Best Practices in Drafting Arbitration Provisions in China-related Commercial Contracts

On August 4, 2009, China's Supreme People's Court issued a new regulation to encourage parties involved in conflicts to consider arbitration as an alternative means of dispute resolution. The regulation is in response to a rapid increase in lawsuits during the past two years. Under the new regulation, agreements achieved in arbitration or mediation by administrative bodies, mercantile organizations and industrial groups will have the same force in law as those judged by Chinese courts.

This latest measure is yet another step in the direction towards the establishment of a more favorable dispute resolution environment in Asia. Indeed, arbitration continues to gain traction in resolving disputes in China. Just within the past year, the International Chamber of Commerce (ICC) opened a branch of the Secretariat in Hong Kong where it set up its International Court of Arbitration. The branch secretariat, the first in Asia, has a case management team to administer cases in the region under the ICC Rules of Arbitration.

In light of these recent developments, it is imperative for contracting parties to implement best practices in drafting China-related commercial contracts. While significant inroads have been made in the development of a more Westernized approach to dispute resolution in China, corporate counsel would be keen to carefully structure China-related commercial contracts to best safeguard against unexpected setbacks often encountered in nascent dispute resolution regimes.

In drafting an effective dispute resolution provision in this context, the most significant point is to agree to arbitration *outside* of China maximize the benefit of neutrality. While this point may seem obvious, many parties unfamiliar with Sino dispute resolution practices will assume that matters will be resolved under similar guidelines and principles adopted in a more familiar milieu.

Hong Kong and Singapore are the best regional alternatives to arbitrating a dispute in mainland China, as they are more closely aligned with the standards of leading European arbitration centers. Because it is a common-law jurisdiction and a part of the People's Republic of China, Hong Kong is uniquely positioned in international arbitration. As an arbitration venue, Hong Kong has benefited from the growing number of Chinese-related disputes arising from the surge of foreign investment rushing into Asia, and in particular China. Because it has kept its English common law-based legal system, foreign parties view Hong Kong as a more familiar and neutral forum for arbitrating commercial disputes. At the same time, Chinese parties regard Hong Kong as a culture-friendly venue due to its close proximity to the mainland.

In addition to negotiating an ICC arbitration in Hong Kong or Singapore, the other favored arbitral bodies in the region are the HKIAC arbitration in Honk Kong and the SIAC arbitration in Singapore. If it can be negotiated, another viable option is to arbitrate in one of the major European arbitration centers such as Zurich, Geneva, London and Stockholm.

Some additional best practices to consider are to keep the language of any arbitral provision as straight forward as possible and to be clear on the language that will govern the arbitration. Due

to the wide gulf in language and culture, doing so will minimize the likelihood for misunderstanding.

Trend to Watch: Look for Hong Kong to increase its profile as a **favorable seat of arbitration in Asia** for disputes involving China-related commercial contracts.