China's Law system

Commercial Dispute resolution in China: Methods, peculiarities and results

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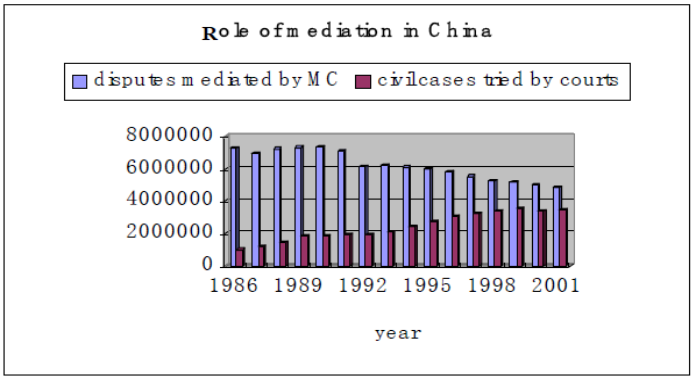
Introduction

As outlined in every paper written during the last decade about China, I will begin by emphasizing the spectacular growth of the Chinese economy.

The recent open policy of the Chinese market attracted numerous foreign investors and entrepreneur who tried to get a share of it. The increase of commercial relations naturally provoked an increase of commercial disputes. Another fact to take into consideration when talking about dispute resolution is that China is the country where the most cases are settled by peaceful methods[1]. Different factors can explain that situation : the culture[2] (fear of losing face, Confucianism, non-confrontational way of approaching the social life, and the social pressure[3]), the law which encourages mediation (Basic courts and public security organs, before accepting a case should inform parties about mediation), the adoption of a hierarchy in the dispute resolution methods[4], and finally a certain mistrust attitude towards courts.

However this feature of the Chinese behavior is decreasing over time as highlighted in the following chart[5].



This can be explained by the influence of foreign ideologies on Chinese traditional ones, or by a lack of insight of the benefits of mediation and conciliation, or simply by the result of an improvement of the judicial system.

We will first focus on the different methods of dispute resolution in China and explain their procedures. We will then emphasize the advantages and drawbacks of these methods in order to be in a position to draw conclusions concerning the Chinese situation.

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[1] CIETAC declared that half of the case they handled was resolved through mediation/conciliation. This number can go up to 88% when it is domestic disputes.

[2] "*Cultural aspect of trade dispute resolution in China*",Pitman B. POTTER, in Journal of Philippine Development Number 41, VolumeXXIII,No.1, 1996.

[3] As seen in the film « Story of Qiuju » by Zhang Yimou, 1992, where a pregnant woman has to face the village pressure to drop the case when she decide to file a lawsuit against a village's head after he physically injured her husband.

[4] Chinese Contract Law Article 128

[5] Chart issued from "*Alternative dispute resolution in China*", Phillipe Billiet, 2012 edition p.22

Methods of dispute resolution

Negotiation, consultation

Negotiation is made on a voluntary basis; it doesn't involve a third-party and does not create a legal liability. This method is used to solve a case out-of-court and sometimes as a preliminary step to other dispute resolution methods. The main advantage of negotiation is that the future relation is not damaged and can even be strengthen.

As an example of a successful negotiation we can mention the NATO bombing of 1999 of the Chinese embassy in Belgrade, killing several Chinese officials and injuring others. The US Government and the Chinese Government agreed on the payment of 4.5 million dollars to the family of the victims, to be paid as soon as possible and in one shot. While the US government agreed to pay, the Chinese Government agreed to give relevant information and receipts confirming the distribution.[6]

Mediation-conciliation

Procedure

Mediation and conciliation have the same purpose, but conciliation is often considered (in Europe) as more structured than mediation and based on fact-finding[7] . The conciliator makes proposition to the parties and has an active role in the process. The mediation is governed by the Chinese Mediation Act of 1th January 2011. We can note that in Chinese the word *Tiaojie* means equally Conciliation and Mediation. Moreover the missions of the mediator, as set in the Chinese Mediation Act, make us say that in China no difference exists between the two concepts.

We can classify Mediation/Conciliation in four groups: Civil Mediation which deals with divorce, inheritance, parental support etc; Administrative mediation which deals with civil and economic disputes and minor criminal disputes; Mediation in Arbitration corresponding to mediation conducted by an arbitration institution; Mediation in litigation or Court Mediation.

The Common procedure of Chinese Mediation is to address the dispute to a third party: the China Council for the promotion for international trade, the CIETAC or the CMAC; each organization using their own rules to help the parties solving their dispute. The mediation, as the negotiation, tends to protect the interests of each party without jeopardizing future relations between them by using non-confrontational methods[8].

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[6] Murphy (ed.), United States Practice in International Law, 1999-2001 (2002), 101. Cited in The Peaceful Settlement of International disputes", Ian Brownlie, in Chinese Journal of international Law 2009 vol 8

[7]" The Peaceful Settlement of International disputes", Ian Brownlie, in Chinese Journal of international Law 2009 vol. 8

[8] "*Alternative dispute resolution in China*", Phillipe BILLIET, 2012 edition.

An example of successful Mediation is the mediation process concerning the Russian beverage dispute (regarding IPR-use) where both parties settled the matter, reinforced their future relationship and obtained advantages regarding the distribution of their respective products.

Peculiarities of Mediation in China

The major difference between mediation/conciliation in China and in the rest of the world is that mediation/conciliation in China can be conducted by a court or an arbitration commission. Another difference is the creation in China of innovative form of mediation/conciliation to respond to the demand.

1. **Combination of arbitration and mediation** (Mediation within the Arbitration process): based on the free will of the parties, a right to mediation is provided even if the mediation is addressed to an arbitration institution. Indeed for each dispute that is referred to CIETAC[9] or CAMAC for arbitration, parties can jointly apply for mediation prior to the formation of the arbitral tribunal (Med-Arb) or at any time prior to the rendering of an arbitral award (Arb-Med). A Mediator from the panel of arbitrator, selected jointly by the parties, will be appointed to mediate the case or the Secretary-General (or Deputy Secretary-General) of the arbitral institution will conduct the mediation.

At the end of this process a conciliation statement can be rendered or a consent award. The major difference between the two stands in the enforceability. While a conciliation statement is binding when the party signed the receipt (letting a period where a party can change its mind and lead to the continuation of the proceedings until an award is rendered) a consent award is binding directly after its rendering by the tribunal. Moreover the award is enforceable by court and abroad thanks to the New-York Convention.

If Conciliation fails, the conciliator in charge of the case can be jointly appointed by the parties to become their arbitrator (even if it is in contradiction with the UNCITRAL rules). To guarantee the fairness of the arbitration and the impartiality of the arbitrator, any view, statement, and proposal made during conciliation cannot be invoked as a ground for any claim, defense or counterclaim.

[9] CIETAC 2012 rules Article 45

2. **Joint Mediation under international arbitration procedures**: When a foreign party and a Chinese party decide to use this mediation device, the Chinese party applies to CIETAC mediation organs whilst the foreign party applies for mediation at its national mediation organs. The two mediation commission will appoint mediators and mediate jointly. Each party trusts its own national institution which is the reason why this method tends to give high productive results.

3. **Combination of Mediation and litigation** (Mediation within Litigation)[10] : The People's court will conduct mediation on a voluntary and lawful basis. If the mediation fails the Court will render an award without delay. The procedure to notify or invite witnesses will be simplified. The mediation will be conducted by a unique judge or by a panel and has for objective to reach a mediation statement. It allows to solve disputes on a voluntary basis and amicably, and for the government to reduce litigation, to save judicial resources and to promote stability.[11] Anyway the free will is sometimes challenged to reach a final agreement as the judge can use his power to influence or "force" the settlement.[12]

[10] Chinese Civil Procedure Law Chapter VIII
11 "Alternative dispute resolution", Philippe Billiet, edition 2012, p.23
[12] *"Commercial Mediation in China: The Challenge of Shifting Paradigms"* By F. Peter PHILLIPS

Arbitration

Procedure

Arbitration is indicated for commercial disputes arising from contracts or property rights[13].

The arbitration is based on different principles[14]: the party autonomy; the denial of court jurisdiction and the level when there is a valid arbitration agreement; the independence of the arbitration commission; the autonomy of the Arbitration agreement from the contract, and the finality of the arbitral awards.

The arbitration is only possible if a valid arbitration agreement or clause exists[15], and it should have a written form as defined in the Chinese arbitration Law. It is an exception to the Article 10 of the Chinese Contract Law which states that a contract does not need to meet any formal conditions to be binding.

Arbitration is conducted by Arbitration institution recognized by the Chinese Government[16]. The most famous are CIETAC and CMAC. The arbitration institutions arrange the administrative details and have a panel from which the parties can select and appoint one arbitrator for their case (Since 2005 also arbitrator from outside the CIETAC panel can be appointed[17]). All the services rendered by the institution to facilitate the settlement have a cost, from the arbitrators' salary toother fees as travel expenses, accommodation, special remuneration, etc. Arbitration can rapidly become much more expensive than the amount of the claim[18].

The confidentiality is ensured (as for mediation and conciliation) thanks to the Conciliation Rules of the China Council for the Promotion of International Trade and the China Chamber of International Commerce[19].

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[13] Chinese Arbitration Law Article 2 and , September 1995

[14] *"Arbitration in China: Practice, Legal Obstacles and reforms",* in ICC Bulletin vol19/No.2 2008, by Fan Kun, p.26

[15] Chinese Arbitration Law Article 4

[16] Ibid. Article 10-15

[17] CIETAC rules Article 24 (2)

[18] Ibid article 72

[19] Ar.26 CCPIT, Ar. 36 CIETAC

Peculiarities of Arbitration in China

1. **The Arbitration is divided in three categories**: Domestic, Foreign and Foreign-related. A foreign – related case is a case where:" *the person is a foreigner, a stateless person or a foreign legal person, the matter of the dispute is located in a foreign country, the breach to the contract occurs in a foreign country*".

The difference in the treatment of the cases is made on this basis. For examples 7 reasons can be invoked to deny exequatur of a Domestic awards: (1)No arbitration clause or arbitration agreement;(2)Matters determined in the award are out of the scope of the arbitration body authority or the arbitration agreement;(3)The formation of the tribunal or the conduct of the arbitration was not in conformity with the procedures that had to be applied;(4)No sufficient evidence to ascertain the facts;(5)Incorrect application of the law;(6)Corruption of an arbitrator;(7)The award is contrary to Chinese public policy.

For a Foreign-related awards only 5 reasons can be invoked : (1)No arbitration clause or arbitration agreement;(2)Matters determined in the award are out of the scope of the arbitration body authority or the arbitration agreement; (3) The formation of the tribunal or the conduct of the arbitration was not in conformity with the procedures that had to be applied;(4)The losing party was not notified to appoint an arbitrator or to take part in the proceedings, or to express his opinion;(5)The award is contrary to Chinese public policy.

It can be noted that a foreign (or foreign-related) case will be revised on limited procedural issues, while a domestic case will be reviewed on its form and on its substance.

Moreover for foreign and foreign-related award the People's Intermediate tribunal has to transmit its decision to refuse the enforcement to the High People's Court for approval. Then, the High People's Court will have to report to the Supreme People's Court for approval. This prior reporting system limit the power of the Intermediate People's Court as the Intermediate Court can deny exequatur of the award only with the consent of the Supreme People's Court.

2. **The Ad-hoc arbitration** is a type of arbitration between parties without the help and service of an arbitration institution. This cost saver method is impossible (and even illegal) in China as the name of the arbitration commission has to be clearly mentioned in the arbitration agreement to be considered as valid. [20]

However, the New-York Convention signed by China gives the possibility to foreign award resulting from ad-hoc arbitration to be recognized and enforced in China.

3. **The doctrine of competence-competence**[21] is not completely implemented as the power to decide on jurisdiction does not lie on arbitration tribunal but with the courts and arbitration institutions. Moreover the article 20 of the Chinese Arbitration Law gives precedence to the People's Court over the Arbitral institution in the case where a party challenges the jurisdiction at court as long as the arbitral institution has not yet rendered an award. In that case the arbitral institutions receive a notice to stop all legal prosecution and wait for the people's court decision. It means that the court has a direct power to decide whether an arbitral agreement is valid or not and not indirectly by way of judicial review after the decision of the arbitral tribunal.

4. **The Arbitral tribunal cannot rule over the validity of an arbitration agreement**[22], only the arbitration institutions have that power through a prima facie assessment.

This system can also lead to delay tactics from a party, as the tribunal will have to wait until the arbitral institution has rendered a decision before continuing the arbitration procedure.

[20] Ibid.Article 6 and 16

[21] Doctrine suggested in Article 16 of the UNCITRAL Model Law

[22] The CIETAC adopted a new rule to possibly allow arbitration tribunal to decide on their own jurisdiction (article 6 of CIETAC 2005 rules) on the basis of a delegation of power granted by the institution.

Litigation

Procedure

The procedure of Civil Litigation is set out in the Civil Procedure Law of 1991.

The Chinese judicial system is pyramidal. There is the Supreme People's Court (最高人民法院) based in Beijing, the High People's Court (高级人民法**院**) based in each provinces and autonomous regions, the Intermediate People's Court (中级人民法**院**) based in each city, and the Basic People's Court (基层人民法**院**) based in various districts. Special Courts also exist as the Maritime, Military or Railway courts.

The following basic principles[23] apply to litigation: the reciprocity; the independence; facts finding, proper application of the law; Native language use (in the contextof Chinese minorities, autonomous regions etc… for foreign-related litigation case the foreigner bear the obligation to translate the documents in Chinese and Mandarin Chinese will be used in courts).

In this context of the court organization it is challenging to determine the jurisdiction[24.] This determination is based on territorial rules (domicile of the defendants or habitual residence, in certain case plaintiff residence, or specific rules for specific situation as contract, tort or assurance) or on the Court level (the Intermediate court deal with significant or major case regarding foreign parties, the SPC deals with cases of a national level, the HPC deals with great cases of a local importance…).

The general timeframe rule to initiate civil actions is two year after noticing the breach (exceptions exist and under the Contract law a dispute arising from an international sale of goods benefits of a four years' timeframe to enter into litigation[25]). It is important to note that most of the time the litigation process will be applied to merely end the relation between parties and no future business will be done between parties. As a matter of fact, litigation is about determining a winning party and a losing party in an adversarial way.[26]

[23] Chinese Civil procedure Law Chapter I Articles 4 -15
[24] Chinese Civil Procedure Law Chapter II
[25] Chinese Civil Procedure Law Article 215, exceptions falls under Chinese Civil Procedure Law ar.135-137.
[26] "*Alternative dispute resolution in China*", Phillipe BILLIET, 2012 edition.P.22

Peculiarities of litigation in China:

1. **The intervention of the courts in arbitration process:**

- Enforcement or annulment of an arbitration process;
- Establishment of the jurisdiction by reviewing the Arbitration agreement, in property preservations measures[27](this is to to avoid degradation of the right and interest of one party by another plaintiff in case the execution of the judgment become impossible);
- Preservation order (where evidence can be destructed or disappear[28]);
- Advanced executions (in urgent situations and when the defendant is capable to fulfill its obligation and the non-execution in advance would seriously endanger the livelihood or production of the applicants).

2. **The courts are not fully independent** from the provincial authority as they select the judges, pay their salary and pay the functioning costs of the courts[29].

3. **Only lawyers based in China can plead before a Chinese court**. The international plaintiffs or defendant cannot bring their well trusted lawyers[30.]

4. **There is no common Law in China, and no "doctrine of precedents" or "stare decisis":** There is no obligation to publish or render public the courts decisions. Only the Supreme People's Court publishes the ruling to be used as a legal source by other courts[31].

[27] Chinese Civil Procedure Law article 92-99
[28]Chinese Arbitration Law Article 46
[29] "*Alternative dispute resolution in China*", Phillipe BILLIET, 2012 edition.P.15
[30] Chinese Civil Procedure Law Article 241
[31]" *Alternative dispute resolution in China*", Phillipe BILLIET, 2012 edition.pp.15-16

Conclusion

After reviewing each method and underlining the very peculiarities of the Chinese system, we can note that the choice of the method to solve a dispute is deeply linked to the results the parties are looking for.

If the parties give priority to the relationship they created and want to strengthen it on a long-term, they will probably opt for negotiation or mediation over arbitration and litigation as we noted that arbitration and litigation were more likely to damage permanently the relations.

Another criterion to take into consideration is the need for international recognition. While arbitration awards fall under the New-York Convention of 1958 which ensures the reciprocal recognition of arbitral award for signatories of the Convention, no specific Convention signed by China recognizes foreign Court decision.

Other criterion that can also be considered are: the length of the procedure, its cost-benefit compared to the amount of the claim, the need of confidentiality, the knowledge of the system and the confidence put in the system.

Facts as the impossibility for an international lawyer to plead in Chinese Court, the dependence of the court to the local government can explain why foreigners shy away from litigation in China. The cultural aspect and also the difficulty to determine jurisdiction are additional reasons which can explain the Chinese tendency to try to avoid Chinese Courts.

Finally Arbitration is often preferred by foreigner over litigation because it offers confidentiality and transparency; also the marketing around arbitration is giving an image of expertise, facility and simplicity when compared to the Chinese litigation. The cost occurred by such a procedure is still very high even if the total amount of the procedure can be recovered by the “winning” party.

By giving the opportunity to combine arbitration and mediation or litigation and mediation, the Chinese dispute resolution system is unique and gets the best results as far as dispute settlements are concerned.

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