SETTLEMENT OF COMMERCIAL DISPUTES WITH CHINESE PARTNERS VIA ARBITRATION

-- Practical Observations for Korean Investors on the Mechanism of Dispute Resolution in the People's Republic of China --

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Introduction
I. Methods of Commercial Dispute Settlement In China
A. Mediation or Conciliation
B. Litigation
C. Arbitration
II. Transnational Commercial Arbitration
A. Brief History
B. Arbitrability and Arbitration Agreement
C. Choice of Arbitration Body and the Rules
D. Choice of Arbitration Venue
E. Choice of Law
F. Appointment of Arbitrators and Formation of Arbitration Tribunal
G. Procedure and Proceedings
H. Award
I. Remedy for Unenforceable Awards
III. Conclusion: Some Advice For Korean Investors

INTRODUCTION

August 24, 1994 marked the second anniversary of the normalization of diplomaticties between the Republic of Korea and the People's Republic of China. Thanks to the rapid economic growth in both countries, commercial transactions between the two have been booming. Within one year after the normalization,

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Korea rose to the fifth largest investor in China, and China ranked the third largest trading partner of Korea, as the Chinese market absorbed nearly 60% of Korea's overseas investment in terms of the number of projects, and 30% in terms of their monetary amount. In the opinion of many Korean economists, including Mr. Kim Chol-Su, Minister of Trade, Industry and Energy, China is the most promising overseas market for Korean products in the 1990s, by virtue of the complementary nature of the two economies.

An overall climate of such prosperity does not, however, guarantee success for every Korean business venture in China. The reasons for unsuccessful experience in China identified by Korean investors include unfamiliarity with the social regime, business environment and legal framework. Under such circumstances, equitable, efficient and effective resolution of business differences or disputes is of mutual importance for China in its efforts to attract foreign investment and for Koreans doing business with or in China. In order to assist Korean colleagues and entrepreneurs in gaining some practical insights into pertinent issues, this paper offers an introduction to the legal regime affecting settlement of business disputes in China, with an emphasis on transnational commercial arbitration, incorporating recent developments.

I. METHODS OF COMMERCIAL DISPUTE SETTLEMENT IN CHINA

A. Mediation or Conciliation

Deeply rooted in the Confucian tradition and persisting in an underdeveloped market economy, there is an overall preference for amicable or informal methods of dispute resolution in China. In the event that differences cannot be resolved through direct negotiation between the parties, mediation and conciliation are considered the most favorable ways to save face or reputation, preserve trust and

existing relationships, maintain confidentiality and avoid legal expense. This general preference for mediation or conciliation is reflected in the law of civil procedure and also in the legal rules governing settlement of transnational commercial disputes.

Conciliation in China is available in three categories of settlement methods for transnational commercial disputes: 1) conciliation via the Beijing Conciliation Center; 2) conciliation in the course of arbitration; and 3) conciliation in the course of litigation.

1. Beijing Conciliation Center

Established in 1987, the Beijing Conciliation Center maintains a panel of conciliators which is identical to the panel of arbitrators of the international arbitral institution in China. Based on written or verbal agreements between disputants, conciliation can be conducted by one or two conciliators using flexible procedures. There has also been a practice of "joint-conciliation" between China and the United States, Germany, France and Japan which was crystallized in the "Beijing-Hamburg Joint-Conciliation Rules." Under these rules, a Chinese party in a dispute may select one conciliator from the panel of the Beijing Conciliation Center while a German party may select another from the panel of the Hamburg Conciliation Center. A considerable number of disputes between Chinese and foreign parties have been resolved through such joint conciliation.

However, the binding force of settlements effected by the Beijing Conciliation Center is recognized neither by Chinese law nor by international legal instruments such as the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Consequently, disputants may incur waste of time and energy if one party subsequently refuses to comply with the settlement.

2. Conciliation in the Course of Arbitration

Conciliation may also be conducted by an arbitration tribunal in the process

of arbitration if the parties so agree. More details will be provided in the subsequent discussion. It suffices to point out here that a settlement reached via conciliation by the international arbitral institution in China is enforceable under either Chinese law or the New York Convention. If the conciliation succeeds, an arbitral award will be issued on the basis of a written agreement signed between the disputants (award by consent). If the conciliation fails, the arbitration will proceed.

3. Conciliation in the Course of Civil Litigation

In the course of civil litigation, disputants may agree to pursue settlement via conciliation by the court. The agreement reached via conciliation must be executed by both parties and confirmed by the judges. Such an agreement has the same legal effect as a court judgment. As in arbitration, if the parties fail to reach an agreement via conciliation, the litigation will proceed.

Against the backdrop of an overall preference for amicable means of dispute settlement in Chinese society, the broad availability of conciliation in the dispute settlement mechanism in China has intrinsic benefits for Korean business people who share the Confucian tradition or attach high value to their existing relationships with Chinese business partners -- it presents a ready exit to compromise at any stage of a dispute before a decision is rendered by a third party.

Conciliation does have technical drawbacks, however. Due to substantive and procedural flexibility, a conciliation usually focuses more on compromise than on the legal rights of the parties. This may undermine the authority or finality of the settlement. In some cases, one party may intentionally divert the other from other means of settlement by insisting on "friendly" conciliation and thereby cause considerable inefficiency. Moreover, some conciliators -- who may be arbitrators if the conciliation is undertaken in the course of arbitration or judges in the course of civil litigation - may resent it if a party declines their proposal for conciliation.

Legislative efforts have been made in China since 1990 to improve conciliation as a method of resolving civil disputes. The Code of Civil Procedure, as amended in 1991, provides that "when hearing a civil action, a people's court shall carry out mediation based on the principles of voluntary participation and legality. If mediation fails, the people's court shall render its judgments promptly." The new Arbitration Rules of the international arbitral institution in China make it clear that conciliation in the course of arbitration may only be conducted by the tribunal if it is voluntary on the part of both parties. Further, no offers or commitments made by either party in the course of conciliation may be adduced in subsequent arbitration proceedings. Unlike the practice of some other arbitral bodies that have provided conciliation as an option before the commencement of arbitration, such as the International Chamber of Commerce (ICC) or the Korean Commercial Arbitration Board (KCAB), the reformed conciliation procedure in the new Rules of the international arbitration institution in China still carries some peculiar features that should be noted by Korean investors.

First, the new Rules sets out no explicit time-limit for the duration of conciliation. Second, the conciliators are not precluded from acting in subsequent judicial or arbitral proceedings.

The efforts have not yet been concerted in some other aspects, either. For example, in an investment negotiation with a Chinese party, a Korean investor will often be presented a model joint venture contract with a clause like the following:

"Any dispute arising out of or in relation to this Contract shall be amicably settled between the parties. However, if the dispute between the parties cannot be resolved by mutual consultation, such a dispute shall be finally settled by arbitration in...."

The model joint venture contract, from which the above clause is derived, was designed by the Chinese government in the early 1980s. It was reticent on the

mechanism of dispute settlement. To avoid inefficiency in the actual course of dispute settlement, a joint venture agreement should provide for a detailed regime of dispute settlement with an express time limit for amicable consultation.

B. Litigation

In order to facilitate economic development, China has introduced significant improvements in its court system over the past decade and a half, through the establishment of "economic chambers" at all levels of courts and various training programs for judges. Since the end of 1993, "intellectual property chambers" have been formed in the courts of major cities including Beijing, Shanghai, Shenzhen, Zhuhai and Guangzhou. Further, the new Arbitration Law clarified and reconfirmed the authority and discretion of courts in granting preservation measures and in deciding the validity of arbitration agreements and awards.

On the other hand, Chinese judges are uneven in their qualifications and experience in deciding commercial cases, as a result of several factors. Traditionally, many judges and prosecutors are retired military officers and continue to hold senior positions. While one may rely on judges in the economic chambers of courts in major cities to have acquired substantial experience and expertise, those in less developed areas may be found wanting. In addition, owing to the intensifying economic competition among the provinces, the courts are also susceptible to local protectionism.

C. Arbitration

The uncertainties of conciliation and litigation in China are avoidable by electing transnational arbitration as an exclusive method of commercial dispute resolution. By contrast to the two methods discussed above, arbitration in China offers a combination of the advantages generally expected in dispute resolution, including party autonomy, efficiency, confidentiality, expertise, impartiality,

finality and enforceability. Specific reasons will be provided below, but it may be noted here that, in practice, arbitration has been the most favored means for foreign investors to settle business disputes with their Chinese partners. This fact has contributed to make the international arbitral institution in China the busiest in the world.

II. TRANSNATIONAL COMMERCIAL ARBITRATION IN CHINA

A. Brief History

Even back in the 1950s, China realized that some vehicle for dispute resolution was indispensable for its transnational economic activities. As early as 1956, the very first arbitral institution was set up to handle disputes arising in China's foreign trade. The Rules of that institution, the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (hereinafter the "Commission"), were to a large extent a copy of a Soviet model. Nevertheless, for a time the Commission was the sole organization in China acquiring experience and training experts in resolving trade disputes. Subsequently, a maritime arbitration body was established in 1959, which adopted similar rules and appointed a similar panel of arbitrators.

The Commission's panel of 21 arbitrators was enlarged to 65 in 1980, when China commenced its economic reforms in the aftermath of the Cultural Revolution. Its Rules were revised, and the scope of arbitrable disputes was expanded to cover not only trade but also foreign investment in financing, transportation, joint ventures and other areas. Accordingly, the Commission was first renamed as "the Foreign Economic and Trade Arbitration Commission of the China Council for Promotion of International Trade" in 1980 and converted to the current name of "China International Economic and Trade Arbitration Commission

(known as the "CIETAC" since) in 1988. For greater convenience, two sub-commissions were set up in Shanghai and Shenzhen, with the same rules and panel of arbitrators.

Throughout the 1980s, China acceded to major international legal instruments on dispute resolution, such as the New York Convention and the Rules of the International Center for the Settlement of Investment Disputes ("ICSID"), entered into bilateral investment treaties with many countries providing for ready recourse to arbitration, and adopted a variety of laws providing for dispute settlement through arbitration, such as provisions in the Code of Civil Procedure, the Foreign Economic Contract Law and the Joint Venture Law. In the meantime, the arbitration commission also signed agreements with the transnational arbitration bodies of many other countries including the Republic of Korea (in December 1992) recommending a "home-and-home" arbitration clause. According to such clause, the place of arbitration will be the country of the respondent. In other words, an arbitration between a Chinese party and a Korean party shall be conducted at the KCAB in Seoul if the Chinese party is the claimant, or at the CIETAC in Beijing if the Korean party is the claimant.

A further elaboration of the law and mechanism of arbitration in China has been achieved over the past few months in order to accommodate the new influx of foreign capital since 1992. In June 1994, the CIETAC was reorganized by the Standing Committee of the National Congress of the China Council for the Promotion of the International Trade (CCPIT, the China Chamber of Commerce), which also adopted a set of new rules (with 81 articles) based largely on the model arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).

On August 31, 1994, the People's Congress enacted the Arbitration Law, thereby establishing a comprehensive legislative framework for arbitration.

As a non-governmental organization, the CIETAC now maintains a panel of 289 arbitrators among whom 86 are foreign nationals from a wide range of

countries, including 4 from Korea. The qualifications for arbitrators as provided for in the Arbitration Law are either more than 8 years of professional experience for arbitrators, attorneys and adjudicators, or senior positions for academics or other experts in relevant fields. The expertise and prestige of these arbitrators will enhance foreign and Chinese parties' confidence in their impartiality and resistance to local or external interference.

Through these efforts, the development of transnational arbitration in China has kept pace with the economic interaction and conformed with international norms.

B. Arbitrability and Arbitration Agreement

The range of arbitrable disputes provided for by the CIETAC Rules covers those "arising from international or external, contractual or non-contractual, economic and trade transactions, those disputes between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between foreign legal persons and/or natural persons, and Chinese legal persons and/or natural persons." The Arbitration Law, however, explicitly excludes the arbitrability of administrative and other disputes concerning marriage, adoption, guardianship, family support and inheritance. In addition, arbitration of labor disputes must be handled by the arbitral committees affiliated with the labor and personnel departments of the Government, thus lies beyond the competence of the CIETAC. Except contractual disputes concerning technology transfer, copyright and computer software licensing, arbitration is not available for disputes over patent and trademark under the Patent Law and the Trademark Law. Finally, disputes over land use rights in China are not arbitrable, according to the Law on Land Management.

To sum up for Korean investors, transnational commercial arbitration is available in China with the CIETAC for a broad range of contractual or property rights disputes (including contractual disputes concerning technology transfer,

copyright and computer software licensing), provided that there is an arbitration agreement between the Chinese and foreign parties.

As arbitration is in principle based on the autonomous choice of the parties, it is consistent for the CIETAC Rules to require an arbitration agreement for the CIETAC's acceptance of an application for arbitration. A noteworthy point is that the arbitration agreement, along with the claimant's application, must be in writing. Such an agreement, as defined by the Rules, can be "an arbitration clause stipulated by the parties in their contract or a written agreement concluded by the parties in other forms" before or after the occurrence of the dispute.

In principle, the CIETAC's aut hority "to decide on the existence and validity of an arbitration agreement and jurisdiction over an arbitration case" is recognized by the Arbitration Law. However, the court reserves the authority to render a final decision on the validity of an arbitration agreement if one party brings the issue before the court while the other party raises it with the arbitration tribunal.

A court shall reject any application for litigation if a valid arbitration agreement has been concluded between the parties. Thus, the parties' desire expressed in an arbitration agreement to preclude each other from pursuing litigation is safeguarded. The validity of an arbitration clause in a contract survives any modification, rescission, termination, invalidity or revocation of the contract. However, it may be nullified by an arbitration tribunal or a court, if a party so argues before the commencement of the first hearing of an arbitration, in case the arbitration agreement contains any of the following defects: a) ultra vires, i.e. the subject matter is not arbitrable; b) incompetence or limited capacity of a party; or c) coercion by a party.

C. Choice of Arbitration Body and the Rules

First of all, it is possible under Chinese law to select an arbitration body outside China other than the CIETAC, with an arbitration clause in either a joint venture agreement or other type of contracts, e.g. a sales contract, or an

agreement after the occurrence of a dispute.

Once the CIETAC is selected in an arbitration agreement, it will only conduct the arbitration under its own rules. In other words, unlike the practice of some other arbitral bodies, such as the Arbitration Institute of the Stockholm Chamber of Commerce or the Korean Commercial Arbitration Board, the CIETAC and its Rules cannot be selected separately. Therefore, some basic understanding of the Rules of the CIETAC is of essential importance for a Korean party who intends to have its future dispute with a Chinese partner arbitrated by the CIETAC.

D. Choice of Arbitration Venue

In principle, the parties may only agree to choose their place of arbitration among the locales of the CIETAC or its two Sub-Commissions, i.e., Beijing, Shanghai and Shenzhen. In the absence of an agreement on the venue, the Claimant may have the priority. If a dispute arises over the option, the CIETAC shall make the decision. Subject to approval by the Chairmen of the CIETAC and its two Sub-Commissions, the arbitration may be conducted in other places. However, it is unpredictable that whether or to what degree shall the Chairmen effect the parties' choice of venue among places other than the locales of the CIETAC and its Sub-Commissions in their arbitration agreements.

E. Choice of Law

Article 53 of the Arbitration Rules of the CIETAC provides: "the arbitration tribunal shall independently and impartially make its arbitral award in accordance with the facts of the case, the law, and the terms of the contracts, international practices and the principles of fairness and reasonableness."

For Sino-foreign joint venture contracts or contracts on joint exploration of natural resources, Chinese law must govern, and the disputes arising in connection with these contracts cannot be dealt with by foreign courts.

Accordingly, a joint venture contract which selects foreign rules as the governing law will not be approved by the government; and an award concerning a joint venture contract rendered by a non-Chinese arbitral body applying non-Chinese law cannot be recognized or enforced by a Chinese court. For other types of contracts, the Foreign Economic Contract Law does not place many restrictions on the parties' autonomy to choose the substantive law unless the application of the selected foreign law violates Chinese law or public interest (ordre public). As the Foreign Economic Contract Law is rather brief, many foreign parties have chosen the Vienna Convention on International Sales of Goods (the "CISG"), which has been ratified by China, to govern their sales contracts with Chinese parties.

In case that the parties have not chosen the governing law of a contract, the arbitration tribunal shall apply a set of conflict of law rules based on the principle of closest connections with the contract.

In case of conflict between domestic law and international treaties to which China is a party, the latter shall apply, with limit to the reservations declared by China at the time of conclusion or entry.

In case of absence of other applicable rules, international custom, e.g., the International Rules for the Interpretation of Trade Terms (the INCOTERMS), shall be applied. After all, by resorting to "the principles of fairness and reasonableness" (ex aequo et bono), the tribunal has certain discretion and flexibility in balancing the overall situation of a case.

F. Appointment of Arbitrators and Formation of Arbitration Tribunal

The arbitration tribunal may consist of either a sole arbitrator or three arbitrators. To form a tribunal of a sole arbitrator, particularly for the expedited procedure, the parties may select an arbitrator by agreement or jointly authorize the Chairman of the CIETAC to appoint one on their behalf, from among the panel of the CIETAC. To form a three-arbitrator tribunal, usually, each party may appoint one arbitrator from among the CIETAC's panel. The third and

presiding arbitrator, however, has to be appointed by the Chairman of the CIETAC. The underlying purpose of such provision is to preclude the possibility that two foreign parties may choose an all-foreign tribunal among the foreign arbitrators on the panel. This is also important because, "when the arbitral tribunal cannot arrive at a majority opinion, the arbitral award shall be decided according to the presiding arbitrator."

An appointed arbitrator having a personal interest in the case must recuse himself. A party may also request recusation of such an arbitrator with a written challenge setting forth facts and reasons in detail, if it has grounds to question the impartiality or independence of the arbitrator.

G. Procedure and Proceedings

To avoid a lengthy discussion into the technical details, it is appropriate here to focus on some points which may be of substantial impact on the actual arbitration by the CIETAC.

1. Request for Arbitration

When requesting for arbitration by the CIETAC, a claimant is required to submit a written application with relevant documentary evidence and an arbitration fee. Apart from the name and address of the claimant and those of the respondent, the application must also provide the arbitration agreement, the facts of the case, the main points of dispute, the claim and its supporting facts and evidence. In the meantime, the claimant may appoint one arbitrator from among the panel of the CIETAC or authorize the Chairman to make an appointment on his behalf.

2. Language

The formal language of the CIETAC is Chinese. Other languages agreed upon by the parties in their arbitration agreements are acceptable but the

Secretariat of the CIETAC has the discretion to request translations of the relevant documents at cost to the parties. Translators or interpreters may be provided by the Secretariat upon request or by the parties themselves. In fact, the majority of the Chinese arbitrators on the panel are proficient in professional English, especially for the purpose of a hearing based on documents.

3. Hearing

Unless the parties otherwise agree, oral hearings shall be conducted in closed sessions so as to preserve the confidentiality which the parties are usually seeking in opting for arbitration as the sole means to resolve disputes. Accordingly, all CIETAC staff and personnel involved are obligated to keep all the substantive and procedural matters of the case confidential.

Upon request by the parties and consent of the tribunal, hearings may also be based on documents only. Cross-examining of parties or witnesses may be conducted in the hearings, under the control of the specific tribunal.

Normally, the process of discovery in the legal system of China is limited. In arbitration, the obligation to produce evidence is basically placed on the parties for their claims, defence or counterclaims. However, the tribunal reserves the discretion to undertake investigations or to collect evidence on its own initiative. When the arbitration is carried out in China, such discretion may prove advantageous for the Chinese party.

In general, the pertinent provisions of the law of civil procedure governing the issue of evidence are also followed in arbitration. Chinese or foreign experts or appraisers may be consulted by the tribunal and called to attend the hearing to explain or clarify their opinions or reports, upon request of the parties with the tribunal's approval.

5. Attorney

By a written Power of Attorney, the parties may authorize Chinese and/or foreign citizens (including lawyers) as attorneys to present their cases in the

course of arbitration.

6. Preservation

Property preservation measures against one party can be carried out in the course of arbitration upon application by the other party. The application must be submitted by the CIETAC to an "intermediate people's court" -- a court at the municipal level -- in the locality of the property or the domicile of the party against whom the measures are sought. At the time of application, a provisional security for the property must be deposited with the court by the applying party.

7. Summary or Expedited Procedure

For cases of smaller claims or upon specific request by the parties, expedited procedure may be followed by a tribunal formed by a sole arbitrator.

8. Costs

The tribunal must calculate and determine the amount of arbitration fees and other expenses on the basis of its chart (see attachment) and actual expenditures, and specify such amount in the award. Up to ten percent (10%) of the total amount awarded to the winning party may be added as compensation for its expenses reasonably incurred in the actual course of arbitration.

H. Award

China ratified the New York Convention in December, 1986 with two declared reservations in accordance with Article I (3)of the Convention. First, China will on the basis of reciprocity apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. Second, China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Chinese law. To implement it, the finality and binding force of an arbitral

award, regardless whether it is rendered by the CIETAC or by another arbitral body outside China, is recognized under similar conditions by the relevant laws of China, including the Arbitration Law and the Code of Civil Procedure.

According to the new rules of the CIETAC, an award should be rendered by the majority opinion of the tribunal. Grounds for the decision must be stated in the award, unless the award incorporates a settlement agreement reached by both parties. A dissenting minority opinion may be recorded and docked in the file. A dissenting arbitrator may or may not sign onto the award. Such provisions on the one hand restricts the discretion of the majority arbitrators, and on the other encourages the minority to dissent.

Both interim and additional awards are available. Typing or calculating errors in the award may be corrected either by the CIETAC itself or upon request of the parties.

Failure of either party to file a defence in writing or appear at the hearing shall not affect the tribunal to proceed and make awards by default.

If a losing party fails to comply with the arbitral award, the prevailing party may apply to the Chinese court for enforcement or apply to a competent foreign court under the New York Convention, to which China acceded in December 1986, or under other international treaties that China has concluded or joined.

Under the Code of Civil Procedure of China, an arbitral award may be set aside by the Chinese court under circumstances similar to those stipulated in Article 5 of the New York Convention. The following constitutes such circumstances:

"(1) the parties have not stipulated clauses on arbitration in their contract, nor subsequently concluded a written arbitration agreement;

(2) the party against whom the application is filed was not notified to appoint an arbitrator or to undertake arbitral proceedings or the said party

failed to state its opinions due to reasons for which it cannot be held responsible;

(3) the composition of the arbitration tribunal or the arbitral proceedings does not conform with arbitration regulations;

(4) certain items of the award exceed the scope of the arbitration agreement or are outside the jurisdiction of the arbitration institution."

Ultimately, recognition of an arbitral award may be refused by the court if it violates public interest of the Chinese society. Nevertheless, with realization of the importance to honor international arbitral awards in fostering its economic goals, Chinese courts have been self-restraint in resorting to the public interest.

Protest against the court's decision on an award may be petitioned to a court at the higher level pursuant to the "supervision procedures on trials" in the Code of Civil Procedure.

I. Remedy for Unenforceable Awards

Where an arbitral award is set aside by the Chinese court, the parties may conclude a new arbitration agreement concerning the dispute or proceed with litigation at the Chinese court.

III. CONCLUSION: SOME ADVICE FOR KOREAN INVESTORS

As a result of tremendous efforts, transnational arbitration in China has evolved into a prominent vehicle, among other methods, for international investors to resolve a broad range of commercial disputes with their Chinese partners. On the basis of the introduction and discussion presented above, the author in conclusion presents the following practical advice for Korean investors.

A. The generally favored informal methods of negotiation, consultation, conciliation and mediation in the framework of dispute settlement in China is not necessarily to the disadvantage of Korean investors. However, to avoid inefficiency and delay in the actual course of a commercial dispute, the election of a time limit for such methods should be articulated in the legal documents governing the transaction. Due caution should be exercised where a Chinese arbitrator in the course of an arbitration proposes settlement via conciliation, as the arbitrator will usually remain sitting in the tribunal for the subsequent proceedings.

However, a Korean party should be aware that conciliation is not a compulsory procedure under relevant laws of China. While conciliation is available as a ready exit to compromise, a party is under no legal obligation to suffer any undue delay intended by either the other party or the tribunal.

B. China has undertaken remarkable improvements in its court system for adjudicating transnational commercial disputes. However, such improvements are uneven among different regions of China. Moreover, due to the additional burden on court dockets resulting from the expansion of economic activities, litigation in China can be very time-consuming.

C. Exclusive recourse to arbitration, or arbitration in connection with mediation, may be assured by an arbitration agreement concluded between Chinese and Korean business partners. A carefully drawn arbitration clause should be incorporated into the transnational business contract at the initial stage of negotiation and contracting, when the bargaining power of each party with respect to the transaction as a whole is real and determinate.

D. A choice of an arbitral body other than the CIETAC is permissible under Chinese law and the New York Convention. This implies that, when an arbitral body is to be selected in a third country, such country should be a

signatory to the New York Convention. Otherwise, its arbitral award may be more difficult to enforce in the Chinese courts, due to the reservation on reciprocity declared by China at the time of its accession to the Convention.

For linguistic and geographical convenience, a Chinese party may prefer to choose the arbitral body in Hong Kong to arbitrate its dispute with a Korean partner. As Hong Kong is destined to revert to Chinese sovereignty in 1997, the legal status of its participation in the New York Convention is uncertain because it is unpredictable at the current stage that whether the arbitral body in Hong Kong will become a domestic sub-division of the CIETAC. Therefore, before the clarification of this issue, the arbitral body in Hong Kong should not be selected for long-term projects in China.

E. If the CIETAC is selected, its rules will automatically apply, leaving no leeway for the parties to design rules in their own favor. In addition, the attitude toward ad hoc arbitration tribunal is generally rather negative in China. Therefore, it is essential for a Korean investor to gain certain familiarity with the Arbitration Rules of the CIETAC before selecting it to arbitrate its disputes with a Chinese partner.

F. Choice of arbitration venue under the CIETAC Rules is basically limited to the locales of the CIETAC and its sub-commissions, i.e., Beijing, Shanghai and Shenzhen. Choice of other places is subject to consent of the CIETAC and the sub-commissions. Since the majority of the Korean ventures in China is concentrated in the Northern part, Beijing may be the most convenient venue for most Korean investors in China, if the CIETAC is to be selected. Therefore, the choice of venue should be clarified in the arbitration clause or agreement with a Chinese partner. Further, mutual understanding should be pursued between the KCAB and the CIETAC so that Korean investors' choice of venue among other convenient locations such as Tianjin, Shandong and Manchuria can be predetermined.

G. For contracts other than joint venture agreements, choice of a foreign law is permitted under Chinese law. Given the authority of the Vienna Convention on International Sales of Goods (the "CISG"), to which China is a party, a Korean investor may consider selecting it as the governing law for a sales contract with a Chinese partner. The CISG, however, will not automatically apply to a sales contract between Korean and Chinese parties, because Korea has not yet acceded to the Convention. Therefore, selection of the CISG as governing law must be expressly provided for in the contract or other legal documents governing the transaction.

As Chinese law is mandatory for joint venture agreements that cannot be litigated at foreign courts, it may better balance a Korean investor's interest to select a prestigious arbitral body in a third country, such as the Arbitration Institute of the Stockholm Chamber of Commerce, to arbitrate a dispute with a Chinese partner involving a major project.

H. Presently four Korean arbitrators are available on the panel of the CIETAC. This offers substantial reassurance and convenience for Korean investors in opting for arbitration with the CIETAC.

I. Last but not least, comprehensive assistance from an expert in Chinese law should be sought when drafting any legal instrument, including an arbitration clause or agreement, with a Chinese partner. Discrepancies in the Chinese version of all relevant legal documents should be eliminated or minimized, Chinese attorneys should be consulted or engaged especially when the CIETAC is selected as the arbitral body.

[ATTACHMENT I]

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION ARBITRATION FEE SCHEDULE

(Effective as from June 1, 1994)

Amount of Claim	Amount of Fee (RMB)
100,000 Yuan or less	4% of the Claim Amount, minimum 2,000 Yuan
100,000 Yuan to 500,000 Yuan	4,000 Yuan Plus 3% of the excess over 100,000 Yuan
500,000 Yuan to 1,000,000 Yuan	16,000 Yuan Plus 2% of the excess over 500,000 Yuan
1,000,000 Yuan to 5,000,000 Yuan	26,000 Yuan Plus 1% of the excess over 1,000,000 Yuan
5,000,000 Yuan or more	66,000 Yuan Plus 0.5% of the excess over 5,000,000 Yuan

If no amount of claim is stated when applying for arbitration, the amount of arbitration fees shall be determined by the secretariats of the Arbitration Commission or its Sub-Commissions.

If the arbitration fee is charged in foreign currency, an amount of foreign currency equivalent to the corresponding RMB value specified in this Schedule shall be paid.

Apart from charging arbitration fees according to the above mentioned Arbitration Fee Schedule, the Arbitration Commission or its Sub Commissions may collect other extra, reasonable and actual expenses pursuant to the relevant provision of the Arbitration Rules.

[ATTACHMENT II]

China International Economic and Trade Arbitration Commission
Address: 6, East Beisanhuan Road, Beijing 100028, CHINA
Cable: COMTRADE Beijing
Telex: 210214 CEXHN CN
Fax: 467-7335
Phone: 466-4433, 467-7395

Shenzhen Sub-Commission
Address: 17/F, 59 Shennan Zhong Road, Shenzhen 518031, CHINA
Cable: 5932 Shenzhen
Fax: 336-4776
Phone: 336-5877, 336-5885

Shanghai Sub-Commission
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