

# Hints for Negotiating In the West

BY RODNEY DE BOOS\*



*Chinese negotiators get insights into drafting with Western, common-law country counterparts*

**I**n any transnational technology transfer agreement, each party must be sensitive to the different legal, cultural and economic bases under which the other party may be operating in order to avoid misunderstandings and to give the technology transfer agreement the best prospects of success. I would expect that experience holds true for almost any arrangement that requires medium- to long-term commitment of each party.

This paper also gives a brief overview of some aspects of Australian law, which I trust will be of assistance in dealing with businessmen and lawyers from common-law jurisdictions and in particular Australia.

## THE FUNDAMENTAL DIFFERENCES

### The Common Law Base

The English Common Law, which became the basis for Australian and American law, is the law as developed by judges over the centuries. The common law has largely been developed through an adversarial process where the parties, usually through their lawyers, argue their case before a judge. The judge conducts the proceedings but is not supposed to descend to the "heat of the moment" and become involved in the proceedings. Thus, the conduct of each party's case is left to that party's lawyers. On completion of the presentation of argument, the judge can either make his decision at that point or refer to consider the matter further and deliver an oral or written judgment at a later date. In the typical case where the subject in dispute is governed by a written contract, the

task of the Court is to enforce the intentions of the parties as expressed in the written word.

### Dispute Resolution

Therefore, Australian businessmen and lawyers are used to the idea that a dispute that develops that cannot be settled by discussion between the parties may ultimately be settled by court proceedings. This is not to say that Australian businessmen, or even their lawyers, like to contemplate that a dispute will result in court proceedings. However, the possibility of litigation is very real. Court proceedings are the major form of dispute resolution in Australia outside the parties settling disputes themselves.

In several times, the cost and inconvenience of court proceedings has led to a renewed interest in arbitration to settle disputes. This interest is fuelled in part by the complexity of many disputes in modern business that involve matters that are not within the technical understanding of judges or many lawyers. Thus, a party contemplating legal proceedings involving a complex technical subject might face the daunting task of first educating its lawyers in the particular subject matter and then having to rely on those lawyers educating the judge on the same subject matter. It is easy to imagine that the opportunity for misunderstanding and error is great.

Parties contemplating a dispute-solving mechanism that is also agreed upon the technical qualifications of the person they would have as arbitrator. Thus, arbitration where the parties have organized in advance the type of arbitrator they would feel comfortable with may well avoid the education process that often is inherent in legal pro-

ceedings. There are additional factors to take into account in deciding upon arbitration, but it is not appropriate to canvass them here. However, it is true that arbitration plays only a quantitatively small role in dispute resolution in Australia.

The other method of dispute resolution that I shall mention is conciliation.

Outside the settlement of labor disputes there is virtually no formal conciliation process in Australia. In my experience, conciliators in a formal sense is almost never used in technology transfer nor is any part of the general commercial area. One might argue that lawyers often fulfill the role of conciliators in their efforts to settle disputes between their respective clients. If one accepts this process as a form of conciliation, then conciliation is an inherent sense could be said to form a major role in dispute resolution.

As I understand the position in China, the preference for dispute resolution procedures is very much the opposite. Thus, the preferred method of dispute resolution is literally negotiation or conciliation followed by arbitration and only then, as a last resort, litigation. It is fair to say that litigation tends to be destructive of the relationship between the parties whereas negotiation, conciliation and mediation tend to replace some degree in preserving the relationship between the parties.

### The 'View' of Contracts

Without wishing to explore the psychological effects of this fundamental difference, it seems to me that one trend will be that the

\*Attorney David Ryan DeBoos, Melbourne, Australia, paper presented at LES China Int Annual Meeting, Shanghai, November 1990.

Western businessmen or lawyers who see the ultimate dispute resolution mechanism as being litigation will wish to negotiate all its essentialities. He or she will seek to be very precise in recording the arrangements and will rely heavily on the precise interpretation of the written word. Once the contract has been agreed and signed the Western party will expect the written word to be complied with and would not expect any request for renegotiation unless in exceptional circumstances. I would expect a person whose preferred form of dispute resolution mechanism is conciliation to be far more interested in the relationship between the parties. This would also produce a different attitude to renegotiation of an agreement. John Franken, in an article in the September 1989 issue of *McNair's*, states that in agreements drafted in China there will be a good deal more ambiguity to allow for the agreement to develop as a living document. This is the opposite to what Western businessmen are accustomed to.

The result is that I would not be surprised if Chinese negotiators find that their Western counterparts tend to want to spend less time building a relationship for the future and more inclined to want to get down to writing the precise contents of the agreement being negotiated. This may well result in Chinese negotiators viewing their Western counterparts as being aggressive or impatient.

#### An Example — The Yin Bundy Tubing

As an example of a series of events that could easily have brought a project to an end, I would like to recount the history of the Hua Yin Bundy Tubing joint venture at Qin Huangdao in Hebei province. The example is taken from an address by Mr. Andrew McCallum, who is the Manager, Business Development - Asia for the Broken Hill Proprietary Company Limited, to the Taxation Institute of Australia at its conference in Beijing in 1989.

After a series of false starts, negotiations began in earnest in Beijing in January 1988 between Bundy Tubing Australia and the Central Iron and Steel Research Institute of

Beijing in relation to a proposed joint venture to produce metal tubing. Negotiations covered 15 months, and a contract was signed at a ceremony at the Australian Embassy in Beijing in February 1989.

Shortly after the General Manager Designate of the joint-venture company moved from Australia to China in April 1989 he was advised that there were a few small problems with the contract and that some "improvements" were required. Bundy Tubing Australia was then presented with a list of 20 or so items in the contract that "needed to be revised." Some of these items were matters of substance, which Bundy Tubing Australia had negotiated long and hard to have included in the Contract. At this stage, Bundy Tubing Australia seriously considered withdrawal from the project. However, the company persisted, and the renegotiation of the contract signed in February 1989 continued for six months. The "final" contract was signed in November 1989. The businessmen for the venture issued in December of that year.

*The Problem of Approval and Authority*  
Another fundamental difference between China and Australia is the type of economy each has.

China has a mixed economy of which an important part is planned. The part that is planned is subject to regulation of the types of arrangements that can be entered into and the form those arrangements must take.

Australia does not have a planned economy, and Australian businessmen have almost no direct regulation relating to technology transfer with which to deal. Thus, Australian businessmen will generally create a wide freedom to contact with whom they wish, for what they desire, and on the terms and conditions they can negotiate. They are not used to bureaucratic delays. In the majority of cases they will not have to submit their agreements to government agencies. In technology licensing agreements there is no need for Australian Government approval, unlike China, which has the Regulations on Administration of Contracts for Importing Technology.

The result is that many Australian

businessmen may not be comfortable with delays that may precede, accompany or follow negotiation of an agreement with a Chinese enterprise. If a Western businessman does not respond well to these delays, his or his Chinese counterpart might find his or her perception that Western businessmen are aggressive and impatient confirmed. However, this situation could probably be avoided if the Chinese negotiating team makes clear from the outset the likely time frame and all of the various approvals that must be obtained before a contract will become effective.

Parallel with the problems that arise in obtaining approvals is the problem of knowing the extent of the authority of the Chinese party to negotiate and contract. The Western businessman is used to negotiating in an environment where he knows, or can fairly easily ascertain, the position and authority of the person with whom he is negotiating. I have heard many Western businessmen complain that, just when they think they have ironed out all the details of a negotiation they are told by the Chinese party that the approval of a higher authority is required, or that certain aspects of the agreement have been rejected.

#### The Time Scale

Businessmen often might also find the type of enterprise that is attracted to the Chinese market. Chinese history and culture are ancient, and Chinese businessmen are therefore culturally inclined to think and work against a long time frame. Australia on the other hand is a young country, and its people tend to think in a shorter time scale. Australian businessmen are driven by both short- and long-range objectives. Traditionally, Australian businessmen operate against annual budgets. Reporting by management is usually done on a monthly, quarterly, half-yearly and annual basis. Plans rarely extend one year or generally of a more strategic nature.

The result of operating against annual profit budgets is that there is an immediacy present in the objectives of Australian businessmen, that does not fit comfortably with delays. To the extent that a delay means more

costs being incurred and a longer period passing until a profit is realized, there is an obvious adverse effect on the enterprise's profit and loss statement. If the profitability of an enterprise is below the expectations of its owners or bankers the managers may be subjected to criticism and at worst dismissal, and the ability to borrow money for working capital will be diminished. Thus, it may be that the majority of Western enterprises see the conclusion of arrangements with Chinese enterprises as being long-term projects. It will then only be those Western enterprises which have sufficient profits to subsidize expenditures on long-term strategic projects that will be able to contemplate arrangements with Chinese enterprises.

Furthermore, actually receiving money when due under a contract will be a priority for the Western enterprise for the same reasons. This may lead to a strong insistence by a Western negotiator on payment being made by letter of credit drawn on a Western bank. If the use of a Chinese bank is required, there may need to be agreement to pay interest to offset delay in payment in the event that the condition of documentation or other cause delays payment.

#### PARTICULAR ASPECTS OF AUSTRALIAN LAW

##### The Interpretation of Documents

It is a basic principle in interpreting contracts in Australian law that the courts are concerned only with the intent of the parties as expressed in that contract. Thus, once a contract is entered into the intent of the parties (to the extent that it might be different to the intent expressed in the contract) is irrelevant. Even if the parties intend one thing but agree in another and that agreement is expressed in the contract, then the parties are bound by the meaning to be given to the words contained in the contract.

It is important to understand that there is no primary rule of good faith in the common law. It is only in situations in which it is clear that one party to a contract is endeavoring to take advantage of a lesser

mistake that the law permits a court to consider the surrounding circumstances to negotiations in an effort to find the true intent of the parties.

In interpreting the words used in contracts the courts will look to the ordinary and natural meaning of those words unless the context otherwise requires. This means that the draftsmen of a document that might be scrutinized by Australian courts must take particular care to choose words that are unambiguous in their meaning and use words that are appropriate according to their ordinary and natural meaning. In cases in which words have acquired a particular technical meaning, that technical meaning is used.

##### Rule of Construction

There are also particular rules that apply to the interpretation of documents. One is the *quatenus proferat* rule. This rule requires that where at least three words designating a particular class are used and then followed by general words, the general words are to be construed as being limited to the class constituted by the particular words. For instance, the phrase "automobile, motorcycle, motor-bus, truck, tramcar or other vehicle" would in all likelihood be construed to mean only "motor vehicles" and not other forms of transport.

Another rule the courts apply is that requiring the express mention of one thing in the exclusion of another. Thus, in order to avoid inconsistency a specific provision expressed in some detail will necessarily be taken to mean that anything inconsistent with the detailed provision will be excluded.

Finally, I would place particular emphasis on an important rule that requires a court to construe an ambiguous provision in the least favorable manner to the person seeking to take advantage of the provision. Thus, where there is an ambiguity the courts will strictly construe the provision against the party seeking to take advantage of the provision.

##### Force Majeure and Frustration

As you will know, a force majeure clause has the effect of re-

leasing a party to a contract for nonperformance in a particular situation. However, unlike Article 28 of the Chinese Foreign Economic Contract Law, Australian law does not imply a force majeure clause into a contract. A party will only be excused from performance in a force majeure situation if the parties have specifically provided for it. Thus, it is necessary on each occasion to consider whether a force majeure clause is appropriate and, if it is, to specifically make provision to the contract where the contract is governed by Australian (or English or United States) law.

In drafting a force majeure clause, it is advisable to list the various events that the parties agree will excuse nonperformance. If a broad force majeure clause is desired, a drafting technique is to list the list of events to be provided by the words "including but without limiting the generality of the following," and for the list to include a catch-all at the end to the effect that "all other circumstances beyond the reasonable control of the party affected." It is common in Australia to see strikes and other industrial disputes and government interference included as force majeure events.

##### ◀ Doctrine of Frustration ▶

Under Australian law force majeure is to be distinguished from the doctrine of frustration. Frustration of a contract results in the discharge of all further obligations of the parties under the contract. Frustration occurs when, without the fault of any party to the contract, an obligation has become impossible of performance due to changed circumstances that render the obligation so substantially different from that originally envisaged that it would be unjust to hold the parties to their obligations. Thus, where the Suez Canal was closed a ship carrying a cargo of iron and steel was trapped in the canal for some months before being able to complete its voyage to India from Cochin on the Black Sea. The voyage had to be completed via the Cape of Good Hope rather than via the Canal. The ship owners claimed damages and the

charterers claimed that the contract had been frustrated. The court held that there was no frustration of the contract because the delay was not critical in the circumstances.

The Australian courts have made it clear that in order to decide whether a contract has been frustrated it is necessary to compare the expectations and interests of the parties as revealed by the contract, properly construed, with the situation that has unfolded.

The effect of the doctrine of frustration is that obligations occurring prior to the frustrating event must be performed while obligations not yet due are discharged. Less, it is said, lies where it falls. Legislation in the States of Victoria and New South Wales now provides for the courts to modify the harsh effects that can flow from the application of the doctrine.

#### Choice of Law, Choice of Forum and Arbitration

Much has been written about choice of law in international contracts, but less is written about the choice of the forum. Having been involved in disputes between parties in different jurisdictions, it seems to me that the more important decision from a practical point of view is the choice of the relevant forum.

When one party sues another for breach of contract in an Australian Court, it is most likely that the party initiating the proceedings will seek damages. In other words, the party that is aggrieved will ask the court to compensate it in monetary terms for its loss arising out of the alleged breach by the other party of its obligations under the agreement. If the party initiating the proceedings is successful and an award is made, the problem then is to enforce the award.

Often either or both parties to an international transaction do not have assets in the jurisdiction of the other party. If there are no assets in the jurisdiction in which the award of damages is made the successful party will have to seek to enforce that judgment in the other jurisdiction. It is extremely difficult and expensive for a successful plaintiff to do in many other cases.

In fact, I do not know of any judgment of a United States court being enforced in Australia. There are no treaties between Australia and the Australian States on the one hand and, for example, the States of the United States of America or the United States of America itself on the other which provide for the recognition of foreign judgments handed down in the courts of the other country or state.

Interestingly, the parties to a contract generally want the law of their domicile to govern any disputes that might arise and the courts of their domicile to be responsible for resolving those disputes. However, this can be very straightforward if decisions handed down cannot be enforced in the domicile of the other party. Thus, on many occasions, I advise a client to adopt at least the courts of the domicile of the other party for the purposes of the particular contract. This will ensure that if my client seeks to issue proceedings against the other party my client will only have to be concerned with the substantive issues of the matter and not with the problems attendant upon enforcement of any judgment should my client be successful.

Australia (as in China) is a signatory to the New York Convention on Arbitration pursuant to which the Federal Australian Government has passed the Arbitration (Foreign Awards and Agreements) Act 1974. The Act establishes a mechanism for the recognition and enforcement of foreign arbitral awards. To my mind it is an extremely important factor in deciding to include an arbitration provision in a commercial agreement. This is particularly the case in inter-Australian technology forming agreements in view of the fact that the Supreme People's Court of China has interpreted such agreements as being within the categories of legal relationships that are subject to the Convention.

One point that inevitably arises in negotiations over an arbitration clause is the place of the arbitration. I have little doubt that in agreeing on the place of arbitration an Australian negotiator will want to have

one to take place in Australia (or a neutral country under the auspices of the Australian legislators) or a recognized international body of rules such as the International Chamber of Commerce or the American Arbitration Association. An alternative forum in Australia is now the Australian Commercial Disputes Centre, which has been established in Sydney. The Centre assists in dispute resolution through a number of means including mediation and arbitration.

#### AN AUSTRALIAN BUSINESSMAN'S OBJECTIVES FOR A SINO-AUSTRALIAN TECHNOLOGY AGREEMENT

I thought that you may be interested to be told of the likely objectives of an Australian businessman when negotiating an agreement to license technology to a Chinese enterprise.

These objectives may be in addition with the desirable features of such an agreement as set by law or by Chinese counterparts.

1. The technology and the use to which it is put should be clearly defined.

2. Technical assistance will be provided if the costs of providing same are provided beforehand.

3. Strict time limits on the implementation of the technology will be imposed, which if not complied with will give the Australian party the right to terminate the contract.

4. A clear foreign exchange solution (e.g. payment in Australian dollars received by letter of credit drawn on an Australian bank) should be agreed before any contract is signed.

5. There will be no right to sub-license.

6. Disputes will be subject to arbitration in accordance with Australian law in Australia.

7. The Chinese licensee must assume the burden of infringement of any industrial property rights and, at the request of the licensor, bring such infringements to an end.

8. All international money and costs should be finalized before any funds are committed.

9. Any law issues will be finalized before any funds are committed.

10. The licensee will be selected on ability to cover political issues not on industrial viability.

11. The licensee will be selected on tax, import duty, infrastructural, bureaucratic and enthusiasm consideration — not on where the con-

tral PRC organizations want the venture established.

12. The licensee must allow inspection of its books and records by the licensor's nominee.

"Of course this list is only a "wish list." In reality, the non-Chinese

partner may well have to make do with something less. However, knowing the objectives of potential non-Chinese partners will give you an idea of the fundamental issues that need to be addressed in any negotiation.