direction by separating their previously combined conciliation and arbitration rules.
138 Anthony Connerty, (1999), at 165, para. 6
An example of ICC arb-med with Chinese assistance in action!

**Suggested Improvement To CIETAC Combination Procedure**

In fact the very basis on which a person reaches a decision/ agreement will be different depending on whether that decision is reached in an arbitration or conciliation. Wang Shengchang makes an interesting comparison\(^{139}\) between an arbitral decision which is reached on the basis of the rule of law and an agreement reached in conciliation which is based on reasonableness, citing Article 11 of the Beijing-Hamburg Conciliation Centre\(^{140}\) by way of example of disputes being settled by reasonableness. It is respectfully submitted that this may be true if the arbitral rules were any other than CIETAC, as the CIETAC Arbitration Rules contain the much criticised provision at Article 53 that in addition to deciding cases on the facts and the law the tribunal should also make reference to the principles of fairness and reasonableness. This provision goes to demonstrate the conciliatory approach under CIETAC arbitration which sets it apart from other institutional rules in this regard.

It is submitted that this is an area where CIETAC may need to review its Rules. The Rules already have ample provision within the facility for arb-con for the settlement of disputes based on fairness. If parties to an international commercial dispute do not specifically agree to a conciliation phase then they might reasonably expect that their dispute is decided, in the first instances, on the facts and the law. If the parties really do want an arbitral decision on bases other than the rule of law they can make a request to the Arbitration Commission under Article 7 for an amendment of the Rules, for example for decisions to based on the *Lex Mercatoria*; to be made *ex aequo et bono* or for the tribunal to act *amiable composteur*.

Such a regime would preserve the ‘unique’ feature of Chinese arb-con whilst at the same time promoting greater party autonomy as to the basis on which their dispute is decided, which under the present Article 53 imposes fairness and reasonableness as the default.

\(^{139}\) Wang Shengchang, (1992), at 115

\(^{140}\) “The conciliator shall be guided by principles of objectivity, fairness, and justice, among other things, the rights and obligations of the parties, the usage of the trade concerned and circumstances surrounding the dispute, including any previous business practices between the parties.”
Conclusion

The use of combination arbitration with conciliation may be ‘unique’ to CIETAC only insofar as they are the only institute which embodies the technique within their arbitral rules. As set out previously the same combination can be achieved using other institutional arbitral and ADR rules. I am not advocating that these other arbitral institutions should immediately change their rules to mirror those of CIETAC, I do however, feel that there needs to be a greater awareness that this facility is available within the other rules.

‘Party autonomy’ means just that, it doesn’t mean ‘legal representative autonomy’, I am sure, but for the philosophical hang-ups of some legal representatives, that if more parties were aware of the possibility of conducting their arbitration in what, after all, is a very pragmatic way, then more use would be made of combination procedures. In this respect CIETAC can at least serve as a model to other arbitral institutions and their users.
PART 4 - CONSTRUCTION AND ENGINEERING ARBITRATION UNDER CIETAC

Statistics

From information provided in the course of research for this dissertation CIETAC have provided details of the numbers construction and engineering arbitrations handled by them, these are set out below, together with, for the sake of comparison, statistics for construction and engineering arbitrations handled by the ICC:

<table>
<thead>
<tr>
<th>Year</th>
<th>CIETAC Total*</th>
<th>Const &amp; Eng ‡</th>
<th>ICC Total</th>
<th>Const &amp; Eng †</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>309</td>
<td>65</td>
<td>365</td>
<td>69</td>
</tr>
<tr>
<td>1990</td>
<td>238</td>
<td>365</td>
<td>69</td>
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<tr>
<td>1991</td>
<td>274</td>
<td>333</td>
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<tr>
<td>1992</td>
<td>267</td>
<td>337</td>
<td>45</td>
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<tr>
<td>1993</td>
<td>486</td>
<td>352</td>
<td>Not Given</td>
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<tr>
<td>1994</td>
<td>829</td>
<td>284</td>
<td>69</td>
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</tr>
<tr>
<td>1995</td>
<td>902</td>
<td>427</td>
<td>87</td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>778</td>
<td>433</td>
<td>61</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>723</td>
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<td>63</td>
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<td>1998</td>
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<td>1999</td>
<td>669</td>
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<td>2000</td>
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<td>2002</td>
<td>9***</td>
<td>Not Available</td>
<td>Not Available</td>
<td></td>
</tr>
</tbody>
</table>

† See Source ICC Court Of International Arbitration Bulletins 1990 to 2001, see calculation at Appendix C hereto.
‡ See Figures provided to the writer by Mr. Zhu Jianlin of CIETAC
* See Zhu and Liu, (2000), at footnote 3
** See Figures obtained from CIETAC via the Chartered Institute of Arbitrators
***To August 2002

Whilst the figures show an exponential growth in such cases by CIETAC in recent years it is from a base of almost zero, and as a percentage of the total numbers of cases handled by CIETAC still represents a mere fraction of their total caseload. As can be seen CIETAC still has some way to go before it can match the ICC either in absolute or percentage terms in respect of the construction and engineering cases handled.

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141 Mr. Zhu Jianlin, CIETAC.
142 Source ICC Court Of International Arbitration Bulletins 1990 to 2001, see calculation at Appendix C hereto.
143 Figures provided to the writer by Mr. Zhu Jianlin of CIETAC
144 Zhu and Liu, (2000), at footnote 3
145 Figures obtained from CIETAC via the Chartered Institute of Arbitrators
Research

The low level of construction and engineering arbitration activity in CIETAC is borne out by two aspects of the results of other research carried out for this dissertation. The research entailed identifying all those persons on the current CIETAC list of arbitrators who describe their specialisation as either a construction or engineering discipline. This revealed the first aspect, in that of 517 persons listed only 22 gave their specialisation as either construction or engineering related.

The second aspect of the research was to contact as many of those twenty-two as possible to find out if they had actually ever been called to sit on a CIETAC appointed tribunal. The writer found contact details for seventeen of the twenty-two and wrote to them, receiving twelve replies. Of the twelve, only four had been called to sit on a CIETAC tribunal, three of which were related to construction or engineering.

The first conclusion to be drawn from this research is that the increase in construction and engineering arbitrations such as it is, is either being carried out by a very select group of the construction and engineering listed arbitrators, or that non-specialist arbitrators are being called to sit on tribunals hearing construction and engineering disputes.

The second conclusion relates to the selection of arbitrators based on nationality, this aspect is analysed in further detail as follows.

Of the twenty-two listed construction and engineering specialists, nine are PR China nationals; three are citizens of Hong Kong or Taiwan\textsuperscript{146} and the remaining eleven from other countries. Interestingly, six of those eleven are from the UK, giving UK nationals by the far the biggest representation of non-PRC listed persons in respect of construction and engineering specialisation.

\textsuperscript{146} Without delving too deeply into the politics of whether Hong Kong and Taiwan form PRC, for the purposes of this discussion it is noted that the CIETAC Rules themselves give Hong Kong, Taiwan and Macao special treatment, and the CIETAC list itself designates the listed persons as being from either Hong Kong or Taiwan.
Under-Representation Of Construction and Engineering Specialists

This under-representation of construction and engineering specialists is worrying and, it is submitted, can be criticised in the same way that under-representation of non-Chinese persons on the list generally, may once have been valid but probably is no longer given the huge increase of listed foreign nationals.

The problem, as identified by Hughes\textsuperscript{147}, manifests itself in the drafting of arbitration an agreement. For example, during negotiations for a lucrative contract a UK construction or engineering company may find that CIETAC arbitration is non-negotiable by the Chinese client, as a compromise the expatriate company accepts this but on the condition that the presiding arbitrator\textsuperscript{148} is from a third country. Disputes arise during the performance of the contract and arbitration is commenced, the UK party makes its choice of arbitrator from among the pool of construction and engineering specialists on the CIETAC list, the Chinese party does likewise\textsuperscript{149}, each party selecting arbitrators of their own nationality. This leaves a pool of just eight remaining non-Chinese and non-UK persons from among whom the parties, or the Chairman of the Arbitration Commission by default\textsuperscript{150}, must choose in order to comply with the contractual provision of a third-country-national, presiding arbitrator.

With the utmost respect to those remaining in the above example, it is submitted that a choice from among eight is too narrow. It may be that through other commitments or conflicts of interest, the choice is restricted further. Granted, there are many other eminent persons on the CIETAC list as a whole, from a very broad range of countries, from among whom the presiding arbitrator could be chosen. However this would detract from one of the perceived advantages of arbitration in the first place, that of having a specialist in the field who would have ready understanding of some of the technical issues of the case.

The problem noted in the above example will occur not just in respect of construction and engineering, surely other specialisations that want to make use of CIETAC arbitration will suffer from the same lack of real choice in appointing a tribunal to meet the method of dispute resolution contractually agreed between the parties. This

\textsuperscript{147} Justin Hughes, (1997), at 74, para. 3
\textsuperscript{148} CIETAC Rules (2000), Article 24, para. 2
\textsuperscript{149} CIETAC Rules (2000), Article 24
\textsuperscript{150} CIETAC Rules (2000), Article 24
problem goes to the heart of the list system, and despite CIETAC’s laudable efforts to improve the situation at the generic level, the problem remains once one attempts to compose a tribunal made up of specialists in a given field.

**CIETAC Need For Review**

It is submitted that this in area which CIETAC need to review. There is an obvious reluctance on the part of CIETAC to abandon the list system altogether, there reasons for doing so, relating to ensuring the quality of arbitrators, are sound as far as they go. However, the list needs to be expanded still further to reflect various specialities, particularly in the context of this dissertation, construction and engineering. Alternatively, as Moser suggests the list should be one of recommendation only\(^{151}\).

A third alternative would be to instigate a ‘fast-track’ procedure for access onto the list. Under such a system parties would have free choice of arbitrator, if that person is not already CIETAC listed then the Commission would make a quick decision on whether that person should be admitted onto the list. The advantage of such an alternative is that CIETAC would still have control of vetting those who make it on to their list. The disadvantage, and it is a substantial one, comes when the Commission refuses admission of a party’s choice on to the list. That party would undoubtedly cry foul, and CIETAC would lay itself open, once again, to criticism of over-intervention and political meddling in the arbitral process, a charge which CIETAC has made much effort to avoid.

The list system therefore remains a dilemma for CIETAC to resolve.

**Under-Representation Is Reflection Of Stage Of Economic Development**

It is submitted that the very low level of construction and engineering disputes and the under representation of specialists in these disciplines on the CIETAC list reflects the stage of development of China’s economy. Thus far most disputes have been under sale of goods and commodity contracts with some disputes regarding joint ventures for manufacturing and the like.

\(^{151}\) Michael J Moser, (1998), at p.30, para.5
Selected CIETAC awards are published on an intermittent basis in ‘Selected Works Of China International Economic And Trade Arbitration Commission’, the first set published in 1995\textsuperscript{152} covers Awards from 1963 to 1988, the second published in 1998\textsuperscript{153} covers awards made between 1989 and 1995. A perusal of the awards shows the development of the economy through the different types of award being handled. Very early awards were all commodity based, for example:

From the 1995 publication:

- Award Nr. 2 Award on Delivery Dispute of Contract for Rice.
- Award Nr. 8 Award on Dispute concerning Delivery of Graphite

Later awards in the 1995 publication show many more disputes regarding manufacturing equipment, reflecting the growing economies need to import specialist equipment. for example:

- Award Nr. 57 Award on Dispute over Contract Sale of Plastic Injector
- Award Nr. 69 Award on Dispute over Sale of packing Machine and Computerised Scales.

The 1998 publication shows yet further evidence of the growth in the Chinese economy and the types of cases being handled by CIETAC, for example:

- Award Nr 55 Award on the Delivery of Toyota Cars

As well as the prevalence of disputes involving joint ventures, for example:

- Award Nr. 70 Award on Dispute concerning Joint Venture for Glazed Products


As reflected in the figures at the outset of this chapter there are virtually none of the selected awards could really be described as construction disputes. However, bearing in mind the relaxation of inward investment and the foreign ownership of construction and engineering companies doing business in China as a result of WTO entry, it is submitted that the next volume of selected works is likely to contain construction disputes.

**Increase Of In-Country Financing**

Those construction and engineering companies who have ventured into the Chinese market have either found the going too tough, or have either by strategy or circumstance been forced to take a very long-term view of the prospects for the Chinese market. Many will have gone into the market on the back of for example World Bank funded projects, such projects will not normally find their way to a CIETAC arbitration as the World Bank Standard Bid Documents specify, UNCITRAL, ICC, SCC or LCIA arbitration\(^\text{154}\).

In future, project finance for major infrastructure projects will not depend so greatly on funding such as from the World Bank, planned projects and projects already under way are funded internally, for example the proposed Beijing-Shanghai express rail link, and the Three Gorges dam project respectively. Other projects are being funded on DBFO models, for example the Shanghai waste water project. The likelihood then, is that dispute resolution clauses in construction and engineering contracts involving foreign contractors will be governed less by the strictures of international governmental lending institutions and are more likely to reflect home advantage, i.e. CIETAC.

It is therefore submitted that a familiarity with CIETAC will be essential for construction and engineering companies venturing into the Chinese market, it is likely that more and more such entities will be asked to consider CIETAC arbitration as the method of resolving disputes. I am not saying that this will in all cases be a *fait accompli*, but may form an element of contract negotiations for which the expatriate contractor should be aware of the factor of risk involved in accepting, rejecting or trading such a term in its contract.

\(^{154}\) World Bank Standard Bid Documents, p.138
PART 5 - CONCLUSIONS

Summary

From the foregoing narrative it can be seen what are the main issues surrounding arbitration under the CIETAC Rules and in China generally, as set in the context of the growth of the Chinese market economy. Conclusions on the various issues are reached within the section to which they relate but are summarised here.

- Confusion surrounding ‘foreign-related’ arbitration persists. CIETAC’s response by taking on domestic as well as international arbitration detracts from its expertise in the latter field.
- The treatment of kompetenz-kompetenz under CIETAC is no more unfavourable than under other arbitral rules or in other jurisdictions.
- Clarification of the status of ad hoc arbitrations would enhance the perception of China as a forum for international commercial arbitration.
- CIETAC needs to amend its rules to remove the discretion allowed to the tribunal to inform the parties when it acts inquisitorially.
- The CIETAC rules can act as a model for other arbitral institutions with regards provisions for confidentiality.
- CIETAC has made great strides in enhancing impartiality of its process, this is fundamental to the success of CIETAC and continued vigilance in this respect is essential. Further efforts are needed by the Chinese judiciary to ensure implementation of the pro-impartiality, anti-protectionist measures they have put in place, not least to comply with China’s WTO commitments.
- Combination proceedings are perhaps not so unique as CIETAC would have us believe, similar outcomes can be achieved using other arbitral/ADR rules. Better awareness of these options would enhance party autonomy, CIETAC can serve as a model for such proceedings.
- Construction and engineering arbitration under CIETAC is set to grow following WTO accession, CIETAC need to prepare for this eventuality.
In Conclusion

CIETAC has made much progress since its formation in 1956 as acknowledged even by its severest critics. The development of its Rules have brought it to the forefront of international commercial arbitration to a point where, with one or two exceptions, any criticism is no more or less justified than criticism of the idiosyncrasies of the various other international arbitral institutions.

The Chinese legislature and judiciary too, has appreciated that there must be the right legal environment for China to be a stable forum for the conduct of proceedings and the enforcement of awards. This imperative is enhanced by China’s entry into the WTO, which, echoing Luke Filei’s words above, now empowers the Chinese administration to implement the necessary residual improvements to the regime governing arbitration.

Entry to the WTO is also the key to the greater use of CIETAC and Chinese arbitration for the resolution of international construction and engineering disputes, as set out previously the amount of contracting activity in this sector is set to increase. In selecting a forum for the resolution of disputes arising out of this increase in contracting activity I am not advocating that CIETAC should be an automatic choice for foreign construction and engineering firms, however it is concluded that CIETAC is now a viable choice from among the available alternatives and opting for CIETAC arbitration does not now pose the critical risk factor which perhaps it once did. The challenge for CIETAC is ensuring that it has sufficient specialist resources to meet the increased demand from this sector.

155 Albeit that was under a different guise.
Chapter I  General Provisions

Section 1  Jurisdiction

Article 1  These Rules are formulated in accordance with the Arbitration Law of the People’s Republic of China and the provisions of other relevant laws, as well as the “Decision” of the former Administration Council of the Central People’s Government and the “Notice” and “Official Reply” of the State Council.

Article 2  China International Economic and Trade Arbitration Commission (originally named the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, later renamed the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, and currently called the China International Economic and Trade Arbitration Commission, hereinafter referred to as the “Arbitration Commission”) independently and impartially resolves, by means of arbitration, disputes of a contractual or non-contractual nature.

The disputes stated in the preceding paragraph include:

1. international or foreign-related disputes;
2. disputes related to the Hong Kong SAR or the Macao SAR or the Taiwan region;
3. disputes between foreign investment enterprises or between a foreign investment enterprise and a Chinese legal person, physical person and/or economic organization;
4. disputes arising from project financing, invitations to tender and bidding submissions, project construction or other activities conducted by a Chinese legal person, physical person and/or other economic organization which utilize capital, technology or services from foreign countries, international organizations or from the Hong Kong SAR, the Macao SAR and the Taiwan region;
5. disputes that may be taken cognizance of by the Arbitration Commission in accordance with special provisions of, or upon special authorization from, the laws or administrative regulations of the People’s Republic of China; and
6. any other domestic disputes that the parties have agreed to arbitrate by the Arbitration Commission.

The Arbitration Commission does not accept the cases over the following disputes:

1. marital, adoption, guardianship, support and succession disputes;
2. administrative disputes that laws require to be handled by administrative authorities;
3. labor disputes and disputes within the agricultural collective economic organizations over contracted management in agriculture.

As copied from International Alternative Disputes Resolution
Article 3 The Arbitration Commission will, upon the written application by one of the parties, accept a case in accordance with the arbitration agreement concluded between the parties, either before or after the occurrence of the dispute, in which it is provided that disputes are to be submitted to the Arbitration Commission for arbitration.

An arbitration agreement means an arbitration clause in a contract concluded between the parties or any other form of written agreement providing for settlement of dispute by arbitration.

Article 4 The Arbitration Commission has the power to decide on the existence and validity of an arbitration agreement and on jurisdiction over an arbitration case. If the parties concerned dispute the validity of an arbitration agreement, with one party requesting the Arbitration Commission to make a decision and the other party requesting the people’s court to make a ruling, the people’s court will make such a ruling.

Article 5 An arbitration clause contained in a contract shall be regarded as existing independently and separately from the other clauses of the contract, and an arbitration agreement attached to a contract shall be treated as a part of the contract existing independently and separately from the other parts of the contract. The validity of an arbitration clause or an arbitration agreement shall not be affected by any modification rescission, termination, expiry, invalidity, or non-existence of the contract.

Article 6 Any objection to an arbitration agreement and/or the jurisdiction over an arbitration case shall be raised before the first hearing conducted by the arbitration tribunal. Where a case is examined on the basis of documents only, an objection to jurisdiction should be raised before submission of the first substantive defense.

Any objection to an arbitration agreement and/or the jurisdiction over an arbitration case shall not affect the hearing of the case according to the arbitration procedures.

Article 7 If the parties agree to submit their dispute to the Arbitration Commission for arbitration, it will be taken that they have agreed to the case being arbitrated under these Rules. However, if the parties have agreed otherwise, and subject to consent by the Arbitration Commission, the parties’ agreement will prevail.

Section 2 Organization

Article 8 The Arbitration Commission has one honorary Chairman and several advisers.

Article 9 The Arbitration Commission consists of one Chairman, several Vice-Chairmen and a number of Commission members. The Chairman performs the functions and duties vested in him by these Rules and the Vice Chairmen may also perform the Chairman’s functions and duties with the Chairman’s authorization.

The Arbitration Commission has a secretariat to handle its day-to-day work under the leadership of the Secretary-General of the Arbitration Commission.

Article 10 The Arbitration Commission establishes a Panel of Arbitrators. The arbitrators are selected and appointed by the Arbitration Commission from among Chinese and foreign persons with professional knowledge and practical experience in the fields of law, economics and trade, science and technology, etc.

Article 11 The Arbitration Commission is based in Beijing. The Arbitration Commission has a Shenzhen Sub-Commission in Shenzhen Special Economic Zone and a Shanghai Sub-Commission in Shanghai. These Sub-Commissions are an integral part of the Arbitration Commission.

The Sub-Commissions have their respective secretariats to handle their day-to-day work under the leadership of the Secretaries-General of the respective Sub-Commissions.
These Rules uniformly apply to the Arbitration Commission and its Sub-Commissions. When arbitration proceedings are conducted in the Sub-Commissions, the functions and duties under these Rules to be carried out by the Chairman, the secretariat and the Secretary-General of the Arbitration Commission shall be performed by the Vice-Chairman as authorized by the Chairman, the secretariats and the Secretaries-General of the Sub-Commissions respectively, except for the circumstances provided for in Article 30 of these Rules.

**Article 12** The Parties may agree to have their dispute arbitrated by the Arbitration Commission in Beijing or by the Shenzhen Sub-Commission in Shenzhen or by the Shanghai Sub-Commission in Shanghai.

In the absence of such an agreement, the Claimant will have option to submit the case to be arbitrated by the Arbitration Commission in Beijing or by the Shenzhen Sub-Commission in Shenzhen or by the Shanghai Sub-Commission in Shanghai.

When deciding on where the case should be arbitrated, the first choice should be final. In case of any dispute, the Arbitration Commission will make a decision accordingly.

**Chapter II Arbitration Proceedings**

**Section 1 Application for Arbitration,**

**Defense and Counter-claim**

**Article 13** The arbitration proceedings will commence from the date on which the Notice of Arbitration is issued by the Arbitration Commission or its Sub-Commissions.

**Article 14** A Claimant submitting an Application for Arbitration must:

1. Submit an Application for Arbitration in writing, which shall, *inter alia*, contain:
   
   a. the names and addresses of the Claimant and the Respondent, including the zip code, telephone, telex, fax, and cable numbers or any other means of electronic telecommunications, if any;
   
   b. the arbitration agreement relied upon by the Claimant;
   
   c. the facts of the case and the main points of dispute; and
   
   d. the Claimants’ claim and the facts and reasons on which his claim is based.

   The Application for Arbitration shall be signed by, and/or affixed with the seal of, the Claimant and/or the authorized agent of the Claimant.

2. Attach to the Application for Arbitration the relevant documentary evidence which supports the facts on which the Claimant’s claim is based.

3. Pay an arbitration fee in advance to the Arbitration Commission according to the Arbitration Fee Schedule of the Arbitration Commission.

**Article 15** Upon receipt of the Application for Arbitration and its attachments, if the secretariat of the Arbitration Commission, after examination, finds that the Claimant has not yet completed the formalities required for arbitration, it will request the Claimant to complete them. If it finds that the Claimant has completed such formalities, the secretariat should promptly send to the Respondent a Notice of Arbitration, together with one copy each of the Claimant’s Application for Arbitration and its attachments as well as the Arbitration Rules, the Panel of Arbitrators and the Arbitration Fee Schedule of the Arbitration Commission. At the same time, the Notice of Arbitration, the Arbitration Rules, the Panel of Arbitrators and Arbitration Fee Schedule should be sent to the Claimant as well.
The secretariat of the Arbitration Commission, after sending the Notice of Arbitration to the Claimant and Respondent, shall appoint one of its staff-members to take charge of procedural administration of the case.

**Article 16** The Claimant and the Respondent shall, within 20 days as from the date of receipt of the Notice of Arbitration, each appoint an arbitrator from among the Panel of Arbitrators of the Arbitration Commission or authorize the Chairman of the Arbitration Commission to make such appointment.

**Article 17** The Respondent shall, within 45 days from the date of receipt of the Notice of Arbitration, submit his written defense and relevant documentary evidence to the secretariat of the Arbitration Commission.

**Article 18** The Respondent shall, at the latest within 60 days from the date of receipt of the Notice of Arbitration, file with the secretariat of the Arbitration Commission his counterclaim in writing, if any. The arbitration tribunal may extend that time limit if it deems that there are justified reasons.

When filing a counterclaim, the Respondent must state in his written statement of counterclaim his specific claim and facts and reasons upon which his claim is based, and attach to his written statement of counterclaim any relevant documentary evidence.

When filing a counterclaim, the Respondent must pay an arbitration fee in advance according to the Arbitration Fee Schedule of the Arbitration Commission.

**Article 19** The Claimant may request to amend his claim and the Respondent may request to amend his counterclaim. However, the arbitration tribunal may refuse such an amendment if it considers that the request has been raised too late and may affect the progress of the arbitration proceedings.

**Article 20** When submitting application for arbitration, written defense, statement of counterclaim, documentary evidence and other documents, the parties shall submit them in quintuplicate. If the number of the parties is more than two, additional copies shall be provided accordingly. If the arbitration tribunal is composed of only one arbitrator, the number of copies submitted may be reduced by two.

**Article 21** The progress of arbitration proceedings shall not be affected notwithstanding the failure of the Respondent to file his defense in writing or the failure of the Claimant to submit his written defense against the Respondent’s counterclaim.

**Article 22** The parties may authorize arbitration agents to deal with the matters relating to arbitration; the authorized arbitration agent must produce a Power of Attorney to the Arbitration Commission.

Both Chinese and foreign citizens can be authorized to act as arbitration agents.

**Article 23** When a party applies for property preservative measures, the Arbitration Commission shall submit the party’s application to the intermediate people’s court for a ruling in the place where the domicile of the party against whom the property preservative measures are sought is located or in the place where the property of the said party is located.

When a party applies for taking interim measures of protection of evidence, the Arbitration Commission shall submit the party’s application to the intermediate people’s court in the place where the evidence is located for a ruling.

**Section 2 Formation of an Arbitration Tribunal**

**Article 24** Each of the parties shall appoint one arbitrator from among the Panel of Arbitrators of the Arbitrator Commission or entrust the Chairman of the Arbitration Commission to make such appointment. A third arbitrator shall be jointly appointed by the Chairman of the Arbitration Commission upon the parties’ joint authorization.
In case the two parties fail to jointly appoint a third arbitrator or fail to jointly entrust the Chairman of the Arbitration Commission to appoint a third arbitrator within 20 days from the date on which the Respondent receives the Notice of Arbitration, the third arbitrator will be appointed by the Chairman of the Arbitration Commission. The third arbitrator will act as the presiding arbitrator.

The presiding arbitrator and the two appointed arbitrators will jointly form an arbitration tribunal to jointly hear the case.

**Article 25** The Claimant and the Respondent may jointly appoint or jointly authorize the Chairman of the Arbitration Commission to appoint a sole arbitrator to form an arbitration tribunal to hear the case alone.

If both parties agree to having a sole arbitrator to hear their case but are unable to agree on the choice of such a sole arbitrator within 20 days from the date on which the Respondent receives the Notice of Arbitration, the Chairman of the Arbitration Commission will make the appointment.

**Article 26** If the Claimant or the Respondent fails to appoint or authorize the Chairman of the Arbitration Commission to appoint an arbitrator according to Article 16 of these Rules, the Chairman of the Arbitration Commission will appoint an arbitrator for the Claimant or the Respondent.

**Article 27** Where there are two or more Claimants and/or Respondents involved in an arbitration case, the Claimants’ side and/or the Respondents’ side each shall, through consultation, appoint or entrust the Chairman of the Arbitration Commission to appoint one arbitrator from among the Panel of Arbitrators of the Arbitration Commission.

If the Claimants’ side or the Respondents’ side fails to make such appointment or entrustment within 20 days as from the date on which the Respondents’ side receives the Notice of Arbitration, the appointment will be made by the Chairman of the Arbitration Commission.

**Article 28** Any appointed arbitrator having a personal interest in the case shall himself disclose such circumstances to the Arbitration Commission and request a withdrawal from his office.

**Article 29** Any party who has justified reasons to suspect the impartiality and independence of an appointed arbitrator may make a request in writing to the Arbitration Commission for that arbitrator’s withdrawal. In the request, the facts and reasons on which the request is based shall be stated with the supporting evidence provided.

A challenge against an arbitrator must be put forward in writing no later than the first oral hearing. If the grounds for the challenge come out or are made known after the first oral hearing, the challenge may nevertheless be raised before the conclusion of the last hearing.

**Article 30** The Chairman of the Arbitration Commission shall decide whether an arbitrator should be withdrawn.

Before any decision is made by the Chairman of the Arbitration Commission, the challenged arbitrator shall continue to perform the duties of an arbitrator.

**Article 31** If an arbitrator is unable to perform the duties owing to his/her withdrawal, demise, removal from the Panel of Arbitrators or any other reasons, a substitute arbitrator shall be appointed in accordance with the procedure pursuant to which the original arbitrator was appointed.

After the appointment of the substitute arbitrator, the arbitration tribunal has discretion to decide whether to repeat the whole or a part of the previous procedures.

**Section 3 Hearing**

**Article 32** The arbitration tribunal will hold oral hearings. At the request of the parties or with their consent, the arbitration tribunal may, if it also considers oral hearings unnecessary, hear and decide a case on the basis of documents only.
Article 33 The date of the first oral hearing shall be decided by the arbitration tribunal in consultation with the secretariat of the Arbitration Commission. The secretariat shall notify the two parties of the decision 30 days before the date of the hearing. Any party having justified reasons may request a postponement of the hearing, but a written request must be submitted to the secretariat of the Arbitration Commission 12 days before the date of the hearing. The arbitration tribunal will then decide whether to postpone the hearing or not.

Article 34 The notice of the date of hearing subsequent to the first hearing is not subject to the 30-day time limit.

Article 35 Where the parties have agreed on the place of arbitration, the case shall be arbitrated in that place. Unless the parties agree otherwise, the cases accepted by the Arbitration Commission shall be heard in Beijing, or in other places with the approval of the Secretary-General of the Arbitration Commission. The cases accepted by a Sub-Commission of the Arbitration Commission is located, or in other places with the approval of the Secretary-General of that Sub-Commission.

Article 36 The arbitration tribunal shall not hear cases in open session. However, if both parties request that an open session hearing be held, the arbitration tribunal shall decide whether to do so or not.

Article 37 For cases heard in closed session, the parties, their arbitration agents, witnesses, arbitrators, experts consulted by the arbitration tribunal and appraisers appointed by the arbitration tribunal and the relevant staff-members of the secretariat of the Arbitration Commission shall not disclose to outsiders the substantive or procedural matters of the case.

Article 38 The parties shall produce evidence in support of the facts on which their claim, defense or counterclaim is based. The arbitration tribunal may, on its own initiative, undertake investigations and collect evidence as it considers necessary.

When investigating and collecting evidence by itself, the arbitration tribunal shall promptly inform the parties to be present if it considers necessary. Should one party or both parties fail to appear, the investigation and collection of evidence shall not be affected.

Article 39 The arbitration tribunal may consult an expert or appoint an appraiser for clarification of the specific issues relating to a case. Such an expert or appraiser may be either a Chinese or foreign organization or citizen.

The arbitration tribunal has the power to order the parties to submit or produce to the expert or appraiser any relevant materials, documents, or properties and goods for check-up, inspection and/or appraisal, and the parties are so obliged as well.

Article 40 The expert’s report and the appraiser’s report shall be copied to the parties so that the parties may have the opportunity to give their opinions thereon. At the request of any party to the case and with the approval of the arbitration tribunal, the expert and appraiser may be present at the hearing, and, if considered necessary and appropriate by the arbitration tribunal, the expert and the appraiser may be present at the hearing, and, if considered necessary and appropriate by the arbitration tribunal, be required to give explanations of their reports.

Article 41 The evidence submitted by the parties will be examined and evaluated by the arbitration tribunal. The arbitration tribunal shall decide whether to adopt the expert’s report and the appraiser’s report.

Article 42 Should one of the parties fail to appear at the hearing, the arbitration tribunal may proceed with the hearing and make an award by default.

Article 43 During the hearing, the arbitration tribunal may make a record in writing and/or by tape-recording. The arbitration tribunal may, when it considers necessary, make a minute stating the main points of the hearing and ask the parties and/or their arbitration agents, witnesses and/or other persons involved to sign and/or affix their seal to it.
The record in writing or by tape-recording is only available for use and reference by the arbitration tribunal.

**Article 44** If the parties reach an amicable settlement agreement by themselves, they may either request the arbitration tribunal to conclude the case by making an award in accordance with the contents of their amicable settlement agreement, or request a dismissal of the case.

The Secretary-General of the Arbitration Commission shall decide on the dismissal of an arbitration case if the decision on dismissal is made before the formation of the arbitration tribunal, and the arbitration tribunal shall decide thereon if the decision on dismissal is made after the formation of the arbitration tribunal.

If the party or the parties refer the dismissed case again to the Arbitration Commission for arbitration, the Chairman of the Arbitration Commission shall decide whether to accept the reference or not.

If the parties reach a settlement agreement by themselves through conciliation without involvement of the Arbitration Commission, any of them may, based on an arbitration agreement concluded between them providing for arbitration by the Arbitration Commission and their settlement agreement, request the Arbitration Commission to appoint a sole arbitrator to render an arbitration award in accordance with the contents of the settlement agreement.

**Article 45** If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.

**Article 46** The arbitration tribunal may conciliate cases in the manner it considers appropriate.

**Article 47** The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further efforts to conciliate will be futile.

**Article 48** If the parties have reached an amicable settlement outside the arbitration tribunal in the course of conciliation conducted by the arbitration tribunal, such settlement shall be taken as one which has been reached through the arbitration tribunal’s conciliation.

**Article 49** The parties shall sign a settlement agreement in writing when an amicable settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal will close the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties.

**Article 50** Should conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the course of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

**Article 51** The party who knows or should have known that any provision or requirement of these Rules has not been compiled with and yet proceeds with the arbitration proceedings without explicitly raising in writing his objection to non-compliance in a timely manner shall be taken to have waived his right to object.

**Section 4 Award**

**Article 52** The arbitration tribunal shall render an arbitral award within 9 months as from the date on which the arbitration tribunal is formed. The Secretary-General of the Arbitration Commission may extend this time limit at the request of the arbitration tribunal if the Secretary-General of the Arbitration Commission considers that it is really necessary and the reasons for extension are truly justified.
Article 53  The arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.

Article 54  Where a case is heard by an arbitration tribunal composed of three arbitrators, the arbitral award shall be decided by the majority of the arbitrators and the minority may be recorded and placed on file.

When the arbitration tribunal cannot attain a majority opinion, the arbitral award shall be decided in accordance with the presiding arbitrator’s opinion.

Article 55  The arbitration tribunal shall state in the tribunal award the claims, the facts of the dispute, the reasons on which the arbitral award is based, the result of the arbitral award, the allocation of the arbitration costs, the date on which and the place at which the arbitral award is made. The facts of the dispute and the reasons on which the arbitral award is based may not be stated in the arbitral award if the parties have agreed not to state them in the arbitral award, or the arbitral award is made in accordance with the contents of the settlement agreement reached between the parties.

Article 56  Unless the arbitral award is made in accordance with the opinion of the presiding arbitrator or the sole arbitrator, the arbitral award shall be signed by a majority of arbitrators. An arbitrator who has a dissenting opinion may sign or not sign his name on the arbitral award.

The arbitrators shall submit the draft arbitral award to the Arbitration Commission before signing the award. The Arbitration Commission may remind the arbitrators of any issue related to the form of the arbitral award on condition that the arbitrators’ independence of decision is not affected.

The Arbitration Commission’s stamp shall be affixed to the arbitral award.

The date on which the arbitral award is made is the date on which the arbitral award comes into legal effect.

Article 57  An interlocutory award or partial award may be made on any issue of the case at any time in the course of arbitration before the final award is made if considered necessary by the arbitration tribunal, or if the parties make such a proposal and it is agreed to by the arbitration tribunal. Either party’s failure to perform the interlocutory award will not affect the continuation of the arbitration proceedings, nor will it prevent the arbitration tribunal from making a final award.

Article 58  The arbitration tribunal has the power to determine in the arbitral award the arbitration fee and other expenses to be paid by the parties to the Arbitration Commission.

Article 59  The arbitration tribunal has the power to decide in the arbitral award that the losing party shall pay the winning party as compensation a proportion of the expenses reasonably incurred by the winning party in dealing with the case. The amount of such compensation shall not in any case exceed 10% of the total amount awarded to the winning party.

Article 60  The arbitral award is final and binding upon both disputing parties. Neither party may bring a suit before a law court or make a request to any other organization for revising the arbitral award.

Article 61  Either party may request in writing that a correction be made to any writing, typing, calculating errors or any errors of a similar nature contained in the arbitral award within 30 days from the date of receipt of the arbitral award; if there is really an error in the arbitral award, the arbitration tribunal shall make a correction in writing within 30 days from the date of the receipt of the written request for correction. The arbitration tribunal may likewise correct any errors in writing on its own initiative within 30 days from the date on which the arbitral award is issued. The correction in writing forms a part of the arbitral award.

Article 62  If anything claimed or counterclaimed is found to have been omitted in the arbitral award, either of the parties may make a request in writing to the arbitration tribunal for an additional award within 30 days from the date on which the arbitral award is received. If there is really something
omitted, the arbitration tribunal shall make an additional award within 30 days from the date on which the arbitral award is issued. The additional award forms a part of the arbitral award previously issued.

Article 63  The parties must automatically execute the arbitral award within the time limit specified in the arbitral award. If no time limit is specified in the arbitral award, the parties shall carry out the arbitral award immediately.

In case one party fails to execute the arbitral award, the other party may apply to the Chinese court for enforcement of the arbitral award pursuant to Chinese law or apply to the competent foreign court for enforcement of the arbitral award according to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards or other international treaties that China has concluded or acceded to.

Chapter III Summary Procedure

Article 64  Unless otherwise agreed by the parties, this Summary Procedure shall apply to any case in dispute where the amount of the claim totals not more than RMB 500,000 yuan, and to any case in dispute where the amount of the claim totals more than RMB 500,000 yuan provided that one party applies for arbitration under this Summary Procedure and the other party agrees in writing.

Article 65  When an application for arbitration is submitted to the Arbitration Commission, the secretariat of the Arbitration Commission shall, if such application is examined and found to be acceptable and qualified for application of the Summary Procedure, send a Notice of Arbitration immediately to the parties.

Unless both parties have jointly appointed one sole arbitrator from among the Panel of Arbitrators of the Arbitration Commission, they shall jointly appoint or jointly entrust the Chairman of the Arbitration Commission to appoint one sole arbitrator within 15 days from the date on which the Notice of Arbitration is received by the Respondent. Should the parties fail to make such appointment or entrustment, the Chairman of the Arbitration Commission shall immediately appoint one sole arbitrator to form an arbitration tribunal to hear the case.

Article 66  The Respondent shall, within 30 days from the date of the receipt of the Notice of Arbitration, submit his defense and relevant documentary evidence to the secretariat of the Arbitration Commission; a counterclaim, if any, shall be filed with documentary evidence within the said time limit.

Article 67  The arbitration tribunal may hear the case in the way it considers appropriate. The arbitration tribunal may in its full discretion decide to hear the case only on the basis of the written materials and evidence submitted by the parties or to hold an oral hearing as well.

Article 68  The parties must hand in written materials and evidence required for arbitration in compliance with the requirements of the arbitration tribunal within the time limit given by the arbitration tribunal.

Article 69  For a case which needs an oral hearing, the secretariat of the Arbitration Commission shall, after the arbitration tribunal within the time limit given by the arbitration tribunal has fixed a date for hearing, inform the parties of the date of the hearing 15 days before the date of the hearing.

Article 70  If the arbitration tribunal decides to hear the case orally, only one oral hearing shall be held. However, the arbitration tribunal may hold two oral hearings if really necessary.

Article 71  Should one of the parties fail to act in compliance with this Summary Procedure during summary proceedings, such failure shall not affect the arbitration tribunal’s conduct of the proceedings and the arbitration tribunal’s power to render an arbitral award.

Article 72  The conduct of the summary proceedings shall not be affected by any amendment of the claim or by the filing of a counterclaim, except that the disputed amount of the revised arbitration claim or counterclaim is in conflict with the provision of Article 64.
Article 73 Where a case is heard orally, the arbitration tribunal shall make an arbitral award within 30 days from the date of the oral hearing if one hearing is to be held, or from the date of the second oral hearing if two oral hearings are to be held. Where a case is examined on the basis of documents only, the arbitration tribunal shall render an arbitral award within 90 days from the date on which the arbitration tribunal is formed. The Secretary-General of the Arbitration Commission may extend the said time limit if such extension is necessary and justified.

Article 74 For matters not covered in this Chapter, the relevant provisions in the other Chapters of these Rules shall apply.

Chapter IV Special Provisions for Domestic Arbitration

Article 75 The provisions of this Chapter apply to the domestic arbitration cases accepted by the Arbitration Commission in respect of the disputes listed in Item (3), (4), (5) and (6) of paragraph 2, Article 2 of these Rules.

The provisions of Summary Procedure of Chapter III shall apply if the domestic arbitration cases fall within the scope of Article 64 of these Rules.

Article 76 After receipt of the Application for Arbitration, the Arbitration Commission, if considered that the application formalities stated in Article 14 of these Rules have been complied with, shall initiate the arbitration proceedings within 5 days and give notification to the parties. Or alternatively, the Arbitration Commission will initiate the arbitration proceedings immediately and notify the parties accordingly. If the Arbitration Commission considers that the application formalities have not been completed, it shall notify the applicant party in writing of its refusal and explain the reasons thereof.

Article 77 Upon receipt of the Application for Arbitration, if the Arbitration Commission considers that the Application does not fulfill the requirements set out in Article 14, it may ask the party to rectify it within a specified time limit. If no required rectification is made within a specified time limit, such Application for Arbitration will be rejected.

Article 78 When the Claimant or the Respondent is required to appoint or authorize the Chairman of the Arbitration Commission to appoint arbitrator(s) according to Article 16, 24, 25 and 27, the time limits provided for by each of the above-mentioned articles shall be 15 days.

Article 79 The Respondent shall, within 30 days from the date of receipt of the Notice of Arbitration, submit his written defense and relevant documentary evidence to the secretariat of the Arbitration Commission.

The Respondent shall, at the latest within 45 days from the date of receipt of the Notice of Arbitration, file with the Arbitration Commission his counterclaim in writing, if any. The arbitration tribunal may extend this time limit if it considers that there are justified reasons.

Article 80 For cases requiring oral hearing(s), the secretariat of the Arbitration Commission shall notify the parties involved of the hearing date at least 15 days in advance. The arbitration tribunal may, with consent from both parties, hold the hearing ahead of schedule. Any party may request a postponement of the hearing if it has justified reasons, but a written request must be submitted to the arbitration tribunal at least 7 days before the date of the hearing. The tribunal will then decide whether to postpone the hearing or not.

The notice of the date of hearing subsequent to the first hearing is not subject to the 15-day time limit stipulated by the preceding paragraph.

Article 81 If a case is heard orally, evidences shall be presented during the hearing(s) and be submitted within the time limit set by the arbitration tribunal.

Article 82 The arbitration tribunal shall make a record of the hearing(s) in writing. Any party or participant in the arbitration may apply for correction if any omission or mistake is found in the record of his own statement. If the arbitration tribunal refuses to correct, such application shall nevertheless be recorded.
The written record shall be signed or sealed by the arbitrator(s), the person who takes the notes, the parties, and other participants to the arbitration, if any.

**Article 83** The arbitration tribunal shall render an arbitral award within 6 months as from the date on which the arbitration tribunal is formed. At the request of the arbitration tribunal, the Secretary-General of the Arbitration Commission may extend this time limit as he considers necessary and justifiable.

**Article 84** For matters not covered in this Chapter, the relevant provisions in the other Chapters of these Rules shall apply.

**Chapter V Supplementary Provisions**

**Article 85** The Chinese language is the official language of the Arbitration Commission. If the parties have agreed otherwise, their agreement shall prevail.

At the hearing, if the parties or their arbitration agents or witnesses require language interpretation, the secretariat of the Arbitration Commission may provide an interpreter for them. Or the parties may bring with them their own interpreter.

The arbitration tribunal and/or the secretariat of the Arbitration Commission may, as it considers necessary, request the parties to hand in the corresponding translation copies in Chinese language or other languages of the documents and evidential materials submitted by the parties.

**Article 86** All the arbitration documents, notices and materials may be sent to the parties and/or their arbitration agents in person, or by registered letter or express airmail, telefax, telex, cable or by any other means considered proper by the secretariat of the Arbitration Commission.

**Article 87** Any written correspondence to the parties and/or their arbitration agents shall be taken to have been properly served if it is delivered to the addressee or delivered at his place of business, habitual residence or mailing address, or if, after reasonable inquiries, none of the aforesaid addresses can be found, the written correspondence is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

**Article 88** Apart from charging arbitration fees from the parties according to the arbitration Fee Schedule of the Arbitration Commission, the Arbitration Commission may collect from the parties other extra, reasonable and actual expenses including arbitrators’ special remuneration and their travel and boarding expenses for dealing with the case, as well as the fees and expenses for experts, appraisers and interpreters appointed by the arbitration tribunal, etc.

If a case is withdrawn after the parties have reached between themselves an amicable settlement or is concluded with an arbitral award made according to paragraph 4 of Article 44, the Arbitration Commission may charge a certain amount of fees from the parties in consideration of the quantity of work and the amount of the actual expenses incurred by the Arbitration Commission.

**Article 89** Where an arbitration agreement or an arbitration clause contained in the contract provides for arbitration to be conducted by China International Economic and Trade Arbitration Commission or its Sub-Commissions or by the formerly named Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, it shall be taken that the parties have unanimously agreed that the arbitration shall be conducted by China International Economic and Trade Arbitration Commission or by its Sub-Commissions.

Where an arbitration agreement or an arbitration clause contained in the contract provides for arbitration by China Council for the Promotion of International Trade/China Chamber of International Commerce or by the arbitration commission or court of arbitration of China Council for the Promotion of International Trade/China Chamber of International Commerce, it shall be taken that the parties have unanimously agreed that the arbitration shall be conducted by China International Economic and Trade Arbitration Commission.
**Article 90** These Rules shall come into force as from October 1st, 2000. For cases accepted by the Arbitration Commission or by its Sub-Commissions before the date on which these Rules become effective, the Rules of Arbitration effective at the time of acceptance shall apply. However, these Rules will be applied if the parties so agree.

**Article 91** The power to interpret these Rules is vested in the Arbitration Commission.
CHINA INTERNATIONAL ECONOMIC AND
TRADE ARBITRATION COMMISSION

ARBITRATION FEE SCHEDULE

(This fee schedule applies to the arbitration cases accepted under Items (1) and (2) of
Paragraph 2, Article 2 of the Arbitration Rules, and becomes effective from October 1st, 2000)

<table>
<thead>
<tr>
<th>Amount of Claim (RMB)</th>
<th>Amount of Fee (RMB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,000,000 Yuan or less</td>
<td>3.5% of the Claimed Amount, minimum 10,000 Yuan</td>
</tr>
<tr>
<td>1,000,000 Yuan to 5,000,000 Yuan</td>
<td>35,000 Yuan plus 2.5% of the amount above 1,000,000 Yuan</td>
</tr>
<tr>
<td>5,000,000 Yuan to 10,000,000 Yuan</td>
<td>135,000 Yuan plus 1.5% of the amount above 5,000,000 Yuan</td>
</tr>
<tr>
<td>10,000,000 Yuan to 50,000,000 Yuan</td>
<td>210,000 Yuan plus 1% of the amount above 10,000,000 Yuan</td>
</tr>
<tr>
<td>50,000,000 Yuan or more Yuan</td>
<td>610,000 Yuan plus 0.5% of the amount above 50,000,000 Yuan</td>
</tr>
</tbody>
</table>

Each case, when being accepted, shall be charged an additional amount of RMB 10,000 Yuan as a Registration Fee which includes the expenses for examining the application for arbitration, initiating the arbitration proceedings, computerizing management and filing the documents.

Where the amount of the claim is not ascertained at the time when the application for arbitration is handed in, or there exists special circumstances, the amount of arbitration fee shall be determined by the secretariat of the Arbitration Commission or the secretariats of the Sub-Commissions of the Arbitration Commission.

If the arbitration is charged in foreign currency, an amount of foreign currency equivalent to the corresponding RMB value specified in this schedule shall be paid.

Apart from charging arbitration fee according to this Arbitration Fee Schedule, the Arbitration Commission may collect other extra, reasonable and actual expenses pursuant to the relevant provisions of the Arbitration Rules.
CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

ARBITRATION FEE SCHEDULE

(This fee schedule applies to the arbitration cases accepted under Items (3), (4), (5) and (6) of Paragraph 2, Article 2 of the Arbitration Rules, and becomes effective from October 1st, 2000)

In accordance with the Notice of the Measures for the Charging of Arbitration Fee by the Arbitration Commissions with the reference number of Guo Ban Fa No. 44/1995 issued by the General Office of the State Council, the arbitration fee for cases taken by the China International Economic and Trade Arbitration Commission under Items (3), (4), (5) and (6) of Paragraph 2, Article 2 of the Arbitration Rules are charged in the following way:

I. Registration Fee

<table>
<thead>
<tr>
<th>Amount of Claim (RMB)</th>
<th>Amount of Registration Fee (RMB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1,000 Yuan or less</td>
<td>Minimum 100 Yuan</td>
</tr>
<tr>
<td>1,001 Yuan to 50,000 Yuan</td>
<td>100 Yuan plus 5% of the amount</td>
</tr>
<tr>
<td></td>
<td>above 1,000 Yuan</td>
</tr>
<tr>
<td>50,001 Yuan to 100,000 Yuan</td>
<td>2,550 Yuan plus 4% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 50,000 Yuan</td>
</tr>
<tr>
<td>100,001 Yuan to 200,000 Yuan</td>
<td>4,550 Yuan plus 3% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 100,000 Yuan</td>
</tr>
<tr>
<td>200,001 Yuan to 500,000 Yuan</td>
<td>7,550 Yuan plus 2% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 200,000 Yuan</td>
</tr>
<tr>
<td>500,001 Yuan to 1,000,000 Yuan</td>
<td>13,550 Yuan plus 1% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 500,000 Yuan</td>
</tr>
<tr>
<td>1,000,000 Yuan or more</td>
<td>18,550 Yuan plus 0.5% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 1,000,000 Yuan</td>
</tr>
</tbody>
</table>

II Handling Fee

<table>
<thead>
<tr>
<th>Amount of Claim (RMB)</th>
<th>Amount of Handling Fee (RMB)</th>
</tr>
</thead>
<tbody>
<tr>
<td>50,000 Yuan or less</td>
<td>Minimum 1,250 Yuan</td>
</tr>
<tr>
<td>50,000 Yuan to 200,000 Yuan</td>
<td>1,250 Yuan plus 2.5% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 50,000 Yuan</td>
</tr>
<tr>
<td>200,000 Yuan to 500,000 Yuan</td>
<td>5,000 Yuan plus 2% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 200,000 Yuan</td>
</tr>
<tr>
<td>500,000 Yuan to 1,000,000 Yuan</td>
<td>11,000 Yuan plus 1.5% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 500,000 Yuan</td>
</tr>
<tr>
<td>1,000,000 Yuan to 3,000,000 Yuan</td>
<td>18,500 Yuan plus 0.5% of the</td>
</tr>
<tr>
<td></td>
<td>amount above 1,000,000 Yuan</td>
</tr>
</tbody>
</table>
3,000,000 Yuan to 6,000,000 Yuan  28,500 Yuan plus 0.45% of the amount above 3,000,000 Yuan
6,000,000 Yuan to 10,000,000 Yuan  42,000 Yuan plus 0.4% of the amount above 6,000,000 Yuan
10,000,000 Yuan to 20,000,000 Yuan  58,000 Yuan plus 0.3% of the amount above 10,000,000 Yuan
20,000,000 Yuan to 40,000,000 Yuan  88,000 Yuan plus 0.2% of the amount above 20,000,000 Yuan
40,000,000 Yuan or more  128,000 Yuan plus 0.15% of the amount above 40,000,000 Yuan

The amount of Claim referred to in this schedule shall be based on the sum of money claimed by the Claimant. If the amount claimed is different from the actual amount in dispute, the actual amount in dispute shall be the basis for calculation.

Where the amount of claim is not ascertained at the time when application for arbitration is handed in, or there exists special circumstances, the amount of arbitration fee deposit shall be determined by the secretariat of the Arbitration Commission or the secretariats of the Sub-Commission in consideration of the specific rights and interests involved in the disputes.

Apart from charging arbitration fee according to this Arbitration Fee Schedule, the Arbitration Commission may collect other extra, reasonable and actual expenses pursuant to the relevant provisions of the Arbitration Rules.
Appendix B - Sample Questionnaire
Arbitration Under CIETAC Rules

- My research relates primarily to arbitration in P.R. China, ‘Chinese’ as used below therefore means P.R. China (excluding Special Autonomous Regions).
- If you feel that any answer requires further expansion, please feel free to continue on a separate sheet.

1. Have you or your firm been involved in an arbitration where one party is Chinese and the other non-Chinese. If so, how many.

2. If so, was the arbitration undertaken using CIETAC rules.

3. If not please specify which arbitration rules were used?

If CIETAC:

4. Was the arbitration conducted in accordance with the current version (Sept, 2000), or previous version of the rules.

5. Were any members of the tribunal non-Chinese?

6. Were non-Chinese members of the tribunal in the minority/majority?

7. Was the arbitration conducted in Chinese, a non-Chinese language or both.

8. Was the arbitration agreement a clause of the underlying contract or ad hoc (i.e. not part of the original contract)?

9. Was the law of the underlying contract Chinese or non-Chinese?

10. Was the ‘place’ of the arbitration China, were any hearings or other business related to the arbitration conducted elsewhere than in China.

11. Who ‘won’ the arbitration the Chinese or non-Chinese party?

12. If the non-Chinese party, was the award satisfactorily enforced?
13. Aside the fact that the party you were representing won or lost, were you satisfied with the conduct of the arbitration by a) the tribunal, b) CIETAC?

……………………………………………………………………………………………………………………………………

14. If no, what were your main concerns, e.g. delays, procedural problems, costs, others (please specify).

……………………………………………………………………………………………………………………………………

15. Were the CIETAC rules adopted in full or were any amendments to the Rules proposed pursuant to the current version, Article 7? Please outline the amendments proposed.

……………………………………………………………………………………………………………………………………

16. If so, was consent to the changes given by CIETAC?

……………………………………………………………………………………………………………………………………

17. Did either of the parties avail themselves of the facility (current CIETAC Rules, Articles 44~50) to use the tribunal as conciliators?

……………………………………………………………………………………………………………………………………

18. If so, did conciliation achieve a settlement?

……………………………………………………………………………………………………………………………………

19. If so, were your clients satisfied with the outcome of the settlement.

……………………………………………………………………………………………………………………………………

20. Was there any intervention by the Chinese courts either during or after the arbitration. If so please give brief details.

……………………………………………………………………………………………………………………………………

21. Did any of the arbitrations involve construction, engineering or related (e.g. consultancy, plant and equipment supply) issues?

……………………………………………………………………………………………………………………………………

22. If there was one thing which you consider would improve CIETAC arbitrations or arbitration in China generally what would it be?

……………………………………………………………………………………………………………………………………

I would like to receive the results of the survey. YES/ NO
Appendix C - Calculation Of Numbers Of ICC Construction And Engineering Cases
<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Const &amp; Eng %</th>
<th>Const &amp; Eng Nr.</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
<td>267</td>
<td>21.00%</td>
<td>56</td>
<td>ICC ICA Bulletin, Vol. 1/ No.1, June 1990, at p.7*</td>
</tr>
<tr>
<td>1985</td>
<td>339</td>
<td>21.00%</td>
<td>71</td>
<td>ICC ICA Bulletin, Vol. 1/ No.1, June 1990, at p.7*</td>
</tr>
<tr>
<td>1986</td>
<td>334</td>
<td>21.00%</td>
<td>70</td>
<td>ICC ICA Bulletin, Vol. 1/ No.1, June 1990, at p.7*</td>
</tr>
<tr>
<td>1987</td>
<td>285</td>
<td>21.00%</td>
<td>60</td>
<td>ICC ICA Bulletin, Vol. 1/ No.1, June 1990, at p.7*</td>
</tr>
<tr>
<td>1988</td>
<td>304</td>
<td>21.00%</td>
<td>64</td>
<td>ICC ICA Bulletin, Vol. 1/ No.1, June 1990, at p.7*</td>
</tr>
<tr>
<td>1997</td>
<td>452</td>
<td>14.00%</td>
<td>63</td>
<td>ICC ICA Bulletin, Vol. 9/ No.1, May 1998, at pp.4 &amp; 8</td>
</tr>
<tr>
<td>1998</td>
<td>466</td>
<td>18.00%</td>
<td>84</td>
<td>ICC ICA Bulletin, Vol.10/ No.1, Spring 1999, at pp.4 &amp; 8</td>
</tr>
<tr>
<td>1999</td>
<td>529</td>
<td>17.70%</td>
<td>94</td>
<td>ICC ICA Bulletin, Vol.11/ No.1, Spring 2000, at pp.7 &amp; 12</td>
</tr>
<tr>
<td>2000</td>
<td>541</td>
<td>not given**</td>
<td>0</td>
<td>ICC ICA Bulletin, Vol.12/ No.1, Spring 2001, at pp.7 &amp; 12</td>
</tr>
</tbody>
</table>

*Based on 1989 percentage by economic sector. "The classification of the cases per economic sector has not undergone notable change." ICC ICA Bulletin V.1/ Nr.1, June 1990 at p.7, para.6

** In 2001 Bulletin does not give construction & engineering separately but amalgamates with 'Goods' at 54% of the total.
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Publisher/Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author(s)</td>
<td>Title</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Trappe</td>
<td>Johannes Trappe, ‘Conciliation in the Far East’, Arbitration International</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>---------------------------------------------------------------------------------------------------</td>
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