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in 55 jurisdictions worldwide

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Contributing editor: Gerhard Wegen and Stephan Wilske Gleiss Lutz

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Callum Campbell

Publisher

Richard Davey

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CEAC

Eckart Brödermann and Thomas Weimann

Brodermann & Jahn Rechtsanwaltsgesellschaft mbH

Clifford Chance

Introduction

What is the importance of arbitration in China-related trade and investments?

International commercial arbitration plays an important role in China-related trade and investments. As China rapidly increases its import and export trade rapidly, there are an increasing number of Chinese, European and other companies worldwide involved in contracts for China-related trade and investments. This leads to a need for dispute resolution mechanisms to support such contracts.

International arbitration provides the backbone securing access to justice for market participants in China-related transactions. Chinese state court judgments are not recognised and enforceable in many countries, in particular in Europe, because of a lack of reciprocity, and foreign judgments are often impossible to enforce in China. There is no functioning system of international treaties securing the enforcement of national state judgments in China and vice versa. In contrast, China is a signatory to the 1958 New York Convention on Recognition and Enforcement of International Arbitral Awards, which is in force in 145 states worldwide, including all EU countries and the US. Therefore international arbitral awards can be enforced in China (whereby, from a Chinese perspective, the 'nationality' of an arbitration award made under the rules of an institutional organisation is determined in light of the seat of the administration of the arbitration institution). Under these circumstances, recourse to arbitration is an important alternative to dispute resolution by ordinary courts. Arbitration gives the parties the best chance of getting a final judgment that is enforceable.

In addition, arbitration is preferable to proceedings before ordinary state courts because it can be faster than court proceedings and, in most cases, cheaper (this is true, at least, when comparing arbitration to fully fledged litigation in more than one instance). For example, there is no need for the translation of documents if the parties agree on English or any other language as a common language and present their documents and submissions in the chosen language to arbitrators who speak that language.

Arbitration, furthermore, is an important tool for dispute resolution in contracts related to China, if the parties wish to agree on strict confidentiality.

What is the importance of institutional arbitration in China related trade and investments?

Chinese national law provides for institutional arbitration. Presently, there is a debate in China about the acceptability of ad hoc arbitration. For international disputes, ad hoc arbitration is not legally prohibited in China. However, recourse to institutional arbitration provides the advantage that, in case of recognition and enforcement proceedings in China, this kind of arbitration is known to the competent Chinese judges. As a result, it is wise to provide for institutional arbitration in China-related contracts to avoid hurdles during the enforcement process.

What is the Chinese European Arbitration Centre (CEAC)?

Overview

The CEAC is an international dispute resolution institution focusing on China-related disputes worldwide. Based on an intensive international dialogue including listening to Chinese and foreign China experts, the CEAC rules provide a tailor-made solution for international disputes in China-related matters. This applies, most importantly, to international contracts with Chinese parties, to joint venture agreements with Chinese or Chinese-controlled parties or to contracts with subsidiaries of Chinese companies in other countries (eg, Europe, North and South America, Africa).

The CEAC (Hamburg) Arbitration Rules are based on and are loosely identical to the UNCITRAL Arbitration Rules. They have been duly adapted to the 2010 UNCITRAL Arbitration Rules. A key feature of the CEAC rules is the special focus on neutrality, eg, in particular with respect to the composition of the Appointing Authority (which appoints the arbitrator if the parties do not agree on the arbitrator or the chairman of an arbitration panel). The CEAC focus on neutrality and equal treatment of China, Europe and the world (outside of China and Europe) is also evidenced by the foundation on the neutral and universally accepted UNCITRAL Arbitration Rules, and by the integration of neutral rules of law in the CEAC choice of law clause.

The CEAC Rules are available in a 'short version' as the 'CEAC Core Rules', showing all supplements and amendments to the underlying UNCITRAL Arbitration Rules and in a 'consolidated version', integrating the applicable text of the UNCITRAL Arbitration Rules and highlighting any deviations in both English and Mandarin.

CEAC is seated in Hamburg, Germany, at the Hamburg Chamber of Commerce, which also operates the Hamburg Beijing Conciliation Centre.

Cornerstones of CEAC (Hamburg) Arbitration Rules

What is the origin of the global spirit of CEAC?

After several years of preparation and preliminary discussions in China, Europe and around the globe, CEAC emerged in 2008 as a result of an international dialogue with, in the end, 470 supporters of the project from 47 nations. The dialogue was initiated by the Hamburg Bar Organisation during a formal visit of a delegation to the World Leading Cities Bar Conference which was hosted by the Shanghai Bar Organisation in 2004, Hamburg and Shanghai being sister cities. Following a number of background discussions including with members of the Hamburg parliament, the concept of the CEAC Rules was then first discussed with a small international group of lawyers in April 2007 on the occasion of the annual meeting of the Inter-Pacific Bar Association (IPBA) in Beijing. The concept was first presented to the international arbitration community during a fringe event of the 2007 annual meeting of the International Bar Association (IBA) in Singapore hosted by the Hamburg Bar Organisation at the Singapore Cricket Club. At that time, 32 lawyers from 12 nations discussed the concept and decided to further pursue the CEAC project

on a worldwide basis. The enlargement from the initial German to Chinese, then European to Chinese to a worldwide project was a direct result of the discussions in Singapore, and in particular the comments and suggestions made by Argentine colleagues. During the process of elaboration of the CEAC Arbitration Rules, draft versions were sent around by e-mail and subject to an international discussion, until the 2008 IPBA annual conference in Los Angeles.

Some law firms have submitted detailed observations. Lawyers involved in arbitration proceedings in China have given detailed advice on the specifics of Chinese law. Experts from UNCITRAL and UNIDROIT have given their input on the choice of law clause (see below). After numerous discussions and e-mail-based exchanges about the first drafts, a number of final workshops took place in Hamburg to discuss the new rules, which were finally approved by the general assembly of the Chinese European Legal Association (CELA) when CEAC was founded in September 2008.

How is CEAC adapted to the needs of China related business?

Several aspects of the CEAC (Hamburg) Arbitration Rules reflect the particular needs of China-related trade.

Most importantly, the CEAC (Hamburg) Arbitration Rules (the Rules) ensure that judgments based on an arbitration clause referring to 'CEAC (Hamburg) Arbitration Rules', the 'CEAC Rules' or the 'Rules of the Chinese European Arbitration Centre' are recognisable and enforceable in China. In this respect, the Rules clarify that, irrespective of the drafting in the contract of the parties, there can be no doubt that the dispute is referred to an arbitration institution rather than to ad hoc arbitration. This correlates to the importance of institutional arbitration from a Chinese perspective. In this respect, article 1 paragraph 1a of the Rules (2010) and the CEAC arbitration clause (which is contained in the annex to the CEAC (Hamburg) Arbitration Rules) differ from various standard clauses used by other arbitration institutions.

Further, the Rules put a special emphasis on ensuring equal treatment of the parties to China-related transactions. In view of the focus of CEAC on China, this implies in particular the active integration of Chinese arbitration experts into the CEAC Board and the appointing authority. Thereby, the cross cultural dialogue takes place at an early stage. This ensures neutrality and recognition of CEAC as an arbitration institution in China. For example, in 2010, the official publication of the China International Economic and Trade Arbitrations Commission (CIETAC), Arbitration and Law published a long article about CEAC in Chinese (vol. 116 (2010), p. 104-130). Further, both CIETAC and the Beijing Arbitration Commission (BAC) have participated in joint events in China in 2009 and 2010.

The focused search for a form of neutrality (which is also acceptable as truly neutral by Chinese organisations and experts) is also reflected in the reference and incorporation of international rules accepted worldwide and, in particular, in China. This includes the UNCITRAL Arbitration Rules, the 1980 UNCITRAL Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (see below). Also, the German arbitration law (applicable at the Hamburg seat of the arbitration) is based on the UNCITRAL Model Law. Given that this is not the case for the Chinese arbitration law, the foundation of the German arbitration law on the UNCITRAL Model Law ensures an internationally acceptable level of neutrality, also for Chinese parties.

What is the freedom provided for by the model arbitration clause?

The model arbitration clause proposed by CEAC is available in various languages and will assist the parties to a China-related contract as early as the stage of contract drafting. Currently, the model arbitration clause is available in English, Mandarin and German but more languages will follow in the near future. It reads in its 2010 version:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in Hamburg (Germany) in accordance with the CEAC (Hamburg) Arbitration Rules.

In addition, the model arbitration clause provides options dealing with the number of arbitrators, the place for hearings, languages to be used in the arbitral proceedings, confidentiality and the applicability of the Rules as in force at the moment of commencement of arbitration proceedings or at the time of conclusion of the contract in dispute.

By providing future parties to a CEAC dispute with these options, CEAC aims to offer a service to the parties on the one hand facilitating contract drafting and on the other hand reminding parties of a number of important issues to be dealt with in international commercial arbitration. For example, in early January 2011 CEAC was informed about a Chinese to African contract, negotiated by a French citizen living in the Philippines that the parties agreed in their CEAC arbitration clause on three arbitrators unless the amount in dispute is less than €250,000 in which case the matter shall be decided by a sole arbitrator.

Is it sensible to combine the CEAC arbitration clause in China related contracts with a mediation or conciliation clause?

Mediation and conciliation have a long history in China, as Chinese parties often want face-saving solutions with their business partners, and European and other foreign companies are also keen to avoid bad press about their business activities in Asia. Therefore, it is sometimes wise to combine a CEAC arbitration clause with a mediation or conciliation clause. For example, the parties might like to provide for conciliation under the Hamburg Beijing Conciliation Rules (which have been in force since 1987) or under the ICC ADR Rules, article 1 of the CEAC Arbitration Rules expressly provides for the possibility of initiating any such mediation or conciliation within 21 days after receipt of the notice of arbitration by the respondent which, upon consent by the other party, will suspend the arbitral proceedings including all deadlines for up to three months or until the termination of the conciliation or mediation, whichever is earlier.

If the mediation is not finished within the three-month period, a further suspension of the arbitral proceedings requires the mutual written consent of all parties, which may be contained in separate documents.

Why does the Model Choice of Law Clause refer to CISG and the UNIDROIT Principles of International Commercial Contracts on an optional basis?

As a result of the international discussion, it became obvious that the majority favoured a pragmatic approach. Therefore, the CEAC arbitration rules integrate a CEAC choice of law clause, as stated in article 35. It was based on input from both UNCITRAL and UNIDROIT.

The model clause provides for a number of possible and non-mandatory options. It thereby reminds future parties to a dispute of the fact that a choice of the law applicable to the substance of the dispute is of vital importance. Often parties from different jurisdictions wish to agree on a neutral law or set of rules. The model clause therefore offers the choices of simply choosing the law of a certain jurisdiction; referring to the 1980 UNCITRAL Convention on the International Sale of Goods (CISG), which will often be common ground for both the Chinese and the non-Chinese party; or opting for the application of the UNIDROIT Principles of International Commercial Contracts, which are globally known and increasingly used in Europe, China and many jurisdictions. China is a signatory state to the CISG. The UNIDROIT Principles of International Commercial Contracts influenced the Chinese legislature when drafting the new Chinese contract law in 1999; as a result there are many similarities

between the Chinese contract law and the UNIDROIT Principles. The model choice of law clause reads:

The arbitral tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. The parties may wish to consider the use of this model clause with the following option by marking one of the following boxes:

This contract shall be governed by

- the law of the jurisdiction of _____ [country to be supplemented], or
- the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law, or
- the UNIDROIT Principles of International Commercial Contracts supplemented by the otherwise applicable law.

In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

A quite specific, notable adaptation to China-related contracts is contained in the reference to the CISG 'without regard to any national reservation'. Thereby, the clause seeks to avoid the application of the Chinese reservation to the CISG made by the Chinese state in accordance with articles 11 and 96 CISG at the time of the ratification. This reservation is outdated. It concerns the requirement of a written form whereas the Chinese contract law of 1999 does not require a written form. The exclusion ensures that the CISG will be applied in this respect in accordance with standards that are also recognised by the Chinese legislature and avoids confusion. This CEAC rule is based on the experience of such a confusion in a German to Chinese arbitration in which the Chinese party tried to avoid the application of the outdated Chinese reservation.

Guiding principles: neutrality, division of power and party autonomy

How does CEAC ensure neutrality by division of power?

A major principle of CEAC is the tripartite division of power, which guarantees neutrality for parties from any country. CEAC pursues a truly global approach to achieve a balance of power, by integrating arbitration experts from China, Europe and other parts of the world on an equal basis, for example in the Appointing Authority and the Advisory Board of CEAC.

How does CEAC apply the principle of division of power in the Appointing Authority?

Most importantly, the work of the Appointing Authority of CEAC is based upon the principle of neutrality and balance of power. The Appointing Authority is competent for the appointment of arbitrators if the parties cannot agree on a sole arbitrator or if the party-appointed arbitrators of a three-person tribunal cannot agree on the chairman. It also decides on arbitrator challenges and on certain issues related to costs of the proceedings (eg, special fees in cases of extreme workload for the arbitrators involved). In view of the importance of the decisions of the Appointing Authority, CEAC ensures neutrality by a balance of power in the competent chamber of the Appointing Authority.

The Appointing Authority is separated into chambers comprising three members, one member from China, one from Europe and one from the rest of the world. According to this principle of division of powers, CEAC ensures that there is always one expert from a neutral region who can particularly assist the panel of the affected chamber in the selection of a neutral arbitrator who takes the interests of both parties into account. The members of the first chamber of the Appointing Authority are Lu Song (China), Angelo Anglani (Italy) and Karen Mills (US/Indonesia). The second chamber, which

was established in autumn 2009, consists of Li Yong, (China), Bart Kasteleijn (Europe) and Nayla Comair-Obeid (Lebanon). Further chambers will follow.

The competencies of the chambers in the Appointing Authority are determined according to the first letter of the name of the respondent named in the notice for arbitration. Currently, the first chamber is competent for the letters A to M and the second chamber for the letters N to Z.

How does CEAC apply the principle of division of power in the management of CEAC?

According to section 6 of CEAC's articles of association, management consists of one or more managing directors. Currently, one Chinese law professor and two German lawyers are active in the management of the CEAC limited liability company responsible for the administration of arbitration proceedings and the ordinary course of business of the newly-founded arbitration institution. It is expected to include a representative from another part of the world outside China and Europe.

Who controls the CEAC Arbitration Rules?

The Advisory Board of CEAC is responsible for amendments to the CEAC Rules. It also advises the CEAC management on matters concerning the administration of arbitration proceedings and other issues of importance. In view of this important function of the Advisory Board, the principle of tripartite division of powers between representatives of China, Europe and the other regions of the world applies to the Advisory Board of CEAC which presently includes experts from mainland China, Hong Kong, Germany, Italy, Switzerland, Spain and the United Kingdom. The members include, inter alia, experts with experience in large arbitration institutions, eg, the former President of the Chartered Institute of Arbitrators, Hew R Dundas, who is the chairman of the Advisory Board, and the former Secretary General of the Hong Kong International Arbitration Centre, Christopher To. They also generally assist the CEAC's management with considerable international arbitration know-how.

Why is party autonomy so important for CEAC?

Party autonomy enables the parties to make the arbitration proceedings suitable, as far as possible, for the case in question.

The CEAC Rules allow the parties to choose freely from among arbitrators from around the world and to decide on the appointment of such arbitrators by themselves without approval of CEAC. The Appointing Authority steps in only if the parties do not reach agreement by themselves. Furthermore, the parties are free to decide on the languages to be used in the arbitral proceedings, places for oral hearings or meetings of the arbitrators. CEAC does not intervene in the arbitration procedure itself, which is left to the parties and the appointed arbitrators.

This strict adherence to the principle of party autonomy guarantees the highest level of influence of both parties in the arbitral proceedings.

Miscellaneous

In what respect do the CEAC (Hamburg) Arbitration Rules deviate from the UNCITRAL Arbitration Rules?

Since the amendment of both the UNCITRAL Rules and, therefore, the CEAC (Hamburg) Arbitration Rules in 2010, there remain very few differences. Many issues that are state of the art for a modern international arbitration centre (eg, multi-party arbitration) are now covered directly in the UNCITRAL Rules. In such cases, in 2010 the CEAC Advisory Board deleted initial special CEAC rules on these issues and replaced them with the UNCITRAL Rules in order to ensure a maximum of correlation between the CEAC Rules and the UNCITRAL Rules. Special CEAC rules concern only a few topics:

- the scope of application including the combination of arbitration and conciliation or mediation (article 1);

- introduction of institutional arbitration (article 3);
- the exclusion of liability of the institution CEAC and its organs (article 16);
- Hamburg as the standard seat of arbitration with the possibility of deviating to other venues for the hearings (article 18);
- the time limits for the award (article 31a);
- the choice of law clause (article 35); and
- costs and fees (articles 40, 41, 43).

What are the costs of arbitral proceedings under the CEAC Rules?

Costs for CEAC arbitral proceedings are determined in accordance with the CEAC fee schedule and its annex, which contains a table of fees related to the amount in dispute. Fees for arbitrators and administrative fees for the CEAC are generally based on the amount in dispute. However, this rule is supplemented by a special rule for cases with a particularly heavy workload for the arbitrators. Costs for CEAC arbitration proceedings are reasonable and comparable to the schedules of costs of other renowned international arbitration institutions. CEAC was recently informed about one large insurance company which is favouring the CEAC Arbitration Rules in particular because of its reasonable costs scheme.

How long will the arbitral proceedings take?

Another provision aiming to boost the efficiency of CEAC arbitration proceedings is article 31a of the CEAC Rules, which provides that the arbitral tribunal shall render a final award within nine months from the date on which the notice of arbitration is received by the CEAC, unless agreed otherwise by the parties.

Young CEAC

The CEAC division for young arbitrators (with less than eight years of practice) is 'Young CEAC'. Founded in 2008, it has organised its first events in Germany, often attracting participants from several European countries. In June 2010, the Chinese member of the Chinese European Legal Association (CELA) Zhong Yin Law Firm organised a seminar in Beijing on 'The Chinese European Arbitration Centre & Practical Application of International Arbitration' at the end of which 'Young CEAC Beijing' was founded in the presence of the President of the Beijing Bar Association.

In November and December 2010, Young CEAC has hosted arbitration events both in China (Beijing and Shanghai) and in Germany (together with the division of young arbitrators of the German arbitration institution DIS in Frankfurt).

The non-profit organisation behind CEAC: What is the Chinese European Legal Association?

The Chinese European Legal Association (CELA) is a German non-profit organisation with 214 members from 29 nations (as per 31 December 2010). The founding members of CELA include the Hamburg Bar Organisation and the Hamburg Chamber of Commerce.

The management of CELA is presently German-Spanish. The Chairman of the international Advisory Board is Gao Zhongze, a former president of the All China Lawyers Association and a former president of the Inter-Pacific Bar Association.

CELA has its seat at the offices of the Hamburg Bar Organisation. It was established in July 2008 to provide a neutral buffer between the law firm members of CELA and the independent arbitration institution CEAC (under the CEAC ethical rules, both members of the CEAC and CELA boards are ineligible for appointment as arbitrators by the CEAC). Law firms supporting CELA cannot have any influence on CEAC arbitration procedures. Although CEAC has received official support from the state of Hamburg, it is, through CELA, a product of the self regulation of and innovation by lawyers. The official support by the state of Hamburg was limited to patronship to the CEAC project by the Hamburg senator of justice and a change of Hamburg court rules to permit to parties to CEAC arbitrations to use the letter box of the Hamburg Court of First Instance to submit documents to the CEAC's administration. This is helpful, when a party wishes to meet a deadline after office hours or on a week end or a holiday.

CELA is an association which promotes legal and cultural exchange between Europe and China. It focuses in particular on the education of lawyers in the field of alternative dispute resolution. CELA's purpose is 'to support the interaction and exchange between China and Europe and the world regarding issues of economics, law and legal culture' and 'to make a contribution to the avoidance, settlement and resolution of disputes related to international trade from and to China'.

According to this purpose, CELA supports the Vis Moot court in Vienna (2009, 2010) and the Düsseldorf Arbitration School (2010). In 2010, it has also become an official supporter of the China EU School of Law. It also supports conferences and events organised by CEAC and Young CEAC.

CELA is open to all experts active in the field of international commercial arbitration and interested in or engaged in China. It offers two types of membership: law firm membership or individual membership at differing rates, depending on the size of the law firm and the country where the individual member comes from.

BRÖDERMANN & JAHN
BUSINESS LAW

CLIFFORD
CHANCE

Dr Eckart Brödermann
broedermann@german-law.com

Thomas Weimann
Thomas.Weimann@CliffordChance.com

Neuer Wall 71
20354 Hamburg
Germany
Tel: +49 40 370 905 0
Fax: +49 40 370 905 55
www.german-law.com

Königsallee 59
40215 Düsseldorf
Germany
Tel: +49 21 143 550
Fax: +49 21 143 555 600
www.cliffordchance.com

In September 2008, CELA founded the CEAC as sole shareholder. The CEAC was officially inaugurated at a ceremony at the Hamburg town hall on 18 September 2008. The Chinese European Arbitration Centre GmbH carries out the operative business of the arbitration centre and is responsible for administering arbitration proceedings.

CEAC is a new arbitration institution tailor-made for international commercial disputes related to China. It has a particular emphasis on service orientation for future parties to arbitration. It is tailored to the specifics of Chinese law and culture and at the same time ensures neutrality for parties from all over the world.

CEAC is open for disputes even if there is only a remote or even no connection to China, if the parties wish to refer their case to CEAC arbitration. In this case, the composition of the appointing authority (including Chinese members) will ensure neutrality. It will take a few years until the CEAC has a fully active caseload. Yet, the high level of recognised international experts involved in the project and, in particular, at the Appointing Authority ensures that the quality of the arbitrations itself will correspond to international stand-

ards. During the past two years, a number of companies have started to integrate CEAC clauses into their contracts. Yet it will take a few years until such contracts lead to arbitrations.

The future of CEAC will be shaped by the continuation of the ongoing international dialogue which strives for dispute prevention and dispute resolution in a time and cost-efficient manner. In 2009 and 2010, the CEAC Rules have been discussed at events organised, for example, in Brussels, Beijing, Buenos Aires, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Jinan, London, Madeira, Madrid, São Paulo, Shanghai, Tsingdao, New York, Vancouver and Zurich. Also, CEAC has concluded formal cooperation agreements with the Hong Kong International Arbitration Centre and the Kuala Lumpur Regional Arbitration Centre.

Further information on the CEAC, Young CEAC and CELA can be found on the internet at www.ceac-arbitration.com and www.cela-hamburg.com.

*Eckart Brödermann and Thomas Weimann are the president and the vice-president of CELA and members of the CEAC Advisory Board.



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