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The 'Big 3' of Chinese international arbitration

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Economic activity inevitably generates disputes, and economic activity between parties in China and the U.S. is no exception. But where should those disputes be resolved?

Resolution in the national courts of China or the United States often is not a viable option. There is no treaty compelling a Chinese court to enforce the judgment of a court in the U.S., or requiring a U.S. court to enforce the judgment of a Chinese court.

Hence, such disputes are increasingly resolved through binding arbitration under an international treaty known as the New York Convention of 1958, to which China, the U.S., and more than 140 other countries are parties. The resulting arbitration awards — unlike court judgments — are enforceable as a matter of right around the world.

So what are the options for arbitrating with Chinese parties?

Theoretically, one can arbitrate a dispute just about anywhere in the world. As a practical matter, however, most international arbitrations involving Chinese parties tend to take place in Asia, and tend to be administered by the "Big 3" of Chinese international arbitration:


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- The China International Economic and Trade Arbitration Commission (CIETAC; www.cietac.org);
- The Hong Kong International Arbitration Centre (HKIAC; www.hkiac.org); and
- The Singapore International Arbitration Centre (SIAC; www.siac.org.sg).

New case filings in the Big 3 have more than doubled in the last 10 years, with CIETAC handling the bulk of disputes. Many users of arbitration view CIETAC negatively, however. There are a number of reasons for this.

For example, Chinese law provides that arbitration proceedings that take place in China must be ad-

ministered by a state-approved institution, with CIETAC being the leading arbitral center headquartered in China.

Perhaps not surprisingly, therefore, the 2010 "Choices in International Arbitration" survey conducted by Queen Mary University of London and White & Case reported that, among the various arbitration centers, survey respondents had the most negative perception of CIETAC and two arbitration centers headquartered in the Middle East.

As might be expected, it is not unusual for non-Chinese parties to prefer a more "neutral" arbitration center and location. As a result, parties often compromise and agree to other Asian arbitration centers, with the HKIC and SIAC being the most popular alternatives.

The survey listed the SIAC as the most preferred arbitral association in Asia. Perhaps one factor influencing this preference in favor of the SIAC over the HKIAC is that many non-Chinese parties presume that, because Hong Kong is a Chinese territory, it may not be sufficiently neutral.

Our own view is that there is little evidence to support this presumption. Hong Kong maintains its own legal system and has an independent judiciary.

One example of this independence can be found as recently as 2011, when the Hong Kong courts enforced a multimillion-dollar award against a state-owned enterprise located in mainland China (*Shandong Hongri Acron Chemical Joint Stock Co. Ltd. v. PetroChina International (Hong Kong) Corp. Ltd.*, CACV 31/2011, July 25, 2011).

Nevertheless, analysis of new case filings suggests there is in fact a growing preference in favor of the SIAC over HKIAC. In the past four years HKIAC has experienced a 17 percent decline in new case filings, whereas the SIAC's caseload has increased 90 percent.

This trend in favor of the SIAC is not entirely surprising to us. Our own experience representing companies in the SIAC has been positive. The SIAC appears to administer international arbitrations in a manner that is consistent with the leading Western arbitration centers where we have defended and prosecuted claims.

How do parties provide for arbitration by one of the Big 3?

The starting point is using the model dispute resolution clause of the three institutions. The arbitration rules of each of the Big 3 specify default rules for how the proceedings will be conducted, but there are two important points to understand about institutional rules.

First, all are designed to provide the parties with maximum flexibility to tailor the process to fit their own needs. Second, precisely because the rules are flexible, it is up to each party to proactively consider and aggressively negotiate for whatever procedures are in its best interest.

What are those procedures? Much depends upon the type of deal and which side of the table the client is on.

Besides the arbitration center and location, some of the key provisions are:

1) Confidentiality of the arbitration;

2) Discovery rights;

3) Language of the arbitration; and

4) Number and qualifications of the arbitrators.

Unfortunately, it is common for lawyers drafting deals to treat the dispute resolution clause as an afterthought, which frequently has unintended and unpleasant consequences for the client.

Fortunately, the unintended consequences can be avoided with minimal effort and cost by having an experienced international dispute resolution expert involved early on in the negotiations. And for clients who routinely enter into international transactions, that expert can help develop a dispute resolution policy to guide future negotiations in these unfamiliar and sometimes treacherous waters.

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