Chapter 2

Dispute Settlement

Cases involving foreign factors can be resolved by litigation or arbitration in municipal courts or international tribunals. This Chapter aims to help students to evaluate each international dispute settlement mechanism and to select the most favorable one for them. It overviews various international dispute settlement mechanisms from the following six aspects:

Part 1 introduces municipal courts systems.

Part 2 analyzes municipal courts' jurisdictions over cases involving foreign factors.

Part 3 discusses the choice of law rules in cases involving foreign factors.

Part 4 answers how to recognize and enforce foreign judgments.

Part 5 explores international commercial arbitration.

Part 6 presents ICSID and WTO dispute resolution mechanism.

Learning Objectives

By the end of this chapter you should:

- Outline the differences between municipal court systems in China and the US;
- Explain in what circumstances a court can exercise personal jurisdiction over foreign natural persons and entities;
- State how a court decides what law should be applied to a dispute;
- Know how to seek recognition and enforcement of foreign judgments;
- Understand how to use arbitration to resolve international commercial disputes; and
- Know ICSID and WTO dispute resolution mechanism.

Key Terms

Appellate body
Arbitration
Choice of court
Choice of law
Comity
Jurisdiction
Litigation
Penal
Reciprocity
Recognition and enforcement

Part 1 Municipal Court System

Municipal courts refer to domestic courts of various nation-states. They are often called upon to hear international civil litigations.

What is the municipal court system in China?

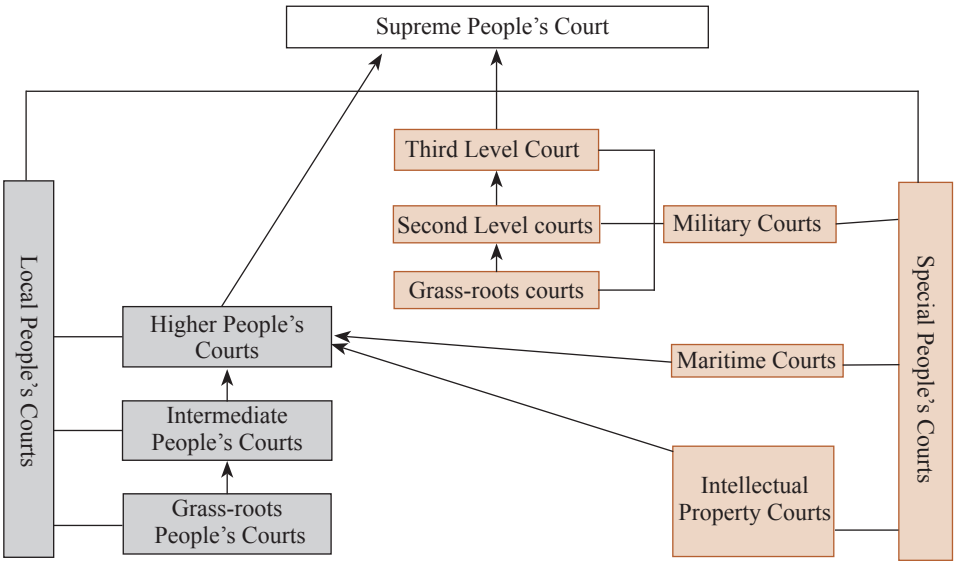
In China, the people's courts are judicial organs exercising judicial power on behalf of the people. China practices a system of courts characterized by "four levels and two instances of trials."

1. What is the four-level system?

- Basic people's courts: at the level of autonomous counties, towns, and municipal districts.
- Intermediate people's courts: at the level of prefectures, autonomous prefectures, and municipalities;
- Higher people's courts: at the level of the provinces, autonomous regions, and special municipalities;
- The Supreme People's Court: it is the court of last resort for the whole People's Republic of China except for Macao Special Administrative Region and Hong Kong Special Administrative Region.

Chinese court system is paralleled by a hierarchy of prosecuting offices called people's procuratorates, the highest being the Supreme People's Procuratorate. Basic people's courts, intermediate people's courts and higher people's courts are called "local people's courts." These courts have general jurisdiction upon civil, administrative and criminal cases. For military, intellectual property, and maritime disputes, China has established Courts of Special Jurisdiction.

Figure 1: Municipal Court System in China



Note: the arrows point to the next superior courts, while the lines denote the components.

2. What is the two-instance-of-trial system?

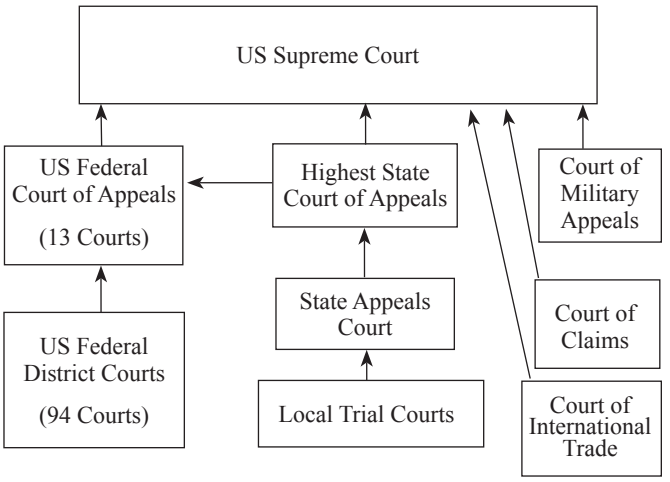
In the administration of adjudication, people's courts adopt the system whereby a case should be finally decided after two trials:

- A judgment of a first instance must come from a local people's court, and a party may bring an appeal only once to the people's court at the next higher level. The people's procuratorate may present a protest to the people's court at the next higher level.
- Judgment of the first instance of the local people's courts at various levels become legally effective, namely "final" if, within the prescribed period for appeal, no party makes an appeal.
- Judgments and orders of the court of the second instance shall be seen as legally effective decisions of the case.
- Any judgments rendered by the Supreme People's Courts as the court of the first instance shall become immediately legally effective.

What is the municipal court system in the US?

The municipal court system in the US is constituted by a federal court system and a state court system. Therefore, it is more complicated than Chinese court system.

Figure 2: Municipal Court System in the US



Note: the arrows point to the next superior courts.

1. US Supreme Court

The US Supreme Court is the court of last resort in the US. It has discretion to decide whether to review a case appealed from the highest court in a state or from a US federal court of appeals. The US Supreme Court will grant a writ of certiorari if it decides to review a case. Each year, about 4,500 cases are submitted to the Supreme Court. However, less than 200 cases are actually accepted for review. The justices choose the cases based on a case's implications for Americans in general or for a certain group within society, not just the impact on the parties actually involved in the lawsuit itself.

2. What is the federal court system?

The US federal court system is constituted by courts of general jurisdiction (Federal Courts of Appeal and Federal District Courts) and courts of special jurisdiction (Court of International Trade and Court of Claims).

(1) Federal District Courts

There are 94 federal district courts across the country, with at least one in every state (larger states have up to four). District courts are the only courts in the federal system in which juries hear testimonies in some cases, and most cases at this level are presented before a single judge.

(2) Federal Courts of Appeal

When cases are appealed from district courts, they go to a federal court of appeals. Courts of appeals do not use juries or witnesses. No new evidence is submitted in an appealed case; appellate courts base their decisions on a review of lower-court records.

There are 12 general appeals courts. All but one of them (which serves only the District of

Columbia) serve an area consisting of three to nine states (called "a circuit"). There is also the US Court of Appeals for the Federal Circuit, which specializes in appeals of decisions in cases involving patents, contract claims against the federal government, federal employment cases and international trade. Between 4 and 26 judges sit on each court of appeals, and each case is usually heard by a panel of three judges. Courts of appeals offer the best hope of reversal for many appellants, since the Supreme Court hears so few cases. Fewer than 1% of the cases heard by federal appeals courts are later reviewed by the Supreme Court.

(3) Court of International Trade

The Court of International Trade hears cases involving appeals of rulings of US Customs offices.

(4) Court of Claims

The Court of Claims hears cases in which the US Government is a defendant.

3. What is the state court system?

Each state has a court system that exists independently from the federal courts. Cases that originate in state courts can be appealed to the Supreme Court of the US if a federal issue is involved and usually only after all venues of appeal in the state courts have been tried. The court system in each state is constituted by courts of general jurisdiction and courts of special jurisdiction. These courts' judgments can be appealed to the state Supreme Court.

(1) State Supreme Court

Every state has a court of last resort, generally called the "supreme court." Although the state supreme court decisions are final within a state court system, sometimes they can be appealed to the US Supreme Court.

(2) Courts of general jurisdiction

State court systems have trial courts at the bottom level and one- or two-level of appellate courts. The appellate courts' judgments can be appealed to the State Supreme Court.

(3) Courts of special jurisdiction

Family courts settle such issues as divorce and child-custody disputes, and probate courts handle the settlement of the estates of deceased persons.

(4) Others

Below these specialized trial courts are less formal trial courts, such as magistrate courts and justice of the peace courts. They handle a variety of minor cases, such as traffic offenses, and usually do not use a jury.

Some basic differences between China and the US court systems

- Different from the US, China does not have a state court system.
- Unlike China, the US does not have the system of "two instances of trials"; therefore, a case may be tried by more than two instances.
- In China, the Supreme People's Court must accept a case if the first-instance court for the case is a Higher People's Court and the losing party appeals to the Supreme People's Court. However, the US Supreme Court has discretion to decide whether to accept an appealed case.

SELF QUIZ: Indicate whether each of the following statements is true or false.

1. China has a federal court system and a province court system.
2. In the US, judgments rendered by the highest court in a state cannot be appealed to the US Supreme Court.
3. Since China has four-level of courts, every case should be tried by four instances.

Part 2 Jurisdiction on Cases Involving Foreign Factors

The competence or ability of a municipal court to exercise the power to try a case is known as jurisdiction. Municipal courts can exercise jurisdiction over cases involving foreign factors[1] based on two principles: person (*in personam*) and thing (*in rem*).

What is personal jurisdiction?

Personal jurisdiction (In personam jurisdiction) is the power of a court to decide disputes relating to a natural person or entity within the forum country[2].

1. In what circumstances is a natural person subject to personal jurisdiction?

- Nationals of the forum country;
- Individuals physically present within the country;
- Individuals domiciled in the country;
- Individuals who consent to the jurisdiction of the country.

1 Cases involving foreign factors: cases involving parties, facts, or transactions from different countries. See Article 1 of Interpretations of the Supreme Peopie's Court on Several Issues Concerning Application of the Law of the Peopie's Republic of China on Choice of Law for Foreign-Related Civil Relationship(I).

2 Forum country: the country wherein a court or arbitration tribunal is located.

2. In what circumstances is an entity subject to personal jurisdiction?

If entities (including business, governmental and non-governmental entities) have sufficient existence in the eyes of the law of the forum country to function legally, sue and be sued, and make decisions through agents, they can be parties to international civil litigations. Entities are subject to the personal jurisdiction of a municipal court in much the same way that individuals are.

- Legal entities created within a country are like nationals of that country, so they are subject to the jurisdiction of that country, or
- Foreign entities who consent to the jurisdiction of the forum country.

3. How can natural persons or entities consent to the personal jurisdiction of a forum country?

Individuals and entities can consent to the personal jurisdiction of a forum country in three ways:

- Defending the substance of the case in court without disputing its jurisdiction;
- Agreeing to the jurisdiction of a particular court in a forum selection clause or agreement (namely "choice of court clause or agreement");
- Appointing an agent within a country to receive service of process on its behalf.

4. China

Chinese courts follow Chinese Civil Procedural Law to decide whether a court can exercise personal jurisdiction upon a foreign defendant. For example, Article 265 of Chinese Civil Procedure Law provides that a lawsuit brought against a defendant who has no domicile in China concerning a contract dispute or other disputes over property rights and interests, the defendant may be under the jurisdiction of the people's court located in the place where:

- The contract is signed or performed;
- The subject matter of the lawsuit is located;
- The defendant's confiscable property is located;
- The infringing act takes place;
- The representative agency, branch or business agent is located.

Article 266 of Chinese Civil Procedure Law provides that lawsuits brought for disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in China shall be under the exclusive jurisdiction of people's courts.

Chinese Civil Procedure Law permits parties to choose foreign courts to adjudicate their disputes. In order to be valid, a choice of court clause must comply with the following requirements:

- The clause is in writing;
- The chosen court is located in the place with actual connections to the disputes, such as the place where the defendant or the plaintiff resides, where the contract is signed or performed,

or where the subject of the action is located;

- The chosen court should not violate the exclusive jurisdiction of Chinese courts.

5. The US

In the US, if there are "minimum contacts" between a natural person or entity and the forum country, US courts would infer that the natural person or entity has consented to the personal jurisdiction of the forum. The "minimum contacts" test is met if this foreign defendant:

- has direct contact with the forum country;
- has a contract with a resident of the forum country;
- have placed their product into the stream of commerce such that it reaches the forum country;
- seek to serve residents of the forum country;
- have satisfied the Calder effects test; or
- have a non-passive website viewed within the forum country.

US courts generally uphold a choice of court clause concluded by parties in an international contract, even if the chosen court has no connection with the dispute.

CASE EXAMPLE: *Calder v. Jones*[1]

Facts: Plaintiff is a California resident in the entertainment business sued the National Enquirer, located in Florida, for libel based on an allegedly defamatory article published by the magazine. The defendant argues that the court in California had no personal jurisdiction in this case.

The US Supreme Court held that: While the article was written and edited in Florida, personal jurisdiction was properly established in California because of the effects of the defendants' conduct in that state. As the article concerned a California resident with a career in California and relied on California sources, the Court found the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California."

Take-away point: The Calder effects test requires (a) an intentional action, that was (b) expressly aimed at the forum state, with (c) knowledge that the brunt of the injury would be felt in the forum state. If a court finds that a defendant's actions meets the test, it may assert personal jurisdiction upon this defendant.

CASE EXAMPLE: *The Bremen v. Zapata Off-Shore Co.*[2]

Facts: A German corporation contracted with a US corporation to transport an oil rig from Louisiana to Italy. During transportation , the rig was damaged and was towed to Tampa, Florida, where the US corporation filed suit. The German corporation, however, asked the US court to enforce the choice of court clause contained in the contract placing jurisdiction in London.

1 Calder v. Jones, 465 US 783 (1984).

2 The Bremen v. Zapata Off-Shore Co. 407 US 1 (1972).

The US Supreme Court held that: Although London had no connection with the dispute, the choice of court clause was valid and should be enforced. The court indicated that "the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."

Take-away point: Choice of court clauses are parties' explicit consent to a court's personal jurisdiction. They provide for orderliness and predictability. They are presumed to be valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable and unjust or the clause was invalid for such reasons as fraud and overreaching.

6. Summary of differences between Chinese and the US law:

- To determine whether to exercise personal jurisdiction upon foreign defendants, US courts follow minimum contracts test and Chinese courts follow statutory provisions under the Civil Procedural Law.
- In the US, a choice of court clause in an international agreement should be enforced unless the plaintiffs can clearly show that (1) enforcement would be unreasonable and unjust, or (2) the clause was invalid for such reasons as fraud and overreaching. Choice of court clauses are presumed to be valid because they provide for orderliness and predictability. Courts do not require the chosen court has connection to the dispute. Compared with US law, Chinese law has more requirements for choice of court clauses, such as the written format and material connection between the place of the chosen court and that of the dispute.

What is *in rem* jurisdiction?

In rem jurisdiction is the power of a court to determine the ownership rights of all natural persons or entities with respect to particular property located within the territory of the forum country. For example, the ownership of real property would be determined by an *in rem* proceeding, as would the ownership of personal property physically within the forum country (such as a ship physically arrested in a port within the forum country).

Jurisdiction fine-tuning

When courts in multiple countries have jurisdiction over a case involving foreign factors, a court may refuse to exercise jurisdiction or oppose other courts to exercise jurisdiction. This is called jurisdiction fine-tuning by late American professor Von Mehrens, a famous jurist in comparative private international law.[1] Civil-law countries adopt *lis pendens,* and common law countries exercise forum non conveniens and anti-suit injunction, to fine tune jurisdictions. All these doctrines aim to avoid

1 A T Von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study*, Martinus Nijhoff publishers, 2007.

irreconcilable judgments, discourage forum shopping, and save judicial resources.

1. *Lis pendens*

Lis pendens is Latin for "suit pending". In civil-law countries, *lis pendens* is used as a restriction to a court to assume its jurisdiction, if another court has been seized first on the same cause of action and between the same parties. This doctrine assumes that the court first seized will render a judgment on the merits of the dispute. It is, however, applied at the stage of determining whether jurisdiction shall be exercised or stayed temporarily pending the judgment of another court. The exercise of jurisdiction may be resumed later should circumstances require.[1]

The first sentence of Article 533 of the Opinions on the Chinese Civil Procedure Law issued by the Supreme People's Court issued in 2014 is a *lis pendens* rule: if both a people's court and a foreign court have jurisdiction over a case, and a party sues in the foreign court and the other party brings an action in the people's court, the people's court can accept the case at its discretion. Therefore, in case of parallel proceedings, even if the trial in a Chinese court started after the foreign proceedings, Chinese courts still can exercise jurisdiction upon the case on the same cause of action and between the same parties.

2. *Forum non conveniens*

Forum non conveniens is a doctrine used by courts in common- law countries to refuse jurisdiction. The basic four-part test for the application of this doctrine is that the defendant will prevail if there is an alternative forum that is (1)available, and (2) adequate, and if (3) private interest factors and (4) public interest factors point toward the alternative forum and away from the US courts. Notably, plaintiffs cannot resist forum non conveniens on the basis of unfavorable substantive law in alternative forums.

China borrows *forum non conveniens* from common law countries to fine tune personal jurisdiction. Article 532 of the Opinions on the Chinese Civil Procedure Law provides that a people's court can dismiss a lawsuit and suggest the plaintiff to sue in a more convenient foreign court when the following circumstances occur. (1) The defendant alleges that this case should be heard in a more convenient foreign court or raises jurisdiction objections. (2) The parties do not reach a choice of court agreement favoring Chinese courts. (3) This case does not fall into the exclusive jurisdiction of Chinese courts. (4) This case has nothing to do with the interests of China, its citizens, legal persons or other organizations. (5) The major disputed facts do not take place in China, Chinese law is not applicable, and it is very difficult for Chinese court to ascertain the facts and applicable law in this case. (6) A foreign court has jurisdiction over this case and it is more convenient for this court to hear this case.

1 Lu Song, The EOS Engineering Corporation Case and the *Nemo Debet BisVexari Pro Una et Eadem Causa* Principle in China, 7 *Chinese J. Int'l L.* 143, 146(2008).

CASE EXAMPLE: ***Canada Malting v. Paterson Steamships, Ltd.***[1]

Facts: Two ships of Canadian registry and ownership, each carrying cargo shipped from one Canadian port to another, collided on Lake Superior while unintentionally in United States waters, and one ship sank. While a suit was pending in a Canadian court of admiralty to determine liability as between the ships, the Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in a federal district court in New York. All the parties were citizens of Canada, and the officers and crew of each vessel—the material witnesses—were citizens and residents of Canada too. The cargo owners brought the suit in the US largely because US liability rules provided more favorable compensation than Canadian rules.

The US Supreme Court held that: the case should be dismissed on grounds of forum non conveniens. The appropriate forum in this case is Canada for five reasons. (1)All the parties were citizens of Canada. (2) Both the colliding vessels were registered under the laws of Canada, and each was owned by a Canadian corporation. (3) The officers and the crew of each vessel—the material witnesses—were citizens and residents of Canada, and so would not be available for compulsory attendance in a US district court. (4) The cargo was shipped under a Canadian bill of lading from one Canadian port to another. (5)The collision occurred at a point where the inland waters narrowed to a neck, and the colliding vessels proceeded in United States waters unintentionally.

Take-away point: Courts in common law countries occasionally use forum non conveniens to decline, in the interest of justice, to exercise jurisdiction, where the suit is between foreigners, or where for kindred reasons the litigation can more appropriately be conducted in a foreign court.

3. Anti-suit injunction

When a litigant sue in a foreign court, it sometimes happens that the litigant's home country is opposed to his doing so. The foreign court may dismiss the case using the doctrine of forum non conveniens; but if it does not, the court in the litigant's home country may intervene by issuing an anti-suit injunction to prevent the litigant from proceeding with the case. Two different standards are used by courts to determine whether to issue an anti-suit injunction.

- The first requires a court to consider comity when granting the injunction to protect its own jurisdiction or to prevent evasion of its public policies.
- The second allows a court to grant the injunction if the foreign proceedings are vexatious or oppressive or if they will otherwise cause inequitable hardship.

Anti-suit injunction is rarely used by courts in civil law countries. Chinese courts have never issued an anti-suit injunction.

1 Canada Malting v. Paterson Steamships, Ltd., 285 US 413 (1932).

SELF QUIZ: Indicate whether each of the following statements is true or false.

4. A foreigner cannot be subject to personaljurisdiction of a country.
5. Municipal courts can exercise jurisdiction over cases involving foreign factors based on two principles: in personam or in rem.
6. US law requires that a valid choice of court clause must be written.
7. Chinese courts have exclusive jurisdiction on lawsuits brought for disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources.
8. To exercise *in rem* jurisdiction, the property must be located in the territorial jurisdiction of the forum.
9. Chinese courts can exercise jurisdiction over a case, even if a litigation on the same cause of action and between the same parties has started in a foreign court.
10. Plaintiffs can resist forum non conveniens on the basis that they can receive better financial compensation in an alternative forum.
11. In common law countries, courts can issue anti-suit injunction without any caution.

Part 3 Choice of Law

In cases involving foreign factors, municipal courts are confronted with the problem of deciding which law to apply. Courts use choice of law rules to determine whether they should apply their own law or foreign law to resolve disputes. Virtually all choice of law rules follow a two-step procedure:

- First, if the parties to a dispute have concluded a choice of law clause indicating the law of a particular country should be applied, the court should apply that law.
- Second, if the parties have not agreed as to which law should apply (either expressly or impliedly) , then the court should determine for itself which law it should apply by (1) following statutory choice of law provisions, (2) determining which country has the most significant relationship with the dispute, or (3) determining which country has the greatest interest in the outcome of the case.

What are choice of law clauses?

Choice of law clause is a clause that parties agree in advance as to what law should be applied in case of disputes. In China, parties may explicitly choose the laws applicable to international business transactions in accordance with the Law of the Application of Law for Foreign -related

Civil Relations. Even if the law chosen by the parties has no factual connection with the country whose law they have chosen, their choice should be enforced by Chinese courts.

Like many other countries, in China if the law chosen by the parties violate the mandatory provisions or harm the social public interests of China, the choice of law clause is void. Mandatory provisions and relevant Chinese law will be applied. Mandatory provisions refer to laws in the following fields:

- Labors protection,
- Environment, food and public health protection,
- Foreign exchange control and financial security,
- Anti-dumping and anti-monopoly, and
- Other mandatory laws.

What are statutory choice of law provisions?

In civil law countries, if parties do not reach a choice of law agreement, a court will apply statutory choice of law provisions to their dispute. These provisions look to the subject matter of the dispute—such as real rights, creditor's rights,and intellectual properties—and provide fairly simple and straightforward guidelines.

Statutory choice of law provisions are simple and easy to apply. However, they are criticized as being too rigid. In recent years, many civil law countries have made their statutory choice of law provisions more flexible by

- Respecting party autonomy in making choice of law clauses, and
- Adopting the most significant relationship doctrine.

Most significant relationship

The most significant relationship doctrine requires a court to apply the law of the country that has the most contacts with the parties and their transaction.

1. China

The most significant relationship principle is a fundamental theory adopted by the Law of the Choice of Law for Foreign-related Civil Relationships. The Law permits parties to choose the laws applicable to contracts by agreement. If the parties do not choose, the laws that have the most significant relationship with the dispute may apply. Courts generally consider the following factors when deciding which country has the most significant relationship with the dispute:

- The place of negotiation or contracting;
- The place of tort action or injury;
- The place of performance;

- The location of the subject matter;
- The nationality, domicile, residence, or place of incorporation of the parties; and
- Other factors relevant to the dispute.

2. US

In the US, courts consider the following general factors to determine which country has the most significant relationship with a case:[1]

- The application of which country's law will best promote the needs of the international legal system for harmony in the political and commercial relations of states?
- Will the purpose of the forum country's law be furthered by applying it to the particular case?
- Will the purpose of the other country's law be furthered by applying it to the particular case?
- If a contract is involved, which country's law will best promote the underlying policies of the legal subject matter (e.g., torts, contracts, etc.) involved?
- Which country's law will best promote certainty, predictability, and uniformity of result?
- Which country's law is easiest to determine and apply?

3. Comparison between China and the US law

- Both laws adopt the most significant relationship principle.
- Courts in the two countries may interpret the principle differently. Although China is a civil-law country, Chinese courts, like the US courts, have discretion in weighing factors when deciding which country has the most significant relationship with the case.

Governmental interest analysis

US courts analyze governmental interest to determine which law should be applied when parties do not make a choice of law agreement. Governmental interest approach requires application of the law of the country with the greatest interest in resolving the particular issue that is raised in the underlying litigation. Under this approach, courts evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be more advanced by the application of its law to the facts of the case under review. Analysis of governmental interest can reveal one of the following results:

- False conflict: only the forum country has an interest=>apply the forum country's law.
- True conflict: both the forum country and another country or countries have some legitimate interest=>apply the forum law, except when the other country's interest is significantly larger than the forum country.
- Unprovided conflict: no country has interests in applying its law=>apply forum law.

1 The Restatement (Second) of Laws: Conflicts, 1971.

SELF QUIZ: Indicate whether each of the following statements is true or false.

12. In China, the Law of the Application of Law for Foreign-related Civil Relations provides choice of law rules.
13. In China, so long as the parties made a choice of law agreement freely, even if they have no factual connection with the country whose law they have chosen, their choice will be enforced.
14. Parties can choose foreign laws to circumvent the anti-dumping and anti-monopoly regulations in China.
15. Since both US and Chinese laws adopt the most significant relationship principle, courts in the two countries interpret the principle in the same way.
16. Governmental interest analysis favors the application of forum law.

Part 4 Recognition and Enforcement of Foreign Judgments

The judgments of one country's courts have no force by themselves in another country. Recognition and enforcement is a legal procedure that a country grants the same force to foreign judgments as they grant their own judgments. The court that renders a judgment is the so-called judgment-rendering court. The court where an application for recognition and enforcement of a judgment is filed is called requested court.

Recognition and enforcement are different:

- Recognition is often confined to non-monetary judgments, such as divorce decrees and other status decisions or judgments on the validity of a contract. These judgments can be recognized but do not need enforcement.
- Recognition is the precondition for enforcement. Enforcement is often related to monetary judgments in civil and commercial cases. Such judgments require the losing party to pay certain amount of money to the winning party. Notably, if a divorce decree divides property between a couple, the monetary part of the decree is enforceable.

Recognition and enforcement of foreign judgment are important not only for winning parties but also for the society at large:

- Recognition and enforcement of foreign judgments can protect winning parties' rights and interests. Winning a judgment is not the end of a lawsuit. When a losing party has no sufficient assets in the forum to fulfill the judgment, a winning party needs to seek recognition and enforcement of the judgment in a foreign forum.

- It can enhance social justice, since justice cannot be achieved unless a legally effective judgment is enforced.
- It can also help achieve judicial economy and maintain certainty between parties regarding their rights and obligations by decreasing re-litigation and consequent inconsistent judgments.

Three legal regimes exist for recognition and enforcement of foreign judgments.

Domestic law

Significant differences exist in domestic laws for recognizing and enforcing foreign judgments.

- Some countries do not recognize and enforce foreign judgments in the absence of a treaty, such as the Netherlands.
- Some countries recognize or enforce foreign judgments under the principle of reciprocity even if no treaty exists, such as China.
- Some countries recognize and enforce foreign judgments more or less to the same degree as domestic judgments, and do not require reciprocity or a treaty, such as the US.

1. China

China Civil Procedure Law provides that recognition and enforcement of foreign judgments can be conducted according to:

- treaties ratified by China, or
- the principle of reciprocity.

For judgments beyond the scope of treaties, reciprocity is the only legal basis available for recognition and enforcement of foreign judgments in China. A key issue is—what reciprocity is under Chinese law?

- **Reciprocity in practice**: Chinese courts and legislators have never defined reciprocity. Scholars generally believe "reciprocity in practice" is Chinese official view of reciprocity. This view is very restrictive: because it means that reciprocity can be established only when a foreign court has recognized and enforced a Chinese judgment in practice.
- **Reciprocity in law**: This is a liberal view of reciprocity. It means that if theoretically a Chinese judgment may be recognized and enforced according to a foreign law, reciprocity can be established between China and this foreign country. Many scholars argue that Chinese courts and legislators should adopt this view.

CASE EXAMPLE: Japanese Citizen *Gomi Akira* Applied for Chinese Courts to Recognize and Enforce a Japanese Judgment (1995)

In 1994, Gomi Akira, a Japanese citizen, applied for the Dalian Intermediate Court to recognize and enforce a Japanese monetary judgment concerning a loan dispute against a Japanese-Chinese joint venture.

The Dalian Intermediate Court held that: Neither bilateral judgment recognition , enforcement treaty nor reciprocity existed between China and Japan, so the Japanese judgment should not be

recognized and enforced.

Take-away point: Reciprocity must exist between a judgment-rendering country and a requested country in the absence of a treaty.

2. US

Most of US states do not require reciprocity or a treaty on recognition and enforcement to recognize and enforce foreign judgments. Therefore, compared with China, it is much easier to recognize and enforce foreign judgments in the US.

The US law for recognize and enforce foreign judgments is state laws. These state laws are generally molded out of the following guiding uniform law documents:

- The Uniform Foreign Money Judgments Recognition Act (UFMJRA)
- The Restatement III
- The Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA)

CASE EXAMPLE: *Hubei Gezhouba Sanlian Industrial Co., Ltd. and Hubei Pinghu Cruise Co., Ltd. v. Robinson Helicopter Company, Inc. (2009)*

Facts: Plaintiffs Hubei Gezhouba Sanlian Industrial Co., Ltd. (Sanlian) and Hubei Pinghu Cruise Co., Ltd. (Pinghu) are business located in Yichang City, Hubei Province, China. Defendant Robinson Helicopter Company, Inc. (RHC) is a California corporation with its principal place of business in Torrance, California, the US. In 2009, Sanlian and Pinghu applied to the US District Court of Central District of California for recognition and enforcement of a Chinese monetary judgment[1] against RHC.

The US District Court of Central District of California held that: Plaintiffs were entitled to the issuance of a domestic judgment in this action in the amount of the Chinese Judgment, with interests calculated as set forth in the Chinese Judgment, for purposes of enforcement, because:

- Service of process in China was proper under Federal Rule 4, the 9th Circuit Direct Mail ruling, and the Hague Service Convention.
- The Chinese Judgment was final, conclusive, and enforceable under Chinese laws and involved the granting of recovery of a sum of money.
- California's UFMJRA applies to this action, seeking recognition of the Chinese Judgment, and none of the stated exceptions to recognition in the UFMJRA are applicable on the facts presented.

1 Early on March 14, 1995, Pinghu and the predecessor of Sanlian brought an action against the RHC for damages in the Los Angeles Superior Court (hereinafter "California State Action"). They alleged that RHC had designed and manufactured a helicopter that crashed into the Yangtze River in China in 1994 and the RHC was responsible for this accident. RHC moved to stay the California State Action on the ground of forum non conveniens. The Los Angeles Superior Court granted the motion and stayed the California State Action. Therefore, on January 14, 2001, Sanlian and Pinghu filed an action against RHC in the Higher People's Court of Hubei Province. On 10 December 2004, the Higher Court issued a judgment in favor of Sanlian and Pinghu and against RHC.

Take-away point: The US requested court applies the law of the judgment-rendering court (namely "the judgment-rendering Chinese court") to decide whether the judgment is final and conclusive. If none of the stated exceptions to recognition in the UFMJRA are applicable, a foreign judgment is recognizable and enforceable in the US. The court does not require reciprocity or a treaty for recognition or enforcement.

3. Comparison between Chinese and the US law:

- Compared with Chinese law, US law is more liberal in recognizing and enforcing foreign judgments.
- Chinese courts often use lack of reciprocity to deny recognizing and enforcing foreign judgments, but US courts generally do not require reciprocity.

Bilateral treaties

Bilateral treaties on recognition and enforcement of judgments have four benefits:

- impose international obligations to countries to recognize and enforce foreign judgments.
- provide firm rules for recognition and enforcement of foreign judgments.
- satisfy the requirement of reciprocity, and
- expand the scope of recognizable judgments.

Countries have different views towards bilateral treaties on recognition and enforcement of foreign judgments.

- Countries with more restrictive domestic laws, particularly those requiring reciprocity, tend to enter into more bilateral treaties. China has concluded bilateral treaties on judgment recognition and enforcement with more than 26 countries. France has concluded almost 40. But the US, who does not require reciprocity, has none.
- Treaties typically exist between countries with political, historical, or geographic proximities, such as between France and its former colonies, between various Arab States.
- Countries in the same legal system are easier to reach treaties, because these countries share similar legal techniques and ideologies. For example, all countries that concluded a bilateral treaty on recognition and enforcement of civil and commercial judgments with China are civil law countries.

Multilateral conventions

Multilateral conventions can help realize global free circulation of judgments. However, reaching a multilateral convention is more difficult than bilateral treaties. Therefore, there are few successful multilateral conventions on recognition and enforcement of foreign judgments in the world.

1. Brussels regime

Brussels Regime refers to Brussels Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters of 1968 and relevant regulations enacted by the European Commission.[1] It establishes a multilateral regime for recognition and enforcement of judgments among member counties of the European Union (EU). It is also the most successful multilateral Conventions for recognition and enforcement of judgments thus far. Brussels Regime is constituted by the following documents:

- Judgments in civil and commercial matters: Brussels Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters of 1968, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter "Brussels I Regulation"), and Council Regulation No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter "Brussels I a Regulation"). Brussels I a Regulation is a recast of the Brussels I Regulation and completely replaced it on January 10, 2015.
- Judgments in matrimonial matters and parental responsibility: Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (namely "Brussels II a Regulation or Brussels II bis Regulation").
- Uncontested claims and payment procedures: Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims; Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 Creating a European Order for Payment Procedure.
- Judgments concerning insolvency: judgments opening insolvency proceedings are recognized under Article 16 of the Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, with the enforcing State's public policy as the only relevant defence (Article 26); other judgments of the insolvency court are enforceable under Article 25 of the Brussels I Regulation.

Brussels Regime is supplemented by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, concluded in Lugano on October 30, 2007. It is the successor to the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters of September16, 1988. Lugano Convention is largely similar to the Brussels Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters of 1968, but it is applicable among non-EU members.[2]

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1 Regulations are enacted by the European Commission and directly applicable to EU members. European Commission has competence to enact regulations in the field of police and administration of justice according to the Treaty of Amsterdam.

2 The signatories of the 2007 Lugano Convention are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland.

2. Hague Choice of Court Convention

The Hague Choice of Court Convention, formally the Convention of 30 June 2005 on Choice of Court Agreements is an international convention concluded under the auspices of the Hague Conference on Private International Law. It is the most recent international effort to enhance global recognition and enforcement of civil and commercial judgments. Thirty countries, including the US, Germany and China have signed this Convention.

This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. An exclusive choice of court agreement designates courts of one Contracting Member or one or more specific courts of one Contracting Member to have exclusive jurisdiction over the dispute. A judgment-rendering court should exercise jurisdiction based upon the exclusive choice of court agreement, and its judgments must be recognized in all Contracting Members where the Convention is applicable. Currently, the Hague Conference on Private International Law is working to expand the scope of the Convention in order to facilitate judgment recognition and enforcement worldwide.

Important requirements and exceptions for recognition and enforcement

1. Valid, final, and on the merits

According to most of domestic laws, treaties, and conventions, a foreign judgment should be valid, final, and on the merits so as to be recognizable and enforceable in other country.

- Validity means that judgments are legally effective according to the law of the rendering country.
- Finality means that judgments are not subject to ordinary appeals. Generally, finality of a judgment is determined by the law of the rendering country. However, some requested country applies its own law to decide the finality of a foreign judgment.
- Judgments must usually be on the merits. Mere procedural decisions are usually not recognizable, because each country's courts usually follow that country's own procedure law so will not be bound by another court's procedural decision.

Chinese law does not use the wordings of "validity and finality", and instead, it requires judgments should be "legally effective". Namely, a foreign judgment must be legally effective in order to be recognized and enforced in China. Chinese courts apply the law of the judgment-rendering court to determine whether a foreign judgment is legally effective.

Many treaties concluded by China requiring judgments for recognition and enforcement should be legally effective. One example is The Judicial Assistance Treaty in Civil Cases on 1 January 1995 between the PRC and Italy (hereinafter "China-Italy Bilateral Treaty").

CASE EXAMPLE: *B&T* Insolvency Case[1]

Facts: On December 18, 2000, B&T Ceramic Group s. r. l. (hereinafter "B&T"), domiciled at Via Calzavecchio n.23, Casalecchio d/R (Bologna), Italy, applied to the Guangdong Foshan

1 B&T Insolvency Case, No.633 Fozhongfajingchuzi (2000).

Intermediate People's Court for recognition and enforcement of the No. 62673 bankruptcy judgment and an adjudication order issued by Italian courts in 1997 and 1999, respectively.[1]

The Guangdong Foshan Intermediate People's Court held that: Article 21 of the China-Italy Bilateral Treaty provided that judgments should be legally effective according to the law of the judgment-rendering country. The bankruptcy judgment and the adjudication order were both legally effective according to Italian law. Therefore, the Foshan Court recognized the Italian bankruptcy judgment and the adjudication order according to China's Civil Procedural Law and Articles 20, 21 and 26 of the China-Italy Treaty.

Take-away point: A foreign judgment must be legally effective in order to be recognized and enforced in China. Chinese courts apply the law of the judgment-rendering court to determine whether a foreign judgment is legally effective.

2. Jurisdiction

Recognition and enforcement of a foreign judgment require that the rendering court had jurisdiction. A judgment-rendering court always applies its own law to determine whether it has jurisdiction over the case. The law of the judgment-rendering court does not bind the requested court. The requested court may apply the law that it thinks suitable to decide whether the judgment-rendering court has jurisdiction. There are three circumstances:

- If the requested court claims exclusive jurisdiction in an area, recognition and enforcement of a foreign judgment in that area is usually denied. For example, France had long protected the privilege of its own nationals to sue and be sued in France by not enforcing foreign judgments against French nationals who had not submitted to the foreign court's jurisdiction.
- Where no exclusive jurisdiction is claimed, some countries, such as Germany, have applied the "mirror-image principle", projecting their own rules of jurisdiction on the foreign courts and upholding the foreign courts' jurisdiction if, in the reverse situation, their own courts would have jurisdiction to hear the case.
- Some countries, such as China, have developed specific jurisdiction laws for recognition and enforcement purposes. Generally they integrate these laws into the bilateral treaties on recognition and enforcement of foreign judgments.

China has developed specific jurisdiction laws for recognition and enforcement purposes. These laws can be found in the bilateral treaties concluded by China. Generally the treaties provide that Chinese courts can deny recognition and enforcement if jurisdiction of a judgment-rendering court infringes the exclusive jurisdiction of Chinese courts. Moreover, the judgment-rendering

1 The No. 62673 judgment declared E.N.Groups.p.a (hereinafter "E.N.") bankrupt. The adjudication order held that overseas corporations in which E.N. hold shares, equipment, and machines, trademarks, patents and business networks were sold as a whole without exception to B&T. Therefore, B&T requested the Foshan court to transfer all property of E.N. in China to it. In China, E.N. holds 98% of share of NanhaiNassetti Pioneer Ceramic Machine Co. Ltd. (hereinafter "NanhaiNassetti") . Accordingly, B&T requested the Foshan court to confirm that B&T holds the 98% of share of HanhaiNassetti and that B&T enjoys full right of control over the corresponding assets.

court should exercise jurisdiction according to the following principles:

- The defendant has his or her domicile or habitual residence in the country where the court is located,
- The defendant has a representative office in the country where the court is located and the action is related to the activities of the office,
- The defendant accepted the jurisdiction of the judgment-rendering court by writing,
- The defendant defended the substance of the case in the judgment-rendering court without questioning its jurisdiction,
- In contractual disputes, the contract was signed, or has been or will be performed in the country where the court is located, or the subject matter is located in that country,
- In cases of tort, the conducts or results of the tort took place in the country where the court is located,
- In cases of personal status, one party has his or her domicile or habitual residence in the country where the court is located,
- In cases of maintenance, the judgment creditor has his or her domicile or habitual residence in the country where the court is located,
- In cases of inheritance, when he or she died, the inherited was domiciled or his or her main inheritance was located in the country where the court is located, or
- The subject matter is a real estate in the country where the court is located.

3. Procedure requirements

If fundamental procedural principles were violated in the judgment-rendering court, the consequent judgment is usually not recognizable and enforceable in a foreign court. Procedure defenses generally include:

- The defendant did not have adequate notice, was not properly served, and had no opportunity to be heard in court are the most important procedural defenses for recognition and enforcement.
- Judgments based upon procedural fraud or abuse of procedure are usually not recognizable and enforceable. However, a party may be precluded from invoking this defense in the enforcement proceedings if it had a chance to invoke them to void the judgment in the judgment-rendering country.
- A rarely used defense is that the judgment was rendered under a judicial system that is generally not fair. This defense not only doubts the procedure of a specific case, but also criticizes the whole judicial system of the judgment-rendering country generally.

According to most of treaties concluded by China, China courts will deny recognition and enforcement of a foreign judgment, if the defendant is not given adequate notice for the judgment-rendering proceedings or is not properly represented by a guardian if lacking legal capacity. Some treaties explicitly provide that “adequate notice” should be decided by the law of the judgment-rendering country. If treaties do not indicate which law should be applied to service, the requested

courts in China will refer to the service provisions under the treaties or apply the Hague Service Convention to determine whether a defendant was given adequate notice.

CASE EXAMPLE: ***Minsk Automatic Production Corporation United v. CNMTC***[1]

Facts: Minsk Automatic Production Corporation United applied to the Beijing No. 2 Intermediate Court to recognize and enforce a judgment issued by Belarus against CNMTC.

The Beijing No. 2 Intermediate People's Court held that: According to the China-Byelorussian Bilateral Treaty on Judicial Service, judgment recognition and enforcement should be denied if a defendant is not given adequate notice for the judgment-rendering proceedings. In this case, the Chinese defendant was served by way of post. The Treaty does not indicate which law should be applied to service. The Beijing Court referred to the Hague Service Convention, holding that serving Chinese defendant by "way of post" was against the reservation made by China under the Convention. Notably, Belarus also acceded to the Convention, but it did not make any reservations like China. Moreover, the service provisions of the China-Byelorussian Bilateral Treaty do not mention post as a way of service. The court concluded that, considering China's reservations under the Hague Service Convention, the recognition and enforcement of the Byelorussian judgment should be denied because the Chinese defendant was not duly served.

Take-away point: the recognition and enforcement of foreign judgments will be denied if the defendant is not duly served according to the bilateral judicial assistance treaty concluded by China or the Hague Service Convention.

4. *Res Judicata*

Res Judicata is the Latin term for "a matter already judged." It means that, if a final judgment has been rendered on a case, continued litigation of the same case between the same parties should be precluded and a court will use *res judicata* to deny recognition and enforcement of judgments from parallel proceedings.

Under the doctrine of *res judicata*, a court can generally deny recognition and enforcement of a foreign judgment if

- A legally effective judgment has been rendered by a court in the requested country for the same cause of action between the same parties,
- A court in the requested country has recognized and enforced a third-country judgment on the same cause of action between the same parties, or
- A court in the requested country is trying a case on the same cause of action between the same parties. Some treaties may require that the trial in the court in the requested country should begin before the commencement of foreign proceeding or the court seized the case first.

1 Minsk Automatic Production Corporation United v. CNMTC, the No.2 Intermediate People's Court in Beijing (2001) ErZhong Min Renzi No. 01815.

5. Public policy exception

A requested court should not review the substance of foreign judgments either under its own law or some other law. The requested court should not reject recognition simply because it would have decided the case differently. However, all legal systems and virtually all recent treaties and conventions allow countries to deny recognition to foreign judgments that violate their public policy. When recognition and enforcement of a foreign judgment would harm a strong and fundamental policy of the requested country, the recognition and enforcement can be denied for public policy exception.

Chinese courts can deny recognition and enforcement of a foreign judgment, if recognition and enforcement would cause harm to Chinese sovereignty, security, and public order. Chinese legislators have long adopted an affirmative attitude towards the application of public policy exception. But they seldom use the term, "public policy," in their legislation. Instead, they tend to use a cluster of terms together to refer to "public policy," such as "public interests," "state sovereignty," "security," "socio-economic order," and "social and public interests of the country," and etc. The focus of sovereignty and security in Chinese law results from a history of foreign invasions from 1840 to 1945. The emphasis of economic orders lies in the fact that developing economy is a predominant issue for China currently. Moreover, Chinese courts would also invoke the public policy exception to refuse recognition and enforcement of judgments tainted by fraud or involving enforcement of a foreign penal or taxation law.

SELF QUIZ: Indicate whether each of the following statements is true or false.

17. Enforcement is often confined to non-monetary judgments.
18. In China, recognition and enforcement of foreign judgments can only be conducted according to the principle of reciprocity.
19. Chinese courts have adopted the view of "reciprocity in law."
20. The US also requires reciprocity to recognize and enforce foreign judgments.
21. The Hague Choice of Court Convention does not require an exclusive choice of court agreement.
22. If a defendant was not properly served, the consequent judgment may not be recognized and enforced in a requested country.
23. China does not make a reservation of the service by post under the Hague Service Convention.
24. Chinese courts can deny recognition and enforcement of a foreign judgment, if recognition and enforcement would cause harm to Chinese sovereignty, security, and public order.

Part 5 International Commercial Arbitration

International commercial arbitration has become more and more popular in the international business community. As the President of the Singapore International Arbitration Center Court of Arbitration, Professor Gary Born, indicates "International commercial arbitration merits study because it illustrates the complexities and uncertainties of contemporary international society — legal, commercial and cultural—while providing a highly sophisticated and effective means of dealing with those complexities in a predicable and uniform manner."[1]

Overview of international commercial arbitration?

1. What is international commercial arbitration?

Arbitration is a private dispute resolution mechanism where parties agree to submit their dispute(s) to a private panel without reference to a court of law. The outcome of the proceeding is final and binding on the parties. UNCITRAL Model Law on International Commercial Arbitration (hereinafter "UNCITRAL Model Law") defines the term "commercial" broadly to cover all relations of a commercial nature, whether contractual or not.[2] An arbitration is international if:[3]

a the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

b one of the following places is situated outside the State in which the parties have their places of business:
   - the place of arbitration if determined in, or pursuant to, the arbitration agreement;
   - any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

2. What are types of arbitration?

There are two types of arbitration: institutional arbitration and *ad hoc* arbitration. Institutional arbitration means parties select an arbitration institution to conduct their arbitration. The institution provides arbitration rules and will administer the arbitration in accordance with its rules, and the parties will be bound to comply with them. The following are examples of famous arbitration institutions in the world.

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1 Gary B. Born, *International Arbitration: Cases and Materials*, Preface to Second Edition (2015).

2 Footnote 2 of the UNCITRAL Model Law on International Commercial Arbitration (2006).

3 Article 3 of the UNCITRAL Model Law on International Commercial Arbitration (2006).

Figure 3: Examples of Famous Arbitration Institutions

Ad hoc arbitration is conducted without the assistance of an arbitration institution. *Ad hoc* arbitration is often conducted according to the UNCITRAL Arbitration Rules and seeks administrative supports from the Permanent Court of Arbitration at the Hague. Alternatively, parties may make up the procedural rules themselves. Chinese Arbitration Act only allows institutional arbitration. *Ad hoc* arbitration may be conducted in free trade zones in China.

Figure 4: Permanent Court of Arbitration at the Hague, the Netherlands.

3. Why arbitrate?

Compared with litigation and mediation, the most significant advantage of arbitration is that the New York Convention has established a uniformed international mechanism to recognize and enforce arbitral awards. Member states of the New York Convention shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of an arbitral award under the Convention than those imposed on the recognition or enforcement of a domestic arbitral award.[1] Recognition and enforcement of the award may be refused

1 Id., article. 3.

according to Article V of the New York Convention. In contrast, no equivalent international mechanism exists to recognize and enforce judgments and mediation decisions internationally. Therefore, the convenience of international enforcement of arbitral awards is the best attraction for commercial parties.

A fundamental characteristic of arbitration is finality, which attracts many commercial parties who want to resolve their disputes in a timely fashion. Unlike litigation, arbitration does not provide recourse to appeal.[1] Arbitration awards can, in limited grounds, be set aside at the seat of arbitration according to lex arbitri[2] or can be rejected to recognize and enforce at the state of recognition and enforcement according to the New York Convention.

Flexibility is another advantage of arbitration. For example, parties have autonomy to determine the qualifications of arbitrators; and in disputes involving technical issues, parties can even select non legal professionals as their arbitrators. In contrast, parties cannot select judges in a litigation. Parties can also freely decide the procedure of arbitration while parties have to follow the court procedures in litigation. Arbitration institutions have emergency arbitration rules which can enable parties to get an arbitral award in a very short period of time. Litigations may be lengthy and costly. However, in recent years, arbitrations of complex commercial disputes have been judicialized. For example, arbitration institution rules become more and more complicated, the costs of arbitration are increasing, and sometimes it takes years for an arbitration panel to issue an award. Therefore, parties need to carefully evaluate the costs and benefits before entering into an arbitration.

Arbitration also has the advantage of neutrality. This partly comes from party autonomy in appointing arbitrators. The criticism is that, in order to be re-appointed, some arbitrators may have favourable bias to big companies. Neutrality of arbitration is also because parties can freely select the seat of arbitration. The most popular seats include Singapore, Paris, London and Geneva. The seat of arbitration may have no connection to the disputes and the parties, and parties select it mainly because it has pro-arbitration law and policies, it is neutral to parties, or its geographic location is convenient for parties to travel. Notably, in past decades, commercial courts have quickly emerged and flourished in London, Singapore and Dubai. These commercial courts adopt English common law, hire internationally renowned judges, and establish an international image of expertise and neutrality in commercial litigations. Parties can select these courts by a choice-of-court agreement even if their disputes have no connection with the states where the courts are located. For example, many international maritime and insurance litigations are conducted in London mainly because its courts have long history of and expertise in dealing with these disputes. Even Chinese governments have established special courts to deal with commercial disputes in its free trade zones. These courts enjoy more flexibility in applicable law compared with courts outside of the free trade zones. Therefore, parties need to notice that commercial

1 A notable exception is Section 69 (1) of the English Arbitration Act 1996, which provides that "unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings".

2 *Lex arbitri* is discussed in details in the following part of "Applicable Law(s)."

courts are "competing" with arbitration in terms of neutrality.

Confidentiality has traditionally been considered as an advantage of arbitration compared with litigation, because confidentiality is an implied duty as the natural extension of the undoubted privacy of the arbitration hearing. Therefore, arbitration has the benefit to help parties to resolve their disputes while maintaining good commercial relationship and public reputation. However, the current trend is while the privacy of the hearing should be respected, confidentiality is not an essential attribute of a private arbitration. If an arbitration is involved with the affairs of public authorities, the public's genuine and legitimate interest in obtaining information about the arbitration may prevail over the parties' implied duty of confidentiality. Therefore, if parties want to ensure the confidentiality of their arbitration, they should sign a separate confidentiality agreement.

4. What is the seat of arbitration?

The "seat" of arbitration is the legal jurisdiction to which the arbitration is tied. The seat is significant because it will determine the applicable law to the arbitration and which national court may intervene during the arbitration and ultimately the extent of this intervention. The award also acquires the "nationality" of the nation where the seat is located for the purpose of enforcement under the New York Convention. For example, parties may agree that their sale of goods contract is governed by Australian Law and disputes shall be submit to an International Chamber of Commerce (hereinafter "ICC") arbitration with its seat in Singapore. In this example, issues of the interpretation of the contract shall be governed by Australian Law. The institutional rules for arbitration shall be those of the ICC. Therefore, the appointment of the arbitrators, timing for the document submissions, etc., shall follow the ICC Arbitration rules. Singapore Law will be applied to the arbitration to determine issues such as arbitrability, the extent to which Singapore court may intervene or assist the arbitral procedure, the conditions that an arbitral award may be set aside, etc. The award will be considered as an award issued in Singapore. This award can be recognized and enforced around the world according to the New York Convention because the Convention applies to Singapore.

The seat of arbitration can be different from the place of hearing. For example, the seat of arbitration can be Singapore but the place of hearing can be arranged in Paris. The place of hearing has no legal significance as the seat of arbitration.

5. What is the legal framework for international commercial arbitration?

(1) International law

The New York Convention of 1958 ensures the recognition and enforcement of arbitration agreements and awards among its member states.[1]

UNCITRAL Arbitration Rules (1976), revised in 2010, provides a comprehensive set of

1 Introduction to the New York Convention can be found in Chapter One.

procedural rules for the conduct of arbitral proceedings. It is not a convention and its adoption is based upon private parties' agreement.

States may refer to the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006, when enacting and reforming their domestic laws on arbitration.

(2) IBA rules

International Bar Association (hereinafter "IBA") also provides useful rules that arbitrators and parties may refer to:

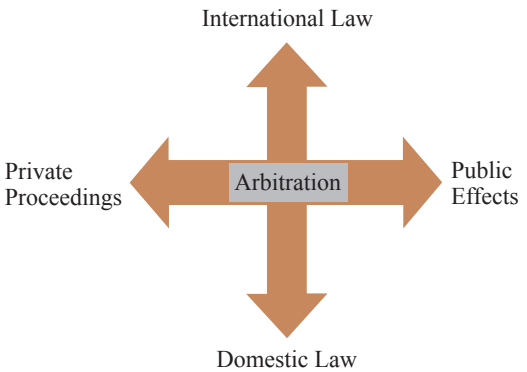
- IBA Rules on the Taking of Evidence in International Arbitration (1999, amended in 2010)
- IBA Guidelines on Conflicts of Interest in International Arbitration (2004, amended in 2014)
- IBA Guidelines for Drafting International Arbitration Clauses (2010)
- IBA Guidelines on Party Representation in International Arbitration (2013)

(3) Domestic law

China develops a tri-system mechanism for arbitration:

- Disputes arising out of contract and other proprietary rights and obligations can be arbitrated according to China Arbitration Law (1995).
- Labour disputes should be arbitrated under the China Labour Dispute Mediation and Arbitration Law (2007).
- Rural Land contract disputes can be arbitrated according to the China Rural Land Contract Dispute Mediation and Arbitration Law (2009).

6. Conclusion



International commercial arbitration is private proceedings with public effects because arbitral awards can be recognized and enforced internationally under the New York Convention. International commercial arbitration is regulated by both domestic and international laws because of its legal framework.

What are arbitration agreements?

According to the UNCITRAL Model Law, "arbitration agreement" is an agreement made by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[1] An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[2]

1. Validity requirements

(1) Writing

Arbitration agreements must be in writing. However, writing need to have an expansive interpretation: an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.[3] Electronic communication, such as electronic data interchange, electronic mail, telegram, telex or telecopy, are considered as writing. Furthermore, the writing requirement may be satisfied if, when negotiating a contract, parties refer to any document containing an arbitration clause and the reference is such as to make that clause part of the contract.

(2) Defined legal relationship

An arbitration agreement must submit a defined legal relationship to arbitration. The wording of the arbitration agreement is crucial because it determines the scope of the submission. For example, Article 2 of the Supreme People's Court's Interpretation of the China Arbitration Law (2006) states that if parties generally stipulate in their contract that the matter for arbitration is "contract disputes", all disputes arising out of the formation, validity, modification, assignment, performance, liabilities for breach, interpretation, rescission and so forth of the contract are subject to arbitration.

In the following case, the arbitration clause goes beyond contractual disputes and cover tort disputes.

CASE EXAMPLE: *Kaverit Steel Crane Ltd v. Kone Corporation*[4]

Facts: A license and distribution agreements contain an arbitration clause indicating all disputes "arising out of or in connection with this contract" shall be referred to arbitration. Claims concerned conspiracy and inducing breach of contract.

Alberta Queen's Bench refused to stay the court proceeding, because the tort-based claims fell

1 Article 7.1 of the UNCITRAL Model Law.

2 Id.

3 Id., Article 7.3.

4 Kaverit Steel Crane Ltd v. Kone Corporation, (1994) XVII YBCA 346.

outside the scope of the arbitration clause.

Alberta Court of Appeal held that: The wording of the arbitration clause was wide enough to bring within its scope any claim that relied on the existence of a contractual relationship. Because the claim alleging conspiracy by unlawful means to harm Kaverit relied upon a breach of contract as the source of the unlawfulness, that dispute should be referred to arbitration. Claims that were not based on the existence of a contract should proceed to trial.

Take-away point: All disputes "arising out of or in connection with this contract" are often interpreted broadly to include both contractual and tort disputes.

(3) Arbitrability

Arbitrability means that a dispute is capable of settlement by arbitration. Generally, criminal matters and disputes over the grant or validity of patents and trademarks are not arbitrable. However, each state may determine arbitrability differently according to its own law. For example, antitrust issues arising out of international contracts are not arbitrable in China but are arbitrable in the US and the EU.

(4) Designate an arbitration institution

Chinese Arbitration Law recognizes institutional arbitration only. Article 16 of the China Arbitration Law provides that an arbitration agreement shall name a designated arbitration institution. The Supreme People's Courts' judicial interpretation further provides that:

- Where the arbitration institution is inaccurately designated, if the arbitration institution can nonetheless be ascertained, then the arbitration agreement is valid;
- Where parties agree to two or more arbitration institutions, they may choose any one of those arbitration institutions by a supplementary agreement, failing which the arbitration agreement is invalid;
- Where parties agree to the place of arbitration, if there is only one arbitration institution in that place, then that arbitration institution is deemed to be designated and the arbitration agreement is valid; if, however, there is more than one arbitration institution in that place, parties may choose one of the arbitration institutions by a supplementary agreement, failing which the arbitration agreement is invalid; and
- Where parties agree to the arbitration rules only, it is deemed that no arbitration institution is designated, unless the parties reach supplementary agreement on a designated arbitration institution or an arbitration institution can be ascertained according to the agreed arbitration rules.

2. Separability of an arbitration clause and an underlying contract

Separability deals with two issues:

- Whether the underlying contract is nonexistent, ineffective, or invalidity and whether this results in the non-existence, ineffectiveness, or invalidity of the arbitration clause.

- Whether a court or an arbitral tribunal, will consider on an interlocutory basis whether there is a valid arbitration clause.

Article 19 of the China Arbitration Law stipulates that an arbitration clause exists independently and is not affected by the revision, dissolution, termination or invalidity of the underlying contract. The arbitral tribunal has the power to confirm the validity of the underlying contract.[1] Both arbitration institutions and people's courts may rule on the validity of the arbitration clause. In the event that one party applies to the arbitration commission while the other party applies to the people's court, the validity of the arbitration clause shall be decided by the people's court and that any objection to the validity issue shall be raised before the first hearing of the arbitral tribunal.[2] Article 3 of the Supreme People's Court's Reply on Several Issues Concerning the Validity of Arbitration Agreements (1998) provides that, if one party applies to the arbitration institution for a confirmation of the validity of the arbitration agreement, and the other party applies to the people's court to find that the arbitration agreement is invalid, if the arbitration institution accepts the application and renders a decision before the people's court accepts the application, the people's court should not entertain the application. If the arbitration institution accepts the application but has not yet rendered a decision, the people's court should accept the application and notify the arbitration institution to terminate the arbitration.

US and English case law holds that challenges to the validity or legality of the underlying contract should be distinguished from challenges to the existence of the underlying contract. The former does not generally affect the associated arbitration clause, but the latter may. US and English courts also consider whether the challenges target the underlying contract generally or focuses on the arbitration clause specially.

- If the validity, legality, or continued effectiveness of the underlying contract is "*generally*" challenged, arbitrator decides the challenge;
- If the existence, validity, legality, or continued effectiveness of the arbitration clause is "*specifically*" challenged, the court at the seat of arbitration decides the challenge; and
- If the *existence (or formation)* of the underlying contract, as distinguished from its *validity, legality, or effectiveness*, is challenged, the court at the seat of arbitration decides the challenge.

The power of the arbitral tribunal to determine its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, is the so called "competence-competence" principle. In China, arbitral tribunals have no power to determine its own jurisdiction. The power is in the arbitration institutions and the court at the seat of arbitration. In the US and the UK, arbitral tribunals have more power to determine its own jurisdiction. French law even goes further and recognizes a very broad competence-competence regime: it permits arbitral tribunals to consider all jurisdictional challenges, including challenges specifically to the

1 Article 19 of the China Arbitration Law.

2 Id, article 20.

arbitration agreement and challenges to the existence of the underlying contract.

CASE EXAMPLE: ***Fiona Trust & Holding Corporation v. Yuri Privalov*** **[2007] UKHL 40**

Facts: Charter parties, which contain arbitration clauses, were procured by bribery.

Issue: Whether the allegation of bribery targets the charter parties generally or it focuses on the arbitration clauses.

The English Court of Appeal held that: It is not enough to say that the bribery impeaches the whole contract unless some special reason indicates that that the bribery impeaches the arbitration clause in particular. The allegation of bribery targets the charter parties generally and not focuses on the arbitration clauses specially. Therefore, the case should be arbitrated.

Challenges to the "existence" of the charter parties may impeach the associated arbitration clauses when there is a claim that signatures on the charter parties were forged, because the ground of attack is not that charter parties were invalid, but is instead that the signatures to the arbitration clauses, as a "distinct agreement", were forged.

Take-away point: If a contract is said to be invalid for reasons such as bribery, unless that bribery relates specifically to the arbitration clause, the clause survives and the validity of the contract as a whole is to be determined by the arbitrators, not the court.

3. Applicable law(s)

Lex arbitri is the law governing the existence and proceedings of the arbitral tribunal. It is often the law of the seat of arbitration. It may not be the same as the law applicable to the substantive matters in dispute.

Lex arbitri applies to the following issues:

- the definition and form of an agreement to arbitrate;
- whether a dispute is capable of being referred to arbitration (that is, whether it is "arbitrable" under the *lex arbitri*);
- the constitution of the arbitral tribunal and any grounds for challenge of that tribunal;
- the entitlement of the arbitral tribunal to rule on its own jurisdiction;
- equal treatment of the parties;
- freedom to agree upon detailed rules of procedure;
- interim measures of protection;
- statements of claim and defence;
- hearings;
- default proceedings;
- court assistance, if required;
- the powers of the arbitrators, including any powers to decide as amiable compositeurs;
- the form and validity of the arbitration award; and

- the finality of the award, including any right to challenge it in the courts of the place of arbitration.

SELF QUIZ: Indicate whether each of the following statements is true or false.

25. Arbitration proceedings should be open to the public.
26. In China, the China Arbitration Act does not apply to labour disputes.
27. Ad hoc arbitration is an arbitration conducted with the assistance of an arbitral institution.
28. The seat of arbitration is very important, because the law of the seat will apply to the arbitration, and also because the award may acquire the "nationality" of the nation where the seat is located for the purpose of enforcement under the New York Convention.
29. The seat of arbitration is the same as the place of hearing.

How to arrange international arbitral proceedings?

1. Establishment and organisation of an arbitral tribunal

According to the UNCITRAL Model Law, parties are free to determine the number of arbitrators, and failing such determination, the number of arbitrators shall be three.[1] Parties are free to agree on a procedure of appointing the arbitrator or arbitrators. [2] In China, if parties fail to agree on the method of formation of the arbitration tribunal or to select the time limit specified in the rules of arbitration, the arbitrators shall be appointed by the chairman of the arbitration commission.[3] An arbitrator can be challenged if he or she is not independent or impartial. Chinese Arbitration Act provides that the arbitrator must withdraw if [4]

- The arbitrator is a party in the case or a close relative of a party or of an agent in the case;
- The arbitrator has a personal interest in the case;
- The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or
- The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent.

Compared with Chinese Arbitration Act, IBA Guidelines on Conflicts of Interest in International Arbitration (2014) provide more comprehensive standards to assess the impartiality and independence of arbitrators. The Guidelines provide four non-exhaustive lists:[5]

a The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, the arbitrator needs to withdraw.

1 Article 10 of the UNCITRAL Model Law.

2 Id., Article 11.

3 Article 32 of the China Arbitration Act.

4 Id., Article 34.

5 IBA Guidelines on Conflicts of Interest in International Arbitration (2014), pages 17-27.

- For example, the arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

b The Waivable Red List covers situations that are serious but not as severe. These situations should be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator.

- For example, the arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held. Or a close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

c The Orange List reflects situations that give rise to parties' doubts about the arbitrator's impartiality or independence. The arbitrator has a duty to disclose such situations. The parties are deemed to have accepted the arbitrator, if, after disclosure, no timely objection is made.

- For example, the arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

d The Green List includes situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose these situations.

- For example, the arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

2. Jurisdiction of an arbitral tribunal

Jurisdiction of an arbitral tribunal has been discussed in the above section of Separability. Here we focus on how to challenge jurisdiction of an arbitral tribunal. The party who opposes the arbitral tribunal's jurisdiction may boycott the arbitration, but nonetheless, the arbitration may proceed without the presence of the opposing party and a default award may be rendered against this party.

A good practice for the opposing party is to take part in the proceedings and raise the jurisdictional matter with the arbitral tribunal at the earliest possible stage. According to the UNCITRAL Model Law, the opposing party should submit its plea that the arbitral tribunal does not have jurisdiction not later than the submission of the statement of defence. The opposing party may request the arbitral tribunal to bifurcate the disputes and issue an interim award on the jurisdiction first. If this award is against the opposing party, the party can challenge this award in the court at the seat of arbitration. Alternatively, the opposing party may continue to participate in the arbitration and expressly reserve its position in relation to the issue of jurisdiction. If the arbitral tribunal renders a final award against the opposing party, the party may challenge the

award and the jurisdiction in the court at the seat of arbitration or at the place of recognition and enforcement of the award.

3. Conduct of the proceedings

UNCITAL Model Law, national arbitration laws and arbitration institution rules provide detailed guidance for conduct of the proceedings. If parties opt for *ad hoo* arbitration, they can design their own rules for conduct of the proceedings. UNCITRAL Notes on Organising Arbitral Proceedings, ICC Commission Report Controlling Time and Costs in Arbitration and ICC Commission Report—Effective Management of Arbitration are all good resources for parties and arbitrators to refer to. The fundamental principle to the proceedings is that parties shall be treated with equality and each party shall be given a full opportunity of presenting his or her case.[1]

At the stage of documentary disclosure, IBA Rules on the Taking of Evidence in International Arbitration and the Redfern Schedule are useful to help arbitrators to limit disclosure to documents that are relevant and material to the outcome of the case.

Table 1: Theoretical Example of Claimant's Redfern Schedule[2]

Document requested	Relevance and materiality of the documents requested to the outcome of the dispute	Responses and objections to the claimant's request to produce documents	Decision of the arbitral tribunal
1. Any and all documents (including documents in electronic form) consisting of information on the general structure of management and the decision-making processes of the respondent, including minutes of board meetings, shareholders' meetings, and other documentation related to the decision-making process at the top level	The claimant asserts that the way in which the management processes were organised at respondent were inadequate and/or were the cause of the delays to production and the generally poor quality of the product. To prove these assertions, the claimant needs to know the respondent's management structure and needs documents normally produced for the purposes of a company's management at the level of top management (i.e. boards, shareholders' meetings, etc.).	This request is so wide that an order for their production would impose an unreasonable burden on the respondent: see the IBA Rules on the Taking of Evidence, Art. 9.	
2. A record of all previous complaints from customers since production began	Such documents will allow the claimant to establish by the respondent, and to demonstrate that this the management methodology adopted methodology was inadequate and unprofessional.	This request is too wide. However, the respondent is prepared to produce a list of complaints received over the last 18 months, whilst keeping the names of the customers confidential.	
3. All correspondence and other documents with the respondent's legal advisers concerning complaints by other customers	Such correspondence will demonstrate the steps to which the respondent went to deny liability for obvious deficiencies in the product.	To the extent that any such correspondence exists (which is denied), it would be covered by legal professional privilege.	

1 Article 18 of the UNCITRAL Model Law.

2 Nigel Blackaby & Constantine Partasides, et. al., *Redfern and Hunters on International Arbitration*, 6th edition, Oxford University Press 2015.

4. Role of national courts during the arbitral proceedings

An arbitration tribunal may need a national court to issue interim/provisional/preliminary measures in situations such as an urgent interim measure is requested prior to the formation of the tribunal, the interim measure affects a third party who is not a party to the arbitration, the tribunal has difficulties in enforcing the measure, or the tribunal has no powers to issue an interim measure because of *lex arbitri*. Therefore, parties need to apply for interim measures before a court. Interim measures include measures that order attendance of witnesses, documentary disclosure, preservation of evidence, preserving the status quo, or relief in respect of parallel proceedings.

When applying for interim measures from a court, parties need to consider three questions.

- What interim measures are allowed by *lex arbitri*?
- If a party to an arbitration agreement makes an application for interim measures to the court rather than to the arbitral tribunal, will this be regarded as a breach of the agreement to arbitrate?
- If the choice between seeking interim measures from the court or from the arbitral tribunal is truly an open choice, should the application be made to the court or to the arbitral tribunal?

The answers can be generally found in *lex arbitri*. For example, Chinese Arbitration Law explicitly provides for two types of interim measures: preservation of property or assets as security for the underlying claims and preservation of evidence.[1] The law further provides that the arbitral tribunal and arbitration institution have no power to issue interim measures: the arbitration institution shall forward the parties' request for interim measures to the intermediate people's court in the place where the evidence or property is located.[2]

How to recognize and enforce arbitral awards internationally?

Recognition and enforcement of arbitral awards internationally are based on the New York Convention. The Convention applies to two kinds of awards: (1) foreign awards that are made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and (2) non-domestic awards that are not considered as domestic awards in the state where the recognition and enforcement of such awards are sought.[3] For example, awards made in the US will be non-domestic if they are made within the legal framework of another country (e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the state where the recognition and enforcement of such awards are sought).

Member states shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of an arbitral award under the Convention than those imposed

1 Articles 28 and 46 of the China Arbitration Law.

2 Article 68 of the China Arbitration Law.

3 Article 1 of the New York Convention.

on the recognition of enforcement of a domestic arbitral award.[1]

Recognition and enforcement of an award may be refused according to an exhaustive list under Article V of the New York Convention.

1. Incapacity of party

Parties to an arbitration agreement must have legal capacity to conclude that agreement. Otherwise, it is invalid. Parties' capacity is determined by the law(s) applicable to the arbitration agreement according to the New York Convention and the UNCITRAL Model Law.[2] For example, a natural person's capacity may be determined by both the law of his or her place of domicile or residence or the law of the contract. More complicated scenarios regarding capacity of parties arise in non-signatory of the arbitration agreement, joinder and intervention, and class arbitration.

When determining whether an arbitration agreement between two parties may bind a non-signatory. Courts and arbitration tribunals will focus on the parties' common intention and ask questions such as:

- Whether the non-signatory actively participated in the conclusion of the contract containing the arbitration agreement,
- Whether the non-signatory has a clear interest in the outcome of the dispute, and
- Whether the non-signatory is party to a contract that is intrinsically intertwined with the contract under which the dispute has arisen

If the answers to the above questions are yes, the arbitration agreement may bind the non-signatory.

2. Lack of valid arbitration agreement

The arbitration agreement must meet any formal validity requirements imposed by the law to which the parties have subject it or, failing any indication thereon, under the law of the country where the award was made. These requirements are discussed in the part of "Arbitration Agreement".

3. Violation of "due process"

Under the New York Convention, "due process" refers to scenarios that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case. Arbitral tribunal should not base its decision on any evidence or argument that the parties have not had an opportunity to comment.

1 Id., article 3.

2 Article V (1)(a) of the New York Convention and article 36 (1)(a) of the Model Law.

CASE EXAMPLE: *CEEG (Shanghai) Solar Science & Technology Co. v. LUMOS LLC*[1]

Facts: CEEG was a Chinese solar panel manufacturer. LUMOS was a solar energy company in Colorado, the US. The parties had a co-branding agreement under which LUMOS agreed to purchase at least a minimum number of solar panels from CEEG over three years and CEEG warranted that the goods would conform to the contract specification. The agreement provided: "all documentation, notices, judicial proceedings, and dispute resolution and arbitration entered into, given, instituted pursuant to, or relating to, this Agreement be drawn up in the English language." And it provided for arbitration before China International Economic and Trade Arbitration Commission (hereinafter "CIETAC"). On the other hand, it provided that each order for goods would be subject to subsequent purchase contracts. The parties did enter into a subsequent contract, which again provided for CIETAC arbitration but did not provide for the use of English.

A dispute arose regarding two shipments of solar modules that LUMOS asserted were defective and CEEG's demand for payment for those shipments. In April 2013, LUMOS received a document written in Chinese with no English translation or any explanation of its contents. All previous communications between CEEG and LUMOS (including those regarding the dispute) had been in English. LUMOS eventually learned that the document was a notice that CEEG had instituted arbitration against LUMOS under the CIETAC rules. By the time LUMOS found a translator to explain the notice and retained counsel, the deadline for selection of arbitrators had passed and the arbitration tribunal that would decide the case had been appointed.

The arbitration proceeded in Chinese, and, following a hearing, the panel issued an award in favor of CEEG. In connection with its decision, the panel determined that the dispute arose solely under the contract and that it had jurisdiction under the arbitration clause in the contract, not the agreement.

The CIETAC Rules provide that if "the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration … shall be Chinese or any other language designated by CIETAC having regard to the circumstances of the case."

CEEG tried to enforce this arbitral award in the US; LUMOS rejected the enforcement, arguing that it had not been given proper notice.

Issue: Whether the award should be recognized and enforced.

The United States Court of Appeals for the Tenth Circuit rejected the recognition and enforcement of the award. The Court ruled that, CEEG argues that CIETAC, and not CEEG, sent the arbitration notice, but this argument is undermined by the fact that the notice letter appears to have been signed by CEEG's counsel. Regardless, CIETAC's rules plainly state that absent agreement between the parties, arbitration proceedings will be held in "Chinese or any other

1 CEEG (Shanghai) Solar Science & Technology Co. v. LUMOS LLC (10th Circuit, the US 2016, Case No. 14-cv-03118-WYD-MEH).

language designated by CIETAC having regard to the circumstances of the case." Thus, CEEG could have moved for CIETAC to proceed in English. CEEG cannot avoid responsibility for insufficient notice by arguing that it assigned to a third party the duty to ensure that the notice was reasonably calculated to apprise LUMOS of the proceedings.

Take-away points: A party can reject recognition and enforcement of an award if it has not been given proper notice.

4. Arbitral tribunal exceeding its authority

If the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, the arbitral tribunal exceeds its authority. The award may be set aside completely. If the award contains decisions on matters beyond the scope of the submission to arbitration, the award may be set aside to the extent of such excess of authority, except where it affects the whole award.

5. Irregular composition of the tribunal and irregular procedure

The composition of the arbitral tribunal and the arbitral procedure must comply with the parties' arbitration agreement, or, failing such agreement, with the *lex arbitri*.

6. Award not binding or set aside

If an award has not yet become binding on the parties, or the award has been set aside or nullified by the competent court at the seat of arbitration, a court may refuse to enforce it, at its discretion.

7. Non-arbitrable subject matter

The recognition and enforcement of an award may be rejected, if the subject matter of the dispute is not arbitrable according to *lex arbitri*. Arbitrability is discussed in the part of "Arbitration Agreement."

Case Study: *Wu Chunying v. Zhang Guiwen*[1]

Facts: Wu Chunying's husband and Zhang Guiwen entered into an agreement to incorporate a limited liability corporation in Mongolia. This agreement provided that any dispute arising under the contract would be submitted to arbitration with the Mongolian National Arbitration Court (MNAC). During the operation of the company the husband of Wu Chunying passed away. On November 3, 2006, Wu Chunying filed a request for arbitration with the MNAC, seeking, among other things, determination of her ability to succeed to her husband's 50% share in the corporation. The arbitral tribunal accepted her request and ruled, inter alia, that according to the Civil Code of Mongolia Wu Chunying was the legal successor to all rights and properties owed

1 Wu Chunying v. Zhang Guiwen, [2009] Min Si Ta Zi No. 33.

by her husband in Mongolia. Wu Chunying applied for recognition and enforcement of the award before the Binzhou Intermediate People's Court in China.

The Binzhou Intermediate People's Court held that: The award should not recognized or enforced under Article V(2)(a) of the New York Convention and Article 3 of the China Arbitration Law. In particular, the court opined that Wu Chunying's right in the corporation as her husband's successor was a matter related to succession law. The Shandong Higher People's Court affirmed this decision. The Shandong Higher People Court reported its opinion to the Supreme People's Court for review in accordance with the Notice of the Supreme People's Court on the Adjudication of the Relevant Issues About Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court. The Supreme People's Court upheld this decision.

Take-away points: First, Article V(2) (a) of the New York Convention provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country. Succession cannot be arbitrated in China. Second, refusing the recognition and enforcement of a foreign-related or foreign arbitration award in China needs the final confirmation from the Supreme People's Court.

8. Violation of public policy

Public policy generally refers to principles which are fundamental to the legal or economic system of any given state. Different states have different concepts of public policy, so an act that breaches the public policy of one state may not breach that of another state.

SELF QUIZ: Indicate whether each of the following statements is true or false.

30. The primary source of the tribunal's powers is the law of the seat.
31. The validity of an arbitration clause is separated from the validity of the contract that contains the arbitration clause.
32. In China, arbitration institutions, instead of arbitrators, are empowered to determine their own jurisdiction, with national courts having the ultimate power to adjudicate that decision on appeal.
33. Competence means that an arbitral tribunal cannot determine its own jurisdiction.
34. Parties can design arbitration procedures. Therefore, it is unnecessary for the procedure to comply with the fundamental principles of natural justice and due process.
35. A valid arbitration agreement is a prerequisite for recognition and enforcement of a consequent arbitration award.
36. A party can challenge the award either in the seat of arbitration or the place of recognition or enforcement.

37. The Washington Convention regulates the recognition and enforcement of arbitral awards.
38. An arbitrator may be challenged if his or her conducts are not impartial.
39. Incapacity of a party to the arbitration agreement can be a reason to set aside an arbitration award.
40. Arbitrators can decide issues beyond the scope of an arbitration agreement.
41. An award can be challenged for procedural and jurisdictional issues.

Part 6 Dispute Resolution in International Tribunals

Besides civil litigations and commercial arbitrations, international business disputes can also be resolved in international tribunals such as ICSID and WTO.

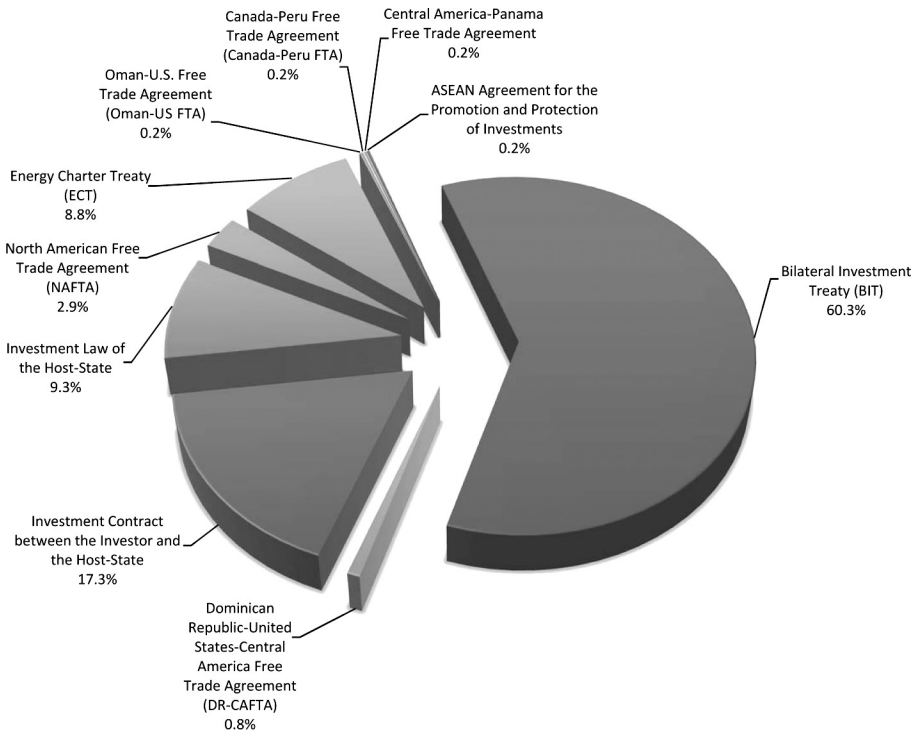
International Center for the Settlement of Investment Disputes (ICSID)

ICSID is a leading international arbitration institution exclusively devoted to investor-state disputes settlement. ICSID facilitates arbitration and conciliation proceedings to resolve investor-state disputes, and it has been significantly influencing the development of international investment law. It was created in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other State (hereinafter "the Washington Convention"). The Convention has now been ratified by 161 countries, including China and the US.[1] The most important contribution of the Washington Convention is that it precludes the home state from intervening with the investment disputes solution between its national and the host state. This significantly departs from traditional notions of international law, which requires disputes between a state and the national of another state to be resolved only between the states alone. States that are parties to the Washington Convention are not allowed to take up disputes on behalf of their nationals unless the ICSID arbitration process fails.

In order to constitute an ICSID arbitration tribunal, two requirements must be met. First, the host state and the home state must both be parties to the Washington Convention. Second, the investor and the host state must both consent to ICSID jurisdiction. The following chart illustrates basis of consent invoked to establish ICSID jurisdiction.

1 The statistics is up to June 15, 2017.

Figure 6: Basis of Consent Invoked to Establish ICSID Jurisdiction in Cases Registered Under the ICSID Convention, Regulations and Rules[1]



1. How does ICSID facilitate the settlement of investment disputes?

ICSID does not conciliate or arbitrate disputes. Rather, it provides the institutional facility and procedural rules for independent conciliation commissions and arbitral tribunals constituted in each case. ICSID has two sets of procedural rules that may govern the initiation and the conduct of proceedings under its auspices. These are:

- the ICSID Convention, Regulations and Rules; and
- the ICSID Additional Facility Rules.

ICSID also administers investment cases under other rules such as the UNCITRAL Arbitration rules.

In most cases, ICSID tribunals consist of three arbitrators. ICSID maintains a list of the ICSID Panel of Arbitrators. Each ICSID Member State may designate four arbitrators to the Panel. The ICSID Panel provides a source from which the parties to ICSID arbitrations may select conciliators and arbitrators, but parties may select any person they wish.

2. What are the usual steps in an ICSID arbitration proceeding?

An ICSID Convention arbitration is initiated by submitting a Request for Arbitration to the

1 ICSID, The ICSID Caseload-Statistics, 2016-1, 10.

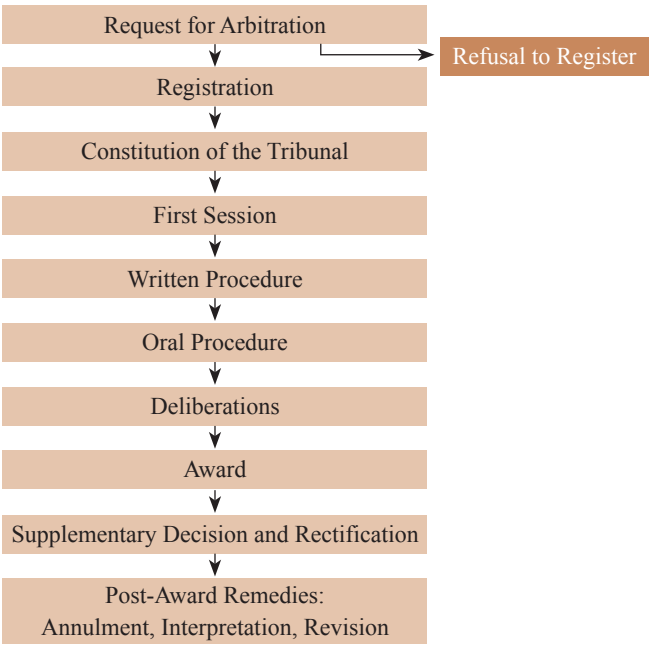
Secretary-General of ICSID. The Request outlines the facts and legal issues to be addressed. The Request will be registered unless the dispute is manifestly outside the jurisdiction of ICSID.

The next procedural step is the constitution of arbitral tribunal. Proceedings are deemed to begin once the tribunal has been constituted. The tribunal holds a first session, typically within 60 days of its constitution.

Subsequently, the proceeding usually comprises two distinct phases: a written procedure followed by in-person hearings. After the parties present their case, the tribunal deliberates and renders its award.

Once an ICSID Convention award is rendered, it is binding and not subject to any appeal or other remedy except those provided by the Convention. The Convention allows the parties to request a supplementary decision or rectification of the award, or to seek the post-award remedies of annulment, interpretation or revision.

Figure 7: Steps in an ICSID Convention Arbitration



WTO

WTO is responsible for implementing and enforcing the rules of international trade between countries. The Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") establishes the dispute resolution mechanism of the WTO.

1. What are the organs in charge with administering and carrying out the DSU?

(1) The Dispute Settlement Body (DSB)

The DSB is responsible for establishing the panels, adopting their reports and those of the

Appellate Body, monitoring implementation of rulings and recommendations, and authorizing the suspension of concessions and other obligations in appropriate cases.

(2) The Dispute Settlement Panels

Panels are to assist the DSB by making an objective assessment of the matter referred to it , including the facts of the cases ,the applicability of and conformity with the pertinent WTO agreements, and by making findings that will help the DSB to make recommendations and rulings to resolve the dispute.

A panel is generally made up of three panelists unless the parties to the dispute agree within ten days of its establishment that it should consist of five panelists. Panelists serve in their individual capacities but not as representatives of any government or organization.

Even if a special meeting has to be convened for the purpose, a panel report is adopted automatically by the DSB within sixty days after it has been circulated, , unless (1) one of the parties to the dispute notifies the DSU that it is going to appeal or (2) the DSB decides by consensus not to adopt the report. If there is an appeal, the DSB will not consider the report until the appeal is completed.

(3) The Appellate Body

The Appellate Body only reviews the legal issues contained in the panel report and the legal interpretations developed by the panel. The Appellate Body may uphold, modify, or reverse a panel's findings and conclusions, and its report will automatically be adopted by the DSB unless the DSB decides by consensus not to do so.

The Appellate Body is made up of seven persons , three of whom will serve on any one case. The seven must be the people from recognized authorities with demonstrated expertise in law, international trade, and the subject matter of the WTO Agreement and its annexes. Their term of office is four years, and once renewable.

Table 2: The DSB Timetables

60 days	Consultation, mediation, etc.
45 days	Panel set up and panelists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	DSB adopts report (if no appeal)
Total=1 year	(without appeal)
60-90 days	Appeals report
30 days	DSB adopts appeals report
Total=1 year 3 months	With Appeal

2. Enforcement

Panel and Appellate Body reports adopted by the DSB are enforced by the DSB. The DSB is responsible for monitoring compliance and, should a state fail to comply with panel or Appellate Body decisions, the DSB may authorize either the non-complying state to pay compensation or the injured state to retaliate.

SELF QUIZ: Indicate whether each of the following statements is true or false.

42. ICSID deals with all kinds of commercial disputes.
43. One precondition for the ICSID to accept a case is that the host state and the home state must both be parties to the Washington Convention.
44. BITs and FTAs can demonstrate a host state's consent to ICSID jurisdiction.
45. WTO panel's decision is final.
46. WTO Appellate Body only reviews the legal issues contained in the panel report and the legal interpretations developed by the panel.
47. When a losing party fails to comply with panel or Appellate Body decisions, this party may have to pay compensation or the injured party may retaliate.

Questions

1. Eye Co., a shipping company headquartered and incorporated in Country I, signed a contract with Kay Co., a company headquartered and incorporated in Country K, to transport goods for Kay Co., from Country K to Country L. No provisions were made in the contract about where disputes would be settled or what law would be used to resolve them. As Eye Co.'s ship delivering the goods was entering the harbor of Country L, the ship blew up, destroying all of Kay Co.'s goods. The parties did not reach any choice of law or choice of court agreements. Kay Co. brought suit in a court in Country L. Eye Co. now argues that the court does not have jurisdiction and that Country L law should not be used to decide the dispute.

Question A

If the Country L is China, does the Chinese court in the harbor have personal jurisdiction over Eye Co.? If the Country L is the US, does the US court in the harbor have personal jurisdiction over Eye Co.?

Question B

What law should be applied?

2. During the negotiations leading to a contract, a facsimile was sent which included a statement "other terms and conditions as per…standard contract." The contract contained an arbitration clause. Some days later, the parties signed a contract in which no mention was made of any

standard contract. When the court proceedings were commenced to recover damages for breach of the contract, an application was made for a stay for arbitration.

Question: Should the court proceedings be stayed?

3. What are the problems that "Reciprocity in Practice" may create in judgment recognition and enforcement?

Suggested Further Readings

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