

LITIGATION AND ARBITRATION IN CHINA (中国诉讼和仲裁实务指引)

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ABSTRACT

China is one of the world's most welcomed investment hot land. No international entities will pay no attention to their entry into Chinese market considering the huge Chinese consumers with strong consumption capabilities. While doing business with China, sometimes, disputes resolution is unavoidable to some extent. Foreign investors are not familiar with Chinese legal practice, especially on litigation or arbitration in China. This article will give a general picture for foreign investors to refer on how to effectively and legally resolve their commercial disputes in China through litigation or arbitration.

It tries every possible means to introduce the litigation and arbitration practice in China, particularly, analyzes the Chinese court structure and judges, jurisdiction, statute of limitation and legal procedures, enforcement of judgment, evidence rules, choice of law, local protectionism, necessity of engaging a local attorney and advice on arbitration as an alternative to litigation, then finally draws attention and conclusion to foreign investors what important factors and advices shall be considered in each procedure when litigating or arbitrating in China.

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I. Introduction

With the rapid development of China's economy within the last two decades, China has absorbed and utilized huge amount of foreign capital. Many foreign investors have been doing business with their Chinese partners or have made direct investment within

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China. However, the global economy is currently slowing down, and China is in no exception. Along with China's abundant utilization of foreign capital in the past and slowing down of the global economy in recent years, comes a sharp increase of various commercial disputes between foreign investors and their Chinese partners. Three alternative methods are available for foreign investors to resolve their disputes in China: mediation, arbitration and litigation. Mediation is conducted between the concerned parties on a voluntary basis and has no legal binding effect. Compared with arbitration, litigation is much stronger in protecting foreign investor's interests though it is more complex, unpredictable and time-consuming. This article tries to address some important things that foreign investors should know with regards to litigation or arbitration in China.

II. Chinese Court Structure and Their Judges

A. Court Structure

There are four layers of courts in China, namely (i) the Basic People's Court in each county and district of prefecture-level city; (ii) the Intermediate People's Court in each prefecture-level city and each provincial capital city; (iii) the Higher People's court in each province, autonomous region or municipality directly under the Chinese Central Government; and (iv) The Supreme People's Court.¹ Along with handling appeals from the higher people's court, the Supreme People's Court rarely accepts and hears cases as the court of first instance, but mainly functions an administrative role, particularly, issuing various juristic interpretations which have a legal binding effect on the lower courts. The threshold of the Higher People's Court in accepting and hearing cases as the court of first instance is relatively high, so the court mainly deals with appeals from the Intermediate People's Courts within the province. In China, more than 90% of the cases are accepted and heard by the Basic and Intermediate People's Courts. For historic reasons, the quality and experience of judges in different court levels vary greatly.

B. Judges

China has adopted a unified national bar examination system which means only those who pass the bar examination can qualify as a judge. However, this only applies to young judges after China adopted the aforementioned system in 2002. Before China

¹ Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] [hereinafter Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), arts. 17–20 (China).

adopted this system, many veteran judges entered into the courts, particularly the Basic People's Court and Intermediate People's Court from the army and were later promoted after years' practice in the court even though they did not receive any formal legal education. Even after China adopted the bar examination system, anyone with a bachelor degree, even when it is not in law, can take the bar examination. In some remote regions, the qualification has even expanded to three-year college graduates. Normally, to work as a judge in a people's court above the intermediate levels requires the candidate to pass the bar examination and have a master degree in law, and even a Ph.D. in law to become a judge in the Higher People's Court. The requirements are even higher for the courts in the coastal cities and the provincial capital city. However, in remote regions bar qualifiers are extremely rare. So the requirements in these regions are much easier to fulfill. Once an individual has passed the bar examination, regardless if the individual has a law degree or not, s/he is normally encouraged to work in the Basic or even Intermediate People's Courts in those remote regions. So, generally speaking, judges in a higher level court or in the coastal cities and the provincial capital city received more formal legal education and training and have more experience to deal with litigations involving foreign elements. However, comparatively speaking, judges in a lower level court or in remote regions are generally less educated, trained and have less experience to deal with foreign related litigation. Furthermore, just like most developing countries, local protectionism which will be addressed below is somewhat unavoidable in China, but such protectionism in coastal cities, provincial capital cities and municipality directly under the Chinese Central Government is relatively less influential compared to that of in lower level cities and remote regions. Therefore, the first important thing for foreign investors to consider before initiating legal action is to consider the level of the courts for jurisdiction.

III. Jurisdictions

In China, most cases fall within the jurisdiction of the Basic People's Courts. Particularly the revised Civil Procedural Law of the People's Republic of China [hereinafter PRC]² has greatly improved the thresholds of jurisdiction of the Intermediate and Higher People's Courts. After the revision, the Intermediate and Higher People's Courts will only accept and hear limited amounts of cases. In principle, those cases involving foreign elements which are complex or of which the disputed amount is huge and have material influence across the regions will be accepted and

² The Civil Procedural Law was revised by the Standing Committee of the National People's Congress on August 31, 2012 and took into effect on January 1, 2013.

heard by the Intermediate People's Courts.³ However, in 2002, the Supreme People's Court empowered the Basic People's Courts located in the economic and technology development zones approved by the State Council⁴ to hear foreign-related cases. In recent years, the Supreme People's Court has further extended such jurisdiction to other Basic People's Court in Dongguan, Guangdong Province, Yiwu, Zhejiang Province and Pudong, Shanghai, etc. In order to avoid strong local protectionism and get more experienced judges in higher level courts to hear the case, technically, it is advisable for foreign investors to try to increase the claimed amount to meet the acceptance thresholds by the Intermediate or Higher People's Court of which their practice varies from province to province. The disadvantage for such increase in claimed amount is that the plaintiff will have to advance more litigation fees to the court which shall be borne completely or mostly by the losing party.

Apart from jurisdiction by level of courts, another important factor foreign investors shall attach importance is the territorial jurisdiction. As a general principle, the plaintiff shall initiate the litigation with the people's court in the domicile of the defendant, including its business operation place.⁵ However, in some special cases, the jurisdiction will fall within the court where the infringement takes place. The places where infringement would take place include not only the places where the infringement acts have actually occurred but also any places where the consequences of infringement have occurred. In the event of a contract or property dispute involving a foreign party which has no domicile in China, if the contract is signed or performed within China, and the object of litigation is within China or the foreign party has any detainable properties or has a representative office within China, the Chinese court where the contract is signed or performed, the Court where the object of the litigation or the foreign party's detainable property or its representative office is located can have jurisdiction over such dispute.⁶

In the event that a foreign investor is sued by their Chinese partner, normally, the Chinese party will purposely choose a court with which they maintained favorable relations to initiate litigation, even though such court does not have proper jurisdiction

³ Civil Procedure Law art. 18 (China); Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa Ruogan Wenti de Yijian (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见) [Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China] [hereinafter Civil Procedure Law Opinions] (issued by the Supreme People's Court, July 14, 1992, effective July 14, 1992), art. 1 (China).

⁴ Zuigao Renmin Fayuan Guanyu Shewai Min Shangshi Anjian Susong Guanxia Ruogan Wenti de Guiding (最高人民法院关于涉外民商事案件诉讼管辖若干问题的规定) [Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Element] (issued by the Supreme People's Court, February 25, 2002, effective March 1, 2002), art. 1 (China).

⁵ Civil Procedure Law art. 21 (China).

⁶ *Id.* art. 265 (China).

over the case. In such occasion, the foreign party should pay close attention and immediately raise objection on jurisdiction within the time limit for submitting the defense paper in order to avoid such court continuing to hear the case.

The matter of jurisdiction is very complex, for which the Supreme People's Court has issued many interpretations to cover various situations. Strategically, jurisdiction is extremely important for both the plaintiff and the defendant and will even have a decisive influence on the final judgment. Therefore, it is advisable to consult with legal advisors to properly determine the proper jurisdiction before initiating or defending litigation in China.

IV. Statute of Limitations and Legal Procedures

A. Statute of Limitations

In most cases, Chinese law adopts a two-year statute of limitation calculated from the date when the plaintiff knew or should have known that his rights were infringed. After expiration of the statute of limitation, the concerned party may still initiate litigation; however, their claim will not be supported by the court if the other party claims that the statute of limitation for the case has already passed. Therefore, after properly locating the jurisdiction, the concerned party shall first consider whether the statute of limitation has already expired before formally initiating or defending such litigation. Otherwise it does not make any sense to advance with the procedures. Of course, in such occasion, the concerned parties may still get the disputes resolved through other means or remedy, such as negotiation, mediation or conclusion of a new agreement, etc.

B. Legal Procedures

1. Filing and Defense

To get the legal proceedings started, the plaintiff must first file a complaint with the People's Court having jurisdiction over the case. The main function of this filing is to start the procedures. The more detailed the complaint is, the defendant will have more chance to learn about the plaintiff's strategy and be better prepared. So technically, the complaint should be as simple as possible, but at least specifying information about the defendant, clear claims, factors and grounds as well as the basic evidence. After receiving the complaint, the People's Court will make a decision whether to accept the case within seven days by issuing an acceptance notice, along with an attached notice on producing evidence, or a refusal notice. If the Court decides to accept the case, the court

will serve the copy of the complaint to the defendant within five days upon acceptance, along with the same notice on producing evidence. The defendant shall submit a defense paper within 15 days (30 days for foreign defendant) after receiving the copy of the complaint. Failure in filing the defense paper does not affect the continuation and judgment of the court. If the defendant files a defense paper, the court will serve a copy of the defense paper within five days upon its receipt to the plaintiff.⁷ Both the plaintiff and defendant will have a 30 day limit for producing and submitting evidence after receiving the notice on producing evidence. Normally, the notice which the court serves to the plaintiff and defendant will specify an exact date for hearing the case.

2. Evidence Submission and Cross Examination

Both the plaintiff and the defendant shall produce and submit all evidence to the court within the court designated time limit for producing evidence. Generally, the evidence submitted after this time limit will not be reviewed and examined by the court, unless the producer has proper reasons for late submission which is also subject to court approval. Therefore, it is notable that foreign investors can file application with the court for late submission of evidence with reasonable grounds if it cannot submit evidence within the time limit. After both the plaintiff and the defendant has submitted all evidence, generally, the court will organize both parties to cross-examine the evidence. If both parties confirm and acknowledge the truthfulness and legacy of the evidence, the court will record this in the file and directly use them as the basis for judgment. If both parties have different opinions to the evidence during the cross examination, the court will further investigate and hear both parties' arguments during the hearing. Proper preparation for evidence is very important for a favorable judgment, which will be further addressed below.

3. Hearing, Appealing and Judgment

After the cross examination of evidence, normally, the court will promptly hear the case. In principle, the court will hear most cases publicly. However, either the plaintiff or the defendant may apply with the court not to publicly hear the case if trade secrets or privacy of either party is involved. In China, the case can be reviewed and heard by one judge or a three-member panel consisting of either all judges or judges and jurors. However, foreign-related cases are generally heard by a panel. During the hearing, the court will hear and get both parties to fully state the facts and its grounds. Apart from both parties' statements, the court procedure normally consists of two steps, (i) investigation (including further cross examination of evidence) purely focusing on matter of facts; and (ii) debate focusing on both matter of facts and matter of law application. After these two steps, the panel will internally discuss the case and then

⁷ *Id.* art. 125 (China).

issue a judgment. In most cases, the judgment cannot be expected on site during the hearing, but normally within one month after the hearing. Either the plaintiff or the defendant may appeal the case by initiating the second instance procedure, which is similar to the procedure in the court of first instance but relatively simpler, within 15 days for a Chinese party or 30 days for a foreign party upon receipt of the judgment if either of them is not satisfied with the judgment.⁸ Failure to appeal the case within the aforementioned time limit will result in the judgment taking into effect. Generally, unless extension is approved, the court will make judgment within six months after docketing for the first instance and within three months after the appeal is accepted for the second instance. However, such time limit is not applicable to foreign related cases.⁹ So, the law does not specify an exact time window for making judgment for foreign related cases. However, in practice, the court will make judgment within one year or six months after accepting the cases in the first and second instance, respectively.

4. Mediation

Throughout the whole procedure, the Chinese court attaches great importance to mediation. Both parties can mediate among themselves or request the court to lead mediation. The mediation statement, after confirmed by the court, will have the same effect as a judgment, which can be enforced immediately. However, the Chinese party often abuses this procedure to delay the proceedings. Mediation can be conducted before, during and even after the hearing. Mediation before the hearing will not affect the continuation of the proceeding if the mediation fails in the end. However, if the foreign party accepts a mediation request by the Chinese party during the hearing, normally, the court will cease the procedures to wait for the mediation result. In this sense, the Chinese party has achieved its purpose of delaying the case. Mediation after the hearing and before the judgment is also permitted and encouraged by the court, but this will not affect the court to make timely judgment when the mediation fails in the end. Therefore, strategically, foreign investors should be very careful in agreeing to a Chinese party's mediation request. It is advisable to accept mediation before or after the hearing, but not during the hearing in order to get the procedures forwarded as scheduled.

V. Enforcement of Judgment

A. General Requirement on Enforcement of Judgment

As mentioned above, the judgment made in the first instance will be enforced if

⁸ *Id.* art. 269 (China).

⁹ *Id.* arts. 270, 149, 176 (China).

both parties do not appeal the case within the stipulated time limit. The judgment made in the second instance shall be final and be enforced immediately.

An effective judgment, even made by the court of the second instance, shall be enforced by the enforcement agency of the court of the first instance which accepted and heard the case. The time limit for applying for enforcing an effective judgment is two years calculated from (i) the last day specified by the judgment for performance; (ii) the last day specified by the judgment for each installment of performance in the event of performance in installments; or (iii) the day when the judgment takes into effect if it does not specify the period of performance.¹⁰ Once the judgment is issued, the losing party will often move, hide or transfer its valuable property and assets beyond the reach of the enforcement agency. Therefore, it is advisable for foreign investors to immediately apply with the court to enforce the judgment when it is enforceable. To ensure enforcement, foreign investors should apply with the court hearing the case, a request for the defendant to provide appropriate security before or during the litigation in order to preserve the defendant's properties and assets.

B. Enforcement of Foreign Court Judgments

Judgment made by a foreign court cannot be directly enforced in China. When a foreign party has initiated litigation against its Chinese partner in a foreign court and obtained a favorable judgment from the foreign court, it shall apply with the Chinese court for recognition and enforcement of the judgment made by the foreign court. Unfortunately, China has not yet acceded to the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*. So compared with foreign arbitration awards, foreign court judgment is relatively difficult to be recognized and enforced in China. To get a foreign court judgment enforced in China, a petition shall be made by the foreign party directly to the Chinese Intermediate Court having jurisdiction or by a foreign court in accordance with international treaty or in reference to the principle of reciprocity. Existence of a treaty is not prerequisite to enforcing a foreign judgment if the principle of reciprocity is satisfied. After receiving the petition, the Chinese court has a wide discretion in evaluating whether to enforce foreign judgments according to international treaties into which China has entered, or by the principle of reciprocity. If the Chinese court determines that the foreign judgment does not violate the fundamental principles of Chinese law, sovereignty, national security, and public policies, then the court may rule on the recognition of the foreign judgment. If enforcement is required, the court will issue a court order to enforce the foreign court judgment.¹¹ When both China and the foreign country where the foreign

¹⁰ *Id.* art. 239 (China).

¹¹ *Id.* arts. 281–82 (China).

court judgment is made has not entered into or acceded into any international treaties and both countries have not established reciprocity relationships, the foreign party may have to institute a lawsuit with the Chinese court having jurisdiction thereof, which will make a judgment whether to enforce the foreign judgment.¹²

VI. Evidence Rules

A. Burden of Proof and Evidence Collection

When the case is accepted by the court, both the plaintiff and the defendant shall diligently prepare for all evidence. Most importantly, the preparation should satisfy the legal requirement. As a general principle, the concerned party shall bear the burden of proof to his claims.¹³ In most cases, the plaintiff shall bear the burden of proof to his claims, but this is not always the case. For instance, in a manufacturing method related patent disputed case, in which the plaintiff claims that the defendant has infringed the plaintiff's patent rights, the defendant shall bear the burden to prove that his method and technology for manufacturing the products is different from the plaintiff's patented technology and method.¹⁴ Principally, the concerned party shall collect evidence by themselves. However, for those evidence which the concerned party or its agent cannot collect due to certain objective reasons or when the court thinks it is necessary to adjudicate the case, the concerned party may request the court or the court will directly intervene and collect those evidence.

B. Forms and Legalization

In China, all evidence submitted to the court, even if it is a witness testimony, such as an affidavit, or physical articles, should be the original one. However, upon court approval, submission of duplications, photographs, copies, or extracts of the original evidence may be permitted when it is objectively difficult to present the original one.¹⁵ Most importantly, evidence formed overseas and even the power of attorney issued to Chinese attorneys by a foreign party, if they are executed overseas, they shall first be subject to notarization by a notary in the country where the evidence is formed or the

¹² Civil Procedure Law Opinions art. 318 (China).

¹³ Civil Procedure Law art. 64 (China).

¹⁴ Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [Provisions of the Supreme People's Court on Evidence in Civil Proceedings] [hereinafter Evidence Provisions] (issued by the Supreme People's Court, Dec. 21, 2001, effective Apr. 1, 2002), art. 4 (China).

¹⁵ Civil Procedure Law art. 70 (China).

power of attorney is executed. Furthermore, the notarization is to be further consularized by the Chinese embassy or consulate stationed in the country where notarization takes place.¹⁶ The evidence formed overseas, if not legalized through these two steps, will not be recognized by the Chinese party and the court even if they are objectively true. So the foreign party shall strictly follow these procedures. After getting all the evidence and documents formed overseas legalized, they shall be further translated into Chinese by a certified Chinese translation company and with each translated page stamped by the company if they are written evidence. Foreign party should speed up these formalities in order to not miss the time window specified by the court for submitting evidence. It is advisable for foreign party to get all evidence legalized before initiating the litigation even though the evidence can be submitted later.

C. Evidence Preservation

In order to assure the smooth continuation of the litigation, in such situations where the evidence is likely to be destroyed, lost or too difficult to obtain later on, the concerned party may apply with the court to preserve such evidence by providing certain securities. The court may also take initiatives to preserve such evidence when public interest is involved. In an infringement case where the infringer normally destroys evidence once their infringement detected, the plaintiff may request for preservation even before initiating the litigation. To some extent, evidence preservation is equally important as property preservation. Therefore, foreign investors shall examine the evidence and request preservation when the Chinese party is likely to destroy them.

VII. Choice of Law

Chinese court will have jurisdiction over a case when a Chinese entity or individual is a party to the case. In other words, when the foreign party sues or is sued by its Chinese partners, the Chinese court will always have jurisdiction over the case. In an infringement case, if the infringement takes place in China, Chinese court will also have jurisdiction over the case, and the Chinese law will be applied. However, in commercial transactions, when foreign investors do business and enter into a contract with their Chinese partners, the parties of such a contract may choose to have a foreign law applied with regard to the settlement of their contractual disputes, unless it is otherwise prohibited by law. If the parties fail in specifying the governing law in such a contract, the law of the country to which the contract is most closely connected shall be applied.

¹⁶ Evidence Provisions art. 11 (China); *Id.* art. 264(China).

A precondition in choosing a foreign law as the governing law is that the contract must involve a foreign element.¹⁷ Therefore, the understanding of the concept of foreign element to the contract is very important. The law keeps silent on the definition of foreign element, but the Supreme People's Court has clarified the definition of foreign element to a contract as including three situations: (1) at least one party involved in the contract is a citizen or a legal person of a foreign country; (2) the object matter in the contract is located within the territory of a foreign country; or (3) the civil rights and obligations are caused, modified, or exterminated by facts that occurred in a foreign country.¹⁸ However, unlike the U.S. common law system, China adopts the civil law regime where the precedent judgment of one court will not have legal binding effect on the other courts over similar cases. Therefore, to some extent, Chinese law is unpredictable. In addition, foreign investors are not familiar with Chinese law either. Foreign investors will be in an unfavorable position if the dispute is governed by Chinese law. So, in practice, most foreign parties prefers to choose foreign law as the governing law when it does business and enters into a contract with its Chinese partners.

VIII. Local Protectionism

Just like in most developing countries, in China, in most cases, local protectionism is somewhat unavoidable because of its special political regime. Unlike western countries, in China, the President of the Court is appointed by the local congress of the same level and his office term can be terminated by the congress at any time based on certain reasons. After the president has been appointed, then he will further appoint judges of the court. The president and his appointed judges do not have life tenure. Most importantly, they are paid by the local administrative government authorities. As judges are not independent from the local congress and government with regards to financial and personnel matters, the concern exists to some extent that the judge may follow the advice from the local government leaders. Normally, the local congress and government will protect the local interests, especially the interests of large state-owned enterprises and the Chinese private enterprises which are big tax payers. Thus, sometimes, it is somewhat difficult to win or enforce a favorable judgment for a foreign

¹⁷ *Zhonghua Renmin Gongheguo Hetong Fa* (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 126 (China).

¹⁸ *Zuigao Renminfayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Min Fa Tongze" Ruogan Wenti de Yijian* (最高人民法院关于贯彻执行《中华人民共和国民事诉讼法》若干问题的意见) [Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the "General Principles of the Civil Law of the People's Republic of China"] (issued by Supreme People's Court, January 26, 1988, effective January 26, 1988), art. 178 (China).

party against its Chinese partners.

Fortunately, China is increasingly paying attention to image and promises that it has made in the international community, and thus is gradually lessening local protectionism against a foreign party. At least, in formality, China is seeking for fairness for both the Chinese and the foreign party. Comparatively speaking, the legal system and practice in coastal cities and courts at higher levels are relatively fair compared to that in remote regions and courts at lower levels. In other words, local protectionism in coastal cities and courts at higher levels is relatively less. That is also the reason for foreign parties to try to get the disputes to fall within the jurisdiction of the court in coastal cities or at courts in higher levels. Another feasible solution for this is that the foreign party engages local attorneys who maintain good relations with the court and local government.

IX. Engaging Local Attorneys

Like other countries, China does not allow foreign attorneys to appear in the courtroom as an attorney-at-law. Only Chinese lawyers working for Chinese law firms may appear in court. When foreign entities or individuals need to engage attorneys for filing or responding to a lawsuit in a Chinese court, they shall engage Chinese attorneys-at-law only.¹⁹ When the foreign entities or individuals really want to engage a foreigner to represent them in dealing with their litigation matters within China, they may engage a citizen of their own country, an attorney-at-law of their home country not as an attorney (which means he cannot enjoy the same rights as the Chinese attorney does before and during the litigation), or a diplomat of their home country stationed within China in their personal names (no privilege enjoyable during the representation) as their agents.²⁰ Even though foreigners can be engaged, comparatively speaking, they do not maintain the same good relations with the judges and local government as Chinese attorneys have with authorities. Therefore, it is advisable for foreign parties to engage a qualified and experienced Chinese attorney-at-law to represent them in dealing with the court.

Since foreign related cases are very complex and all the relevant materials are in foreign languages, it is very important to engage an advocate who has experience in handling similar disputes and can communicate effectively in both Chinese and the language of the foreign party. Most importantly, such advocate should know the Chinese court practice and maintain good relations with the court and local government in order to deal with local protectionism.

¹⁹ Civil Procedure Law art. 263 (China).

²⁰ Civil Procedure Law Opinions art. 308 (China).

X. Arbitration as an Alternative to Litigation

In China, arbitration is an effective dispute settlement mechanism compared with litigation. In cases where the contracting parties choose arbitration to resolve their disputes, they have many options. They may choose arbitrators, while judges are not optional. They may choose the arbitration language, while language is not selective in the court proceedings. The working language in Chinese courts is Chinese, while foreign language is permitted as the working language in arbitration tribunals. They may also have the disputes arbitrated within China or abroad. Even within China, they may choose the arbitration tribunals while they cannot choose the court if the disputes are resolved through litigation in China. Most importantly, unlike litigation, the arbitration awards will be final and binding on the parties. In case of arbitration, the transaction contract must clearly stipulate that disputes arising therefrom shall be resolved through arbitration, unless the parties can agree on arbitration after the dispute has arisen (in practice, it is often difficult and impossible). Without an arbitration clause, the disputes will not be accepted by arbitration tribunals in China. In addition, a specific arbitration tribunal must be clearly stated in the contract; otherwise, the convention that the disputes shall be resolved through arbitration will be unenforceable under Chinese laws.

The most welcomed and frequently used arbitration tribunal within China by foreign investors is the China International Economic and Trade Arbitration Commission [hereinafter CIETAC] in Beijing. Recently CIETAC has handled many foreign related contractual disputes. As mentioned above, the contracting parties can also have their disputes arbitrated outside of China. As an alternative to CIETAC, the contracting parties can also specify an arbitration tribunal outside China, such as in Singapore, Stockholm, Geneva or Hong Kong or some other business centers. China acceded to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [hereinafter New York Convention] in 1987. Under the New York Convention, arbitral awards rendered in other signatory countries are recognized and enforceable in China. Therefore, arbitration awards made by the arbitration tribunal in other member states of the New York Convention can be recognized and enforced in China.

XI. Conclusion

With the global economy slowing down, foreign investors will see more and more disputes with their Chinese partners. Unlike the common law system, Chinese law is very complex and unpredictable. In addition, local protectionism will exist more or less. Therefore, the proper jurisdiction over the case by courts at a higher level or in coastal regions is the first important thing foreign investors should consider when initiating or

defending litigation in China. Proper preparation of all evidence and assurance of complying with Chinese law are extremely important for a favorable judgment. To prevent the Chinese party from destroying evidence and transferring valuable properties and assets after judgment, it is necessary to timely preserve the evidence and assets of the Chinese party. Thus, a foreign party should immediately apply with the court to enforce the judgment when it becomes effective. Since most foreign parties are unfamiliar with the Chinese law, it is strongly advisable for the foreign party to specify in the contract a foreign law as the governing law when doing business and contracting with Chinese partners. It is equally important to engage qualified and experienced Chinese attorneys who are familiar with Chinese court practice and maintain good relations with the court and local government to lessen local protectionism.

As an alternative, arbitration is more favorable and less time-consuming for foreign investors who may have many options in arbitration which are prohibited in litigation. When doing business and contracting with Chinese partners, it is strongly advisable for a foreign party to specify in the contract arbitration as a means to resolve their disputes.