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International Practice / *Part 1 of 2*

Planning for Commercial Dispute Resolution: The View from the People's Republic of China

BY JOSEPH T. MCLAUGHLIN

Resolving disputes arising out of cross-border agreements can be enormously costly and ultimately destructive of what was once a mutually beneficial business relationship. Chinese companies entering into cross-border agreements have critical choices to make with respect to the procedure by which disputes with the counterparty will be resolved.

CPR

China has a long and successful history of using mediation and arbitration to resolve disputes in China. When a Chinese company has the economic leverage to do so, it may well insist on arbitration in China under the well-known China International Economic and Trade Association Commission—better known as Cietac—Arbitration Rules.

The first part of this article explores alternative dispute resolution in all its forms in China.

And if a Chinese company is required or persuaded by its counterparty to choose arbitration outside China under the rules of an international institution, there are many fair and efficient sets of rules applicable in a variety of forums from which to choose. The second part of this article will explore factors to be considered in drafting such arbitration agreements and indentify several international institutions which administer arbitrations.

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MEDIATION'S LONGSTANDING INFLUENCE IN CHINA

Deeply rooted within Chinese culture is the importance of compromise as a means to resolve disputes and preserve harmony. The ancient Chinese philosopher Confucius observed that "Li," or natural hierarchy, is on a higher plain than "Fa," the rule of law. This view cuts across all relationships, including business relationships.

Within the Chinese business community, the conventional wisdom is that respect and compromise generate business. Because of this respect for harmony, the concept and use of conciliation—i.e., mediation—within China are deeply engrained. Nevertheless, when business disputes arise between Chinese parties and foreign parties, the use of conciliation, surprisingly, is not particularly well-developed. Randall Peerenboom & Kathleen Scanlon, "An Untapped Dispute Resolution Option: Mediation Offers Companies Distinct Advantages in Certain Cases," 32 China Bus. Rev. 4, 36 (2005).

For business disputes between a Chinese entity and a foreign company (or its foreign investment enterprise counterpart), there are three basic conciliation options within China: (1) private mediation administrated under the auspices of an institutional provider; (2)

(continued on page 141)

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settle the dispute outside the authority of a judicial body.

Before the protectorate era—see "The Basics" box on page 139—Moroccans used to submit their disputes to *Oulemas* or *Fkihs*—Muslim jurists—whose knowledge came from the *Chraa*, which is Muslim law. They were accredited due to their full knowledge and experience of professional uses and customs, and they were of good morality.

Also, tribal representatives, appointed due to their ethical qualities and their knowledge, discussed issues relating to disputes between community members within a *Jmaa*, or meeting, and proposed conciliation or arbitration as they saw fit.

* * *

While arbitration use is now fairly extensive in Morocco, particularly at the international level, mediation use is not. Moroccan citizens do not trust this "private" mode of settling disputes, and there is lack of trust in the independent third party mediator, as opposed to a state-appointed judge. This distrust has even applied to some extent to arbitration.

But in both areas, the Moroccan government and various public and private organizations are currently working on increasing awareness of alternatives to litigation and on training professionals. Along with the recent changes in the law, therefore, there is reason to be optimistic about the future of alternatives to litigation in Morocco.

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Next month, Worldly Perspectives moves to Eastern Europe and sets its sights on Romania.

International Practice

(continued from front page)

mediation within litigation; and (3) mediation within arbitration. See Wang Wenying, "The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective," 20 *Ohio St. J. on Disp. Resol.* 421 (2005).

Private Mediation: Private institutions exist in China that can assist parties with commercial disputes to arrange a mediation between them for an administrative fee. One of the first institutions began in 1987, when the China Council for the Promotion of International Trade ("CCPIT")/China Chamber of International Commerce ("CCOIC") established the CCPIT Beijing Conciliation Center. CCPIT/CCOIC, Mediation Center, Foreword (2005) (on file with authors).

Since 1987, the CCPIT/CCOIC has established more than 40 other mediation centers throughout China. All of the centers function under the global supervision of the CCPIT/CCOIC and collectively are referred to as the CCPIT/CCOIC Mediation Center.

According to certain available statistics, by the end of 2003, this mediation network had handled a cumulative caseload of more than 4,000 cases, with an 80% or higher success rate. The range of cases included both domestic disputes and international ones. See Wenying, supra, at 427.

Mediation occurring under the auspices of any of these 40 plus CCPIT/CCOIC centers in China is governed by a uniform set of rules. Id. The rules, revised in 2005, are divided into four chapters: (i) Chapter I—General Provisions; (ii) Chapter II—Organizations; (iii) Chapter III—Mediation Proceedings (e.g., Acceptance of Cases, Selection (or Appointment) of Mediators, Format of Mediation, Location of Mediation); and (iv) Chapter IV—Supplementary Articles (e.g., the mediator may not be appointed as an arbitrator unless parties agree; the parties shall not request the mediator to act as witness in subsequent proceedings; the mediator shall determine proportion of mediation fees to be paid by each party unless parties otherwise agree, etc.). CCPIT/CCOIC Mediation Rules (effective 2005) (on file with author).

Navigating Chinese ADR

The challenge: International commercial conflict resolution that takes place in China.

What to do? There's a myriad of options. You need to know how to effectively identify the potential trouble spots.

Forming your strategy: A veteran international practitioner lays out the advantages and disadvantages of the choices.

The Mediation Center maintains an appointed panel of mediators. One interesting feature of the Mediation Center's rules is a provision regarding the number of mediators: It provides for a default position of two mediators, with each party selecting one. Prior to the 2005 rules revision, parties using the Mediation Center services were required to select a mediator from the center's panel.

Now, under the revision, the parties' options have expanded, and they can now agree to select a mediator or mediators who are not listed on the center's panel. See CCPIT/CCOIC Mediation Rules, Art. 16 (effective 2005) ("Unless the parties agree otherwise, the parties shall select a mediator from the Mediation Center's Panel of Mediators").

The Center also has promulgated a uniform CCPIT/CCOIC Mediation Center Code of Conduct for Mediators (effective 2005) (on file with authors). Under the code, a mediator must be independent and impartial. Moreover, in the event mediation does not resolve the dispute, the code says that the mediator "shall not act as an arbitrator" in any subsequent arbitration for the same dispute "unless agreed by the parties."

In addition to the Mediation Center, the CCPIT/CCOIC recently pursued a joint project with the International Institute for Conflict Prevention and Resolution—the CPR Institute, which publishes *Alternatives*—to establish a U.S.-China Business Mediation Center in 2004. For details, see "CPR Around the World" under "Practice Areas" at www.cpradr.org, or http://adr.ccpit.org. See also J. Melnitzer, "U.S. Lawyers Launch New Center in China," *Corp. Legal Times* 29 (May 2004).

The U.S.-China Business Mediation Center charges a $2,500 administrative fee for select-

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International Practice

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ing one mediator, and requires a $1,250-per-party deposit toward the mediator's fee.

The purpose of the U.S.-China Business Mediation Center is to assist with administered mediation services for transnational disputes involving U.S. and Chinese companies. The U.S.-China Business Mediation Center has offices in both China and the U.S. In China, the U.S.-China Business Mediation Center is accessible through the CCPIT in Beijing, and in the U.S., the center is accessible through the CPR Institute in New York.

The mission of the U.S.-China Business Mediation Center is to promote the use of mediation between U.S. and Chinese parties by addressing the following areas:

- The U.S.-China Business Mediation Center has promulgated rules for mediations, which are intended to reflect standards of both U.S. and Chinese business mediations. The rules are modeled on the CPR Institute mediation procedures and the parties and the mediator(s) can modify the rules as they see fit.
- The Chinese and U.S. mediators available through the U.S.-China Business Mediator Center have been trained by CPR and CCPIT to be aware of the business practices and legal alternatives of both Chinese and U.S. companies. The first training program for the U.S.-China Business Mediation Center's mediators was held in July 2004, in Hong Kong where a total of 26 selected mediators—13 Chinese and 13 from the U.S.—attended a two-day program. The U.S.-China Business Mediation Center plans to train additional mediators, as needed.
- The mediators are selected by the parties, not the U.S.-China Business Mediation Center, to maximize party control over the process. The parties also choose between mediation by either a single mediator or a team of one Chinese and one Western mediator. The U.S.-China Business Mediation Center can assist in the appointment of mediator(s) where the parties cannot agree on a candidate by requesting both parties to rank a list of candidates in order of preference, before the candidate with the lowest combined score is selected.
- The mediation procedures endorsed by the U.S.-China Business Mediation Center include a mediator ethics code.

Demand has not been robust. But initially, in 2005, the U.S.-China Business Mediation Center in Beijing had been used as a means to resolve at least one dispute between a U.S. corporation and a Chinese company. (Information on file with author.)

Mediation within Litigation: The practice of combining litigation and mediation in the Chinese court system is firmly established. See Wenying, supra at 430-35. Courts routinely emphasize the use of conciliation, and the Civil Procedure Law of the P.R.C. (Trial Implementation) contains provisions addressing the use of conciliation. Id at 432-35.

Under the Civil Procedure Law, the parties have a right to request conciliation. When a court conducts conciliation, the judge presiding over the case generally acts as the mediator. Such an arrangement can compromise the integrity and effectiveness of mediation in large measure because of the "mediator judge's" authority to render a final decision in the event the mediation is not successful.

Litigation in Chinese courts is not a favored dispute resolution method: "The 'litigation solution' is the least desirable for the parties. As Confucius said, 'To handle lawsuits, I am resolved to eliminate lawsuits.' In China, litigation filings may well end up in a special folder entitled 'Wait for the gods to handle.'" Yang Jiang, "A World of Difference When Doing Business in China, a Little Understanding Goes a Long Way," 61 *Or. St. B. Bull.* 19 (April 2001).

If the parties reach a mediated settlement agreement, the court will prepare a "Conciliation Statement" that sets forth the claims, the facts and the result of the conciliation, which is then signed by the parties and the court.

Mediation within the Arbitration: The first set of arbitration rules promulgated by arguably the most prominent international arbitration center in China, the China International Economic and Trade Association Commission, or Cietac, did not contain any mediation provisions. Of course, the parties to a Cietac arbitration could reach a mediated settlement on their own without using Cietac. Cietac Arbitration Rules, adopted by China Chamber of International Commerce, (effective May 1, 2005) (referred to her as the 2005 Cietac Arbitration Rules), Art. 40.

Nevertheless, because of China's deeply rooted cultural connection with conciliation, and the use of conciliation in Chinese courts, it was only a matter of time before Cietac formally incorporated conciliation into its arbitration rules. In its second set of arbitration rules, released in 1989, Cietac specifically addressed conciliation and subsequent revisions to the Cietac Arbitration Rules have continued to do so, including the most recent May 2005 revision.

Under the 2005 revision of the Cietac Arbitration Rules, Article 40—Combination of Conciliation with Arbitration—provides that the "arbitral tribunal" may conciliate the case pending before it when "both parties" so "desire," or even if only one party "so desires" and the "other party agrees when approached by the arbitral tribunal." Id at 40(5). If the conciliation fails, the "arbitral tribunal shall proceed with the arbitration and render an arbitral award."

The 2005 Cietac Arbitration Rules, in Art. 40 (8), further provide for confidentiality with regard to communications during the course of mediation:

> Where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

Despite this provision, due process concerns exist about the dual role of an arbitrator-mediator. (A summary of the debates on the advantages of a combination of arbitration with conciliation can be found in United Nations Commission on International Trade Law [commonly referred to as Uncitral] Working Reports, A/CN.9/460 (April 6, 1999), A/CN.9/468 (April 10, 2000), and A/CN/WG.II/WP.110 (Sept. 22, 2000).) The essence of the concern is that during the mediation sessions, particularly the private caucus sessions, the arbitrator may learn of confidential aspects of the dispute in an attempt to settle that would not have been disclosed during the arbitration. The information obtained may later prejudice

the arbitrator in the conduct of the resumed arbitration proceedings.

Moreover, if the same person is acting as both an arbitrator and mediator, the effectiveness of mediation could be diminished because the parties are less willing to share confidential, yet helpful, information. The integrity of arbitral decision-making could be compromised in the event such information is later used against a party by the arbitrator after an unsuccessful conciliation.

Enforcement of Mediated Settlement Agreements: The outcome of a successful mediation—settlement—is the same regardless of the forum (private, court or arbitration) in which the mediation occurs. The forum, however, has important implications for a settlement agreement's enforcement.

A mediated settlement agreement reached in a private mediation setting traditionally could only be enforced as a contractual obligation. But the 2005 Uniform Conciliation Rules of the CCPIT/CCOIC Mediation Center offer the following option: "When signing the settlement agreement, the parties may provide an arbitration clause therein, as follows:

> The settlement agreement is binding on both of the parties, and any of the parties is allowed to apply to the China International Economic and Trade Arbitration Commission (Cietac) for arbitration under the Arbitration Rules effective at the time of application. The parties agree to entrust the Chairman of the Arbitration Commission to appoint a sole arbitrator to examine the case on the basis of documents only. The sole arbitrator may, in a way he or she deems appropriate, conduct the arbitration procedures expeditiously and render an arbitral award following the content of the settlement agreement. The arbitral award shall be final and binding on the parties."

CCPIT/CCOIC Mediation Rules, Art. 27 (2005). Because this provision is comparatively recent, actual experiences using this mechanism remain to be observed.

Compared to mediated settlement agreements reached in private mediation, a mediated agreement reached within a court conciliation has the stronger legal effect of a court judgment, without appellate rights. Civil Procedure Law of the People's Republic of China, Art. 89 (referred to here as the Civil Procedure Law). Similarly, a mediated agreement reached within a Cietac arbitration proceeding has the stronger legal effect of an arbitral award, and its favorable enforcement features, even if the arbitral tribunal did not assist in the mediation process. 2005 Cietac Arbitration Rules, Art. 40(1) and 40(5).1. Although both of these forms of mediation appear to offer stronger enforcement mechanisms in the event that a party defaults under the agreement, this factor needs to be balanced against the generally higher quality of mediation offered by the private institutions.

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Next issue, author Joseph McLaughlin continues with adjudicative processes. He explains the distinctions between domestic Chinese arbitration and international arbitration matters, and considerations in dealing with the arbitration tribunal. The articles conclude in September with forms of ADR clauses for China contracts.

Case Management / *Part 1 of 2*

Before and During Hearings, Here's How to Manage Arbitration Matters Before They Get Out of Hand

BY E. DAVID D. TAVENDER

In the face of widespread concerns about escalating costs and delays in commercial arbitrations, proactive case management by arbitration tribunals focusing on what is necessary and yet fair can do much to restore speed and cost effectiveness in arbitrations.

This article examines management techniques from leading commentators, which are supplemented by this author's experience as an arbitrator.

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First some stage-setting on arbitration case management: Redfern and Hunter in Law and Practice of International Commercial Arbitration (4th ed.), para. 646, state:

> Arbitration relies on speed and cost-effectiveness for its survival. Very often what is quick is cost-effective. This has been recognized by legislators and institutions alike. However, it is important that the procedure adopted by arbitral tribunals should be fair. A balance must be struck between speed and fairness. This balance varies from case to case and no absolute time-limits can be prescribed. The parties have their own role to play in this context, and the issue of delay should be kept in mind. Procedures that are adopted in an arbitral proceeding should depend on the nature of the dispute, and the arbitral tribunal should be free to design the procedure according to its requirements; detailed procedures agreed by the parties needlessly tie the hands of the arbitral tribunal. Delay may be avoided more easily by wise choice of the composition of the arbitral tribunal rather than by inserting detailed procedural rules into the arbitration agreement.

A 2007 report from the International Chamber of Commerce Commission on Ar-

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International ADR / *Part 2 of 2*

China's Passage: With ADR Options Increasing, Precise Contract Drafting Is Essential for Arbitration Users

BY JOSEPH T. MCLAUGHLIN

Last issue, the author discussed mediation in China. This month, he concludes with adjudicative processes, focusing on arbitration, and ends with two model clauses.

* * *

In the context of a commercial dispute between a Chinese company and a U.S. company, arbitration has many features that are advantageous for U.S. companies in comparison to Chinese court proceedings. They include:

- Neutrality and expertise—Parties can have a role in selecting arbitrators who possess a certain legal or business background, as opposed to appearing before a judge in a local Chinese court, who may lack impartiality and expertise in the relevant subject matter.
- Flexibility—Arbitration procedures typically are not as complex, or rigid, as Chinese court rules.
- Quality—A 2001 survey of U.S. companies in Beijing conducted by the American Chamber of Commerce reported that most of the companies that had actual arbitration experience in China rated arbitration administered by major Chinese arbitration centers favorably. See Johnson Tan, "A Look at Cietac: Is it Fair and Efficient?" China Law & Practice, available at www.chinalawandpractice.com. The survey found that 75% of respondents considered Chinese arbitration to be fairer and more efficient, or about the same in terms of fairness and efficiency, compared with similar institutions outside China.
- Choice of counsel—Foreign attorneys can represent parties in an arbitration proceeding; however, they cannot represent parties in a court proceeding. (Note, however, that foreign attorneys are not permitted to give a legal opinion on Chinese law, even in an arbitration). See 2005 Cietac Arbitration Rules, Art. 16, ("Chinese and foreign nationals may accept the engagement (of clients) and act as representatives in the arbitration").
- Confidentiality—Arbitration is a private proceeding, in contrast to public court proceedings, which often can be associated with criminal matters.
- Enforceability—There are significant obstacles to the enforcement of Chinese court judgments outside China and enforcement of foreign court judgments within China. By contrast, arbitral awards can be enforced pursuant to the New York Convention, to which China became a signatory in 1987, thereby linking China to the 143 other signatory countries and their enforcement mechanisms.

(continued on page 157)

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all of whom are spreading the word. Indeed, awareness-raising events and mediation trainings for lawyers, judges and company managers, as well as training programs for students in secondary schools, will be the main focus of the Bulgarian mediation organizations for the next few years.

* * *

Next month: More in Eastern Europe as Worldly Perspectives moves to Romania.

An Interview with a Bulgarian Court Mediation Pioneer

The *Worldly Perspectives* columnists spoke with Evgeni Georgiev, a judge at the Sofia Regional Court in Bulgaria. He is a mediation pioneer and a great supporter of mediation, significantly contributing to the establishment and achievements of the first Settlement Center at the Sofia Regional Court.

What is the most important achievement in the field of mediation in Bulgaria in the past three years?

Mediators and judges started to work together—this is the biggest success of mediation in Bulgaria.

Which is your most successful recent mediation?

. . . [A] 55-year-old neighbor . . . stopped me at the front door of the apartment building to ask me to be a witness [as to] what her husband was taking from their home. They had just had a serious argument. I agreed but I proposed to talk to them and see whether I could help somehow. So, we went upstairs in their apartment.

I went with the husband in one of the rooms and asked the wife to wait in the kitchen. The husband was very reserved but he shared that he had no interest in any joint property they had. The only thing he wanted was to leave because the situation at home was unbearable.

Then, I talked to the lady. She was very open. Almost crying she told me the story of their family life. She also had no interest in the joint property but was willing to split with her husband.

I felt very weak, as if I could not do anything. Most of the cases I had mediated before [involved] only interests and very little emotions. To the contrary, here I had just emotions.

I got them together and told them they had no property problem. I advised them that I could be their witness if they liked. Further, I told them they had a communication problem and better go to a psychologist. Then, I left.

A few days later, my wife told me that she saw the couple shopping in the supermarket. Some time after that I saw them drinking coffee, talking in front of the building, and their teenage son was around. That might be my most successful recent mediation, if I really helped the couple.

What fosters most mediation in Bulgaria?

You cannot single out just one thing. . . . There are many things combined that help. These are: mediators' activism; judges' support [and] referrals to mediation; support from the bar; media coverage and other forms of publicity, [and] training for mediators.

What are the next steps to make mediation work for more people in Bulgaria?

If we are able to make attorneys think that mediation can help their business we will tremendously increase the use of mediation. At the same time we have to make all judges understand that mediation is a very effective tool for docket management and that they have the power to refer cases to mediation. While working on these two issues we have to make sure that mediators get proper training and meet the highest professional and ethical standards.

International ADR

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Elements of a valid clause: When drafting an arbitration clause, counsel for foreign companies must be aware of the requirements of an enforceable clause under the Arbitration Law: intent to arbitrate; subject matter; and identification of an arbitration commission.

The Arbitration Law of the People's Republic of China was enacted on Aug. 31, 1994, by the National People's Congress. It contained major revisions to the domestic and international arbitration systems. The Arbitration Law became effective as of Sept. 1, 1995.

Under Arbitration Law Art. 16, a valid arbitration agreement must identify an "arbitration commission" to administer the arbitration. If a clause does not identify an arbitration commission, the clause is void, unless the parties reach a supplementary agreement. Two additional comments to consider when drafting a clause under the Arbitration Law: (i) there is no express prohibition against ad hoc arbitration, but the Arbitration Law's requirement that the agreement identify an arbitration commission essentially precludes recognition of "ad hoc" or "party-administered" arbitration proceedings; and (ii) there is some uncertainty as to whether foreign arbitration institutions qualify as an "arbitration commission."

Regarding (ii), for example, on its website, the ICC states that "[al]though there is some uncertainty as to whether foreign arbitration institutions qualify as arbitration commissions within the meaning of the law, it would in any case be prudent for parties wishing to have an ICC arbitration in Mainland China to include in their arbitration clause an explicit reference to the arbitration institution of their choice." See www.iccwbo.org.

Adjudicative Processes Continued—Domestic and International Distinctions: Before a U.S. company agrees to arbitrate in China, it should appreciate the difference between "domestic" Chinese arbitration and "international" arbitration. An international arbitration involves "foreign-related elements," which is defined in a 1998 opinion of the Supreme People's Court.

A foreign-related element means: (i) one or more parties to the contract are foreign companies or foreign citizens; (ii) a legal relationship is created in a foreign country; or (iii) the subject matter of the dispute is located in a foreign country. See Opinions on the Implementation

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of the General Principles of Civil Law of the PRC, issued by the Supreme People's Court, ¶ 178 (Jan. 26, 1988). The significant features of each type of arbitration are depicted in the table at the bottom of this page.

Special circumstances are presented when the foreign company organizes a Chinese subsidiary and registers it in China as an FIE, a foreign-invested enterprise. Although it may seem an anomaly, the presence of an FIE as a party to an arbitration simply is not sufficient to render the arbitration "international." A dispute between an FIE and a Chinese company, or between two FIEs, is only considered an international arbitration under Chinese law if there is a "foreign-related element"—e.g., the dispute's subject matter is located outside China. This fine distinction can be a trap for the unwary when agreeing to arbitrate in China.

Cietac's Dominant Role in International Arbitrations. Established in the 1950s, Cietac handled virtually all international arbitrations held in China until 1996, when a legal reform occurred that allowed local Chinese arbitration commissions, in addition to Cietac, to hear international arbitrations. Today, parties may submit international disputes to Cietac or any of the more than 170 local arbitration commissions throughout China. Michael Moser, "Crossing Borders: The Role of Arbitration in Resolving Disputes between International Firms and Their Chinese Business Partners," *Corporate Counsel* (June 2005). Arguably, the most prominent local commission is the Beijing Arbitration Commission, established in 1995. See, supra, Tan.

From a practical standpoint, if a U.S. party agrees to arbitrate in China, the choices essentially are limited to an arbitration administrated either by Cietac or by one of the various domestic Chinese arbitration commissions located in the major cities, including in Beijing, Shanghai, and Shenzhen. Part of the reason for this limitation is the uncertainty about whether foreign arbitration institutions qualify as an "arbitration commission" under the Chinese Arbitration law.

China's Adjudicative Processes

The options: Following up on last month's mediation analysis, the author now turns to China arbitration.

The advantages over the courts: Flexibility, successful history, enforcement, and more.

Potential sticking points: The 15-year-old arbitration law's formality must be followed precisely when drafting. See the suggested forms at Part 2's end.

For example, even though China became an ICC member more than a decade ago and some ICC arbitration proceedings have been conducted there (see Moser, supra, and Jeremy Cohen, "International Commercial Arbitration in China," conference speech at American Foreign Law Association meeting in New York (Jan. 13, 2005) (on file with authors)), there remains uncertainty as to whether the ICC qualifies as an "arbitration commission" under Chinese law.

Cietac is based in Beijing with significant Shanghai and Shenzhen subdivisions. Despite the availability of other arbitration institutions in China, Cietac remains the powerhouse and leader for international arbitrations. For example, it was reported that in 2003, Cietac handled 709 cases, 422 of which were foreign-related and 287 domestic—an increase of 25 cases from the previous year. Of the total, 373 cases, including 119 domestic cases, were handled by Cietac's Beijing Commission; 205—also including 119 domestic cases—by its Shanghai Sub-Commission; and 131, including 49 domestic cases, by its Shenzhen Sub-Commission.

These cases involved parties from about 40 countries and regions, especially the Hong Kong and Macao special administrative regions which accounted for 26.5% of the total. There were 49 disputes with U.S. parties, accounting for 6.9%. One quarter of the total cases were transaction contract disputes, while 22.6% concerned joint investment and cooperation contracts. Chinese Government's Official Web Portal, available at http://english.gov.cn/200-508/14/content_22681.htm (China Yearbook 2004). For 2004, one source reports a total case figure of 850 (domestic and international) for Cietac cases. See www.hkiac.org.

Importance of Properly Identifying an "Arbitration Commission" and Its Location. As noted, under Arbitration Law Art. 16, a valid arbitra-

Comparing Arbitration Processes in China

	'Domestic' Arbitration	'International' Arbitration
Definition	The arbitration is conducted in China and the dispute has no 'foreign-related element.'	The arbitration is conducted outside of China or the arbitration is conducted in China and the dispute involves "foreign-related element."
Governing Law	Only Chinese law applies. Parties cannot contractually agree upon any other governing law.	Parties can contractually agree upon governing law other than Chinese law.
Standard of Judicial Review	Broad: Courts may refuse to enforce award if it is based on insufficient evidence, incorrect application of law or it 'violates the public interest of the society.' Civil Procedure Law, Art. 260; see also Arbitration Law Art. 58 on domestic arbitration.	Limited: Courts cannot refuse to enforce award based on insufficient evidence or incorrect application of law. Courts can refuse to enforce an award if it "violates the public interest of the society." Arbitration Law, Art. 70; Civil Procedure Law, Art. 258 and Art. 260(1).

tion agreement must contain a clear provision designating an arbitration commission to administer the proceeding, or a Chinese court will not enforce the clause.

A textbook example of this principle is the case of *Guanghope v. Mirant,* where the Supreme People's Court (the highest court in China) had to determine the validity of the following arbitration clause involving a U.S. corporation:

> All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators, one to be appointed in writing by each of the parties within one (1) calendar month, after having been required in writing to do so by either of the parties or in case the Arbitrators do not agree to the decision of an Umpire appointed in writing by the Arbitrators. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company in respect of quantum.

Civil Ruling of the Supreme People's Court, (2002) Min Si Zhong Zi No. 29 [not published]. For facts and comments, see Paul Donovan Reynolds & Song Yue, The PRC Supreme People's Court on the Validity of an Arbitration Clause, 142 *J. of the Chartered Institute of Arbitrators* 70 (2004).

The Chinese Supreme People's Court found that the clause was invalid because the parties did not identify an arbitration commission. *Guanghope* provides a concrete drafting point for the parties who must specifically identify an arbitration institution in their agreement. Although theoretically they can do so after a dispute arises, practically, it is unrealistic to expect any such agreement from a party that intends to oppose enforcement.

Moreover, even when the parties specify the commission, confusion may arise over the commission's exact location. A U.S. Circuit Court opinion illustrates this drafting point, *China National Metal Products Import/Export Co. v. Apex Digital Inc.,* 379 F.3d 796 (9th Cir. 2004). In this case, the parties entered into a series of written sales agreements for DVD players. Paragraph 15 of each of the purchase orders provided:

> ARBITRATION: All dispute[s] arising from or in connection with this Contract shall be submitted to [Cietac] for arbitration which shall be conducted by the Commission in Beijing or by its Shenzhen Sub-Commission in Shenzhen or by its Shanghai Subcommission in Shanghai at the Claimant's option in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

A dispute arose and Apex Digital commenced arbitration proceedings against China National in Shanghai by filing a claim with the Cietac Sub-Commission in Shanghai concerning nine of the purchase orders. Soon after, China National filed its own Statement of Claims with Cietac in Beijing concerning eight of the same purchase orders.

Apex Digital objected to Cietac and asserted that China National should be required to raise its claims as counterclaims in the Shanghai arbitration. Cietac disagreed and let both arbitrations proceed separately and independently.

The Beijing proceeding produced an award in favor of China National. Although Apex opposed confirmation on the ground that the Beijing proceeding was invalid, the Ninth U.S. Circuit Court of Appeals confirmed the award:

> The clause provides that [the] arbitration proceeding "shall be conducted" by Cietac. Although the clause specifies that the choice of forum in one of three alternative venues, listed disjunctively, is "at the Claimant's option in accordance with [Cietac's] rules," the clause does not define "Claimant" but leaves it open as a variable term (i.e., either party could be a claimant). [Id. at 800-801.]

Under this technical reading, the court reasoned that the clause itself directed that Cietac would conduct the arbitration "at the Claimant's option in accordance with [Cietac's] arbitration rules in effect at the time of applying for arbitration." Therefore, the parties agreed not only to Cietac's arbitration rules, but also to Cietac's interpretation of its rules. Here, Cietac determined that both arbitrations could proceed.

Thus, there was no violation of the parties' agreement—even though the Ninth Circuit agreed with Apex Digital's contention that dual arbitrations on the same purchase orders was an inefficient process. Nevertheless, the parties' purchase orders called for Cietac's rules interpretation and, therefore, the resulting inefficient procedure.

Adjudicative Processes Continued: The Tribunal's Composition: Until recently, only those individuals on preapproved lists maintained by the Chinese arbitration commissions were eligible to be arbitrators in a Chinese arbitration. See Moser, supra. These lists were predominantly Chinese—i.e., "non-foreign"—arbitrators. Indeed, before 1988, no foreigners appeared on the Cietac panel, despite the large number of international arbitrations that Cietac administered. Since then, foreigners have been added; the Cietac panel now has least one-third foreign members.

Currently, Cietac has eight arbitrator panels—the International Panel, the Domestic Panel, and six specialized panels that handle domestic disputes in various industries. The International (foreign-related) Disputes Panel is the largest, with more than 600 arbitrators, including foreign arbitrators. See Cietac website at www.cietac.org.cn/shiw/zhongcaishiwu.asp, and Moser, supra.

Moreover, parties' choices with regard to arbitrator selection continue to expand. Effective May 2005, Cietac arbitration parties are no longer limited to Cietac's Panel of Arbitrators, and can appoint arbitrators who are not even listed on the preapproved panel. Cietac Arbitration Rules, adopted by China Chamber of International Commerce, Art. 24 (October 1, 2000)("Each of the parties shall appoint one arbitrator from among the Panel of Arbitrators of the Arbitration Commission or entrust the Chairman of the Arbitration Commission to make such appointment"). Now, parties can agree "to appoint arbitrators from outside of the Cietac's Panel of Arbitrators," subject to confirmation by the "Chairman of Cietac in accordance with the law." 2005 Cietac Arbitration Rules, Art. 21(2). The exact parameters of this new confirmation process, however, remain uncertain.

Strides towards increasing parties' choices also are occurring with regard to the appointment of the tribunal's "presiding" arbitrator,

(continued on next page)

International ADR

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who occupies a pivotal position because, typically, the presiding arbitrator's opinion determines the outcome if the tribunal cannot reach a majority decision. Under the previous Cietac arbitration rules, most presiding arbitrators were appointed by Cietac. Under the revised rules, however, Cietac has created a list system that allows parties to rate candidates, and the candidate receiving the highest number of votes will be appointed.

Significantly, the 2005 Cietac Arbitration Rules address issues relating to arbitrators' independence and impartiality. The 2005 Cietac Arbitration Rules require that an arbitrator sign a declaration disclosing any facts or circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence, including circumstances arising during the arbitral proceedings. Based upon such disclosures, a party may challenge an arbitrator, and if the challenge is contested, the Cietac chairman determines the outcome of the contested challenge.

The 2005 Cietac Arbitration Rules do not address whether the presiding arbitrator can be of the same nationality as either party. If the parties do not agree that the presiding arbitrator cannot be either Chinese or of the nationality of the other party, then even under the new list system discussed above, a Chinese arbitrator could end up occupying the pivotal position of the tribunal chair.

In the event that an arbitrator is unable to perform his or her panel duties, automatic replacement does not occur under the 2005 Cietac Arbitration Rules. Rather, the Cietac chairman can render a "final decision on whether an arbitrator should be replaced or not with or without stating the reasons therefore." Moreover, if after the conclusion of the last oral hearing, an arbitrator is unable to participate in the tribunal deliberation or render the award due to his or her demise or removal from the Cietac Panel of Arbitrators, the other two arbitrators may continue the arbitration and render an award after consulting with the parties, and obtaining the Cietac Chairman's approval. Id. at Art. 27. The 2005 Cietac Arbitration Rules also allow the Cietac chairman to replace an arbitrator if he or she is prevented "de jure or de facto" from fulfilling his or her functions, or the arbitrator "fails to fulfill [his or her] functions in accordance with the requirements" of the rules. In the event of a replacement, the substitute arbitrator shall be appointed following the same procedure as used to appoint the original arbitrator. Id.

Jurisdictional Issues: The Arbitration Law authorizes Cietac, or other Chinese arbitration commissions, to determine a party's challenge to the arbitral tribunal's jurisdiction, provided that none of the parties request the court to decide the issue. Specifically, the arbitration commission may decide all jurisdictional issues, including the existence and validity of an arbitration agreement. Until recently, the Cietac Arbitration Rules did not provide for the delegation of such decision-making to the arbitral tribunal, thus making Cietac arbitrations out of step with other major arbitration institutional rules outside China. Alan Redfern & Martin Hunger, Law and Practice of International Commercial Arbitration 5-39—5-42 (4th ed. 2004). But under Art. 6 of the revised 2005 rules, Cietac may now delegate this power to the arbitral tribunal.

The "Seat" of Arbitration: The concept that an arbitration is governed by the law of the place in which it is held—i.e., the "seat"—is well recognized and understood in international arbitrations. The law of the seat, or the "lex arbitri," is likely to address numerous issues, including the components of an enforceable agreement to arbitrate, and the award's form, validity and finality. Redfern & Hunter, supra at 2-14, 2-10. The seat selection also indicates the geographical place for the arbitration. Under major institutional arbitration rules and laws, all of the arbitration proceedings generally are not required to be physically held at the seat's geographical location.

Under earlier versions of the Cietac Arbitration Rules, it was not clear that parties could hold any part of a Cietac proceeding outside China. The most recent set of rules, at Arts. 31-32, open up the parties' options by providing: "Where the parties have agreed on the place of oral hearings, the case shall be heard at that agreed place." This revision has been perceived as expanding parties' options by permitting them to identify Cietac as the arbitration commission, which clearly satisfies the requirement to identify an arbitration institution, yet also allows parties to conduct oral hearings at sites outside China—for example, in New York. See Moser, supra.

Language of Arbitration Proceeding: A foreign company that agrees to arbitration to resolve international disputes should always be mindful of the proceeding's language. Chinese international arbitrations are no different. Under Cietac Arbitration Rule Art. 67, if the parties do not specify, Chinese is the default language. So if the foreign company does not provide in the contract that English will be used for both the written submissions and oral proceedings, then, under the Cietac Arbitration Rules, Chinese will be the arbitration's official language of the arbitration.

The ramifications of the official language choice are multifaceted. For example, the proceeding's language will affect the party's choice of counsel. If Chinese is the proceeding's language, a lawyer who can speak Mandarin would be a more effective advocate because he or she can communicate directly with the arbitrators without an interpreter. Moreover, the translation into Chinese of any necessary documents is expensive and time-consuming, and should be factored into any cost-benefit analysis of arbitration.

Provisional Measures and Partial Awards. Under the Arbitration Law, arbitrators cannot grant any form of provisional relief to protect property or evidence. Civil Procedure Law, Art. 256; Arbitration Law, Art. 68. Only a court can grant such relief. Moreover, even before a party can request court relief, the Chinese Arbitration Law requires the petitioning party first to file its request for provisional relief with the administering arbitration commission. Thereafter, that body will submit the request to the Court. Thus, unlike the Uncitral Model Law, for example, which permits parties to apply directly to a court for provisional measures of protection, the Chinese Arbitration Law does not afford the parties this opportunity.

Although arbitrators are not empowered to issue provisional relief, under the Cietac Arbitration Rules arbitrators can issue partial or interlocutory awards. Specifically, Cietac Arbitration Rule Art. 44 provides that "an interlocutory or partial award may be made on any issue of the case at any time during the arbitration

before the final award is made if considered necessary by the arbitral tribunal, or if the parties request and the arbitral tribunal accepts." For example, if a U.S. company agrees to use the Cietac Arbitration Rules, it will have an option to seek partial awards, which may prove to be useful to narrow the scope of the arbitration early in the process.

Confidentiality. Under the Arbitration Law Art. 40, arbitration proceedings are deemed private and not open to the public, unless the parties agree otherwise. Similarly, institutional arbitration rules—for example, Cietac—provide for confidentiality of the proceedings. 2005 Cietac Arbitration Rules, Art. 33.

Confidentiality is further emphasized by particular institutional arbitrator ethics codes. The Cietac-promulgated code provides that arbitrators shall strictly maintain the confidentiality of arbitration proceedings. Pursuant to the Code, arbitrators cannot disclose to outsiders any circumstances regarding the substance and procedure of a case, including the case details, hearing proceedings, and the outcome of deliberations. Cietac Code of Ethics for Arbitrators, adopted by Cietac on April 6, 1993.

Arbitral Awards. If a foreign company agrees to arbitrate under the Cietac Arbitration Rules, what can it expect in terms of the award and enforcement?

First, under the Cietac Arbitration Rules Art. 45, prior to the execution of any award, Cietac reviews a draft. This review encompasses "issues" addressed in the award and arguably encompasses more than a review as to form only.

Second, in the event of a dissenting opinion, Cietac Arbitration Rules Art. 43 provides that a written dissenting opinion "shall" be docketed in the file and may be attached to the award, but it shall not form a part of the award.

Third, statistical evidence on the outcome of Cietac arbitrations, although scarce, suggests that a foreign party arbitrating against a Chinese party will be treated fairly. In a 2001 American Chamber of Commerce survey of U.S. companies with China arbitration experience, the majority view of respondents who had actual China arbitration experience was that arbitrations are less costly, more efficient and no less fair when compared to arbitrations in other international arbitration centers. See Tan, supra.

Fourth, on the China enforcement front, the nation is a party to the New York Convention. Its courts are obliged to enforce foreign arbitral awards made in another signatory state. Jan Paulsson, et al., The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts, Appendix 5 (2nd rev. ed., 1999). Moreover, under the Arbitration Law, judicial interference with an arbitral award rendered in a China international proceeding is limited by statute. Nevertheless, when it comes to enforcement there have been some unfortunate instances; however, as noted by one commentator, "on the whole . . . the situation is improving." See Moser, supra.

The reasons for such improvements include the Supreme People's Court's notice that precludes any Intermediate People's Court from enforcing a Cietac arbitral award, as well as any foreign arbitral award issued by a signatory of the New York Convention, unless the lower court has received approval to do so from the Higher People's Court or Supreme People's Court. Because the Higher People's Court and Supreme People's Court are perceived to be less affected by local protectionism, the purpose underlying this system is to provide a monitoring component to China's New York Convention obligations. See Cheng Dejun, Michael J. Moser, Wang Shengchang, International Arbitration in the People's Republic of China 135 (1995).

Still, much room for improvement exists for enforcement issues. One survey conducted by UCLA Prof. Randall Peerenboom, which was published in the *American Journal of Comparative Law,* investigated the 89 award-enforcement proceedings in the Chinese courts. The survey reported that:

> [A]lmost half of all foreign and Cietac awards were enforced in the sense that the party recovered at least some amount. The enforcement rate for foreign awards was 52%, slightly higher than the 47% success rate for Cietac awards. Furthermore, investors can expect to recover 75-50% of the award amount in 34% of the cases and half of the award at least 40% of the time.

Randall Peerenboom, "Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC," 49 *Am. J. Comp. L.* 249 (2001).

OTHER CHOICES FOR A PRC PARTY

A Chinese party considering an agreement to arbitrate disputes outside China has a variety of excellent choices, both in terms of fair and efficient institutional arbitration rules and neutral, arbitration-friendly forums in Asia, Europe and the United States. (Neutrality is based on the forum not being the home country of either party in the arbitration.)

In Europe, the ICC arbitration rules are the most widely used in international contracts, followed by the LCIA (formerly London Court of International Arbitration) rules, and the less frequently used Stockholm Chamber of Commerce arbitration rules. The most frequently used forums in Europe for arbitration are Geneva, Paris and London.

In the United States, commonly used arbitration rules include those by the International Centre for Dispute Resolution, a division of the American Arbitration Association; the International Institute for Conflict Prevention and Resolution; and JAMS, a private firm of former judges and experienced lawyers who serve as arbitrators and mediators. The most frequently used U.S. arbitration forums are New York, Los Angeles, and Washington, D.C.

For parties transacting business in China, another possible arbitration venue is Hong Kong. Among the choices available to parties is the Hong Kong International Arbitration Center, or HKIAC, which is available to administer proceedings under its own set of arbitration rules that are modeled on the Uncitral Arbitration Rules.

HKIAC also can act solely as an appointing authority, and has at its disposal an arbitration panel of 200 individuals, from about 23 different nations. See www.hkiac.org/main.html. Similarly, HKIAC's facilities are available to parties who have chosen to arbitrate under another set of institutional arbitration rules. Hong Kong Arbitration Ordinance, Ch. 341 of the Law of Hong Kong.

After the 1997 handover of Hong Kong to China, a practical concern that arose was whether the Hong Kong-issued awards would be treated as "domestic" or "international" for

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International ADR

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enforcement purposes. As discussed above, if an award is considered to be the result of a "domestic" arbitration, the Chinese courts could apply a broader scope of judicial review that would increase the vulnerability of such awards.

This uncertainty was addressed by a 2000 "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region," issued by the Supreme People's Court on June 18, 1999 (effective on Feb. 1, 2000), and the Arbitration Ordinance. Pursuant to the "Arrangement," an arbitral award rendered in Hong Kong and enforced in China, and vice-versa, would be treated as a New York Convention award, i.e., an "international" arbitral award subject only to a limited scope of judicial review.

Similarly, an arbitral award rendered in Hong Kong may be enforced in China in essentially the same way as a New York Convention award. Currently, under the Arrangement, all arbitration awards rendered in Hong Kong, whether ad hoc or under the rules of the ICC, LCIA or any other body, will be enforceable in China. A 2003 draft Supreme People's Court opinion exists, however, which some commentators contend, if adopted, would render Hong Kong ad hoc awards involving a Chinese party unenforceable in China. See The Resolution of China Disputes through Arbitration, 37 (Freshfields Bruckhaus Deringer, ed., 2004).

Generally, enforcement of awards in Hong Kong is very reliable. A survey of Hong Kong arbitral awards from 1997–2004, reported only 4% were set aside out of about 185 enforcement applications filed in the Hong Kong courts. See www.hkiac.org/en_statistics.htlm. The Singapore International Arbitration Center is well-respected and has fair and efficient arbitration rules, but in comparison to Hong Kong, it is not used as frequently by parties, in part due to its location in relation to the People's Republic of China.

Two Model Clauses

Planning for commercial disputes involving Chinese parties requires familiarity with Chinese culture, legal structures and practicalities. In the end, as is often the case in international contracts generally, if the parties can agree upon a dispute resolution mechanism before any dispute arises, both the dispute resolution processes, and outcome, will better serve the needs of the parties.

Parties to cross-border agreements often are best served if they can negotiate at least a two-step dispute resolution clause that provides for a period of private mediation and thereafter commencement of arbitration for any remaining disputes. The mediation should be separate and apart from the arbitration proceedings. Moreover, the arbitration portion should address certain specific issues, including the identification of an "arbitration commission," the nationality of any presiding arbitrator, a provision that the arbitrators cannot act as mediators, and that the language of the written submissions and the arbitration hearings is English. For the Chinese party, a model clause to begin the negotiation process is as follows:

> The parties shall endeavor to settle any dispute arising out of or relating to this Agreement by mediation under the U.S.-China Business Mediation Center (the "Center") and its procedures. Unless otherwise agreed, the parties will select a mediator from the Center's panel of mediators.
>
> Any dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein within 45 days after initiation of the mediation procedure under the Center's procedures, shall be finally resolved by arbitration in accordance with the China International Economic and Trade Association Commission ("Cietac") Arbitration Rules [in effect on the date of this] Agreement. The seat of the arbitration shall be Beijing, China. Oral hearings can be held at places other than the seat of arbitration, including places outside the People's Republic of China. The tribunal shall consist of three arbitrators and they need not be listed on the Cietac Panel of Arbitrators; however, each arbitrator must be qualified to serve. The presiding arbitrator shall be of a different nationality than that of each party. The arbitrators are not permitted to act as mediators or conciliators. The language of the arbitration and submissions and proceedings shall be English or Chinese, at the option of each party.

For the foreign party, the counterproposal, if Cietac arbitration in Beijing is not acceptable, could be:

> Any dispute, controversy or claim arising out of this contract, including its existence, validity, breach or termination, shall be referred to and finally decided by arbitration under the [LCIA, ICC, HKIAC] Rules, which Rules are deemed to be incorporated by reference into this clause.
>
> The number of arbitrators shall be [3, 1] and they shall all have experience with the performance of contracts in China. The place of arbitration shall be [Geneva, Paris, London, New York]. The language of the written submissions and the oral proceedings in the arbitration shall be English.
>
> The governing law of the contract shall be the substantive law of [New York; England; Switzerland], excluding the conflict of laws provisions thereof.
>
> Prior to the commencement of arbitration hereunder, the parties shall attempt to mediate their disputes for a period of 60 days under the Mediation Rules of the [CPR, ICDR, JAMS] and the mediator shall be selected by the parties or, failing agreement, by the institution.

—Joseph T. McLaughlin