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AN APPROACH TO INTERNATIONAL ARBITRATION: CHINA & LATIN AMERICA

By Nicolás Ossa G.*

I. INTRODUCTION

The Free Trade Agreement between Chile and China last August was ratified unanimously by the Chilean Congress and has been in force since October 1, 2006. It is the first treaty of this kind that China has signed with a non-Asian country. With 1,315,000,000 inhabitants and a sustained economic growth of 8-10 % over the last decade, China is undoubtedly an important player in global economic policy. For Chile, the possibilities for investment are tremendous. Chile expects to increase its scale of production to allow China to take advantages of the enormous variety, quality and quantity of Chilean natural resources.

II. MUTUAL BENEFITS OF THE CHINA-CHILE FTA

In 2005, commercial exchange between Chile and China reached $7 billion (U.S.), making the People's Republic of China (PRC) Chile's second largest commercial partner, after the United States. The conclusion of the FTA with the Asian power is projected by Chileans as central to Chile's ability to sustain its growth of exports. The FTA grants to Chilean exporters an unquestionable advantage over its competitors, including preferential access to the PRC market while offering certain permanent rules for the development of business and the resolution of disputes. It is believed that the FTA with China will allow Chile to expand its exports to agriculture, livestock, forest, and fishing products. In the past, Chile exported primarily copper and cellulose to China. Chile already had preferential access to markets representing almost 70% of the world-wide gross internal product (GIP) before signing this agreement. Chile has signed free trade agreements with countries representing 70% of the world-wide GIP, including the United States, the European Union, Korea, and the Mercosur Union. Having concluded the FTA with China, that number has risen to 75%, making Chile the most commercially-integrated economy in the world.

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* Nicolás Ossa is a partner in OSSA Lawyers & Consultants in Santiago, a Chilean consulting firm with offices in Brazil and China. He has an LL.M. in International Trade Contracts, Investments, and Arbitration from the University Catolica in Santiago, Chile. He can be reached at Augusto Leguía Norte 100, Floor 3, El Golf – Las Condes, Santiago. Tel: (Chile): +56 2 470 2901 | +56 9 9220.7607 | + 56 9 8400.1767 | e-mail: ossaguzman@ossaguzman.cl | Web: www. ossaguzman.cl

Chilean consumers will benefit from foreign goods with reduced import taxes and tariffs, including, *inter alia*, machinery, computers, printers, cars, mobile phones, etc.

III. CHILE'S IMPORTANCE TO CHINA: A SPRINGBOARD TO INVESTMENT IN LATIN AMERICA

In recent years, a new trend has emerged in foreign investment in Chile. Prospective investors are no longer looking merely at the country's natural resources or its domestic market: Chile is a stepping stone to other markets in Latin America and around the world. Chile's expanding network of free trade agreements has been fundamental in encouraging companies to adopt this approach. In 2002, Chile reformed its tax laws in an effort to promote itself as a forum for managing investments in other markets and to encourage partnerships between foreign investors and local Chilean firms. In keeping with Chile's policy of minimizing tax barriers to investment, the reform means that foreign investors will no longer be liable for Chilean taxation on the earnings they derive from assets in other countries. The network of commercial agreements to which Chile has subscribed, and the recent tax legislative reforms, known as *Springboard for Businesses Legislation,* create an attractive environment for businesses that seek to conduct transactions in multiple countries in Latin America or engage in commercial transactions between Latin America and the rest of the world.

Chilean exports to China today amount to more than 10% of the total of Chilean exports. That figure was less than 1% fifteen years ago. Chinese imports from Latin America quadrupled from US$ 5,400,000,000 (U.S.) in 2000 to more than $ 22,000,000,000 (U.S.) million in 2005. This represents an annual growth of 42% over those years, almost twice the rate of growth of the global imports from China (26%).

With the possibility of extending the free trade agreement to the service and investment sector—a matter currently under negotiation—Chile is likely to be the gateway to Chinese investments in Latin America, especially in sectors such as energy, mining, infrastructure, and agriculture.

IV. ASIA-LATIN AMERICAN INTERNATIONAL COMMERCIAL ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

Given the extensive changes taking place and the increase in commercial transactions between Asia and Latin America, it is reasonable to assume that there will also be an escalation in commercial disputes arising from these transactions. The following is an overview of the possibilities for dispute resolution for potential conflicts in this context.

V. THE CHINESE ARBITRATION ACT

Chinese law endorses arbitration as a lawful method for resolving international commercial and investment disputes. The Arbitration Act of the People's Republic of China (CAA) which is based on the UNCITRAL Model Law came into effect on September 1, 1995. It applies to both domestic and international arbitration in China. According to the CAA, an arbitral award is final and binding on both parties and has the effect of *res judicata*. Such awards can be effectively enforced by courts. One of the salient features of the CAA is that it confess special treatment to international arbitration.

VI. INTERNATIONAL ARBITRATION IN CHINA

Since the 1950s, China, in practice, has accepted arbitration and treated arbitral awards as final decisions. Arbitration agreements are generally considered valid and constitute the basis for an arbitration proceeding to the exclusion of the jurisdiction of courts, unless the agreement is void. According to Chinese law, arbitrations shall be conducted independently and without any interference from governmental, administrative or judicial authorities; and arbitral awards are final and binding and enforceable by the courts.

As early as 1956 and 1959, the first two international arbitration institutions, China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) were founded under the auspices of the China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC). All international arbitration cases were submitted to CIETAC and CMAC for arbitration. Although other arbitration institutions can now accept international cases since the CAA, has been in effect, almost all international arbitration cases are still filed with CIETAC.[1]

VII. THE CIETAC: AN OVERVIEW

The China International Economic and Trade Arbitration Commission (CIETAC), established originally in 1956, formulated its own rules of arbitration procedure. The Provisional Rules of Arbitration Procedure were established in 1980.[2]

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[1] In addition to CIETAC, there are over 150 local arbitration commissions in China, which were originally established to hear purely domestic disputes, but can now hear many different types of disputes where a valid agreement to arbitration exists. The most notable of these is the Beijing Arbitration Commission.

[2] CIETAC rules were amended in 1988, 1994, 1995, 1998, 2000 and, most recently, in 2005. The final amendments were revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on January 11, 2005, and became effective on May 1, 2005.

CIETAC, according to its rules, "independently and impartially resolves, by means of arbitration, disputes arising from economic and trade transactions of a contractual or non-contractual nature." Such disputes include international or foreign-related disputes, disputes related to Hong Kong SAR, Macao SAR or Taiwan, disputes between foreign investment companies or between a foreign investment enterprise and a Chinese person or company, disputes that may be within the jurisdiction of CIETAC in accordance with special provisions or upon special authorization provided by law or administrative regulations of the PRC, and any other domestic dispute that the parties have agreed to arbitrate by CIETAC.

In 1992, the number of international cases adjudicated by CIETAC exceeded, for the first time, those adjudicated by the LCIA and the AAA, and CIETAC ranked second, just after the ICC Court of International Arbitration for its caseload. Since 1993, the number of cases handled by CIETAC per year has ranked it among the biggest and most influential arbitration institutions in the world. CIETAC has continuously encouraged cooperation with other international arbitration institutions. It has signed arbitration cooperation agreements with nearly thirty international arbitration institutions in order to develop its international status.

Chinese Law allows parties to a contract with a *foreign element*[3] to choose the law to be applied, although in practice, Chinese parties normally insist that the contracts be governed by Chinese Law. This is a problem typically encountered by investors in China. Rules and practices tend to be very protective of Chinese culture and its legal system. In some situations, for example, as with international sale and purchase agreements, it is possible to persuade a Chinese party to accept the law of another country to govern the contract. Where the elected law is one of a non-Asian country, the arbitration shall be filed and conducted by a totally impartial international arbitration court, such as the ICC. For example, a contract between a Chinese and a Chilean party might contain an arbitration clause electing ICC arbitration seated in Paris, with US law as the applicable law.

The CIETAC Rules now state that, if the parties have agreed that other rules shall apply, *subject to the consent of CIETAC*, the parties' agreement will prevail. They do not state, however, the criteria for CIETAC's exercise of discretion or what follows if CIETAC does not approve the parties' choice of arbitration rules if it is other than the CIETAC Rules.

One foreign law which may be acceptable to Chinese parties is Hong Kong law. Chinese parties who do business in Hong Kong may be familiar with it and prepared to accept it. Hong Kong law, which is based on English common law, is familiar to many foreign parties who do business internationally.

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[3] The Chinese term is *she wai he tong*. Foreign element contracts include those in which: (i) one or both parties to the contract are foreigners; (ii) the subject matter of the contract is in a foreign country; or, (iii) the contract was made, modified, or terminated in a foreign country.

In practice, a CIETAC arbitration venued in Beijing, Shanghai, or Shenzhen—the only three cities in which the arbitration can take place in China—is relatively cost-efficient as compared to other international arbitration centers such as the ICC in Paris, the LCIA in London, or the AAA or ICDR in New York. The arbitration process in CIETAC is handled quite differently from the arbitration process with which Latin American and United States businesses are familiar. For example, discovery essentially does not exist; testimony can be oral or written; the arbitration panel may appoint its own experts, etc.

Arbitration in China is different from arbitration in other venues around the world. Insight into the Chinese legal culture and idiosyncrasies can influence the outcome of your dispute.

VIII. APPOINTMENT OF FOREIGN ARBITRATORS IN CHINA

The CIETAC Panel of Arbitrators for International Disputes includes approximately 160 arbitrators from foreign countries, the Hong Kong Special Administrative Region, Macao (SAR), and Taiwan. Parties seeking foreign arbitrators must appoint foreigners arbitrator from the CIETAC Panel of Arbitrators.

IX. ENFORCEMENT OF ARBITRAL AWARDS IN CHINA

China became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on December 2, 1986. This means that any arbitral award involving a Chinese entity is generally enforceable by and against that entity, both in China and in other countries that are signatories to the New York Convention (which includes more than 125 countries, including Chile).

Since 1995, if the People's Court decides to refuse enforcement to a foreign award, it must first obtain approval from the Superior People's Court in the same jurisdiction. Any superior court that decides to uphold a lower court's refusal to enforce an international award or a foreign award must, in turn, report its decision to the Supreme People's Court, before finalizing the decision to refuse the enforcement. By issuing this official document, the PRC has established an internal control mechanism by which undue refusal to enforce is effectively checked.

X. AD HOC ARBITRATION

Ad hoc arbitration is excluded in China. China favors institutional arbitration. Courts also narrowly interpret the rigid requirement that the arbitration agreement must be in written form. In practice, failing to meet this requirement can have devastating consequences.

XI. INTERNATIONAL CHAMBER OF COMMERCE (ICC) ARBITRATION

Chinese law is silent with regard to foreign arbitration institutions' conducting arbitral proceedings in China. In theory, the ICC International Court of Arbitration may conduct its arbitration proceedings in China. On the other hand, the arbitral proceedings of the ICC must be in compliance with the compulsory provisions of Chinese Law. Under the Chinese Arbitration Act, for example, certain procedural rules relating to the validity of the arbitration agreement and the appointment of the arbitrators are different from their counterparts in the ICC Arbitration Rules.

Under the ICC Rules of Arbitration, parties are free to agree upon the place of arbitration. If they fail to do so, the place shall be determined by the ICC. In more than 60% of ICC cases, the place of arbitration is not Paris (the ICC headquarters). Uncertainty may arise when electing an ICC arbitration in China. If the parties, for example, include the standard ICC arbitration clause in a contract and, at the same time, indicate that the arbitration will take place in China, such a clause may be declared null and void by Chinese courts.

It would certainly be convenient for investors if the PRC would accept the standard ICC clause and permit foreign arbitral panels (including ICC tribunals) to conduct arbitrations in China, not only because the arbitration is private in nature, but because the Chinese arbitral institutions would probably improve their own performance in light of competition. It would present opportunities for Chinese lawyers to be involved in relevant international arbitration cases and, in that connection, to gradually improve the law and arbitration practices of China and Asia.

XII. CONCLUSIONS

In the past, commercial parties have often had strong preferences against arbitrating disputes in China. Nevertheless, China has certainly made notable advances in arbitration in recent years. The publication of the Notice on Handling Awards Involving Foreign Interest and Foreign Arbitral Awards (1995), issued by the Supreme People's Court is one case in point. As mentioned earlier, it requires any People's Court intending to deny enforcement of a foreign arbitral award first to obtain approval from the Superior People's Court in the same jurisdiction, and any superior People's Court proposing to uphold the lower Court's refusal to enforce must, in turn, report its decision to the Supreme People's Court.

As China seeks to increase the flow of trade and foreign investment to its country, it is crucial that foreign parties looking to trade with or invest in China have confidence that the local courts will enforce arbitration awards against Chinese parties. Despite inadequacies that remain, the progress made in Chinese arbitration is a clear indication of China's efforts to make itself a more attractive venue for international arbitrations.