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Arbitration of International Commercial Disputes in China on the Rise

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Unique challenges and procedures impact U.S. litigators

Like the economic power of China itself, commercial arbitration in China [PDF] is expanding at a rapid pace. Litigators from the United States are facing the increasing possibility of having to arbitrate their clients' business disputes with Chinese companies in China, under unfamiliar rules and procedures.

David T. Miyamoto, Los Angeles, a member of the Section of Litigation's International Litigation Committee and the moderator of a recent CLE teleconference, "China: The New Frontier in Arbitration," describes China as an "increasingly important and perhaps the most dynamic player in the global economy." Recent statistics "reflect a massive increase in cross-border trade and foreign investment in China. As all attorneys know, where there is business, there will inevitably be disputes," Miyamoto states. "In today's China, arbitration is the most common method for resolving foreign-related disputes."

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Ariel L. Ye, Beijing, a litigator experienced with arbitration in China and one of the panelists for the teleconference, discussed traps for the unwary foreign practitioner who seeks to enforce an arbitration agreement in China [Word document]. She gave the example of a litigator from the United States who recently attempted to arbitrate a dispute between a U.S. company and a Chinese company that had previously agreed to arbitrate any dispute arising out of the parties' contract. That agreement turned out to be unenforceable in China, however, because it failed to specify the name of the arbitration institution that would resolve a resulting dispute.

According to Ye, the best known arbitration institution in China is the China International Economic and Trade Arbitration Commission (CIETAC). If one party to a contract is a foreign entity, the parties can also agree to arbitrate a dispute in Hong Kong with the Hong Kong International Arbitration Centre (HKIAC) or one of many other arbitration institutions set up in China.

Based upon recent statistics, Ye noted that CIETAC "deals with almost double the number of cases conducted before the American Arbitration Association" and has become "the most active arbitration institution in the world." She stressed, however, that U.S. litigators should be aware of "major features that make CIETAC different from major Western institutions."

For example, in a CIETAC arbitration, the arbitrators are generally required to be members of the CIETAC panel. Ye explained that the panel includes almost 500 arbitrators for foreign-related disputes and that CIETAC must give special permission to appoint an arbitrator who is not on its approved list. CIETAC also bases its arbitration fees on a percentage of the amount in controversy, which means that its fees can be quite large for substantial cases.

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According to the conference panelists, the choice of an arbitral institution will be a function of parties' relative bargaining power. Ye noted that benefits from using CIETAC include efficiency, cost-effectiveness for cases involving smaller claims, and a higher success rate for enforcing arbitral awards in China. Even so, she also identified potential risks that include CIETAC's relative inexperience in complex commercial cases, large fees in cases involving substantial claims, and somewhat rigid procedures regarding the appointment of arbitrators.

Ye also pointed out that it is important for foreign entities to realize that broad discovery, which U.S. litigators might expect, is not available in China. She warned that if a party to a business transaction failed to make or preserve documents regarding the transaction, the parties would be unable to rely on discovery to obtain any missing materials.

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