China Arbitration Overhauled

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Registration of programs provides certainty, public inspection; infringement actions assisted

Forty years ago, not long after the coming into being of the People's Republic, China decided to initiate an arbitration system to handle disputes in trading with foreigners. By a Decree issued by the then Central Government, a Foreign Trade Arbitration Commission was set up under the China Council for the Promotion of International Trade (CCPIT). Some four years later, another Decree was promulgated by the State Council to empower CCPIT to organize the China Maritime Arbitration Commission to make awards on the maritime disputes with foreign factors.

Unfortunately, within the framework of a highly centralized planned economy taken after the Soviet pattern, the so-called foreign-related arbitration system in China made very little progress in its first 25 years or so. Since 1978, the open-door policy has given a big push to the system. In recent years, especially after its claim to be building up a so-called socialist market economy, China has become one of the leaders in world arbitration. In 1993, China ranked first in terms of the number of new submissions (486 new cases).[1] From January to August 1994, China International Economic Arbitration Commission (CIETAC)[2] received 501[3] new applications for arbitration.

Along with this international dispute-oriented arbitration system, there has been another arbitration system, the domestic economic contract arbitration system, which has a network covering the entire country. Although being named Economic Contracts Arbitration Commissions, these bodies by nature are no more than administrative organs managed by the State Administration of Industry and Commerce and its local offices. It is not without reason to say that to arbitrate domestic economic contract disputes is compulsory. It was the practice before 1983 that if the losing party was not satisfied with the award, it might go to the superior body of the one that made the first award for a new award. If the second award by the higher arbitration body was still not to his satisfaction, he had the right to initiate a lawsuit with a court. Since the enforcement of the new PRC Economic Contracts Arbitration Regulations on August 22, 1983, the two-instance system was changed into one-instance, but the losing party shall have the right to appeal to challenge the award.

In addition to the two major arbitration systems, there are some other special arbitration systems, e.g. labor dispute arbitration, copyright arbitration, technology contract arbitration, securities dispute arbitration, etc. To a significant extent, these systems are administrative by nature, and is actually government controlled with hats of arbitration.

UNIFORM NEW LAW ENACTED

Duality of arbitration in China produced many troubles in the country's economic development. It was particularly harming China's international market-oriented economy. It came to be essential to unify the arbitration system to suit the new market economy. After years of drafting and revising, the PRC promulgated its first Arbitration Law on August 31, 1994, it became enforceable on September 1, 1995, thus leaving a full year to update the system. According to the new law, arbitration bodies shall not be set up at different administrative levels, and it gives power to the municipal governments in Beijing, Shanghai, Tianjin and those capital cities of the provinces and autonomous regions to consult local chambers of commerce to reorganize independent arbitration institutions, which shall be registered with local judicial administrative bodies. China does not intend to initiate ad hoc arbitration practice in the near future.

Any dispute between two parties, be they individuals, entities or other economic organizations, in relation to a contract or an interest in property is arbitrable, except for those relating to marriage, adoption, tutelage, maintaining and succession, and to administrative disputes. Arbitration is to be conducted based on an arbitration agreement concluded voluntarily between the parties before or after a dispute, which shall exclude jurisdiction of court over the same dispute. The current domestic arbitration practice shall be abolished. The award made by any arbitration body shall be final and binding.

ARBITRATORS AND ARBITRATION ASSOCIATION

Arbitration commissions are to be organized based on some prescribed conditions. Among other things, the panels must contain no less than two thirds of experts from legal and business communities. To be engaged as arbitrator, one must satisfy at least one of the following basic criteria:

1. Engaged in arbitration business for more than eight years.

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2. Practiced law as an attorney for no less than eight years.

3. Used to be a judge for at least eight years.

4. Being involved in legal researching and teaching and with a senior professional title.

5. Being a businessman with legal knowledge and senior professional title or equivalent professional skill.

As stipulated in Article 15 of the law, all arbitration commissions are members of the so-called Arbitration Association, which is termed as a corporate body to be organized by its member commissions and independent of any administrative control. The Association has the right to discipline the malfeasant arbitrators.

GENERAL PROCEEDINGS

The general proceedings of arbitration in China are in conformity with the prevailing world practice. The following are the major points for attention:

Arbitration Agreement

The Arbitration agreement must be clear and valid. The subject matter must be arbitrable. If unclear and the disputing parties cannot reach an agreement to make it clear afterward, the arbitration agreement shall be deemed invalid. The law gives power to arbitration tribunals to declare the validity of an arbitration agreement. Besides, if either side objects to the validity of the agreement, it may apply either to the arbitration commission or the court to make a decision or ruling. If one party challenges the validity of the agreement with the arbitration body, and the other with the court, it is the court that has the right to make a decision. If one party lodges a claim with a court without making known to the court of the existence of an arbitration agreement, the court shall not reject the petition unless the other party files objection to the court by submitting the valid arbitration agreement before the first court hearing.

Preservative Measures

Preservative measures may be applied with the arbitration tribunal, if either party has a reason to worry about the future execution of the award to be made by a tribunal. However, it is not the tribunal that has the right to make a decision on the application. Instead, it is the tribunal's obligation to pass on without delay the application to the court in the place where the other party resides. The court shall make a ruling in accordance with legal procedures. If the court rules to take preservative measures against the claimed, a bond or guarantee may be required to be set. In case of a loss by the claimed due to the measures that are proven wrongly taken, the applicant shall be liable to the compensation of the loss.

Legal Agent in Arbitration

Disputing parties are entitled to engage a legal agent in arbitration proceedings. Unlike the provisions in PRC Civil Procedure Law, which stipulates that if a foreign party needs to engage a lawyer to represent him in the proceedings he is allowed to delegate such a power to a Chinese lawyer only, the Arbitration Law does not confine the foreign parties to sign a Power of Attorney with Chinese lawyers alone. Foreign lawyers may appear before an arbitration tribunal to defend their foreign clients legitimate rights and interests in China.

Challenge System

The arbitration tribunal is to be composed of three arbitrators, or a commonly chosen arbitrator may sit alone to hear the dispute. After the composition of the tribunal, either party has the right to challenge any member of the tribunal, if he has a reason to do that, anytime before the first hearing, or before the last hearing if the cause for the challenge is known to the challenging party after the first hearing. However, it is the Arbitration Commission Chairman's power to make a decision on the challenge. In addition to being challenged by either party, if an arbitrator has an interest in the dispute, which may obviously result partiality of the arbitrator, he or she is obliged to apply for an avoidance of being involved in arbitrating the dispute. If an arbitrator is found to conduct a private interview with either party or his agent, or accepts an invitation by the latter to a dinner, or takes a gift from the latter, and he or she shall be disciplined, or subject to legal sanction if the behavior violates relevant laws. If a challenge is sustained, the parties may apply for renewing the proceedings, which shall be ruled on by the tribunal.

Settlement

The parties may settle the dispute by themselves in the process of arbitration, or apply for a settlement by a tribunal. If a settlement is reached by themselves, and the request for dismissal by the claimant is agreed by the tribunal, either party still has a right to initiate arbitration proceedings if he is repent of the dismissal afterwards. If a settlement is conciliated by the tribunal, it shall make an agreement of settlement or an award. The two documents shall be equally enforceable. However, if either party feels repent of the agreement of settlement before he signs the receipt of the document, the tribunal shall make an award on the dispute based on its own judgment.

Abrogation of Award

An award may be applied for being abrogated by the Intermediary People's Court in the place where the Arbitration Commission made the award resides to make a ruling on the abrogation of the award, provided:

1. There is no written arbitration agreement between the two parties.

2. The subject matter of the dispute is not included in the scope of the arbitration agreement, or shall not be arbitrated by the Arbitration Commission made the award.

3. The composition of the tribunal or the procedures used in arbitration violates statutory proceedings.

4. The award is made based on false evidence.

5. The evidence that is so important that the impartiality in making an award could be harmed was concealed by the other party.

6. The arbitrator is found corrupted in making the award.

7. The court deems that the award

is made against public interest.

If a party intends to file an application for the nullification of an arbitration award, he should make the application within six months of the receipt of the award, and the court must make a ruling on the application within two months. If the court thinks it possible for the Arbitration Commission to rearbitrate the dispute, it will give the latter a time limit for a new award, and simultaneously make a ruling to suspend the procedure for abrogation. If the Commission refuses to rearbitrate the case, the court shall rule on the resumption of the abrogation proceedings.

Execution of Award

If the losing party refuses to execute the award, the winning party may go to the court of the former's residence for an enforcement of the award. However, the court may make a ruling of nonexecution based on certain proven allegations by the refusing party, e.g. the application of law is incorrect, the factfinding is lack of significant evidences, etc.

If one party requests a court to enforce an award while the other applies for the abrogation of the same, the court shall rule on the suspension of the execution until the validity of the award is declared.

Arbitration With Foreign Involvement

In a transition from a highly centralized economy to a market economy, China does not want to decentralize the arbitration with foreign factors, at least in the foreseeable future. The law empowers the China Chamber of International Commerce to organize the foreign-related Arbitration Commission. Competent foreigners may be invited to be on the Panel of Arbitrators of the Commission, which now keeps a panel of about 390 arbitrators, of whom around 20% are foreigners. Out of the disputes handled by the China International Economic and Trade Arbitration Commission, the country's only foreign-related arbitration commission, around 30% are concerned with the joint ventures in China, and another 28-30% with international buying and selling. Securities disputes began to come to the attention of CIETAC.

ARBITRATION USED IN IP PROTECTION

In terms of intellectual property protection, since China has built up an administrative adjudication system to handle the disputes with regard to IP rights registration, nullification and declaration, as well as infringement and counterfeiting, only a few licensing disputes have been resolved through arbitration. Since China has not yet unified its laws on economic contracts, e.g. there are at present PRC Economic Contracts Law, PRC Foreign-Related Economic Contracts Law, PRC Technology Contracts Law & PRC Regulations On The Administration Of Technology Importation Contracts, etc., the jurisdiction of arbitration is still separated. If the licensing contract involves a foreign licensor and contains a clause of arbitration, the dispute shall be submitted to CIETAC. If both the licensor and the licensee are Chinese entities or individuals and the parties agreed to settle the dispute by arbitration, a dispute arising in the execution of the contract shall be under the jurisdiction of the so-called Technology Contracts Arbitration Institutes.

CIETAC arbitrates foreign-related licensing disputes in accordance with its prescribed Rules, which is close to the general practice in the world. The awards made by the arbitration body cannot be appealed to court. The new Arbitration Law does not have too much impact on the CIETAC Rules. In terms of substantive issues in the disputes, the arbitrators will base themselves upon the stipulations laid down in the PRC Regulations On the Administration of Technology Importation Contracts and the PRC Foreign-Related Contracts Law, as well as other pertinent laws and regulations, e.g. Patent Law, Trademark law, Computer Software Protection Regulations, Copyright Law, Law on the Foreign-Invested Enterprise Income Taxes, etc. Since many contractual parties had chosen a neutral country to be the venue of arbitration, which is more or less due to the foreign parties' preference, the number of disputes with respect to licensing submitted to CIETAC has been small.

In the field of domestic licensing contract arbitration, the State Commission of Science and Technology issued a provisional Technology Contracts Arbitration Rules on June 25, 1991. The Rules is applicable now and may be abolished by the establishment of the new unified arbitration system. This arbitration system has such unique features as the following:

1. The technology contracts arbitration institutions are under the supervision of the Technology Contracts Arbitration Commission set up by the State Commission of Science and Technology of the People's Republic of China. The organization of arbitration institutions shall be subject to the approval by the State Commission of Science and Technology. Candidates must pass the examination held by SCST before being engaged as professional or part-time arbitrators.

2. Disputing parties may lodge claims with a Technology Contracts Arbitration Institute based on the written arbitration agreement, in which an agreed Institute must be identified.

3. If the dispute involves the right to a patent, to the application for a patent, to the exploitation of a patented or unpatented technology, etc., the arbitration procedures shall be suspended until decisions are made by other authorities, such as Patent Office, Patent Reexemination Board, the Administrative Office for Patent Affairs, etc.

4. The award by the Arbitration Institute shall be enforceable on the day it is served on the parties. Neither party shall appeal to the court. However, the Technology Contracts Arbitration Commission of SCST has a right to instruct the Arbitration Institute to revise the award or to rearbitrate the dispute, if the Commission thinks the award is wrongly made. Further, if an Arbitration Institute finds something wrong with an enforced award and thinks it necessary to revise the award or to rearbitrate the dispute,

it shall report to the Commission for an approval.

5. If the losing party refuses to execute an award, the winning party may apply, either directly or through the Arbitration Institute that made the award, with a court. If the court makes a ruling on non-execution of the award, the parties may either reinitiate the arbitration proceedings or appeal to court for a settlement.

CONCLUSION

The old arbitration system, formed in China in the framework of a rigid, centralized planned economy, lagged behind the economic development in the country. It was necessary to dismantle the old mechanism and to make a set-up suitable to a market-oriented economy. It is expected that the stronger the market mechanism, the weaker administrative involvement in business activities, the more important role the arbitration system will play in the national economy. It will not take long for China to lead the world arbitration business.

NOTES

1. 1993-94 Working Report by CIETAC, P.1, Delivered at a Seminar on Arbitration at Beijing, September 15-16, 1994.

2. The name of the Foreign Trade Arbitration Commission was changed to Foreign Economic and Trade Arbitration Commission on February 26, 1980. The major purpose of this change was to enlarge the scope of the Commission's jurisdiction over the disputes to keep pace with economic development in China at that time. After that, the Commission was empowered to arbitrate not only the trade disputes with foreign companies and individuals, but also disputes arising from other economic activities between China and foreign countries, e.g. joint ventures, international financing, etc. In 1988, the Commission was renamed China International Economic and Trade Arbitration Commission (CIETAC) to handle cases covering the whole range of international economic and trade disputes.

3. *Ibid* (1).