The Wisdom behind the Selection of Chinese Institutions

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As discussed in the first post in our series, the Chinese arbitration system has matured over the last several years. Foreign parties should favor arbitration clauses in their China deals. Even so, this brings us to yet another question. Should a dispute resolution clause for a China-centered contract select a China-based institution to host the arbitration? Or should a non-Chinese party instead take refuge with regional offshore powerhouse institutions?

Answers will of course vary according to the contemplated contract's particular circumstances. Nonetheless, Chinese arbitration institutions offer two clear advantages. Chinese courts will facilitate China's institutional interim measure requests. Also, Chinese institutions offer international service without the cost premium. We explore how these advantages each can impact a dispute. We book-end the advantages with reassurances that Chinese institutions offer truly international arbitration.

Chinese Institutions handle numerous Foreign-Related Cases

In the year 2016, Chinese arbitration institutions handled approximately 1,500 genuine[1] foreign-related cases. Guangzhou Arbitration Commission handled roughly a third of these arbitrations. The rest were split among CIETAC, BIAC, SHIAC, and SHAC (Shanghai Arbitration Commission). Hangzhou and Nanchang's Commissions also hosted more than 50 foreign-related cases.

Our firm is particularly familiar with the practice of CIETAC, BIAC, and SHIAC. All three have modern rules systems updated in 2015. Each includes some form of Joinder and Consolidation. None prohibit document production. BIAC and SHIAC only default to summary procedure when the amount in dispute falls at 1 million RMB or under. CIETAC's summary procedure applies even in amounts as high as 5 million RMB.

[1] We only count disputes reaching beyond Hong Kong, Taiwan, Macau. If these jurisdictions are included, Chinese arbitration institutions handled over 3,000 foreign-related cases.

The Advantages

China's leading institutions offer two primary advantages over respected off-shore center competitors. First, China's judicial system allows only China-based institutions to facilitate preservation and interim measures within China for commercial arbitration cases at present. Second, China's leading institutions offer more affordable rates than regional off-shore competitors. We recommend seriously considering using China's leading institutions as long as either of these two considerations are important to the dispute resolution needs in your contract.

Interim Measures

Of all these factors, interim measures should be at the top of the list. Might it be necessary to freeze Chinese bank accounts to protect collection following an award? Is it conceivable that the Chinese party will hold critical evidence such that a preservation order might be advisable? If either may become a possibility, choose China. As long as Chinese institutions administer the case, itself seated in China, it will be much more convenient to apply interim measures. A China-seated and -administered arbitration removes the primary obstacle for a foreign party which seeks interim measures against a Chinese party. If the arbitration happens outside China, Chinese courts regularly decline to grant interim measures. The difference is quite stark. Interim measures include a broad array of remedies. The term embraces almost all remedies beyond money damages. Essentially, offshore institutions will serve well as long as your enterprise only desires an award of money damages. Otherwise, regard selection of a China institution with some seriousness. Disputes are unpredictable in character. They can involve many unforeseeable contingencies. One should only surrender the option of interim measures if other compelling reasons favor selection of an offshore institution.

Lower Costs

Costs can emerge as a concern for moderate-value contracts. As a practical matter, institutional costs come in the form of both the commission's fees and arbitrator fees. A sizeable number of meritorious cases settle before the awards stage. As such, amicable resolution may result in each side bearing their costs. In general, the higher

the amount of the subject contract, the more attractive an offshore "arbitration hub" premium service appears. Nevertheless, rarely does it behoove parties to a million dollar USD contract to pay the premiums necessary for Geneva or Singapore's excellent service. CIETAC, BIAC, and SHIAC offer competitive filing rates. Additionally, respondents only pay fees upon filing counter-claims. A prospective foreign respondent has minimal upfront exposure under Chinese arbitration pricing.

Furthermore, the rates for Chinese arbitrators at Chinese institutions remain competitive with their Singapore, Hong Kong, and even Korean peers. Chinese arbitrators in foreign-related cases charge fees more commensurate with their domestic peers. And they are every bit as qualified for international practice.

Qualified International Arbitrators

The CIETAC Panel List encompasses 410 foreign arbitrators from 70 jurisdictions. Parties agree to the Panel List upon selection of CIETAC, and yet they may appoint arbitrator off the panel list as long as both parties agree to do so. Chinese national arbitrators offer multiple language fluencies between them, and almost all bear strong English language skills.

The chairperson issues the procedural order and runs the procedure. Therefore, a foreign party desirous of an arbitration with common law characteristics may request a foreign arbitrator as chairperson to balance national representation on the panel. The most effective strategy for a foreign party will be to appoint a Chinese national and allow the selected institution to choose a foreign national chairperson.

Conclusion: Trust in Chinese Arbitration

A dispute resolution clause may select an institution from an array of jurisdictions. Obviously, the best selection will depend on a variety of factors specific to the transaction. Even so, a wise choice will contemplate Chinese arbitrations for China-related contracts with seriousness. Years of Chinese development and local support has rendered as outdated reflexive aversion or heuristic suspicion of Chinese arbitration, if such fears ever held justification at all. In any case, we offer two advantages of mainland arbitration. Chinese institutions can implement interim measures since they have the support of Chinese courts. And Chinese institutions offer substantial cost savings without any practical compromise as to the international

character of proceedings. Premium offshore service institutions have their place, but more contracts could benefit from the selection of China institutions.

In the subsequent installment in this series, we will discuss how to tailor arbitration clauses to best effect. Selection of the seat and the law of the arbitration also remain critical decisions. Model clauses are a starting point, but not the end, to forum and rules selection.

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