Arbitral Chronicle VIII
A Swiss Arbitrator’s View of the CIETAC Arbitration System

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For a long time I had wished to experience arbitration in China – to live something culturally different from our Western-type procedures. And in 2004, my wish materialized – I was asked by CIETAC whether I would agree to chair an arbitral tribunal in a dispute between a Chinese manufacturer of automobile parts and its Italian buyer. The arbitration clause provided for CIETAC arbitration in Beijing but specified as well that the chairman of the arbitral tribunal was to be a Swiss national. At that time the list system was compulsory, and the chairman was to be chosen consequently among the four Swiss on the list – and it turned out that I was the only one available. Before agreeing I started to investigate the proceedings and saw that the language for the case was to be Chinese. How was that? The CIETAC Rules in force at that time provided that proceedings were to be in Chinese, but that parties could agree on another language. However in this case the defendant, the Italian party, was defaulting with the result that no agreement could be reached between the parties on English.

I asked CIETAC how I could chair proceedings in Chinese while I spoke no Chinese at all, but they told me not to worry, they would provide for simultaneous interpretation.

And actually it worked very well. I had a young Chinese assistant who spoke perfect English of the American type – she had studied in the Chinese campus of an American university – who was whispering to my ear in a continuous flow, and I think she missed very little. I had as well two excellent Chinese colleagues – one lady, a high-level civil servant in a Chinese Ministry, and one

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practicing lawyer, and our deliberation, right after the hearing and while we ate the Peking duck, went very smoothly. It lasted less than two hours, and we reached a satisfactory decision. There were however some aspects of the proceedings which were strange to me. During the hearing one of my colleagues suggested that we try to clarify by ourselves a factual point which for him was not clear. I told him that we could only do that if the parties were informed, and had the opportunity later on to comment on the results of our investigation. “There is no need at all to advise the parties”, was his reaction. “We do this as a matter of routine in Chinese domestic cases”. Obviously the concept of due process as we understand it in the Western world was alien to him.

I thought it was up to me, as chairman, to draft myself the award, but my colleagues told me they preferred to do it themselves with the help of the CIETAC assistant, as there was a Chinese way to draft awards with which I was obviously not familiar. And a month later I received the award in Chinese, ready for my signature. I had a student at the Interpretation School in Geneva translating it for me – it reflected acutely our decision. However, it was very short – 9 pages in all, with only four pages for discussing the not-so-easy legal aspect of the case.

My second and third CIETAC cases were in 2011 and 2012. What a change! In these two cases I was a co-arbitrator appointed by a German claimant, and our chairmen were Chinese lawyers working in international law firms in Beijing, and very conversant with the requirements of international business transactions. They understood as well fully the due process concept, and were determined to apply it.

The cases took place under the new 2012 CIETAC Arbitration Rules, in spirit for the 2011 case and in force for the 2012 case.

Under these new Rules the requirement to choose arbitrators exclusively from CIETAC’s panel of arbitrators has been lifted, and if no agreement between the parties as to the language, it will be designated by CIETAC, and not be necessarily Chinese. The respect of due process has been very much improved, with now the obligation to submit to the parties for comments the result of any investigation conducted by the arbitral tribunal. I was struck during these two cases by the care with which the legal issues were discussed, especially whether the Convention on the International Sale of Goods – the Vienna Convention – overrode provisions of the applicable Chinese laws. Rather than being conducted in two hours while eating duck at the conclusion of the hearing, the deliberations took place over several weeks and resulted in the last case in a very well drafted 40 pages arbitral award.

There is however still some room for improvement in the CIETAC proceedings. My two 2011/2012 arbitral tribunals showed great leniency towards the disregard by the Chinese party of the procedural time-limits set in procedural orders. In our last case the Chinese defendant, an important steel maker,