

CHAPTER 4

Jurisdiction and the Arbitration Agreement

4.1 INTRODUCTION

Before CIETAC or CMAC may accept a dispute for arbitration, two key conditions must be met:

- (1) the subject matter of the dispute must fall within the scope of jurisdiction of the arbitration body as stipulated in the relevant procedural rules; and
- (2) the parties must have entered into a valid arbitration agreement.

Both of these issues are discussed in this chapter.

4.2 JURISDICTION

4.2.1 CMAC

CMAC's jurisdiction is set out in Article 2 of the CMAC Rules. This provision grants CMAC the power to hear the following types of disputes:

- (1) disputes arising from salvage and general average;
- (2) disputes arising from collisions between vessels, or from damage caused by vessels to structures or installations at sea, in areas of water connected to the sea, in harbours, as well as submarine or underwater installations;
- (3) disputes arising from management, operation, chartering, mortgage, agency, towage, raising, sale, repair, building, demolition of sea-going/river vessels, as well as disputes arising from carriage by sea undertaken in accordance with contracts of affreightment, bills of lading or other documents, and disputes arising from marine insurance;
- (4) disputes regarding the utilisation of marine resources and pollution damage to the marine environment;
- (5) disputes arising from freight forwarding contracts, contracts for the supply of shipping materials, employment of seamen aboard a foreign vessel, fishery production and fishing contracts; and
- (6) other maritime disputes submitted to arbitration by agreement between the parties.

The primary responsibility of CMAC is to deal with international or foreign-related maritime cases. However, the broad wording of

paragraph (6) above also grants CMAC the power to accept domestic cases, provided that the parties have reached an arbitration agreement to submit their disputes to CMAC for arbitration.

4.2.2 CIETAC

CIETAC's jurisdiction has been significantly expanded since its founding in the 1950s. Before discussing the scope of CIETAC's subject matter jurisdiction under the current CIETAC Rules, it will be useful to review briefly the evolution of CIETAC's jurisdiction as reflected in earlier versions of the procedural rules of CIETAC and its predecessors.

4.2.2.1 1956 FTAC Rules

As discussed in Chapter 1, the 1956 Provisional Rules of Procedure of the Foreign Trade Arbitration Commission (FTAC) vested the arbitration body with the authority to handle only disputes arising between foreign and Chinese entities. Moreover, the types of disputes over which FTAC tribunals could exercise jurisdiction were limited to disputes arising out of or relating to 'foreign trade transactions'. Under the 1956 Rules, FTAC tribunals had no power to exercise jurisdiction over disputes between domestic Chinese entities.

4.2.2.2 1980 FETAC Rules

The 1980 FETAC Rules provided for a significant expansion of the arbitration body's jurisdiction. Apart from 'foreign trade' disputes, FETAC was authorised to accept applications for the arbitration of disputes involving various forms of 'economic co-operation with foreign countries'. These included, principally, disputes involving foreign investment contracts and loan contracts involving foreign banks. While expanding the kinds of disputes over which the arbitration body could assert jurisdiction, the FETAC Rules continued to require that disputes handled by it involve a 'foreign' party.

4.2.2.3 1988 CIETAC Rules

In 1988 FTAC changed its name to CIETAC and issued revised arbitration rules. Article 2 of the 1988 CIETAC Rules provided simply that CIETAC's subject matter jurisdiction extends to disputes arising from 'international economic and trade' (*guoji jingjimaoyi*) transactions.

The question of what types of disputes may properly be classified as 'international' or *guoji* under the 1988 CIETAC Rules generated significant controversy in Chinese legal circles. In general, there was broad agreement that the requirement was met in the following types of cases:

- (1) where the dispute is between a Chinese company, enterprise or other economic organisation and a foreign company, enterprise, other type of economic organisation or individual;
- (2) where the dispute is between a foreign company, enterprise, other type of economic organisation or individual and another foreign company, enterprise, other type of economic organisation or individual; and
- (3) where the dispute is between a company, enterprise, other type of economic organisation or individual from the Hong Kong and Macao regions or Taiwan Province and a foreign company, enterprise, other type of economic organisation or individual.

Different views, however, were expressed regarding the question of whether the following types of cases could be deemed to be 'international' in nature and thus within CIETAC's jurisdiction:

- (a) where the dispute is between a company, enterprise, other type of economic organisation or individual from the Hong Kong and Macao regions or Taiwan Province and a company, enterprise or other economic organisation from the Hong Kong and Macao regions or Taiwan Province or from the Chinese mainland; and
- (b) where the dispute is between a mainland Chinese company, enterprise or other economic organisation and another mainland Chinese company, enterprise or other economic organisation.

As regards the first scenario, described under paragraph (a) above, the concerns expressed were largely based on political grounds. Since official PRC government policy was that Hong Kong, Macao and Taiwan constitute inalienable parts of Chinese territory how, it was asked, could disputes involving parties in such regions be deemed 'international'? In the event, practical considerations prevailed. In the actual handling of dispute cases under the 1988 CIETAC Rules, CIETAC treated parties from Hong Kong, Macao and Taiwan on the same basis as foreign parties for purposes of asserting jurisdiction and disposing of claims. This approach is consistent with Chinese foreign investment policy which also treats investments by companies from Hong Kong, Macao and Taiwan on the same footing as those from foreign countries.¹

The question of whether CIETAC could accept jurisdiction over disputes falling within paragraph (b) above, however, proved to be more controversial. In particular, some commentators argued that joint ventures and wholly-owned subsidiaries of foreign companies established in China (commonly referred to as 'foreign investment enterprises') are in reality 'foreign', even though as a matter of Chinese law they are deemed to

¹ See *Regulations of the State Council Concerning the Encouragement of Investment by Overseas Chinese and Hong Kong and Macao Compatriots*, promulgated on 19 August 1990, and *Regulations of the State Council for the Encouragement of Investment by Taiwanese Compatriots*, promulgated on 3 July 1989.

constitute Chinese legal persons, and that as such, disputes involving such entities should be deemed 'international' in character. Another line of opinion, however, rejected this view and adhered to a strict definition of 'international' based on the legal nationality of the parties. In this view, a dispute involving a foreign investment enterprise does not by itself establish an 'international' dispute and hence should be considered outside CIETAC's jurisdiction.

The different points of view of CIETAC and the Chinese courts were brought into sharp focus in the case of *China International Construction and Consultant Corporation v Beijing Lidu Hotel Company*.² This case involved a dispute relating to a construction contract entered into between the China International Construction and Consultant Corporation ('CICCC') and the Beijing Lidu Hotel Company ('Lidu'), a joint venture, for the construction of a hotel and apartment complex in Beijing. Upon completion of the work, Lidu refused to pay amounts outstanding under the contract and CICCC commenced an arbitration before CIETAC in accordance with the arbitration clause agreed in the contract. CIETAC took jurisdiction on the basis of the arbitration clause and the arbitration tribunal went on to render an award in favour of CICCC. When Lidu failed to comply with the award, CICCC filed an application with the Beijing Intermediate People's Court for enforcement.

In the enforcement proceedings, Lidu argued that the award should be denied enforcement on the grounds that CIETAC had no power to arbitrate the dispute. Lidu pointed out that both CICCC and Lidu were 'Chinese legal persons'. Accordingly, Lidu argued, the dispute could not be deemed 'international' and it thus failed to meet the precondition necessary for CIETAC, in accordance with its rules, to properly take jurisdiction. In its decision rendered on 23 December 1992, the court held in favour of Lidu and issued an order denying enforcement. In its decision the court stated as follows:

... Both parties to the dispute are Chinese legal persons. The dispute between them contained no foreign elements. According to the Rules of Procedure of CIETAC, a dispute must arise from international economic and trade transactions otherwise it will be beyond the jurisdiction of CIETAC. The objection raised by Lidu is therefore justified. In accordance with Article 260(1)(d) of the Civil Procedure Law, the award shall therefore be denied enforcement.

The provisions of the 1991 Civil Procedure Law cited by the Beijing Intermediate People's Court as the basis for its denial of enforcement of the CIETAC award allow a People's Court to refuse enforcement where the award deals with matters which 'fall outside the competence of the arbitration organisation'.

² Reported in *Renmin fayuan anli xuan* (Selected Cases of the People's Courts) Vol 4 (1993) at pp 137-140.

The definition of 'economic and trade' (*jingjimaoyi*) transactions has proved to be less problematic. Both CIETAC officials and legal commentators have interpreted the phrase liberally to include most kinds of 'commercial' disputes. The guideline frequently followed in determining the scope of 'economic and trade transactions' is the Notice of the Supreme People's Court of the People's Republic of China on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, issued on 10 April 1987 at the time of China's accession to the New York Convention.³ The notice states that China will apply the Convention to 'contractual and non-contractual commercial legal relations', which it defines to include the following:

... relations concerning economic rights and obligations arising out of contract, tort or relevant provisions of law, including disputes concerning the sale and purchase of goods, lease of property, contracting for project work, processing arrangements, technology transfer, equity joint ventures, co-operative joint ventures, exploration and exploitation of natural resources, insurance, financing, labour, agency, consultancy services and transportation by sea, air, railway or road, as well as product liability, environmental pollution, accidents at sea and ownership, but not including disputes between foreign investors and government bodies.

It should be noted that the above list is not intended to be exhaustive. Nor would CIETAC's jurisdiction extend to all of the commercial disputes enumerated by the Supreme Court's list. For example, disputes relating to maritime matters may be 'commercial' in nature, but they will be referred to CMAC as they fall within its jurisdictional mandate.

4.2.2.4 1994 CIETAC Rules

The 1994 CIETAC Rules introduced a number of changes to Article 2 of the 1988 Rules in an attempt to clarify the scope of CIETAC's jurisdiction.⁴

First, Article 2 was revised to provide that CIETAC is empowered to assume jurisdiction over 'disputes arising from international or foreign-related, contractual or non-contractual, economic and trade transactions ...' (emphasis added).

Secondly, additional language was also added to provide explicitly that CIETAC may hear disputes between the following parties:

- (1) 'foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons';

³ See the Materials set out in Part V of this book.

⁴ See Cheng, 'Guanyu zhongguo guoji jingji maoyi zhongcai weiyuanhui zhongcai guizi xiugai caoan de baogao' (Report on the Draft Amendment to the Arbitration Rules of the China International Economic and Trade Arbitration Commission) in *China International Commercial Arbitration Yearbook 1993-1994* (Beijing, 1994) and Moser, 'China's New International Arbitration Rules' in 11 *Journal of International Arbitration* 3 (September 1994) at p 5.

- (2) 'foreign legal persons and/or natural persons'; and
- (3) 'Chinese legal persons and/or natural persons'.

The main impact of these changes was twofold. First, the changes served to codify in the Rules CIETAC's existing practice with respect to the definition of 'international' and the handling of disputes falling within paragraphs (1) and (2) above. Second, the addition of the word 'foreign-related' (*shewai*) to Article 2 was intended to make explicit that CIETAC may assume jurisdiction over disputes between *domestic* Chinese legal persons, as contemplated by paragraph (3) above, so long as a 'foreign element' (*shewai yinsu*) is present in the transaction.

Although no definition of 'foreign-related element' is specifically provided in China's basic laws, judicial interpretation does shed some light on the meaning of the concept. In an important opinion of the Supreme People's Court on the interpretation of the Civil Procedure Law,⁵ the court held that a foreign-related element will be considered to exist in any of the following circumstances:

- (1) where either or both of the parties are a person of foreign nationality or a stateless person, or a company or organisation domiciled in a foreign country;
- (2) where the legal facts that establish, change or terminate the civil legal relationships between the parties take place in a foreign country; or
- (3) where the subject matter of the dispute is situated in a foreign country.

According to judicial interpretation, therefore, a dispute between Chinese legal persons (including a Chinese-foreign joint venture or other foreign investment enterprise and another Chinese legal person) will not necessarily always be deemed to be a purely domestic dispute. If the contract in dispute was signed, amended or terminated in the territory of a country other than China, a dispute arising from that contract may be considered to be 'foreign-related' in nature because the requirement set forth in item (2) above has been satisfied. In such circumstances, the 1994 CIETAC Rules would permit CIETAC to assert jurisdiction over the dispute.

4.2.2.5 1995 CIETAC Rules

In 1995, CIETAC amended its rules once again. Changes were made to Article 2 of the Rules to allow CIETAC to accept cases in accordance with 'special provisions or special authorisation' as set forth in relevant laws or administrative regulations of the PRC. The change was introduced to accommodate a 1994 Notice of the Securities Commission of the State Council designating CIETAC as China's sole arbitration body to handle all

⁵ See *Opinion of the Supreme People's Court on Several Questions Concerning the Implementation of the Civil Procedure Law of the People's Republic of China*, issued 14 July 1992 at Para 304.

the date of receipt of the copy of the appeal petition. If a party is unable to lodge an appeal or to submit a bill of defence within the statutory time limit and applies for an extension thereof, the People's Court shall decide on the application.

Article 250 The period for the trial by the People's Court of civil cases involving foreign parties shall not be subject to the restriction of Articles 135 and 159 hereof.

CHAPTER 27

PRESERVATION OF PROPERTY

Article 251 A party may apply to a People's Court for preservation of property in accordance with Article 92 hereof.

An interested party may apply to a People's Court for preservation of property prior to the institution of an action in accordance with Article 93 hereof.

Article 252 After the People's Court has ruled to allow preservation of property prior to the institution of an action, the applicant shall institute an action within 30 days. If the applicant fails to institute an action within the time limit, the People's Court shall cancel the preservation of property.

Article 253 If, after the People's Court has rendered a ruling to allow preservation of property prior to the institution of an action, the person against whom an application is made provides security, the People's Court shall cancel the preservation of property.

Article 254 If an application for preservation of property is made wrongfully, the applicant shall compensate the person against whom the application is made for any loss incurred as a result of the preservation of property.

Article 255 If a People's Court decides that preserved property needs to be kept under surveillance, it shall notify the relevant unit to take charge of surveillance. The surveillance expenses shall be borne by the person against whom the application is made.

Article 256 An order from a People's Court to cancel preservation shall be carried out by an enforcement officer.

CHAPTER 28

ARBITRATION

Article 257 With respect to disputes which arise from economic, trade, transport or maritime activities involving foreign parties, if the parties have included an arbitration clause in their contract or have subsequently reached a written arbitration agreement which provides that such disputes shall be submitted for arbitration to an arbitration organ of the People's Republic of China for foreign-related disputes or to another arbitration organ, no party may institute an action in a People's Court.

If the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement, an action may be instituted in a People's Court.

Article 258 If a party applies for preservation of property, the arbitration organ of the People's Republic of China for foreign-related disputes shall submit the application to the Intermediate People's Court of the place where the domicile of the person against whom the application is made is located or where the property is located.

Article 259 After an award has been made by an arbitration organ of the People's Republic of China for foreign-related disputes, no party may institute an action in a People's Court. If a party fails to perform the arbitral award, the other party may apply for enforcement to the Intermediate People's Court of the place where the domicile of the person against whom an application is made is located or where the property is located.

Article 260 If the person against whom the application is made presents evidence which proves that the arbitral award made by an arbitration organ of the People's Republic of China for foreign-related disputes involves any of the following circumstances, the People's Court shall after examination and verification by a collegiate bench formed by the People's Court, rule to deny enforcement of the award:

- (1) the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- (2) the person against whom the application is made was not notified to appoint an arbitrator or to take part in the arbitration proceedings or the said person was unable to state his opinions due to reasons for which he is not responsible;
- (3) the composition of the arbitral tribunal or the arbitration procedure was not in conformity with the rules or arbitration;
- (4) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ.

Article 261 If a People's Court rules to deny enforcement of an arbitral award, a party may, in accordance with the written arbitration agreement between the two parties, reapply to the arbitration organ for arbitration, or institute an action in a People's Court.

CHAPTER 29

JUDICIAL ASSISTANCE

Article 262 Pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity, People's Courts and foreign courts may request mutual assistance in the service of legal documents, investigation, taking of evidence, and other acts in connection with litigation, on each other's behalf.

If any matter in which a foreign court requests assistance would harm the sovereignty, security or public interest of the People's Republic of China, the People's Court shall refuse to comply with the request.

Article 263 The request for and provision of judicial assistance shall be conducted through the channels stipulated in the international treaties concluded or acceded to by the People's Republic of China. Where no treaty relations exist, the request for and provision of judicial assistance shall be conducted through diplomatic channels.

The embassy or a consulate in the People's Republic of China of a foreign state may serve documents on, investigate, and take evidence from its citizens, provided that the law of the People's Republic of China is not violated and that no coercive measures are adopted.

Except for the circumstances set forth in the preceding paragraph, no foreign agency or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents, carry out an investigation or take evidence within the territory of the People's Republic of China.

Article 264 The letter of request for judicial assistance and its annexes submitted to a People's Court by a foreign court shall be accompanied by a Chinese translation or text in another language as specified in the relevant international treaty.

The letter of request for judicial assistance and its annexes submitted to a foreign court by a People's Court shall be accompanied by a translation in the language of the state or a text in another language as specified in the relevant international treaty.

Article 265 The judicial assistance provided by a People's Court shall be carried out in accordance with the procedure prescribed by the law of the People's Republic of China. If a special method is requested by a foreign court, judicial assistance may also be provided by the method requested, provided that such special method does not contradict the law of the People's Republic of China.

Article 266 If a party applies for enforcement of a legally effective judgment or ruling made by a People's Court and the party subject to enforcement or his property is not located within the territory of the People's Republic of China, it may directly apply for recognition and enforcement to the competent foreign court. Alternatively, the People's Court may, pursuant to an international treaty concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity, request the foreign court to recognize and enforce the judgment or ruling.

If a party applies for enforcement of a legally effective arbitral award made by an arbitration organ of the People's Republic of China for foreign-related disputes and the party subject to enforcement or its property is not located within the territory of the People's Republic of China, it shall directly apply for recognition and enforcement to the competent foreign court.

Article 267 If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a People's Court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the competent Intermediate People's Court

of the People's Republic of China. Alternatively, the foreign court may, pursuant to the provisions of the international treaty concluded or acceded to by the foreign state and the People's Republic of China, or in accordance with the principle of reciprocity, request the People's Court to recognize and enforce the judgment or ruling.

Article 268 Having received an application or a request for recognition and enforcement of a legally effective judgment or ruling of a foreign court, a People's Court shall review such judgment or ruling pursuant to the international treaty concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the People's Court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates state sovereignty, security and the public interest, it shall rule to recognize its effectiveness. If enforcement is necessary, it shall issue an order of enforcement, which shall be implemented in accordance with the relevant provisions of this Law. If such judgment or ruling contradicts the basic principles of the law of the People's Republic of China or violates state sovereignty, security or the public interest, the People's Court shall refuse to recognize and enforce the same.

Article 269 If an award made by a foreign arbitration organ requires recognition and enforcement by a People's Court of the People's Republic of China, the party concerned shall directly apply to the Intermediate People's Court of the place where the party subject to enforcement is domiciled or where his property is located. The People's Court shall handle the matter pursuant to the international treaty concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity.

Article 270 This Law shall be implemented from the date of promulgation. At the same time, the Civil Procedure Law of the People's Republic of China (for Trial Implementation) shall be repealed.