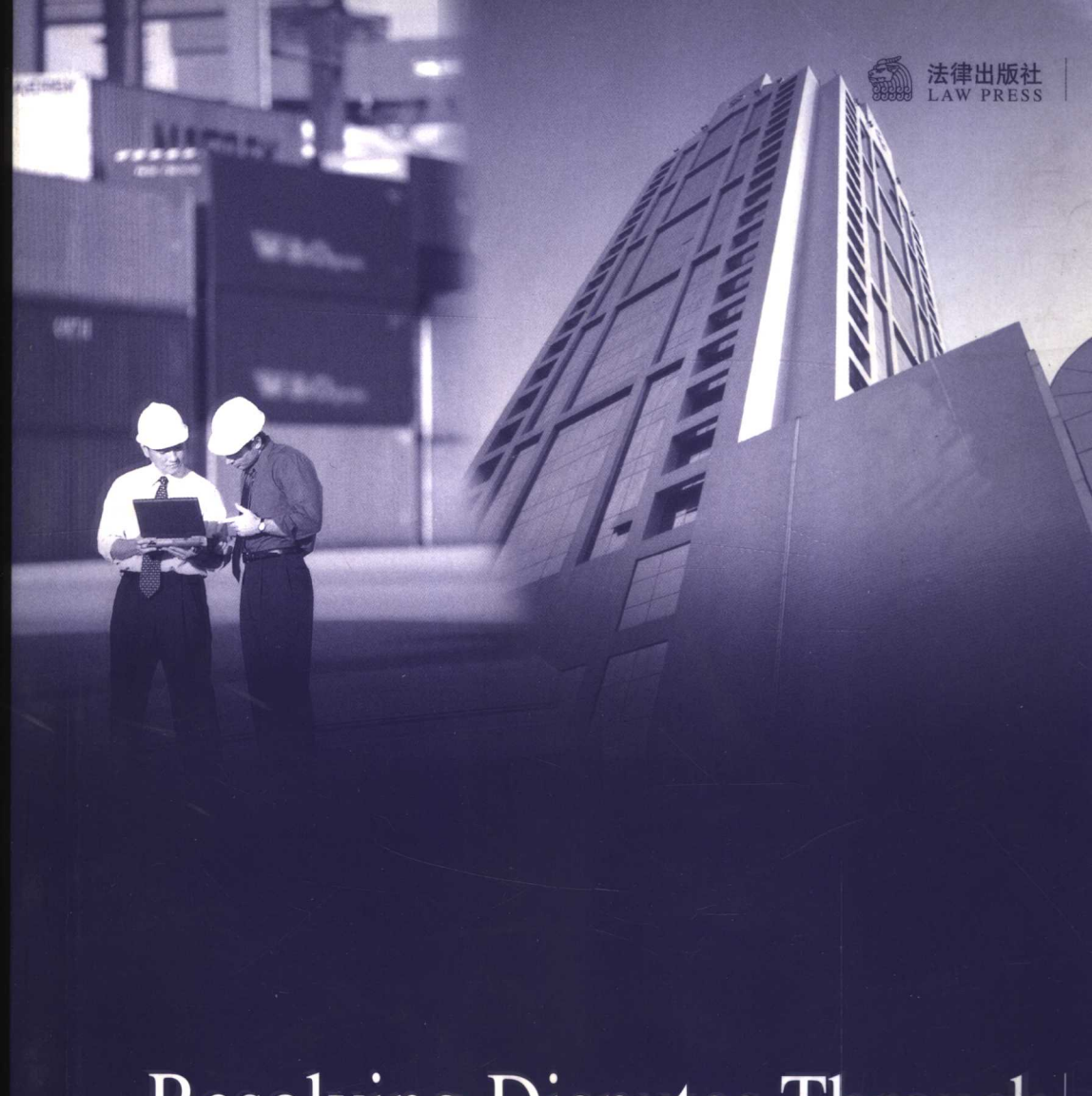

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Preface

Dr. Wang Sheng Chang has been engaged in international commercial arbitration for many years. He is a council member of International Council for Commercial Arbitration (ICCA) and Vice Chairman of China International Economic and Trade Arbitration Commission (CIETAC). He has conducted hundreds of hearings of cases in China, Sweden, UK, Singapore, Hong Kong and elsewhere under Chinese, Swedish, ICC, Singapore, Hong Kong Rules, etc.

With much experience in arbitration practice, Dr. Wang has been invited to lecture at many law schools inside and outside China, and speak at tens of international arbitration conferences. Dr. Wang has done a very good job to promote arbitration in China and in the whole world.

These selected papers of Dr. Wang provide readers with outside and inside information about arbitration and conciliation in the mainland of China. I highly recommend these selected papers to those who are keen nee to know about the operation of resolving disputes through arbitration and conciliation in China mainland.

Professor Tang Houzhi
6 May 2003, Beijing

CONTENTS

PART ONE

POLICY CONSIDERATION

THE GLOBALIZATION OF ECONOMY AND CHINA'S INTERNATIONAL ARBITRATION

By

Wang Sheng Chang

The following is the lunchtime speech delivered at the Seminar on Globalization and Arbitration jointly sponsored by the International Chamber of Commerce (ICC) and the ICC China on 15th October 2002 in Being. The edited version of the speech can be found in ASIAN DISPUTE REVIEW [*2003*] at pp. *187~188.*

It is my great pleasure and privilege to take this occasion to talk about the globalization of economy and the international arbitration in China.

First of all, I would like to congratulate ICC and ICC China on the success of the seminar on arbitration held this morning. As a leading arbitration institution, the ICC Court may provide with worldwide arbitration service to the parties, with its arbitral awards enforceable globally. The reality that the ICC Court has held this arbitration seminar and has conducted arbitration proceedings in Mainland China is in itself a good example that the globalization of

world economy has brought with it the globalization of world arbitration.

It is well recognized that in the last few decades the economies of various countries have become even more interdependent, and that trade in goods, trade in services and the flow of capital throughout the world have expanded tremendously over the years. No doubt the globalization of economies has generated far-reaching influences as a whole.

However, one should not in any way overlook or underestimate the impact of the globalization of the world economy on international commercial arbitration. Expansion of the economy has given and will inevitably continue giving birth to by-products, i. e. disputes. Nowadays, no one will doubt that arbitration is the preferred mechanism for resolving international commercial disputes. The existence of an efficient and trustworthy arbitration system gives business people the necessary confidence when they make foreign investments and participate in foreign trade.

To meet the need of international trade and economic cooperation, many countries have undertaken substantial reforms on their arbitration laws. The United Nations has also made great efforts to promote the unification and harmonization of arbitration laws and rules. In the international regime, there are around 130 Contracting States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention), which has provided a solid base for the growth of international commercial arbitration. The UNCITRAL Model Law, adopted in 1985, constitutes another sound and promising basis for the desired harmonization and improvement of national laws.

Against the background of this widespread wave of legal reform in arbitration and the accelerated progress of globalization of economy in international arena, arbitration has emerged as a growth industry

which in turn provides remarkable support to other growth industries. With regard to the situation in China, I should submit that China has on the one hand made remarkable achievements in use of arbitration, though there remain some regrettable pitfalls on the other.

The history of China's involvement in international commercial arbitration can be traced back to the 1950s, when the predecessors to CIETAC and CMAC, China's two key arbitration service providers, were established. Ever since then, CIETAC and CMAC have gradually earned a respectful reputation as fair forums in resolving disputes in Mainland China. According to laws, Chinese parties are free to decide to go abroad for arbitration, but in the majority of cases they have submitted their disputes for arbitration before CIETAC and CMAC. In fact, in the last ten years CIETAC has maintained a record of high caseload in international commercial arbitration.

The recent six years, however, have witnessed a fall in CIETAC's caseload in foreign-related matter. A few commentators argue that this fall suggests that CIETAC has lost appeal to Western parties. Personally I cannot concur with such a perception. The overall caseload of foreign-related arbitrations in Mainland China is growing year by year, but a notable new phenomenon is that there are too many arbitration bodies in the Mainland and that the caseload has been greatly split between them. Since 1995, local authorities in the Mainland have set up 166 arbitration bodies which have all competed for business. China now has more arbitration bodies than the rest of the world put together. There are too many and some have very few cases. Some local governments compel or strongly persuade companies in their areas to use local arbitration bodies to deal with the disputes. This is, in my view, contrary to the transparency and non-discrimination provisions of the World Trade Organization and I believe that many people feel uncomfortable with this.

Promoting the wider use of arbitration is actually an underlying

requirement of economic development. Arbitration bodies, arbitrators, practitioners, scholars, enterprises, governmental authorities and judicial organs may collectively push ahead the cause in proper ways. Looking retrospectively at the relationship between arbitration and the courts in China, it is not hard to come to the conclusion that the courts are playing a more supportive role in arbitration. To implement the Civil Procedure Law and the Arbitration Law, the Supreme People's Court has issued more than twenty pieces of judicial interpretations in the last six years. Research work has demonstrated that these judicial interpretations embrace a pro-arbitration bias.

Yet, as the time goes by, I am also becoming aware of the fact that there may be a hint of some bitter deviation from the foregoing policy orientation by some judicial personnel. To my knowledge the Supreme People's Court is drafting a new set of rules to address unresolved parts of the Arbitration Law, in particular the issue of how to determine the validity of a foreign-related arbitration agreement if it contains any defective or ambiguous provisions. In addition, it seems to me that the issue how to adjudicate the binding force of an arbitration agreement upon a non-signatory in exceptional situations is also not beyond question. Due to a lack of firm, unambiguous and coherent policy on arbitration upheld by the judicial organs, many people are worrying about difficulties with respect to the co-ordination of the future relationship between arbitration and the courts of law.

With regard to the recent developments of arbitration in Mainland China, the restrictive policy imposed by the Ministry of Justice on the activities of foreign lawyers in arbitration conducted in Mainland China appears to be most disappointing. For nearly 50 years, parties to international commercial arbitration in the Mainland have been able to engage foreign lawyers to present their cases. This has long been regarded as a welcoming gesture that China adopts an open policy favouring arbitration over court litigation. However the *Rules of the*

Ministry of Justice for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China, effective as from 1 September 2002, pose some limitations on the involvement of foreign lawyers in international arbitration in China. Article 32 (4) of these Rules stipulates that lawyers from representative offices of foreign law firms should not be permitted to practice law relating to "PRC legal matters" if the foreign lawyers act "in the capacity as an agent in arbitration proceedings, issuing opinions or comments on the application of PRC law and facts involving PRC law". I should say that even though in the past a few countries have restricted the involvement of foreign lawyers in arbitration, for instance Singapore and Japan, in recent years they have abolished these restrictions so as to facilitate arbitration. In my own view I would venture to say that the provision I have mentioned is certainly outdated and inappropriate; a rescission of such inappropriate rules is a matter of real urgency.

By and large, the discouraging news suggests a serious demand for the renovation of policy for international arbitration in China. It is essential for a country to maintain a rational, coherent and stable policy that is friendly to arbitration for the purpose of boosting its position as an arbitration centre. Unlike litigation, arbitration is a means of dispute resolution based on party autonomy, and the parties are indeed shopping the forums with comparative study in order to find places of arbitration in which they believe that they can have confidence. This surely means arbitration can be deemed "floating", at least at the time of concluding the arbitration agreement by the parties. Too much judicial or governmental interference will adversely affect the healthy development of international arbitration. It does no good to the healthy development of economy either.

With China's accession to the WTO, it can be easily foreseen that there will be a reasonable expectation for greater growth of international arbitration service, provided either by Chinese arbitration

bodies or by foreign arbitration institutions. Taking into account of the problematic issues that I mentioned above, by conclusion I would like to appeal for a wiser policy towards arbitration, a policy with open but not empty mind.

THE ARBITRATION LAW AFTER CHINA'S ACCESSION TO THE WTO

By

Wang Sheng Chang

The following is an article published in CHINA LAW [2002] Vol. 37 at pp. 71~76.

The People's Republic of China became the 143rd member of the World Trade Organization (WTO) on 11th November 2001. China's accession to the World Trade Organization will not only benefit the country's economic development, but also have far-reaching influences on Chinese society. WTO membership will accelerate the modernization of Chinese society and have a positive effect on people's lives. However, it may also exac erbate some existing problems beneath.

To strictly honor its commitments for entry into the WTO, China takes the responsibility to ensure analyzing and amending existing laws, regulations, codes and other policy measures so as to conform to the WTO requirements. Review of relevant state laws and statutes has been completed by and large, and a number of laws and regulations have been repealed, revised and formulated. The Chinese

government has also announced its firm determination to have the nation mechanism geared with the demands generated from China's entry into the WTO. The Chinese government officially announced that the following measures would be taken: First, following the principles of the uniformity of law, nondiscrimination, and openness and transparency, China is to quickly improve the system of foreign-related economic laws and statutes so that they are suitable to domestic conditions and the WTO rules and able to guarantee fair and efficient law enforcement. Second, according to China's commitments in its entry into the WTO, China is to gradually expand the spheres of activity open to foreign businesses. Third, China is to study, master and fully exercise all the rights that China enjoys as a member of the WTO, and promote and participate in regional economic cooperation. Fourth, China is to study and publicize information about the WTO and its rules, and to provide training to public servants, and to bring forth, through training, a contingent of people who are well acquainted with the WTO rules and international economic cooperation and trade. [1]

Implementation of the commitments will undoubtedly boost China's links with the outside world and prosper its economy. Consequently the players in market economy will more frequently seek for assistance in resolving disputes that are believed to be inevitable by-products of prosperity of economy. It is not surprise that arbitration will play a greater role in resolving disputes.

Along with the widespread wave of legal reform in arbitration on international arena, nowadays arbitration has emerged to be a growth industry and it in turn provides with remarkable support to other industries in growth. When confronting with the situation in China, one may pay attention to the underlying problems and future

[1] *See*, Report on the Work of the Government of the PRC by Premier Zhu Rongji delivered at the Fifth Session of the Ninth National People's Congress on March 5, 2002 in Beijing.

movement relating to arbitration.

As required by the WTO rules, laws, regulations, rules and policies of Members concerning trade in goods, trade in services, trade-related intellectual property right protection and investment measures shall be made to the public; except those concerning national security or otherwise permitted by the WTO rules. After new laws, regulations or measures are published, opinions from all sources should be allowed and a certain period of time should be given for comments. The adequate openness and transparency of laws, regulations and policies may help improve the credibility and confidence, meanwhile creating a forum for fair play.

Effective as from 1st September 1995, the Arbitration Law of the PRC was adopted by the 9th Session of the Standing Committee of the 8th National People's Congress of the PRC and it was promptly published thereafter. One of the important goals of the new Arbitration Law is to change the nature of the domestic arbitration, i. e. to separate domestic arbitration bodies from the governmental authorities, affording the re-organized arbitration bodies with a high degree of autonomy and independence, free from interference from the government, and therefore it is expected to have normalized arbitration service conforming to normal standard in domestic regime as well. In the last six years, the various municipalities have initiated the establishment of more than 160 arbitration bodies, widely scattered in almost every corner across Mainland China. In addition, the pioneers of China's foreign-relation arbitration, i. e. the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC), operate their business as usual under the new Arbitration Law.[2]

While it is worth noting that the newly established arbitration

[2] A recent development of CIETAC arbitration is that CIETAC may take domestic arbitration cases as well, according to its revised Rules of Procedure adopted in 2000.