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# CHINESE METHODS FOR SETTLING ECONOMIC DISPUTES CONCERNING FOREIGNERS AND THEIR LEGAL BASES†

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Translation by Godfrey Lam‡ and Neil Meyers‡‡

*Abstract:* This translation of an original Chinese language work by Xiao Yongzhen discusses the legal authority Chinese courts rely on in addressing economic disputes arising from foreign investment and joint-venture agreements in the People's Republic of China. The translation details specific legal mechanisms used in China, as well as distinct Chinese legislation and practices relied upon to amicably resolve contractual disputes between private parties involving foreign interests in China.

*Translators' Introductory Note:* The style of Chinese law review articles differs somewhat from that of American law reviews; therefore this translation should be read with those differences in mind. Chinese law review articles tend to be more expository rather than analytical as compared to American law reviews. Writing in the context of a civil law system, Chinese legal scholars rarely cite case law as authority. Constitutional and statutory authorities are commonly cited within the text of the article rather than through footnotes. The original text of this article does not contain any footnotes. Footnotes have been added by the translators to clarify or explain certain ambiguities in the text, provide specific citations, and to offer further information.

## I. LEGAL AUTHORITY FOR RESOLUTION OF ECONOMIC DISPUTES INVOLVING FOREIGN INTERESTS IN CHINA

During the past decade, China achieved great progress in the establishment of its legal system. In fundamental aspects of its political, economic, and social life, China is no longer without law but now has laws to follow. A socialist legal system based on the Constitution has already begun to take shape. As the Chinese socialist legal system has developed and the legal environment for foreign economic and trade activities in China has been improved, the legal authority for China's resolution of economic disputes involving foreign interests has become more systematic and complete.

First, the relevant provisions of the Chinese Constitution contain the

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† 2 Studies In Law (Faxue Yanjiu) 79 (1991).

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‡‡ B.A., 1985 Brandeis; J.D., Rutgers; LL.M., 1992 University of Washington.

legal authority for resolution of economic disputes. Article 18 of the Constitution provides:

The People's Republic of China (P.R.C.) permits foreign enterprises, other foreign economic organizations, and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other economic organizations in accordance with the law of the P.R.C. . . . all foreign enterprises and other foreign economic organizations in China, as well as joint-ventures with Chinese and foreign investment located in China, shall abide by the law of the P.R.C. Their lawful rights and interests are protected by the law of the P.R.C.

Article 32 of the Constitution also provides, "the P.R.C. protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory, foreigners must abide by the law of the P.R.C." To further the development of reforms and open policies, the First Session of the Seventh National People's Congress in April 1988 approved the amendments to the Constitution. These amendments have significant implications for the development of Sino-foreign economic cooperation. For example, Article 10 of the amended Constitution provides, "the land-use right may be assigned in accordance with the provisions of the law." This is an important reform of the national land system, and undoubtedly provides greater opportunities for foreign investment activities in China. These constitutional provisions are the foundation and the pillars of Chinese legislation concerning foreign interests. These provisions are also the basic principles of, and the starting point for, the legislation and practice of resolution of economic disputes involving foreign interests in China. These provisions are the fundamental guarantee of just, reasonable, and appropriate resolution of economic disputes involving foreign interests in China.

Second, Chinese law guarantees foreigners (natural and legal persons) the same status before the law as Chinese citizens or legal persons for resolving economic disputes through litigation, arbitration, etc. This is so in the application of both substantive and procedural law, unless otherwise provided by law. Article 186 of the Civil Procedure Law of the P.R.C. (Provisional) provides, "Foreign nationals or stateless person initiating or responding to legal actions in the people's courts shall have the same litigation rights and obligations as citizens of the P.R.C."<sup>1</sup> There is even a specific

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<sup>1</sup> [Translators' Note] The provisional law has been replaced by the Code of Civil Procedure of the

chapter in that law which provides corresponding rules for arbitration and litigation procedures involving foreigners which are equally applicable to both the Chinese and the foreign party to the dispute.<sup>2</sup> Article 71 of The Law of the P.R.C. on Administrative Litigation which took effect October 1, 1990, also clearly provides, "[a] foreign national, stateless person, or foreign entity which is a party to an administrative case shall have the same rights and obligations of litigation as a citizen or an entity of the P.R.C." Article 8 of the P.R.C. General Principles of Civil Law also provides: "[t]he provisions of this law with regard to citizens shall apply to foreign nationals and stateless persons within the territory of the P.R.C."<sup>3</sup> The General Principles contain one chapter of nine articles which provides clear rules for addressing the question of applicable law in civil law relations involving foreign interests. According to these provisions, the applicable law may be Chinese law, foreign law, international treaties concluded or acceded to by China, or customary international practice. These provisions are just, reasonable, and extremely important for the resolution of economic disputes.

Third, of the more than ninety economic laws and regulations involving foreign interests enacted during the past decade, many specifically include provisions addressing foreign economic disputes. For example, the Law of the P.R.C. on Sino-foreign Joint Equity Enterprises and the Law of the P.R.C. on Chinese-Foreign Cooperative Enterprises both contain provisions concerning the resolution of disputes through negotiation, mediation, arbitration, and adjudicatory procedures. Procedural rules and regulations of the Income Tax Law of the P.R.C. for Chinese or Foreign Equity Ventures and of the Income Tax Law of the P.R.C. for Foreign Enterprises, all have provisions concerning the resolution of tax disputes through an application to higher tax authorities for reconsideration or through the initiation of a lawsuit.<sup>4</sup> The Foreign Economic Contract Law of the P.R.C. not only provides for such methods of

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People's Republic of China (effective since April 9, 1991). Article 5 of the Code provides, "A foreign national, stateless person, or foreign enterprise or organization initiating or responding to legal action in a people's court shall have the same litigation rights and obligations as a citizen, legal person or other organization of the People's Republic of China."

<sup>2</sup> [Translators' Note] Chapters 24 to 29 of the Code of Civil Procedure contain special provisions governing procedure for civil actions involving foreign interests.

<sup>3</sup> [Translators' Note] The actual text of the law continues: "unless the laws stipulate otherwise."

<sup>4</sup> [Translators' Note] This is an economic administrative dispute between parties of different status. The author is drawing a distinction between an economic dispute between parties who are both economic actors and a dispute between an economic actor and a governmental administrative authority. Both income tax laws have been repealed and replaced by the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises as of July 1, 1991. Article 6 of the new law has similar provisions.

dispute resolution as negotiation, mediation, arbitration, and litigation in a separate chapter, but also provides in its general principles:

[t]he parties to a contract may choose the law to be applied to the settlement of the disputes arising from the contract. In the absence of such a choice by the parties, the law of the country which has the closest connection with the contract applies. Chinese-foreign equity joint-ventures,<sup>5</sup> contracts for Chinese-foreign cooperative enterprises, and for Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of the P.R.C., shall be governed by the law of the P.R.C. The international practice may apply where no relevant provision is stipulated in the law of the P.R.C. (Article 5).

These provisions have a direct significance for the appropriate handling of relevant economic disputes involving foreign interests.

Fourth, international treaties concluded or acceded to by China also form an important basis for resolution of economic disputes involving foreign interests in China. These international treaties are ratified through legal procedures and have force of law in China. The Civil Procedure Law of the P.R.C. (Provisional), General Principles of Civil Law, Foreign Economic Contract Law, and the Law of the P.R.C. on Administrative Litigation all provide that in the event of a discrepancy between the terms of an international treaty concluded or acceded to by the P.R.C., and Chinese domestic law, the terms of the international treaty should be applied (except terms to which China has declared reservations). Of the treaties concluded or acceded to by China, over fifty concern adjudication and arbitration. These include, for example, The United Nations Convention on Contracts for the International Sale of Goods, The Paris Convention for the Protection of Industrial Property Rights, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [The New York Convention]. In addition, China has signed twenty-seven bilateral agreements for the protection of investments with twenty-eight countries, the majority of which contain provisions concerning the resolution of investment disputes between one contracting state and citizens of the other contracting state. These agreements also address economic disputes between parties of different status. For example, some agreements protecting investment

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<sup>5</sup> [Translators' Note] Under P.R.C. law, a joint venture enterprise may be formed as either an equity joint venture or a contractual joint venture.

expressly provide that a solution to a dispute should first be sought through consultation and negotiation. If the dispute cannot be resolved within a set period of time, then: (1) either party may bring a suit before the court or administrative department which has jurisdiction under the law of the country in which the investment is located, or (2) if the dispute concerns compensation for nationalization or expropriation of the investment, the dispute may be submitted to arbitration by mutual agreement. In some cases, agreement by both parties concludes where both parties are from member states of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [The Washington Convention]. Any dispute may be submitted to "The International Center for the Settlement of Investment Disputes" [the International Center] for resolution according to the conditions in effect when the host country became a member state under the treaty. Alternatively, the parties may agree to negotiate which investment disputes to submit to the International Center for mediation or arbitration. The parties may also reach a supplementary agreement concerning the type of disputes which may be submitted to and the manner of proceedings which may be used by the International Center in carrying out arbitration and mediation.

In 1987, China acceded to the 1958 New York Convention concerning the recognition and enforcement of foreign arbitration awards. China also formally applied for membership in GATT, carrying out over four years of negotiations concerning tariff reduction and concessions. China entered "The Convention Establishing the Multilateral Investment Guarantee Agency" in 1988,<sup>6</sup> and signed the 1965 Washington Convention in 1990. Furthermore, China is ratifying the necessary domestic legal procedures in order to join the International Center. China has substantially demonstrated that it fully accedes to international practice for resolution of economic disputes.

In conclusion, as far as resolution of economic disputes involving foreign interests are concerned, the Constitution, The Civil Procedure Law of the P.R.C. (Provisional), The Law of the P.R.C. on Administrative Litigation, the General Principles of Civil Law, important economic laws and regulations involving foreign interests, and the international treaties concluded or acceded to by China, demonstrate that China possesses a relatively systematic and complete legal base which guarantees a just, reasonable, and appropriate resolution of economic disputes.

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<sup>6</sup> [Translators' Note] China entered the Convention under the auspices of the World Bank.

## II. CHINA'S PRIMARY METHODS FOR RESOLUTION OF ECONOMIC DISPUTES INVOLVING FOREIGN INTERESTS

As provided by the laws and regulations of China, and according to many years of practice, there are four principal methods for the resolution of economic disputes involving foreign nationals in China: negotiation, mediation, arbitration, and litigation.

### A. *Negotiation*

Amicable negotiation takes place between the parties to the dispute. We advocate that the parties should in the spirit of mutual understanding and compromise, distinguish right from wrong, eliminate differences, and settle the dispute with the goal of friendly cooperation. Even if future cooperation is impossible, the parties should part on good terms. This is one of the traditional methods of dispute resolution among the Chinese people. There is a saying in Chinese, "harmony is most valuable" (*heweigui*). Of course, this "harmony" must be based on the principles of reasonableness, lawfulness, equality and mutual benefit. There are numerous examples of resolving conflicts in this manner. Of the more than fifteen thousand Sino-foreign equity joint-ventures and cooperative enterprises in China, the majority are doing well or reasonably well. According to a survey of seventy equity joint-venture manufacturers conducted by an American management information firm<sup>7</sup> and the China International Trade Research Institute, fifty percent of them have achieved investment results exceeding their originally anticipated profit levels, forty-four percent have achieved their anticipated profit levels, while only six percent have failed to reach their targets. This is not to say that there have not been any disputes or disagreements between the Chinese and foreign parties to the successful enterprises. But rather, most parties have resolved disputes at the early stages through friendly negotiations or mediation. Consequently, few disputes are submitted to arbitration or to the courts.

### B. *Mediation*

Mediation is a method of dispute resolution in which a third party intervenes to facilitate and recommend compromise between the parties to the

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<sup>7</sup> [Translators' Note] The firm's name cannot be accurately identified from the text of the article, and has been deleted for this reason.

dispute. Historically, this has been one of the traditional Chinese methods of dispute resolution. There have been further developments in this method since 1949. Through legislation, the People's Mediation Committee System has been established nation-wide, resolving millions of civil and economic disputes and minor criminal matters each year. In recent years, mediation has been effectively extended to such areas as Sino-foreign economic cooperation and technology transfer. Many foreign friends have recognized the positive results. For example, Ninian Stephens, the former Governor General of Australia [1982-1989] and a highly qualified legal expert, while still in office, praised China's system of mediation and arbitration when, he met the President of The Supreme People's Court, Mr. Ren Jianxin. He said China's tradition and practice of mediation was extremely good. Sino-foreign economic activity would continue to increase as China implements its policy of openness and economic development of the coastal region, "We are happy to observe the development of a mediation system in Australia in recent years, [which] was learned from China." Evidently, mediation has important significance to the sound development of economic and trade activities among many countries.

The Chinese style of resolving foreign economic disputes through mediation includes the following methods.

### 1. *Administrative Mediation*

Administrative mediation is conducted by a governmental administrative organ to settle civil disputes between parties of equal status. This form of mediation is very important in China. The parties to the dispute do not enter into arbitration or file suit in a court. Instead, a third party assists the disputants in reaching a mutually agreed solution. The third party may be a mediation group, some other organization, or an individual. We may consider the example of "Xiteng." Xihu Tengqi Enterprises Ltd.<sup>8</sup> was formed by the Zhejiang Province Furniture Products Company and three Hong Kong investors. It was the first joint-venture enterprise in Zhejiang province as well as one of the earliest and more successful joint-venture enterprises in China. This enterprise found its raw materials and market outside of China and was competitive in the international market.<sup>9</sup> But in 1986, disputes arose between

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<sup>8</sup> [Translators' Note] West Lake Rattan Enterprises Ltd.

<sup>9</sup> [Translators' Note] The purpose of the Chinese participation in the joint venture was to supply Chinese workmanship since the raw materials were imported into China and the finished product was exported from China.



the Chinese and the foreign parties, among the different foreign parties, and within the Chinese furniture company itself because the raw materials supplied by the foreign partners were substandard. This resulted in the arbitrary dismissal of the joint-venture enterprise's Chairman-General Manager by the Chinese party's parent company in violation of the joint-venture law and the joint-venture contract. This disturbance severely affected Xiteng's normal production and sales when at the Guangzhou Export Commodities Fair, the volume of transactions was reduced by seventy-two percent. This in turn caused the shut down of many cooperative processing factories which depended on Xiteng for materials. The Xiteng incident attracted both domestic and international attention. Eventually, the Provincial Economic and Trade Bureau, the Provincial Government, the Ministry of Foreign Economic Relations and Trade, and the central authorities for foreign investment became concerned and began mediation to distinguish right from wrong, correct mistakes, and restore the Chairman-General Manager. After one hundred forty-seven days of effort, the situation was calmed. There are many other examples<sup>10</sup> of Sino-foreign economic disputes which were resolved through administrative mediation without the use of arbitration or litigation. Lawyers played important roles in some of these mediations.

It should also be noted that this type of mediation is not mandatory and a mediation agreement is not legally binding, but depends on voluntary performance by the parties. Furthermore, the dispute may be submitted to arbitration according to the parties' agreement where the parties do not agree to submit to administrative mediation, where the mediation fails, or where the mediation agreement is renounced. Where the parties cannot agree to submit to arbitration in the absence of an arbitration clause, they have the right to file a suit in the people's court.

## 2. *Mediation During the Course of Arbitration*

In China, all arbitration organs emphasize the role of mediation during the course of arbitration proceedings. The Regulations of the P.R.C. for Arbitration over Economic Contracts<sup>11</sup> provide, "in handling cases, the arbitration organ shall first conduct a mediation." The arbitration provisions of the China International Economic And Trade Arbitration Commission and

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<sup>10</sup> [Translators' Note] The author lists the names of three enterprises in disputes that were similarly resolved: Lu Bao Da Xia, Jing Lun Fan Dian, and Wu Han Mi Feng Jian Chang.

<sup>11</sup> [Translators' Note] The Regulations of the P.R.C. on Arbitration for Economic Contracts, article 25.

of the China Maritime Arbitration Commission provide that: "[t]he arbitration commission and arbitration tribunals may undertake mediation with regard to any case under their jurisdiction. If a case is resolved through conciliation, the arbitration tribunal shall render an award based on the context of the conciliation agreement between the two parties." In order to integrate mediation into arbitration, these organs make maximum use of mediation. In fact, fifty percent of the cases handled by China's organs for arbitration involving foreigners are successfully resolved through mediation.

Together with some foreign arbitration organs, China's arbitration organs have created a new form of mediation: Sino-foreign joint mediation. Each party to the dispute makes a request for arbitration to their country's arbitration organs. The arbitration organs of each country then assign an equal number of one or more mediators. China and the United States have already used this method with good results to resolve disputes in two trade contracts involving large sums of money. The results were well received by both parties to the disputes. China and the Federal Republic of Germany<sup>12</sup> have separately established the "Beijing Mediation Center" and the "Beijing-Hamburg Mediation Center." These two centers have signed bilateral mediation and cooperation agreements and have formulated the "Beijing-Hamburg Mediation Regulations." Disputes between the two countries, or any international economic, trade, or maritime disputes may be submitted to the two centers individually or jointly for mediation. At the present time, these centers are mediating numerous international trade disputes. The establishment of these centers represents a new and important step in the development of international "joint mediation."

### 3. *Mediation in the Course of Litigation*

The Civil Procedure Law of the P.R.C. (Provisional) provides, "in hearing civil cases, the people's courts should stress mediation; when mediation fails, the court shall render judgment in a timely manner."<sup>13</sup> In addition to establishing mediation as a basic duty and principle of the court, the law contains another section which provides, "[if a civil case which has been accepted by a people's court] can be mediated, the court should, based on an examination of the facts and on distinguishing right from wrong,

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<sup>12</sup> [Translators' Note] This article was written prior to German reunification.

<sup>13</sup> [Translators' Note] The Civil Procedure Law of the P.R.C. (Provisional), article 6. See also Code of Civil Procedure, article 9.

conduct mediation and urge the parties to reach an agreement."<sup>14</sup> The law further provides specific procedures for mediation. These provisions are applicable to economic disputes involving foreign interests handled by the people's courts. In other words, Chinese courts also stress the use of mediation in cases of economic disputes involving foreign interests. Such mediation is carried out on the basis of examining the facts and distinguishing right from wrong in order that the Chinese and foreign party may reach a mutual understanding and agreement. Where mediation fails, the court should make a timely decision. But, mediation is not applicable where the court is handling an economic administrative case involving foreign interests.

### C. *Arbitration*

China's arbitration system involving foreign interests was established in the 1950's. At present there are two regular arbitration organs: the China International Economic And Trade Arbitration Commission and the China Maritime Arbitration Commission. Both were established under the China Council for the Promotion of International Trade (also known as the China Chamber of International Commerce). In order to meet the needs of the open-door policy and the development of the Shenzhen Special Economic Zone, the predecessor of the China International Economic And Trade Arbitration Commission, the Foreign Economic and Trade Arbitration Commission, set up an office in Shenzhen in 1984 (which was changed to the Shenzhen Branch in 1989) to handle local arbitration cases involving foreign interests. At the time there were fifteen arbitrators—eight of whom were specially invited, well-known members of Hong Kong's legal and commercial circles. Subsequently the number was increased. A branch was also established in Shanghai.

For over thirty years, particularly during the last ten years, China's organs for arbitration have justly, reasonably, and appropriately resolved many cases of Sino-foreign economic disputes based on facts and law, adherence to the principles of independence and autonomy, equality and mutual benefit, and reference to international practice. In recent years, China's organs for arbitration have received numerous applications for arbitration of Sino-foreign economic disputes. At the present time, there are over three hundred cases before the two arbitration organs involving parties from several countries and territories. The Chinese arbitration organs rank

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<sup>14</sup> [Translators' Note] *Id* article 97. See also Code of Civil Procedure, Chapter 8.

second or third in the world based on the number of cases accepted and resolved.

*1. The Scope of Cases Accepted by China's Organs for Arbitration Involving Foreign Interests*

The China International Economic And Trade Arbitration Commission (Arbitration Commission) accepts any dispute arising in international trade. That is to say, there is no restriction as to the parties or the scope of the dispute.

The Arbitration Commission may accept any of the following international trade disputes:

- (1) between Chinese and foreign parties,
- (2) involving foreign parties only, or
- (3) between Chinese parties only but involving foreign elements.

The Arbitration Commission specifically accepts the following maritime dispute cases:<sup>15</sup>

- (1) disputes over remuneration for salvage services rendered by sea-going vessels to each other or by a sea-going vessel to a river craft and vice-versa;
- (2) disputes arising from collisions between sea-going vessels or between sea-going vessels and river craft or from damage caused by sea-going vessels to harbor structures or installations;
- (3) disputes involving sea-going vessels, arising from such areas of business as chartering, agency, towage, salvage, trading, maintenance and construction, as well as disputes over ocean transportation undertaken in accordance with contracts of delivery, bills of lading and other shipping documents, and disputes over maritime insurance;
- (4) disputes involving pollution damage to the marine environment; and
- (5) other maritime disputes where both of the disputing parties agree require arbitration.

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<sup>15</sup> [Translators' Note] As translated in China Laws for Foreign Business, Business Regulation 10-505(3) (1991).

## 2. *Principal Characteristics of Chinese Arbitration Involving Foreign Interests*

The principal characteristics of Chinese arbitration involving foreign interests can be described as follows:

a) The principles of equality and justice: all persons, Chinese or foreign, are equal before the law, and cases are decided on their merits. For example, an American company and a Chinese company formed a joint-venture enterprise which processed leather in Ningxia Province. A dispute arose when the Chinese party unilaterally amended the contract. The American party sought arbitration by the China International Economic and Trade Arbitration Commission and sought to have the contract held null and void requesting that their investment capital be returned with interest. The result of the arbitration was that the American party prevailed, the contract was held void, and the Chinese party returned all of the American party's investment capital with interest. In another case, a [mainland] Chinese XX<sup>16</sup> restaurant<sup>17</sup> and the XX company of Hong Kong signed a contract to jointly operate the XX restaurant. The agreement provided that the Hong Kong company would be responsible for the costs and materials for the renovation of the premises, as well as provide the restaurant operating equipment. The Chinese side was to provide the right to the use of the building,<sup>18</sup> construction equipment and to carry out the renovation work. Subsequently, the contract could not be performed because the Hong Kong side stopped providing equipment and removed its personnel, thus bringing the renovation work to a halt. After several unsuccessful attempts at negotiation, the Chinese party, suffering great losses, applied to the China International Economic and Trade Arbitration Commission for arbitration. The arbitration tribunal determined that the Hong Kong company had breached the contract and ordered it to pay liquidated damages as provided by the contract.<sup>19</sup> Incidentally, the Chinese XX Restaurant returned the Hong Kong company's tools. In this case, the [mainland] Chinese party prevailed.

b) Arbitration procedures are simple, clear, and convenient;

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<sup>16</sup> [Translators' Note] The original text reads, "XX." The actual names of the parties are not given.

<sup>17</sup> [Translators' Note] The Chinese character translated as restaurant may also mean hotel. There is no way to determine which meaning is appropriate here.

<sup>18</sup> [Translators' Note] In China, all land belongs to the state. However, land use rights may be granted to individuals or legal entities.

<sup>19</sup> [Translators' Note] The contract contained a liquidated damages clause.

appropriate laws are applied, and the autonomy of the parties is respected. These are guaranteed by the procedural rules of China's two arbitration organs. In fact, the Chinese courts seldom interfere with arbitration. The correct application of governing law has been discussed in Part I above and will not be repeated here.

c) The combination of arbitration and mediation is an important characteristic of the practice of Chinese arbitration organs. This has already been partially explained in the above discussion on mediation during arbitration. Here some differences in the relationship between arbitration and mediation in China and in other countries will be discussed. First, mediation and arbitration procedures are distinctly separated in other countries. However, in China, mediation is carried out during arbitration procedures. This is what we call "the combination of arbitration and mediation." It has the advantages of simplifying procedures, saving time, and reducing costs. Second, in Western countries the mediators may not act as arbitrators in subsequent arbitration procedures, and arbitrators cannot mediate during arbitration. The opposite holds true in China. If mediation is unsuccessful, the mediators may be assigned as arbitrators to carry out mediation during arbitration.

### *3. Reforms in Chinese Arbitration Involving Foreign Interests*

For more than thirty years, particularly in the last decade or so, the Chinese system for arbitration involving foreign interests has made considerable improvements. This is evident in the scope of cases accepted for arbitration and the gradual liberalization of choice of law rules. In 1988, China further improved its system for arbitration involving foreign interests through a major revision of arbitration regulations. For example, the scope of cases accepted for arbitration by the China International Economic and Trade Arbitration Commission was expanded from economic disputes involving foreign interests in China to include all international economic and trade disputes. Arbitrators are no longer required to be mainland Chinese but may now include people from outside of China. (At present there are ninety-six arbitrators from mainland China, eight from Hong Kong and Macao, and five from other countries.) Formerly, the chief arbitrator was elected by the arbitrators who, in turn, were appointed by the parties. Now, the chief arbitrator is selected by the chairman of the arbitration commission. There are now express provisions requiring arbitration to be carried out in private.

However, where the parties demand open arbitration hearings, the arbitrators have final discretion. There are provisions to avoid conflicts of interest on the part of the arbitrators. The arbitrators may carry out their own investigation and collect evidence. The hearings may be conducted outside of China. The parties may apply to the Chinese courts for an interim property protection order while arbitration is pending. The parties may seek enforcement of arbitration awards in the Chinese courts or in foreign courts which have jurisdiction, in accordance with the 1958 New York Convention or other international treaties concluded or acceded to by China. China's arbitration regulations were amended with reference to UNCITRAL<sup>20</sup> Model Law on International Commercial Arbitration and are therefore in line with the regulations of the majority of permanent international arbitration organs. In June 1988, the name of The Foreign Economic and Trade Arbitration Commission was changed to China International Economic And Trade Arbitration Commission. Similarly, the Maritime Arbitration Commission of the China Council for the Promotion of International Trade was also changed to the China Maritime Arbitration Commission. Important corresponding amendments were also made to its rules for arbitration.

The above is a basic survey of the Chinese system of arbitration involving foreign interests. It should also be pointed out that in recent years Chinese arbitration organs have established more and more extensive and friendly relations with foreign arbitration organs. They have written or oral arbitration and mediation cooperation agreements with arbitration and mediation organs in Japan, France, Italy, Ghana, the United States, Sweden and Germany. Furthermore, Chinese arbitration organs will discuss or sign cooperation agreements with their counterparts in Australia, Belgium, Canada, Spain, and the Netherlands. The International Commercial Arbitration Commission has invited Chinese arbitration organs to send representatives to participate in the organization. Arbitration organs in the United Kingdom, Australia, Canada, Poland, and Hong Kong have invited Chinese arbitrators to participate in arbitration. The United Nations Trade Development Council/GATT "International Trade Center" has invited Chinese arbitrators to act as arbitration experts. China has also participated in the drafting of the UNCITRAL Model Law on International Commercial Arbitration. Chinese arbitration organs are working to further develop and strengthen international cooperation, and contribute their efforts to promote

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<sup>20</sup> [Translators' Note] United Nations Commission on International Trade Law.

the development of international arbitration and international trade and economic relations.

#### *D. Litigation*

Litigation is also an important method of resolution of economic disputes involving foreign interests in China. As has been mentioned above, Chinese laws provide that foreigners and stateless persons have the same litigation rights and duties as Chinese citizens when they are bringing or defending a suit in the people's courts. Then, under what circumstances can economic disputes involving foreign interests be litigated in the people's courts?

According to the Civil Procedure Law of the P.R.C. (Provisional), disputes arising from economic trade, transport, and maritime affairs may not be litigated in the people's court if the parties have agreed in writing to arbitration. Where the parties have not agreed in writing to arbitration they may bring suit in the people's courts. Where the Chinese arbitration organs have made an arbitration award, the parties may not bring a suit in the people's courts. Furthermore, between the 1982 Civil Procedure Law of the P.R.C. (Provisional), which provided that administrative litigation cases may be brought in the people's courts, and the 1989 Administrative Litigation Law, there are more than one hundred thirty laws and regulations providing for the litigation of administrative cases. During this period, the courts at all levels established more than fourteen hundred administrative tribunals. The Administrative Litigation Law further recognizes and expands the litigation rights of citizens, legal persons, and organizations. These administrative litigation regulations are applicable to administrative litigation brought by foreigners, stateless persons, and foreign organizations in China, unless otherwise provided by law.

In handling cases of economic disputes involving foreign interests, the people's courts will adhere to the system and principles of adjudication according to the constitution and other laws. For example, the people's courts have exclusive jurisdiction and will independently try cases in accordance with the law. Both litigants will be treated equally under the applicable law based on the facts and legal principles including; public trials, right to plead a defense, trial by a panel of judges, avoidance of conflicts of interests, a hearing of second instance, appeal, and judicial review. These systems and principles guarantee fair and lawful adjudication, ensuring just resolution of economic disputes involving foreigners in China.



### *1. Questions of Jurisdiction*

There are four levels of courts in China, namely the Supreme People's Court, People's High Courts, Intermediate People's Courts and Basic People's Courts. According to the Civil Procedure Law of the P.R.C. (Provisional) the Intermediate People's Court is the court of first instance for economic disputes involving foreign interests in China.<sup>21</sup> The People's High Court is the court of second instance. A party not satisfied with the decision of the Intermediate People's Court may appeal to the People's High Court for a second and final trial. Economic disputes involving foreign interests which have significant impact in provinces, autonomous regions, or municipalities directly under the central authority will first be tried in the People's High Court and may be appealed to the Supreme People's Court. Such cases which have significant impact on the entire country will be heard only by the Supreme People's Court. However, there has not yet been such a case. In addition, the Civil Procedure Law of the P.R.C. (Provisional) has provisions regarding jurisdiction by region and jurisdiction by transfer and designation. These are also applicable to cases of economic disputes involving foreigners.

According to the "Decision of the Standing Committee of the NPC Concerning the Establishment of Maritime Courts in China's Coastal Port Cities" of November 1984, maritime courts are the courts of first instance for maritime cases and maritime commercial cases, with appeal to the People's High Court for the same area as the maritime court.

Cases involving patent disputes are somewhat special. According to the jurisdictional designation legally made by the Supreme People's Court in February 1985, patent disputes can be classified as follows: (i) concerns related to the issuance of patent rights, the validity of an existing patent right, or, the implementation of compulsory licensing and the fees associated with such licensing. In all of these types of disputes, the Intermediate People's Court in Beijing is the court of first instance and appeals may be taken to the People's High Court in Beijing. (ii) Where the issues relate to licensing fees accruing between the time the patent application is published and the patent is granted, infringement of patents, or, contracts for transfer of patent rights, the court of first instance will be the respective Intermediate People's Courts of the provinces, autonomous regions, and municipalities directly under the

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<sup>21</sup> [Translators' Note] The Code of Civil Procedure has no special provisions governing foreign disputes or level of jurisdiction. Foreign disputes may be within the jurisdiction of any appropriate level of People's Courts.

central authorities, and special economic zones, and appeals may be taken to the corresponding People's High Courts.

## 2. *The People's Courts' Division of Labor and Jurisdiction Over Economic Disputes Involving Foreign Interests*

The Economic Division of the People's Courts handles cases commenced in the People's Courts involving (i) disputes between Chinese and foreign parties arising from economic and trade relations, particularly economic contract disputes, (ii) economic and trade disputes involving foreign enterprises and organizations in China, (iii) economic and trade disputes involving foreign enterprises and organizations outside China, where the parties have agreed in writing to submit disputes to the People's Courts, (iv) disputes involving industrial property, including economic administrative cases in this field, and (v) labor disputes involving foreign and Chinese parties.

The Administrative Division handles cases brought by foreign parties conducting business activities in China against penalties or other administrative actions or decisions imposed by Chinese administrative organs (but excluding cases involving industrial property rights).

The Maritime Court handles (i) maritime tort cases such as collision between vessels, damage to port facilities, water pollution, activities affecting navigation, personal injuries or death occurring in ocean transport or other activities, (ii) various types of marine commercial contracts, such as for the carriage of goods, persons and luggage, construction, repair, charter and sale of vessels, marine insurance, salvage, port activities and labor services, and (iii) other commercial maritime cases such as general salvage, exploration and exploitation of the sea, maritime claim preservation and execution.

## 3. *The Problem of Applicable Law in Adjudication*

The foreign economic laws enacted by the National People's Congress and its Standing Committee, the regulations enacted by the State Council, and the international treaties and agreements concluded and acceded to by China, form the basis from which the People's Courts adjudicate economic disputes involving foreign interests. In addition, the people's courts of the provinces, autonomous regions and municipalities directly under the central authority may also apply laws and regulations enacted by these local authorities, provided that these laws and regulations are not in conflict with the

Constitution or the central government's laws and administrative regulations. In order to further reform and implement the open-door policy, in July 1988 the Supreme People's Court determined that the people's courts may refer to laws and regulations enacted by the People's Congress or its Standing Committee of Cities (1) as specified by the State Council, (2) in which the People's Courts in the provisional level are allocated, or, promulgated by the ministries of the State Council, the People's Governments of the provincial level, the cities in which the provincial governments are allocated, or of the special economic zones, to the extent that they do not conflict with other laws and regulations. Moreover, parties to Sino-foreign economic contracts may choose the governing law to be applied in the event of a contractual dispute. Where there is no choice by the parties, the law of the country with the closest connection with the contract will be applicable. Chinese law will be applied to contracts for Sino-foreign joint equity enterprises, Sino-foreign cooperative enterprises, and for Sino-foreign cooperative exploration and development of natural resources, to be implemented within the Chinese territory. Where the applicable Chinese law lacks the relevant provisions, international practice may be applied. In the event that new laws or regulations are promulgated after the contracts are concluded [in all three types of contracts], the contracts will still be enforced according to their original terms. This adequately demonstrates China's emphasis on contracts and trustworthiness.

In practice, the adjudication of economic disputes involving foreigners proves that Chinese courts are clearly adjudicatory organs exercising independent judicial power according to law. The courts can ensure that cases will be decided on their merits, that Chinese and foreign parties will be treated equally, and that legal rights will be protected. After only ten years experience in handling economic disputes, Chinese courts are exploring, probing and continually improving and perfecting their roles. They have played and will continue to play an important role in the realization of the country's reform and open policies through the just adjudication of domestic and Sino-foreign economic disputes.