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Fora for the Resolution of International Business Disputes When Doing Business with the People's Republic of China

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Trade Arbitration Commission (CIETAC) and its arbitration rules of procedure were amended. The amended rules came into force on January 1, 1989. Major changes in the rules include the following:

1. The jurisdiction of the Commission is enlarged to take cognizance of cases between Chinese and foreign parties, and between foreign parties and between Chinese parties involving foreign factors.

2. Non-Chinese citizens will be able to join the panel of arbitrators of the Commission.

3. The presiding arbitrator in the arbitration tribunal shall be appointed by the Chairman of the Commission instead of being chosen by the appointed arbitrators.

4. Hearings shall be conducted in closed sessions instead of open sessions as previously done in accordance with the old rules.

5. Provisions are laid down for challenging arbitrators by the parties.

6. Consolidated arbitration can be carried out according to the new rules.

7. The Commission and the arbitration tribunal may conciliate the cases under their cognizance and if conciliation is successful, the arbitration tribunal shall make an award in accordance with the contents of the settlement agreement reached by and between the parties through conciliation.

Fora for the Resolution of International Business Disputes When Doing Business with the People's Republic of China

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It is an unfortunate fact of legal life that dispute resolution clauses are often given little thought during negotiations leading up to an international commercial agreement. The content of a dispute-resolution clause, however, can very well determine the outcome of a claim, and may even deter litigation of the dispute itself. If the clause provides for the selection of arbitrators who are more attune to the

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culture and legal philosophy of your adversary, you may have an uphill battle, to say the least. Conversely, the location selected for the arbitration can make arbitration so expensive for one of the parties that it may prefer to resolve the dispute informally, rather than fight it.

For these reasons, Western firms doing business with the People's Republic of China should pay particular attention to their dispute-resolution clauses. One of the most important features of a dispute-resolution clause is the jurisdiction selected for the arbitration. The choice of forum will directly affect at least the following matters:

1. Enforcement of the arbitral award abroad;
2. The availability of interim remedies during the course of the arbitration;
3. The background and qualifications of the arbitrators available for the arbitration;
4. The right to appeal or review the ensuing arbitral award;
5. The language utilized during the arbitration proceedings;
6. The expense and convenience of the arbitration; and
7. The conciliation procedures available.

With these issues in mind, this paper will survey the following jurisdictions as the designated site for an arbitration between a Western and a Chinese party: The People's Republic of China, Hong Kong, Australia, Sweden, and California.

I. Enforceability of the Arbitral Award

The first consideration for any party negotiating a dispute-resolution clause should be whether the forum selected for the arbitration is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the preeminent treaty governing enforcement of foreign arbitral awards.

The virtue of the New York Convention is that it makes an arbitral award more enforceable internationally than a judgment issued by a court in the same jurisdiction. This is so because each signatory to the New York Convention has agreed, at a minimum, to enforce arbitration awards rendered in any signatory jurisdiction. However, many of the signatory states have adopted the treaty reservation which requires that a state only recognizes awards made in the territory of another contracting state. Therefore, it is important to choose a jurisdiction that is a signatory to the New York Convention, espe-

cially if an adversary's assets are located in one of the signatory states. Each of the jurisdictions considered here—the People's Republic of China, Hong Kong,[1] Australia, Sweden, and California—are parties to, or are covered by the New York Convention.

The People's Republic of China, however, only ratified the Convention in 1987 and has not yet enacted implementing legislation. Chinese scholars advise that the Chinese will respect an arbitration award rendered in another signatory jurisdiction; however, one should be aware that the failure to enact implementing legislation creates some uncertainty.

II. THE AVAILABILITY OF INTERIM REMEDIES

Arbitration is often, but not always, faster than litigation in court. In litigation, however, a party has the option of promptly seeking interim relief to preserve the status quo pending a decision, which relief can be enforced pursuant to judicial processes. This is not always the case in arbitration.

Therefore, in choosing a jurisdiction for arbitration, a party ought to consider whether interim remedies are available in that forum, particularly if that party is dealing with trade secrets or intellectual property which may necessitate interim relief before the conclusion of the arbitration. Where prompt relief may be necessary, one needs to know: (a) whether interim relief can be obtained in the jurisdiction selected, and (b) whether one must obtain it from the arbitrators or may resort to the courts. Of course, a party can always draft an arbitration clause to expressly authorize a party to obtain interim relief from the courts. Of the jurisdictions under consideration, interim relief is most easily obtained in Hong Kong, Australia, and California.

A. Hong Kong

Arbitration in Hong Kong is presently governed by its Arbitration Ordinance. Under the Ordinance, the High Court may issue orders securing the amount in dispute, preserving the subject matter of the arbitration, appointing receivers, and issuing interim injunctions.[2]

Further, the Hong Kong Government has endorsed the Law Reform Commission's recommendations to adopt the Model Law on In-

1. The United Kingdom entered on behalf of Hong Kong.
2. Arbitration Ordinance, Laws of Hong Kong, Chap. 341, § 14 (1982).

ternational Commercial Arbitration propounded by the United Nations Commission on International Trade Law (UNCITRAL). Thus, it may become law shortly.[3] The UNCITRAL Model Law entitles an arbitral tribunal to order an interim measure of protection.[4]

B. Australia

In Australia, the UNCITRAL Model Law became effective June 12, 1989, although parties may agree to opt out of it. Accordingly, an interim measure of protection is available from Australian arbitral tribunals pursuant to Article 17 of the Model Law. Further, Article 9 of the UNCITRAL Model Law provides that it is not "inconsistent" with an arbitration agreement for a party to request from a court an interim measure of protection.[5]

C. California

California has adopted the UNCITRAL Model Law as well, although it adopted a modified form to comport with principles of federalism and California procedure.[6] California law provides that in an international commercial arbitration, a party may request from a court "an interim measure of protection."[7] The arbitral tribunal may also order interim measures of protection.[8] Furthermore, where the tribunal orders an interim measure of relief, California provides a procedure by which a Superior Court can enforce that relief.[9]

D. Sweden

In Sweden, arbitrators do not have the power to issue attachments, temporary restraining orders, or orders appointing receivers. Instead, only the courts are vested with the power to issue interim orders for the custody and protection of property.

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3. The UNCITRAL Model Arbitration Law was adopted by UNCITRAL on June 21, 1985, and was the product of work by representatives from some 61 nations and various international organizations codifying procedures for conducting international commercial arbitrations.

4. UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985), art. 17, reproduced in INTERNATIONAL COMMERCIAL ARBITRATION (January 1988).

5. *Id.* art. 9.

6. CAL. CIV. PROC. CODE §§ 1297.11-.432 (West Supp. 1989).

7. *Id.* § 1297.91.

8. *Id.* § 1297.171.

9. *Id.* §§ 1297.92-1297.95.

E. The People's Republic of China

Under the rules of the China International Economic and Trade Arbitration Commission (CIETAC),[10] a tribunal may submit a party's request for interim relief to a Chinese court for a ruling. Only a court, however, can grant interim relief.

III. THE CHOICE OF ARBITRATORS

The capabilities and background of the arbitrators are highly important in determining one's chances of success in an arbitration. Therefore, another crucial factor in choosing a forum is the pool of arbitrators from which the parties' arbitrator will be selected.

In the case of arbitration arising out of a commercial venture in the People's Republic of China, the availability of non-nationals to arbitrate the dispute is a significant consideration. This is important not because a Chinese arbitrator will fail to attempt to be fair to the Western party, but because an arbitrator's legal and cultural background will necessarily influence how he decides a dispute. A common law lawyer representing a common law client may very well be at a disadvantage in an arbitration against a civil law party before a civil law arbitrator. That arbitrator will simply have a clearer understanding of the legal position of the civil law adversary and be more persuaded by a civil law presentation, other things being equal.

For instance, a civil law arbitrator will often give less weight to, and limit the scope of, cross-examination. A civil law arbitrator may also look more to written rather than testimonial evidence, in contrast to an arbitrator of a common law background.

Indeed, the selection of the arbitrator will even affect the application of the parties' choice-of-law clause. As a practical matter, an arbitrator unfamiliar with the law selected by the parties to govern the dispute may not reach his decision in strict accordance with it.

Admittedly, the choice of forum is not necessarily determinative of the pool of arbitrators available. Obviously, the parties can designate an arbitral institution which, in turn, will make a selection from its own list of arbitrators if the parties cannot agree. Still, these arbitral institutions often select arbitrators who reside in the country

10. The China International Economic and Trade Arbitration Commission is the successor to the Foreign Economic and Trade Arbitration Commission, which along with the China Maritime Arbitration Commission, are the two institutions available for resolving foreign trade disputes in China.

where the arbitration will be held; hence, the jurisdiction chosen for the arbitration can be very important, although not determinative.

Until recently, CIETAC only offered Chinese arbitrators. However, its amended rules, effective on January 1, 1989, authorize non-Chinese citizens to join the panel of arbitrators. For those who choose Hong Kong as the arbitral site, the Hong Kong International Arbitration Centre has a good panel of international arbitrators, including Chinese arbitrators. Arbitrators with a common law as well as a civil law background are also available in Hong Kong. Hong Kong is thus a good compromise site when the Chinese party insists on arbitration in China pursuant to the rules of CIETAC.

Sweden, Australia, and California will, of course, have a variety of arbitrators to choose from, depending upon the arbitral institution which is selected to choose the arbitrators. Naturally, one's prospects of getting a common law arbitrator are enhanced in Australia and California.

IV. Right To Appeal

The right to appeal and review an arbitral award in the jurisdiction selected for an arbitration is often overlooked. Nonetheless, such rights can seriously affect the finality of the arbitral award, the cost of the arbitral process (by including an appellate stage), and the speed by which the award can be enforced abroad.

On the other hand, broader appellate review can limit the arbitrator's right to make arbitrary decisions. Ideally, a party wants sufficient review to preclude arbitrarily rendered awards, but not so extensive so as to undermine the speed, cost-effectiveness, and finality of arbitration.

The New York Convention allows only limited grounds for challenging an arbitration award where a party seeks to enforce it abroad. These grounds include: (a) a violation of due process; (b) invalidity of the arbitral agreement; (c) the arbitrator's exceeding his authority; (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure; and (e) violation of public policy.

The Convention, however, provides that a court can refuse recognition and enforcement of an award when "the award . . . has been set aside or suspended by a competent authority of the country in

which . . . that award was made."[11] Thus, a successful appeal of the award in the issuing jurisdiction can prevent its enforcement abroad. If the country where the award has been rendered has a very broad right of review, the losing party can derail the award on a ground not otherwise permitted under the New York Convention.

Furthermore, even the mere initiation of an appellate stage risks delaying the award's enforcement elsewhere. Under Article VI of the New York Convention, recognition and enforcement may be adjourned if an application for setting aside or suspending the award has been made to a competent authority in the country where the award has been rendered.[12] Hence, it follows that the broader the rights of review in the jurisdiction where the award is rendered, the greater the chance that the losing party will be able to upset that award.

A. The People's Republic of China

In China, there is no right to review an award rendered by CIETAC. This eliminates the cost and delay of an appellate stage, but also leaves any challenge to (and, thus, control over) the arbitrator's decision to the courts of the jurisdiction where enforcement is sought.

B. Hong Kong

Hong Kong's law follows the English practice under the English Arbitration Acts. The High Court of Hong Kong does not have jurisdiction to set aside an award on the basis of errors of fact or law alone. Rather, the High Court may hear an appeal of an arbitral award upon the consent of all parties or where the High Court concludes that the determination of a question of law could substantially affect the rights of one or more of the parties. The Court may also make leave to appeal conditional upon the appellant's satisfaction of any conditions which the Court deems appropriate, such as the payment of security.

In Hong Kong, as in England, the parties may, however, exclude the right of appeal by entering into a written exclusion agreement by which all judicial review is precluded except for the following: where an arbitrator engages in misconduct or where an improper procurement of an award must be remedied.

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11. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3 U.S.T. 2517, T.I.A.S. No. 6997, art. V, § 1(e).

12. *Id.* art. VI.

C. Sweden

In Sweden, an appeal is not permitted on the merits, but arbitral awards can be challenged on the basis of procedural or form defects. Defects are of two basic types: those which render an award "void" and those which render it "voidable."

An award is void if: (a) there was no valid arbitration agreement; (b) the award was not put in writing or not signed by the arbitrators; (c) the decision involved a non-arbitrable issue; or (d) the matter was the subject of a pending court action when the award was given.[13] An award can also be challenged if it is "so obscure as to make enforcement impossible."[14]

An award also may be set aside if it is "voidable." In such a case, the party challenging the award must bring an action to set it aside within 60 days from the time that it received an original or certified copy of the award.[15] An award may be challenged within the 60-day period if: (a) the arbitrators went beyond the matters submitted to them or rendered an untimely award; (b) a decision was rendered in a case in which the arbitral proceedings should not have taken place in Sweden; (c) the arbitrator was disqualified or not properly appointed; or (d) any other procedural irregularity occurred through no fault of the challenging party which, "in probability," may be assumed to have influenced the decision.[16] However, the latter ground—procedural irregularities—may be waived if the party was aware of the irregularity, and took part in the proceedings without objection. Nonetheless, the right to challenge an award on the basis of a procedural irregularity renders the scope of review greater in Sweden than that in China, Australia, or California. Sweden's scope of review is also greater than Hong Kong's in cases involving an exclusion agreement.

D. California

The right to review an *international* commercial arbitral award in California is governed by the Federal Arbitration Act.[17] The basis on which to vacate an arbitration award under the federal act is nar-

13. The Arbitration Act of 1929, Lag om skiljeman, 1929 No. 145, § 20, reproduced in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Supp. 1 (May 1984).

14. *Id.* § 22.

15. *Id.* § 21.

16. *Id.*

17. 9 U.S.C. §§ 1-15 (1988). An exception may exist in the case of an award which does not involve United States foreign commerce.

row. Errors of law or mistakes of fact are not proper grounds to vacate an award.

The grounds to vacate an award are similar to, and in some respects more narrow than, those allowed under the New York Convention. The federal act authorizes an award to be vacated on the following grounds: (a) where it is procured by corruption, fraud or undue means; (b) where the arbitrators exceeded their powers; (c) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or were guilty of some other misbehavior by which a party's rights have been prejudiced; (d) where there was evident partiality or corruption by the arbitrators; (e) where the arbitrators have so imperfectly executed their powers that a "mutual, final, and definite" award was not made. One further ground, "manifest disregard of the law," has been judicially developed. The United States Supreme Court first sanctioned the concept in *Wilko v. Swan*,[18] but has not addressed it thereafter. In practice, the stringent requirements to prove a "manifest disregard of the law" make a successful challenge on this ground unlikely. Where the award is vacated, and the time within which the agreement required the award to be made has not expired, the court may, at its discretion, direct a rehearing by the arbitrators.[19]

E. Australia

With Australia's enactment of the UNCITRAL Model Law, review of an international arbitral award is now limited to the narrow grounds set forth in Chapter VII of the Act, which parallels those grounds under the New York Convention.

V. LANGUAGE

The language to be used in an arbitration proceeding is also a neglected consideration. The choice of a language can impact translation costs and affect the communication of a party's position to the arbitrator. If the arbitrator speaks a different language than the witness, that means that not only may the arbitrator hear a slightly different response (when translated) than the witness gave, but he may also hear a slightly different question (when translated) than the witness heard. The result can be confusion, or worse, a loss of the witness' credibility.

18. 346 U.S. 427, 436-37 (1953).
19. Federal Arbitration Act, 9 U.S.C. § 10 (1988).

In an ideal world, the arbitrator will be fluent in the client's language. At a minimum, a site should be selected where one's adversary does not have the language advantage. For this reason, one should be aware that if the arbitration is conducted pursuant to the rules of CIETAC, the arbitration proceedings are to be conducted in Chinese.

In the other jurisdictions discussed, there is no requirement that the arbitration be conducted in any particular language. It is quite possible, however, that it will be conducted in the language of the country in which it is held unless the parties provide otherwise.

VI. The Expense and Convenience of the Arbitral Site

The expense and convenience of the forum for the arbitration will be based on a number of factors, including the following:

1. The cost and difficulty of transporting the witnesses and documents to the arbitration forum;

2. The cost of the arbitrator(s), including transportation and lodging expenses;

3. The availability of telecopy, photocopying, telex and translation services at the forum; and

4. The availability of law libraries.

The weight which these factors are given depends upon the individual circumstances of the case and the needs of the parties. Some of the sites surveyed, however, have arbitral institutions very experienced in administering arbitrations—an additional factor which should be considered in weighing the convenience of the forum.

In Sweden, the Arbitration Institute of the Stockholm Chamber of Commerce is very experienced in overseeing international arbi tration and can make arrangements for all necessary services. In Melbourne, Australia, the Australian Centre for International Commercial Arbitration offers appointing and administrative services for international arbitrations held in Australia. The Hong Kong International Arbitration Center, which was established in 1985, can provide administrative and other services for international arbitrations. In California, the American Arbitration Association is probably the best-known administrator for arbitrations. Additionally, in 1986, the Center for International Commercial Arbitration was established in Los Angeles to provide administrative services specifically for international commercial arbitrations and conciliations.

VII. CONCILIATION

Conciliation and mediation are traditional methods for resolving disputes in China. Indeed, in China, conciliation and arbitration are considered part of a single process. From the Chinese point of view, the best person to decide the dispute in the event of arbitration is the conciliator who already has an understanding of the parties' positions and a background in the case. Therefore, in the context of commercial agreements between Western and Chinese parties, conciliation should always be considered first.

In the West, a conciliator will rarely become the arbitrator because the West expects the arbitrator (or judge) to be pristine in his understanding of the facts. Everything that the arbitrator (or judge) learns is to be learned in the "courtroom." A conciliator who learns the confidences of the parties during a conciliation, has, from the West's point of view, become infected with facts presented outside the "courtroom."

A. China

In China, the secretariat of the China International Economic and Foreign Trade Commission will preside over a conciliation referred to it; alternatively, the arbitral tribunal established by it can oversee the conciliation. If the conciliation fails, the dispute will be referred to arbitration.

Joint conciliation is also available. This process requires a Chinese party to apply to the China International Economic and Foreign Trade Arbitration Commission for the appointment of a conciliator, while the Western party is required to do the same with respect to a corresponding arbitral institution in its own country.

B. Hong Kong

The 1982 amendments to the Hong Kong Arbitration Ordinance attempt to mesh the Eastern and Western approaches to conciliation. The ordinance allows a conciliator, if the conciliation fails, to continue on as arbitrator, a procedure which the Chinese favor.

In a further effort to bridge the gap between East and West, Hong Kong is in the process of enacting an amendment endorsed by the Law Reform Commission, which would allow an arbitrator to act as conciliator *during* the course of an arbitration and not be disqualified from continuing the arbitration if the conciliation fails. The arbitrator, however, would be required to disclose to all of the parties,

before resuming, information obtained by him during the conciliation which is material to the arbitral proceedings. This, of course, is a very creative compromise given the real tension in conciliation philosophies between East and West.

C. California

Sitting on the Pacific Rim, California is sensitive to the needs of Pacific Rim cultures and now promotes conciliation as a dispute-resolution mechanism in international commercial disputes. Accordingly, California has enacted the new international arbitration and conciliation code previously discussed. As pointed out, the arbitral provisions are based on the UNCITRAL Model Act, but the conciliation provisions are new.

According to this new code, it is California's policy to promote resolution of international commercial disputes by conciliation and the code has adopted several unique provisions to achieve this. First, it tolls the statute of limitations and stays any arbitral or judicial proceedings during the course of the conciliation so that the parties can concentrate on the conciliation without instituting or prosecuting actions to protect their rights.[20] Second, the conciliation code allows an agreement reached at the end of a conciliation to be placed in the form of an arbitral award, with the same force and effect of such an award.[21] Third, the code maintains the confidentiality of statements made in the course of the conciliation or in documents prepared for the purpose of the conciliation. Disclosure of anything stated during the course of the conciliation cannot be compelled in any civil action unless all parties consent to it.[22] Fourth, bowing partly to Eastern preference, California provides that a conciliator may serve as an arbitrator, but only if all parties consent or their arbitral rules so provide.[23] Finally, the parties may appear in person or be represented by any person of their choice, who need not be a member of the California bar.[24]

VIII. CONCLUSION

Selecting a forum for a dispute-resolution clause requires careful

20. CAL. CODE CIV. PROC. §§ 1297.381-1297.382 (West 1989).
21. *Id.* § 1297.401.
22. *Id.* § 1297.371(a).
23. *Id.* § 1297.341.
24. *Id.* § 1297.351.

thought in the context of Chinese-Western commercial relations. Admittedly, some of the jurisdictions discussed may not be acceptable to the Chinese party, depending upon the nature of the transaction and the circumstances. Still, given the impact that such factors as the background of the arbitrators, the language of the proceedings, and the right of appeal have on the outcome of the dispute, a properly drafted dispute-resolution clause not only will provide a fair basis for resolving a dispute but may also provide the incentives and mechanisms to resolve the case before an arbitration actually commences.

A look at the jurisdictions surveyed suggests that there are good reasons why Hong Kong or Sweden ought to be acceptable to a Chinese party as well as its Western counterpart. Furthermore, California's enactment of a conciliation code and the UNCITRAL Model Law provides strong support for why California also ought to be considered under certain circumstances.

Finally, there is no reason why compromises cannot be reached which combine the advantages of the various jurisdictions. For instance, the Stockholm Chamber of Commerce need not administer the arbitration in Stockholm. It can administer an arbitration in Hong Kong and make its rules and list of arbitrators available to that jurisdiction. The bottom line is that there is no single right answer—as long as some thought has been given to the question.

A Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region

JOHN MCDERMOTT*

I. INTRODUCTION

The goal of both litigation and arbitration—at least from the plaintiff's or complainant's perspective—is to obtain a sizeable money judgment or award. But even a large award or judgment is of little value unless it can be enforced quickly and easily. The most effective way to guarantee the enforceability of a judgment is to litigate the suit

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