International Arbitration: Managing Risk in High Growth – High Risk Markets

A Conference for In-house Counsel and Executives Involved in International Arbitration

Wednesday, September 10, 2008

sponsored by:

K&L GATES  Navigant Consulting
Arbitration in China

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▪ BRIEF INTRODUCTION OF ARBITRATION IN CHINA
Arbitration Organizations

- CIETAC – focus on international disputes. Established in 1956, but fast growth since 1990; Now CIETAC has Beijing HQ, Shanghai Commission, South China Commission in Shenzhen and several offices in the major cities in China;

- Local arbitration commission in major cities – focus on domestic disputes. Among the 180 commissions, **Beijing Arbitration Commission** and **Shanghai Arbitration Commission** become more competitive in handling international disputes
Arbitration Law

- The first Arbitration Law in China became effective on September 1, 1995;

- The Supreme Court released several judicial interpretations during the past mainly with respect to the validity of an arbitration clause and the enforcement of awards.

- Arbitration commissions have their own arbitration procedural rules but these rules are substantially similar.
Use of Arbitration in Practice

- Arbitration is widely accepted for dispute resolution for cross-border transactions in China;

- Arbitration is also well accepted for dispute resolution in business between Chinese domestic companies.
One characteristic of Arbitration in China

- The institutional arbitration only and no ad hoc arbitration in China;
- CHINA AS A SEAT OF ARBITRATION
China as the arbitration seat is generally acceptable or even recommended if enforcement of the award involves the property in China for the following five reasons.
China’s legal Environment Substantially Improved

- Legal framework for market economy established: various laws promulgated, *the Anti-trust Law of the PRC* effective on August 1, 2008;

- After accession to WTO, the legal system more transparent;

- Judges and arbitrators are better educated and more experienced than previous.
Arbitration Environment Improved and Cases in Fast Growth

- Arbitration more and more widely used in Chinese domestic deals;

- CIETAC (the leading arbitration commission for international arbitration) in 2007 received 1118 cases, among which 429 cases involve foreign interests;

- With more than 200 listed foreign arbitrators for CIETAC;

- Other commissions like Beijing Arbitration Commission and Shanghai Arbitration Commission are also well accepted for international transactions.
Not Much Interference From Courts

Chinese courts do not have much interference with the arbitration except for the following respects:

- During the arbitration, one party may request the court for evidence preservation or property preservation;

- One party may request the court to determine the validity of arbitration clauses prior to the initial arbitration hearing.
Chinese courts may revoke an arbitration award involving foreign interests if one of the followings is proved:

- (i) parties fail to agree on arbitration in writing;
- (ii) a party is not served with the notice on appointing its arbitrator or arbitration procedure, or is not given opportunities to express its opinion due to no fault of such party;
- (iii) composition of the arbitration tribunal or the procedure of arbitration violates arbitral rules;
- (iv) dispute submitted to arbitration does not fall under the permitted scope of arbitration or the arbitration committee is not authorized to handle the matter.
Not Much Interference From Court (continued)

- Refusal of enforcement involving foreign interests needs approval from high court and the Supreme Court
Advantages in Enforcement of Chinese Arbitration Compared with that of Foreign Awards

- For Chinese arbitration, a party may seek a court order for property preservation, which will greatly help the future enforcement of awards if the Chinese party intends to conceal their property to evade the enforcement. However, such a court order for property preservation is generally not available in China for an arbitration case handled by a foreign arbitration institution.

- Enforcement of an award by a Chinese arbitration institution may involve less complicated procedure than that of a foreign award: For a foreign award, its Chinese translation needs legalization of Chinese Embassy or consulate or notarization in China when a party requests a court for enforcement; Such notarization and legalization is not needed for enforcement of Chinese arbitration award.
Time Efficient

- Most cases in China concluded in six months
CHINA ARBITRATION STILL IN ITS DEVELOPING PERIOD
China started building its modern legal system only from 1980’s and it still has a lot to be improved;

The first Arbitration Law in China effective on September 1, 1995;

CIETAC established in 1956, but its growth started only from 1990
RECOMMENDED SEATS OF ARBITRATION
If enforcement of the award of a case involves the property in China, China arbitration could be a choice by considering the above-mentioned advantages;

If the Chinese party has strong governmental background, the US party may need to be cautious in choosing the China arbitration;

If a dispute arises from a formation of a joint venture with its Chinese counterpart, Chinese arbitration may be considered;

Chinese parties are generally unwilling to accept the US or European arbitration but final choice depends on the bargaining power;

In case of deadlock in choosing US or China arbitration seat, HK arbitration is mostly a compromise agreeable to both a Chinese party and a US party.
ENFORCEMENT OF FOREIGN AWARDS
Legal Basis for Enforcement

- China is a member of *New York Convention*;

- China’s reservation in two points: (1) only recognize the awards in the member countries; (2) only recognize the awards related to commercial matters;

- The Supreme Court of China has released judicial notices specifying procedures for enforcement.
Procedures for Enforcement:

- Prepare proper documents, especially note that the Chinese translation of the foreign award needs legalization of Chinese Embassy (consulate) or notarization in China;
- File with an intermediate court in which jurisdiction where the Chinese party resides or the property of the Chinese party is located;
- Generally, the court will make a decision on whether to recognize and enforce a foreign award within two months;
- If the court decides to refuse it, the approval of high court and the Supreme Court is needed;
- Generally, the court will complete the enforcement within 6 months.
Measures for Safeguarding Proper Enforcement

- Request for enforcement only through certain intermediate courts (China courts in four hierarchy: county court, intermediate court, high court and Supreme Court) to ensure only the courts with qualified judges will handle the enforcement of foreign awards.

- An intermediate court’s decision on refusing enforcement of a foreign award needs approval of the high court and the Supreme Court. Several higher layers of approval will reduce possibility of the wrong decision of an intermediate court in refusing enforcement.
Reasonable Grounds for Refusal of Enforcement

- Major grounds for refusal of enforcement of foreign awards: Article V of New York Convention;

- Another ground for refusal: Request for enforcement after the prescribed period:
  (1) Before April, 2008, only within six months after the award;
  (2) After April, 2008, within two years after the award
Enforcement of Foreign Awards Refused

- 12 foreign awards were refused or not enforced during 2000-2007 for the following reasons:
  (a) 4 -- deadline for request missed
  (b) 5 -- invalid arbitration clause
  (c) 1 – arbitration notices not served to one party
  (d) 1 -- appointment of arbitrator inappropriate
  (e) 1 – the losing party’s lack of property to enforce
RECOMMENDATION IN ARBITRATION CLAUSE
Mainly consider the following commissions: CIETAC in Beijing or Shanghai (www.cietac.org.cn); Beijing Arbitration Commission (www.bjac.org.cn); Shanghai Arbitration Commission (www.accsh.org.cn);

Describe the accurate names and places of these commissions to avoid any confusion;

To be more assured, set certain requirements for selection of the third arbitrator in the panel, whose choice is to be determined by an arbitration commission.
MISCELLANEOUS POINTS FOR ARBITRATION IN CHINA
Although the foreign party may try to avoid Chinese law as the governing law but contracts like Chinese-foreign equity joint venture contracts in China can only take Chinese law as the governing law;

Choose respected and well-known Chinese arbitrators in case of using China law or a listed foreign arbitrator by considering the relevant governing law and his specialties (e.g., Some well-respected Chinese professors may be considered if his/her specialty is suitable; Do not use a foreign lawyer with general international trade background to arbitrate a dispute about a case on construction matters as construction requires special knowledge!)
THANK YOU!
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NAVIGANT
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Arbitration regime: Russia and the CIS
Legal framework: Russia

• Arbitration law: based on UNCITRAL Model Law

• Arbitration institution: International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry

• Party to the UN Convention on Recognition and Enforcement of Arbitral Awards

• Party to the European Convention on International Commercial Arbitration
Legal framework: Ukraine

- Arbitration law: based on UNCITRAL Model Law
- Arbitration institution: International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
- Party to the UN Convention on Recognition and Enforcement of Arbitral Awards (New York Convention)
- Party to the European Convention on International Commercial Arbitration
- Party to the International Convention on the Settlement of Investment Disputes (ICSID)
- Party to the Energy Charter Treaty
- Has a Bilateral Investment Treaty (BIT) with the United States
• Arbitration law: based on UNCITRAL Model Law

• Arbitration institution: International Court of Arbitration at the Chamber of Commerce and Industry of the Republic of Kazakhstan

• Party to the UN Convention on Recognition and Enforcement of Arbitral Awards (New York Convention)

• Party to the European Convention on International Commercial Arbitration

• Party to the International Convention on the Settlement of Investment Disputes (ICSID)

• Party to the Energy Charter Treaty

• Has a Bilateral Investment Treaty (BIT) with the United States
Local arbitration seats

- **International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry**
  

- **International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry**
  

- **International Court of Arbitration at the Chamber of Commerce and Industry of the Republic of Kazakhstan**
  
  http://www.cci.kz/221
Role of local courts

• **Interim measures**
  ✓ Local v. foreign arbitration
  ✓ Enforcement of interim measures issued by foreign arbitral tribunals

• **Jurisdictional review**
  ✓ Invalidating arbitration agreements
  ✓ Interpreting subject matter of the dispute to preclude arbitration

• **Enforcement**
  ✓ Public policy argument
  ✓ Procedural formalities
Disputes with the state: Russia

- Not party to the ICSID Convention
- Signed but not ratified the Energy Charter Treaty (treaty provisions apply pending ratification)
- Ratified approximately 30 BITs
- Execution of awards against state property in Russia and abroad is very difficult
Disputes with the state: Ukraine

- Party to the ICSID Convention
- Party to the Energy Charter Treaty
- Ratified approximately 50 BITs
- Contact authority: Ministry of Justice
- Moratorium on enforcement of awards against state property
Disputes with the state: Kazakhstan

- Party to the ICSID Convention
- Party to the Energy Charter Treaty
- Ratified approximately 30 BITs
- Contact authority: Ministry of Justice
• Follow model clauses of arbitration institutions

• Consider mandatory rules of law in each country

• Beware of details and comply with all formalities

• Try to avoid arbitrating and litigating in Russia and the CIS

• Provide for mediation procedures

• Research enforcement mechanisms
Contact information

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