

The International Comparative Legal Guide to:

International Arbitration 2007

A practical insight to cross-border International Arbitration work



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China/Sweden Arbitrations

Vinge

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Swedish Background

Already the Visby City Law from the 1300s and, later on, the Swedish 1667 Maritime Act, 1669 Enforcement Statute, and 1734 Enforcement Code contained provisions on arbitration. Sweden adopted its first complete Arbitration Act in 1887, replaced by two acts in 1929, including the Foreign Arbitration Agreements and Awards Act, following Sweden's accession to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. There were minor changes in 1972 when Sweden acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Finn Madsen, *Commercial Arbitration in Sweden*, 2006, p. 14 *et seq.*).

SCC Arbitration Institute, preceded by arbitration institutions at other Swedish chambers of commerce, was established in 1917, linked to but independent from SCC existing since 1902. During its first decades, it only dealt with domestic disputes (Ulf Franke, *SCC's Årsskrift 1981*, p. 6 *et seq.*, Birgitta Blom, *SCC Yearbook 1993*, p. 6, *SCC's Årsskrift 1992*, Förord).

Sweden began appearing in the 1960s in US-USSR foreign trade contracts as seat of arbitration. A study from 1973 to 1976 by the American Arbitration Association and USSR Chamber of Commerce and Industry established that Sweden had the characteristics desirable as seat for international arbitration. This resulted in the US-USSR Optional Clause Agreement in December 1976, which became important to Stockholm as such seat (Ulf Franke, *SCC's Årsskrift 1981*, p. 9, *SCC Yearbook 1990*, p. 14 *et seq.*). The parties agreed to an Optional Arbitration Clause as acceptable for trade contracts between US and USSR entities (*Arbitration in Sweden*, 1984, Appendix 5). The arbitration was to take place in Stockholm pursuant to the newly adopted 1976 UNCITRAL Arbitration Rules, and SCC was to act as default appointing authority. The presiding arbitrator was to be appointed from a list of 18 arbitrators, among them six Swedes, of which four were judges.

In 1977, it was said: "In recent years, Sweden has increasingly become a center for arbitration of disputes between parties in different countries. [...] The appointing authority under the arbitration clauses has in many cases been the Stockholm Chamber of Commerce, its President or its Arbitration Institute." (Sven Swarting, *Arbitration in Sweden*, Preface). An increasing number of contracts involving non-Swedish parties also provided that the contract should be governed by Swedish substantive law (Sven Swarting, *Arbitration in Sweden*, second ed., 1984, Preface).

Contacts were established between (the predecessor to) CIETAC, the leading Chinese arbitration institution over the years, and SCC in the mid-seventies (Birgitta Blom, *SCC Yearbook 1997*, Preface).

The reasons for foreign parties' growing interest in Stockholm included Sweden's neutrality, Sweden's long tradition in arbitration, the existence of SCC capable of administering international arbitrations, the flexible procedure, respecting party autonomy, of the 1929 acts, the limited intervention of Swedish courts in arbitration, including the narrow setting aside grounds, the right of foreign arbitrators and counsel to act in Swedish arbitrations, the parties' freedom to agree upon the language of the arbitration, the enforceability of Swedish awards under the 1927 Geneva Convention and the 1958 New York Convention, the availability of experienced arbitrators among members of the Swedish bar, the judiciary, academics and businessmen, and the availability in English and other languages of commentaries on the Swedish arbitration acts (Ulf Franke, *SCC's Årsskrift 1981*, p. 6 *et seq.*, Bengt Westerling, *SCC Yearbook 1982*, p. 12 *et seq.*).

In the beginning of the 1980s Stockholm became a centre also for arbitration involving Chinese parties (Johan Gernandt, *ICCA Congress series No. 12*, p. 50), and CIETAC and SCC signed a co-operation agreement in 1984 (www.cietac.org). Chinese parties regarded SCC as their second choice after CIETAC (Gernandt, *Ibid.*, cf. Cheng Dejun, Michael J Moser, Wang Sheng Chang, *International Arbitration in the People's Republic of China*, 1995, p. 5), following the lead of socialist eastern European states (Moser, *ICCA Congress series No. 12*, p. 95).

By 1990, in most SCC cases both parties came from countries other than Sweden and, although east-west cases still formed the largest part of the international case load, there were cases from virtually all parts of the world. The international contracts referred to SCC Rules, or provided for *ad hoc* arbitration in Sweden, with or without reference to UNCITRAL Arbitration Rules (Ulf Franke, *SCC Yearbook 1990*, p.14 *et seq.*).

In 1992, after the dissolution of USSR, a new arrangement for arbitration in Stockholm between American and Russian parties was entered into by AAA and the Chamber of Commerce and Industry of the Russian Federation (Birgitta Blom, *SCC Yearbook 1993*, Preface).

In 1996, the present Swedish Arbitration Act entered into force, substantially based on the 1929 acts.

Chinese Background

From the beginning of the 1900s there were attempts to create a modern Chinese legal code, hindered by, *inter alia*, civil war. The establishment of the People's Republic in 1949 entailed a legal system where law however played a minor role in the social order, and events like the Great Leap Forward and the Great Cultural Revolution followed. In the late 1970s, after the opening up policy

was adopted, attention was given to create a legal system as such is generally known. The economic growth following, and the development of the planned economy into a socialist market-oriented one, entailed an unprecedented increase in legislation (cf. Warren Khoo, *ICCA Congress series No. 12*, p. 70 *et seq.*).

The concept of rule of law only recently received increasing and open attention in China, which titles and publishing dates of books in China testify to, such as: *Studies of Rule of Law and Rule by the Party*, Zhang Heng Shan et al, 2004, *Rule of Law and Rule by Morality*, Xie Yue et al, 2003, *An Introduction to Rule of Law*, Hu Ze Yun, 2003, *Administration by Law in a Nation Ruled by Law*, Chan Zhong Le, 2002, and *How to Conduct Litigation Against Government Officials*, Hu Zhan Guo, 2002 (*Ibid.*).

In 1954, the then Government Administration Council of the Central People's Government decided to establish the (predecessor to) the China International Economic and Trade Arbitration Commission, CIETAC, within the (predecessor to) the China Chamber of International Commerce. According to the decision, it was necessary to establish an arbitral body for settling disputes concerning foreign trade (Article 1). Deviating from domestic principles, the arbitration commission was to exercise jurisdiction in accordance with the parties' agreements (Article 2), and the award was to be final, subject to no appeal (Article 12).

At the time, CIETAC only accepted foreign-related cases, and hundreds of other arbitration commissions, subordinated to government authorities at various levels, handled domestic cases, in which no arbitration agreement was required and awards were subject to appeal (Wang Sheng Chang, *Ibid.*, p. 28, *SCC Yearbook 1995*, p. 23 *et seq.*).

The 1979 Agreement on Trade Relations Between USA and China provided that the parties encouraged their entities to settle disputes through conciliation and by an arbitration institution in China, USA or a third country. The rules of the institution were to apply, or UNCITRAL Arbitration Rules, or other international rules (Cheng Dejun, Michael J Moser, Wang Sheng Chang, *International Arbitration in the People's Republic of China, 1995*, p. 5). Further, in connection with the adoption of the 1979 Law on China-Foreign Equity Joint Ventures, the Ministry of Foreign Economic Cooperation and Trade recommended a contract for equity joint ventures including alternative arbitration clauses. The arbitration would take place in Beijing under the rules of CIETAC's predecessor, or outside China (place to be filled in) under rules of an arbitration institution (to be filled in), or in the respondent's country (Zhang Yuqing, *ICCA Congress series No. 12*, p. 167).

In 1987, the New York Convention became effective in China, with the reciprocity and commercial reservations.

Following the 1995 Chinese Arbitration Law, which constituted a fundamental change of domestic arbitration, arbitration commissions for domestic as well as foreign-related cases were established (Wang Sheng Chang, *Ibid.*, p. 37).

China acceded to the World Trade Organization in 2001.

The Supreme People's Court unifies the Chinese law development through Replies to questions from the high courts in pending cases and Judicial Interpretations or Notices on its own initiative. More than 40 Notices and Replies have dealt with arbitration matters (Kong Yuan, *Asian International Arbitration Journal, Vol 2, No. 2, 2006*, p. 191).

The Use of Arbitration in Sweden and China

In Sweden, business to business contracts of some size not providing for arbitration are rare, contracts with government

entities excepted. *Ad hoc* arbitration is common, as well as arbitration administered by, *inter alia*, SCC. The Government Bill of the 1996 act estimated that there were a maximum of 300 to 400 *ad hoc* arbitrations annually in Sweden (*Proposition 1998/99:35 Ny lag om skiljeförfarande*, p. 36). In China, arbitration is normally provided for in form contracts used by state-owned corporations (Cheng Dejun, Michael J Moser, Wang Sheng Chang, *International Arbitration in the People's Republic of China, 1995*, p. 4 *et seq.*).

The annual number of cases filed with SCC exceeded 100 for the first time in 1993 (111 cases, cf. *SCC Yearbook 1994* p. 6). SCC received in 2006, until 11 December, 134 cases (*SCC's electronic Newsletter 2/2006*). The 169 cases received in 2003 involved 257 parties from 37 countries (Johan Gernandt, *ICCA Congress series No. 12*, p. 48). In 1993, CIETAC received 486 foreign-related and domestic cases (Wang Sheng Chang, *Ibid.*, p. 36), and, in 2005, the total reached 979 cases (www.hkiac.org). Further, the Beijing Arbitration Commission established in 1995 has grown rapidly. In 2004, BAC accepted 1,796 domestic and foreign-related cases (www.bjac.org.cn). From the adoption of the 1995 Chinese Arbitration Law until 2003, the local commissions received more than 80,000 cases (Wang Sheng Chang, *Ibid.*, p. 37). Today, there are nearly 200 arbitration commissions (Michael J Moser, *Special Advertising Section, O'Melveny & Myers LLP, 2006*).

During the five years preceding the 2004 ICCA Congress in Beijing, SCC received 56 cases involving Chinese parties, where multi-party situations are common since there are frequently a foreign trade corporation and an end user on the Chinese side. The cases dealt with sales of goods, joint ventures, licences and transfers of know-how, and construction. In some China-related SCC cases meetings and hearings have been held in Asia in, *inter alia*, Hong Kong (Johan Gernandt, *ICCA Congress series No. 12*, p. 50).

Stockholm continues to be the preferred venue outside China under many contracts, such as the form petroleum contracts used by the China National Offshore Oil Corporation and the China National Petroleum Corporation. Largely for travel cost and language reasons many Chinese parties have however started to show a preference for arbitration in Singapore or Hong Kong. Hong Kong has grown in importance since the issue of reciprocal enforcement of Hong Kong and Mainland China awards was resolved through the Arbitral Awards Enforcement Arrangement in 2000 (Michael J Moser, *Ibid.*, p. 95).

Bilateral and multilateral investment treaties sometimes refer to SCC Rules, SCC as the appointing authority, or Stockholm as seat; also treaties entered into by China. SCC handled, from 2001 until early 2005, 19 such arbitrations (*Stockholm International Arbitration Newsletter 2/2005*). There is no such reported case against China, in spite of China's more than 100 treaties and the great amount of foreign investments in China, maybe due to that the arbitration clauses in China's treaties have only covered disputes on quantum, not liability.

China recently entered into two treaties with the Netherlands and Germany, under which China consented to arbitration concerning all disputes under the treaty. The question therefore arises whether investors of other states which have treaties with China, containing most favoured nation clauses, have the right to arbitrate against China also issues on liability, in accordance with the rights granted Dutch and German investors (cf. Moser, *ICCA Congress series No. 12*, p. 98). There seems to be conflicting ICSID awards on this.

The Model Law and Chinese and Swedish Arbitration

The Swedish and Chinese legislators considered the Model Law

when drafting their present laws, but there are some differences, mainly in disposition, not in substance, and neither China nor Sweden is regarded as a Model Law country. The Chinese and Swedish positions on some fundamental principles of the Model Law are as follows.

The Chinese and Swedish laws, as well as the Model Law, recognise not only arbitration agreements regarding existing disputes, but also regarding future disputes (Model Law Article 7 (1), Chinese Law Article 16, Swedish Act Section 1, cf. New York Convention Article II (1)), and a court, on the request of the respondent, shall not admit a case to which an arbitration agreement applies (Model Law Article 8, Chinese Arbitration Law Article 26, Civil Procedure Law Article 257, Swedish Act Section 4, cf. New York Convention Article II (3)).

Fundamental is also that an arbitrator shall be removed if his impartiality or independence is in doubt (Model Law Article 12 (2), Chinese Law Article 34, Swedish Act Section 8, cf. CIETAC Rules Article 26, and SCC Rules, effective from 1 January 2007, Article 14).

Moreover, the principle of *kompetenz-kompetenz* is provided for (Model Law Article 16 (1) first sentence, Chinese Law Article 20, Swedish Act Section 2, cf. CIETAC Rules Article 6). The Chinese Law provides however that a party challenging the validity of the arbitration agreement may request the arbitration commission or the court to make a determination, and that, if one party requests a determination of the commission and the other of the court, the court shall rule. According to Article 12 of the Supreme Court's Interpretation, effective September 2006, an application for a court determination shall be dealt with by the relevant intermediate court, unless the case concerns a maritime dispute. Where a commission has made a determination, the court shall not accept an application to determine the issue or to set aside the determination (Interpretation Article 13). CIETAC may, if necessary, delegate its power to determine the existence and validity of an arbitration agreement to the tribunal (CIETAC Rules Article 6). Under a 1998 Supreme Court Reply, if the respondent in arbitration contesting the validity of the arbitration agreement chooses to bring an action to the court, the arbitration commission will be ordered to suspend the arbitration (Michael J Moser and Peter Yuen, *Ibid.*, p. 107).

Then, the Swedish and Chinese laws contain provisions on the doctrine of separability or severability of the arbitration agreement from the main contract (Model Law Article 16 (1) second sentence, Chinese Law Article 19, 2006 Interpretation Article 10, Chinese Contract Law Article 57, Swedish Act Section 3, cf. CIETAC Rules Article 5), and on each party's right to an oral hearing (Model Law Article 24 (1) second sentence, Chinese Law Article 39, Swedish Act Section 24 first paragraph, cf. SCC Rules Article 27 (1) and CIETAC Rules Article 29 (2)).

Regarding equal treatment of the parties and their rights to present their cases (Model Law Article 18, cf. New York Convention Article V (1) (b) and (2) (b)), the Swedish Act has express provisions (Sections 21 and 24, cf. SCC Rules Article 19), whereas the Chinese Law provides that it is formulated in order to ensure, *inter alia*, the impartial arbitration of disputes (Article 1), that evidence may be examined by the parties (Article 45), that the parties have the right to carry on debate, and that, at the end of the debate, final opinions shall be solicited from the parties (Article 47). CIETAC Rules expressly provide, *inter alia*, that an arbitrator shall treat the parties equally (Articles 19 and 29).

Moreover, the Swedish Act (Section 24 second paragraph) and the Model Law (Article 24 (3)) contain provisions to the effect that all information in the hands of the tribunal concerning the dispute shall be communicated to each party. This is not expressly provided for

in the Chinese Law. However, it provides that appraisers appointed by the tribunal shall attend the hearing if requested by a party (Article 44, cf. CIETAC Rules Article 38, which also deals with experts), and that evidence shall be presented during the hearing (Article 45, cf. CIETAC Rules Article 39). No exception is provided regarding evidence the tribunal may have collected on its own motion. The law expressly provides that the written application for arbitration, including, *inter alia*, the claim, facts and evidence, and the written defence, shall be served on the respective parties (Articles 22, 23 and 25). CIETAC Rules provide that the defence too, to be communicated to the claimant, shall contain, *inter alia*, the facts and evidence (Article 12).

In modern arbitration it is fundamental that the tribunal resolves the substantive dispute in accordance with the parties' contract and the applicable law, and not as *amiable compositeur*, unless the parties have authorised otherwise (Model Law Article 28). Although the Swedish Act is silent on these issues, this is also the position in Sweden under uncodified principles. SCC Rules expressly provide that the tribunal shall decide on the basis of the applicable law, and that it shall decide as *amiable compositeur* only if the parties have so authorised (Article 22). Thus, if the parties are free to contract on the issue under the applicable law - and have done so - the tribunal shall decide the issue in accordance with the contract. The Chinese Law provides that disputes shall be resolved on the basis of facts, in compliance with law, and in an equitable and reasonable manner (Article 7). One might ask if this gives the arbitrators a right and/or obligation to deviate from the applicable law and contract, to the extent they hold such deviation equitable or reasonable (cf. Michael J Moser, *Ibid.*, p. 94).

Under Article 28 (1) of the Model Law the parties are free to agree on the law to apply to the merits. This principle is also part of Swedish law, although it is not provided for in the Arbitration Act. SCC Rules contain an express provision thereon (Article 22 (1)). Under Article 126 of the Chinese Contract Law, parties to a contract with a foreign element may choose the governing law of the contract, unless Chinese law provides otherwise. Exceptions include Sino-foreign joint venture contracts and natural resources contracts (Chua Eu Jin, *Asian International Arbitration Journal*, Vol. 1, No. 1, 2005, p. 21).

Most would regard it fundamental in modern international arbitration that an award cannot be reviewed on the merits, unless otherwise agreed, which is the case in Sweden for domestic as well as international arbitration (Model Law Articles 5 and 34, Swedish Act Sections 33, 34 and 36, cf. SCC Rules Article 40). Chinese awards made in foreign-related arbitration cannot be reviewed on the merits (Chinese Law Articles 65 and 70, Civil Procedure Law Article 260 first paragraph, 2006 Interpretation Article 17, cf. CIETAC Rules Article 49). Chinese awards which are not foreign-related are to some extent reviewable also on the merits (Chinese Law Article 58). Whether Chinese arbitration involving China-incorporated subsidiaries of foreign companies are considered as foreign-related or not is unclear (Michael J Moser and Peter Yuen, *ICCA Congress series No. 12*, p. 103).

Setting aside applications in China are handled by the intermediate courts (Chinese Law Article 58).

Regarding enforceability, Swedish awards are enforceable in Sweden in circumstances following also from the Model Law (Articles 35 and 36) and the New York Convention (Article V) (Swedish Enforcement Code Chapter 3 Section 15-18), and so are foreign awards (Arbitration Act Sections 52-60, Enforcement Code Chapter 3 Section 2). This is also the position on enforcement in China of Chinese foreign-related awards (Arbitration Law Article 71, Civil Procedure Law Article 260 first paragraph). Other Chinese awards are refused enforcement not only on procedural

grounds but also in some circumstances relating to the merits (Chinese Law Article 63, Civil Procedure Law Article 217 second paragraph).

The intermediate courts handle enforcement applications (2006 Interpretation Article 29). The time limit for application is only six months where the parties are juridical persons, running from the last date for performance specified in the award (Civil Procedure Law Article 219).

According to the Civil Procedure Law, parties to a foreign award shall apply for enforcement to the intermediate courts, which shall deal with the matter in accordance with international treaties acceded to by China, or in accordance with the principle of reciprocity (Article 269). As stated above, China has acceded to the New York Convention.

It is unclear whether foreign *ad hoc* awards, although made in states parties to the New York Convention, are recognised and enforced in Mainland China, and whether awards resulting from arbitrations in Hong Kong are regarded as foreign or Chinese (cf., *inter alia*, Wang Sheng Chang, *Ibid.*, p. 29, Michael J Moser and Peter Yuen, *Ibid.*, p. 103, Moser and Friven Yeoh, *Mealey's International Arbitration Report*, Vol. 21, No. 9, September 2006).

Further on Enforcement in China

Regarding actual enforcement of foreign and foreign-related awards in China, problems have been reported due to protectionism towards Chinese parties, lack of judicial independence, and courts' lack of knowledge or experience in arbitration (Chua Eu Jin, *Asian International Arbitration Journal*, Vol. 1, No. 1, 2005, p. 28, Neil Kaplan, *ICCA Congress series No. 12*, p. 67, Warren Khoo, *Ibid.*, p. 79, Zhang Yuqing, *Ibid.*, p. 74 *et seq.*, Jingzhou Tao, *International Commercial Arbitration in Asia*, ed. Philip J McConnaughay, Thomas H Ginsburg, 2002, p. 1-38 *et seq.*).

Under the Chinese Constitution, courts exercise their judicial powers independently and free from interference from administrative organs. However, the Supreme Court is responsible to the Standing Committee of the National People's Congress, and the local courts are responsible to the local people's congresses, and judges are subject to removal by the National People's Congress, the Standing Committee, the local people's congresses or their standing committees. Further, the Law on Judges is somewhat unclear on in what circumstances a judge may be removed (Warren Khoo, *ICCA Congress series No. 12*, p. 78). In contrast, under the Swedish Constitution, a judge may be removed from his office only if he has proved himself to be obviously unfit for his office due to criminal activity or grave or repeated non-fulfilment of his official duties, and such removal is subject to a court's final determination.

An article on enforcement in Tianjin of a Stockholm award constitutes testimony of delay apparently caused by not too helpful court officials. The claimant US company initiated enforcement proceedings in January 1996. The court recognised the award, but not until in August 1997, when the respondent, owned by the local government, was ordered to honour the award. Moreover, the claimant received part payment of the awarded amount in the course of the execution not until in April 1998 (Magnus André, *Stockholm Arbitration Report 2000:1*, p.73 *et seq.*, comment by Wang Sheng Chang, *Ibid.*, p. 81 *et seq.*).

Supreme Court Notices of August 1995 and October 1998 provide for Prior Reporting rules as follows (Wang Sheng Chang, *ICCA Congress series No. 12*, p. 32 *et seq.*, Warren Khoo, *Ibid.*, p. 87, Lu Xiaolong, *Ibid.*, p. 347 *et seq.*).

Intermediate courts contemplating to refuse recognition or enforcement of awards must report this to the higher court within

two months, and, if the higher court agrees, it has to report this to the Supreme Court. Only after the Supreme Court's confirmation may the intermediate courts refuse recognition or enforcement. The courts must rule to enforce the award within two months from accepting the application, and execute the ruling within six months from the ruling, unless there are special circumstances.

Under Article 313 of the Chinese Criminal Law, effective from October 1997 as amended, a person having the ability to execute a judgment or award who refuses to do so may in serious circumstances be sentenced to jail. Under a 2002 law interpretation by the Standing Committee, such serious circumstances include, *inter alia*, where a person against whom enforcement is sought conceals or transfers property, where a third person having a duty to assist in enforcement refuses to provide assistance, and where a person against whom enforcement is sought, conspiring with a state official, disrupts the enforcement; such state official also to be sentenced (*Ibid.*).

The fact that enforcement applications are thus not dealt with by first instance courts decreases the risk of local protectionism, like the Prior Reporting mechanism. Further, seemingly, possibilities of intentional delay of enforcement have decreased. Moreover, judges' lack of knowledge or experience in arbitration will naturally diminish over time, accelerated by the centralisation of enforcement and other arbitration matters to the intermediate courts and the Supreme Court's Replies and Interpretations. According to Michael J Moser, on the whole, the situation has improved quite dramatically (*Special Advertising Section, O'Melveny & Meyers LLP*, 2006).

Some Special Features of Chinese and Swedish Arbitration

The Chinese Arbitration Law expressly presupposes the existence of arbitration commissions. The law provides, *inter alia*, that an arbitration agreement shall contain a designated arbitration commission, and that the arbitration agreement shall be void if it contains no or an unclear provision concerning the arbitration commission, unless the parties can reach a supplementary agreement thereon (Articles 16 and 18).

In a Reply of December 1996 an arbitration clause providing for arbitration before CIETAC or SCC was held valid and entitling the parties to request arbitration before either of the arbitration institutions (Warren Khoo, *ICCA Congress series No. 12*, p. 75). The 2006 Interpretation however provides that, where the parties are unable to reach an agreement on the choice of institution, the arbitration agreement is invalid (Article 5).

In a 2003 case, the Supreme Court declared an arbitration clause providing for *ad hoc* arbitration in China invalid (Michael J Moser, *Ibid.*, p. 91).

The Chinese law provides that the central or local governments shall arrange for departments and chambers of commerce to establish arbitration commissions, which shall draw up lists of arbitrators (Articles 10-14). Foreign-related commissions may be established by the China Chamber of International Commerce, and may appoint their arbitrators from among foreigners (Articles 66 and 67).

Thus, there is a risk that an arbitration agreement, providing for arbitration in China, designating a foreign arbitration institution, such as SCC or ICC, is void under Articles 16 and 18 (cf. Michael J Moser and Peter Yuen, *Ibid.*, p. 106, Moser, Friven Yeoh, *Mealey's International Arbitration Report*, Vol. 21, No. 9, September 2006). Since the 2006 Interpretation (Article 16) provides that the law chosen by the parties applies to the validity of a foreign-related

arbitration agreement, the risk of invalidity seems to decrease if the parties have agreed, for instance, for Swedish law to apply to the arbitration agreement. Where the parties have made no such choice of law, the law of the place of arbitration applies if the parties have agreed upon the place (Interpretation Article 16), which takes us back to Chinese law in our example. Interestingly enough, the Swedish Act (Section 48) is similar to the Interpretation in this respect, whereas the Model Law is silent on the law applicable to the arbitration agreement.

The arbitration commission is involved not only in the initial stage of the proceedings before the constitution of the tribunal but also thereafter. The parties' written submissions on the merits are exchanged via the commission, and it notifies the parties of the hearing date (Articles 22, 24, 25 and 41). Furthermore, the tribunal's award shall be sealed by the commission (Article 54). CIETAC scrutinises its awards to some extent (Article 45).

Further, under the Chinese Law, already the request for arbitration shall contain, *inter alia*, the facts and evidence relied on (Article 23), whereas the Model Law distinguishes between the request for arbitration and the statement of claim; the latter to be submitted when the tribunal has been constituted (Articles 21 and 23). The Swedish Act is in accordance with the Model Law (Sections 19 and 23, cf. SCC Rules Articles 2 and 24).

As for appointment of arbitrators, under the Chinese Law, the arbitration commission shall deliver to the parties a list of arbitrators after accepting an application for arbitration (Article 25). The provisions on formation of the tribunal do not expressly state that the arbitrators appointed must be on the list, but this seems implicit (Articles 30-38). Under 2005 CIETAC Rules arbitrators may be appointed from outside CIETAC's list, if the parties have so agreed, provided that the arbitrators so appointed are confirmed by the chairman of CIETAC "in accordance with the law" (Article 21).

Moreover, a Chinese tribunal may collect evidence on its own initiative (Article 43), and Chinese arbitrators are traditionally accustomed to an inquisitorial approach (Wang Sheng Chang, *ICCA Congress series No. 12*, p. 35). "In the course of examining cases, they will go for information about the cases from both disputing parties as much as listen to the views of other persons concerned, and at the same time, they make investigations on the market or on the spot whenever necessary and possible, which enables them to draw a clear line between the right and the wrong, to ascertain liability and finally make an award fair, reasonable and truth-seeking." (Ren Jianxin, *SCC Yearbook 1983*, p. 54). However, 2005 CIETAC Rules provide that, unless otherwise agreed by the parties, the tribunal may adopt an inquisitorial or adversarial approach, having regard to the circumstances of the case (Article 29 (3)).

Further, Chinese Law provides for the combination of arbitration with conciliation or, rather, mediation (Articles 49-52). Traditionally, China had a non-litigious culture, and mediation has a long tradition in China. Under the 1982 Civil Procedure Law, a party should first enter into conciliation when bringing a case to court. Under the revised 1991 Civil Procedure Law, the parties are free to choose whether to take part in conciliation or not (William K Slate II, *ICCA Congress series No. 12*, p. 15 *et seq.*, Wang Sheng Chang, *Ibid.*, p. 35 *et seq.*, and Ariel Ye, *Ibid.*, p. 478 *et seq.*).

It is provided that the tribunal may carry out conciliation, that it shall conduct conciliation if both parties voluntarily seek it, and that, if conciliation is unsuccessful, an award shall be made (Article 51). Thus, it is implied that the arbitrators shall not resign in case conciliation is unsuccessful. According to CIETAC Rules, where

the parties have settled by themselves, either party may, if there is an arbitration agreement, request CIETAC to constitute a tribunal to render an award in accordance with the settlement agreement (Article 40 (1)). CIETAC Rules further provide that where conciliation fails during arbitration, no statement made during the conciliation shall be invoked in any subsequent proceedings (Article 40 (8)). In CIETAC's arbitration practice, more than 50 percent of the parties have agreed to mediation, with a 20 percent success rate (Wang Sheng Chang, *Ibid.*, p. 41).

As regards foreign counsel in Chinese arbitration, the protocol on China's accession to the WTO provides limitations on foreign law firms' representative offices' consultancy on Chinese law. Implementation Rules of the Chinese Ministry of Justice from 2002 and 2004 contain provisions to the effect that foreign lawyers are not permitted to practice law relating to Chinese legal matters in Chinese arbitration. However, in two CIETAC arbitration cases it has been held that foreign lawyers are entitled to act as counsel in arbitrations in China under the Arbitration Law and CIETAC Rules, and that an alleged violation of the Rules of the Ministry of Justice are irrelevant in this respect (Wang Sheng Chang, *Ibid.*, p. 44 *et seq.*). Further, the Ministry of Justice has, somewhat unclearly, in a letter to CIETAC stated that foreign law firms are not prohibited from representing clients in arbitrations in China, and that, however, when Chinese law is applied, they should refrain from providing legal advice, and assist clients in engaging local lawyers (Jingzhou Tao, *Ibid.*, p. 83 *et seq.*).

A distinctive feature of the Swedish Act is a provision to the effect that the claimant has recourse to court against a tribunal's negative determination on jurisdiction (Section 36). A termination of the arbitral proceedings for, *inter alia*, lack of jurisdiction without resolving the issues submitted to a tribunal sitting in Sweden shall be made in the form of an award (Section 27). Most laws on arbitration do not contain any express provision on review of negative determinations on jurisdiction (Stefan Kröll, *Arbitration International, Vol. 20, No.1, 2004*, p. 55 *et seq.*). The German Supreme Court has held that the provision in its code of judicial procedure, identical to the provision regarding excess of mandate in the Model Law (Article 34 (2) (a) (iii)), does not apply to negative determinations on jurisdiction (Case III ZB 44/01 of 6 June 2002).

In addition, unlike the Model Law (Article 7 (2)) and the Chinese Law (Article 16), the Swedish Act does not require the arbitration agreement to be in writing. This does not mean the Swedish legislator considered oral arbitration agreements common. An advantage with no such requirement is that general principles on contract formation can apply also to the issue of whether an arbitration agreement has come into existence, without resort to formal considerations.

Finally, if none of the parties is domiciled or has a place of business in Sweden, they are free under Section 51 of the Swedish Act to enter into an express exclusion agreement regarding the grounds for setting aside an award contained in Section 34. Such a provision is rare in other countries.

Conclusion

To sum up some of the above, in spite of the different backgrounds in China and Sweden, their present systems on arbitration are similar in basic respects, and both reflect fundamental principles of modern international arbitration contained in the Model Law.



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