

WIPO Workshop zu IP Streitbeilegungsverfahren IP Arbitration in China

Dr. Thomas Pattloch, LL.M.Eur



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Selection of relevant laws and regulations

- > Arbitration Law
- > Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"
- > Law of the People's Republic of China on Labor-dispute Mediation and Arbitration
- > Civil Procedure Law
- > CIETAC Procedural Rules, revised as of May 1, 2012
- > New York Convention for Enforcement of International Arbitration Awards

Some facts and figures

- > Over 1300 arbitration cases with CIETAC in 2010 out of that 470 with foreign parties
- > Tendency rising: 1,435 cases in 2011
- > More than 280 foreign arbitrators on CIETAC list of arbitrators
- > 20-30% of cases settled by mediation through CIETAC
- > Strong competition among arbitration institutions in Asia:
 - Singapore International Arbitration Centre
 - Hong Kong International Arbitration Centre
 - Local arbitration commissions, e.g. Xi'an Arbitration Commission
 - CIETAC former branches as competitors?

Arbitrability

> Art 3 Chinese Arbitration law on disputes which are not arbitrable:

*“(1) marital, adoption, guardianship, support and succession disputes;
(2) administrative disputes that shall be handled by administrative organs
as prescribed by law”.*

> Generally, all disputes which cannot be privately settled between the parties are not arbitrable.



IP disputes and arbitration

- > Criminal / administrative IP disputes
- > Civil:
 - Contractual: copyright, technology transfer, trademark license
 - Tort
 - Ownership: Copyright – patents/trademark ownership to be treated differently?

Labor disputes – priority of labor arbitration?

- > Art 77 Chinese Arbitration Law provides that labor dispute has to be regulated by specific regulations
 - “Law of the People's Republic of China on Labor Dispute Mediation and Arbitration“
- > Art 79 Chinese Labor Law - affirmed by Supreme People Court Opinion (1998) *“Reply of the Supreme People’s Court on Whether or Not a People’s Court Should Accept a Labor Dispute Case for Which a Labor Arbitration Commission Fails to Make an Arbitration Award within Specified Time Limit or for Which a Labor Arbitration Commission Issues a Notice of Non-acceptance”*;
 - NB: Art 83 Chinese Labor Law and Art 5 Labor Dispute Mediation and Arbitration Law both stipulate that one party to the labor dispute arbitration may bring suit to the court if he/she is not satisfied with the arbitration award.

Exceptions?

- > Non-disclosure of trade secrets and intellectual property and non-competition?
 - Art 23 Labor Contract Law provides the employers and employees the possibility to freely include the confidentiality clause either in labor contract or in confidentiality agreement.
 - The Chinese Supreme People's Court tried to address the court competence issue on this question: Art 79 Labor Law provides labor arbitration as mandatory procedure prior to the commencement of court proceedings for labor disputes. The question is if a court is competent to hear a case if it arises out of the non-disclosure/non-competition agreement between the parties and one of the parties is suing for trade secret damages caused by breach of non-competition clause.
 - » SPC [2010] 最高人民法院关于印发《最高人民法院知识产权案件年度报告（2009）》的通知, Nr. 40

Claims and arbitrability

- > The SPC argues that Chinese Contract Law allows the parties to freely choose which claims a party wants to assert if there are more than one available parallel at the same time, e.g. either breach of the contract or economic damages. A labor dispute is a dispute that arises out of a labor relationship and the Labor Law does not require a party to assert its claim only based on labor contract, neither.
- > Common practice of CIETAC Shanghai (independent commission) to accept matters which relates to disclosure of confidential information after termination of labor contracts. It was also willing to accept non-competition disputes, as long as they are only involved with economic damages.

CIETAC rules

- > Arbitration rules CIETAC, in its revised version effective as of May 01, 2012
 - Art 21(2): provisional measures and interim rulings – conflict with Art 100 (revised) Chinese Civil Procedure Law?
 - Application of new rules inside China: Problem enforcement of “procedural orders“ – arbitration awards

- > The major recent dispute between CIETAC Beijing and CIETAC Shanghai/Shenzhen: August 4, 2012 statement and state of play
 - Consequences for arbitration clauses: Art 18 Arbitration Law?



Ad hoc arbitration

- > Arbitration institutions vs. Ad hoc tribunals
 - In China: Art 16, 18 Arbitration Law, Art 4 SPC Judicial Interpretation on Certain Issues Concerning the Application of the Arbitration Law of the PRC
 - Outside China: Case law and *lex loci arbitri* for validity of arbitration clause

Art 58 Arbitration Law: Setting aside a (domestic) award

- (1) There is no arbitration agreement;
- (2) The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- (3) The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;
- (4) The evidence on which the award is based was forged;
- (5) The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or
- (6) The arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case.

The people's court shall rule to set aside the arbitration award if a collegial panel formed by the people's court verifies upon examination that the award involves one of the circumstances set forth in the preceding paragraph.

If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award.

Art 237 CPL – invalidating domestic arbitration awards

- (1) the parties have had no arbitration clause in their contract, nor have subsequently reached a written agreement on arbitration;
- (2) the matters dealt with by the award fall outside the scope of the arbitration agreement or are matters which the arbitral organ has no power to arbitrate;
- (3) the composition of the arbitration tribunal or the procedure for arbitration contradicts the procedure prescribed by the law.
- (4) the evidences based on which the arbitral award is made is falsified;
- (5) the other parties conceal the evidences from the arbitral organ which are sufficient to affect the impartiality of the arbitral award; or
- (6) the arbitrators have committed embezzlement, accepted bribes or done malpractice for personal benefits or perverted the law in the arbitration of the case.

Enforcement foreign arbitration award

- > Foreign and foreign related arbitration and enforcement
 - Supreme People’s Court (1987) *“Notice of the Supreme People’s Court on Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards Acceded to by China”*

- > If enforcement is intended by Intermediate People’s Court to be declined, *“Notice of the Supreme People’s Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People’ Courts”* (1995) report to Higher People’s Court and ultimately SPC
 - Time limit: decision within 2 months upon receipt of application at each instance, enforcement to be completed within 6 months

Art 70 Arbitration Law/Art 274 CPL – foreign arbitration awards

- (1) the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;
- (2) the party against whom the application for execution is made is not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or is unable to present his case due to causes for which he is not responsible;
- (3) the composition of the arbitration tribunal or the procedure for arbitration is not in conformity with the rules of arbitration; or
- (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ is not empowered to arbitrate.

If the people's court determines that the execution of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the execution of the arbitral award.

Practice

- > In the practice the “Reporting System” works well judged by past court decisions.
- > It usually takes 3 – 6 months for each instance to issue a statement report.
- > Most cases get the final “response” of SPC within 14 months in total. Only in rare cases, SPC needed 13 months or even four years, see [2006] Min Si Ta Zi Di 1 Hao/ [2005] Min Si Ta Zi Di 12 Hao
- > Actual enforcement at enforcement division at court (can take longer time!)
 - Objections by award debtor
 - Settlement
 - Freezing assets

Office Details

Beijing ^Ω

Unit 2307&08, West Tower,
Twin Towers
B-12 Jianguomenwai Avenue
Chaoyang District
Beijing 100022
T. +86 (10)6567 5886

Berlin

Ebertstraße 15
10117 Berlin
T. +49 (0)30 88 56 36 0

Bratislava

TaylorWessing e|n|w|c
Panenská 6
81103 Bratislava
T. +421(0)2 5263 2804

Brno ^Ω

TaylorWessing e|n|w|c
Dominikánské náměstí 4/5
602 00 Brno
T. +420 543 420 401

Brussels

Trône House
4 Rue du Trône
1000 Brussels
T. +32 (0)2 289 6060

Budapest

TaylorWessing e|n|w|c
Dorottya u. 1. III. em.
1051 Budapest
T. +36 (0)1 327 04 07

Cambridge

24 Hills Road
Cambridge, CB2 1JP
T. +44 (0)1223 446400

Dubai

26th Floor, Rolex Tower,
Sheikh Zayed Road,
P.O. Box 33675
Dubai, United Arab Emirates
T. +971 (0)4 309 1000

Düsseldorf

Benrather Straße 15
40213 Düsseldorf
T. +49 (0)211 83 87 0

Frankfurt

Senckenberganlage 20-22
60325 Frankfurt a.M.
T. +49 (0)69 971 30 0

Hamburg

Hanseatic Trade Center
Am Sandtorkai 41
20457 Hamburg
T. +49 (0)4 0 36 80 30

Kiev

TaylorWessing e|n|w|c
Illinsky Business Center
vul. Illinska 8
04070 Kiev
T. +38 (0)44 369 32 44

Klagenfurt ^Ω

TaylorWessing e|n|w|c
Alter Platz 1
9020 Klagenfurt
T. +43 (0)463 51 52 27

London

5 New Street Square
London EC4A 3TW
T. +44 (0)20 7300 7000

Munich

Isartorplatz 8
80331 Munich
T. +49 (0)89 2 10 38 0

Paris

42 avenue Montaigne
75008 Paris
T. +33 (0)1 72 74 03 33

Prague

TaylorWessing e|n|w|c
U Prasné brány 1
CZ-110 00 Praha 1
T. +420 224 81 92 16

Shanghai ^Ω

Unit 1509, United Plaza
No. 1468, Nanjing West Road
Shanghai 200040
T. +86 (0)21 6247 7247

Singapore

RHTLaw Taylor Wessing LLP
Six Battery Road
#09-01, #10-01
Singapore 049909
T. +65 6381 6868

Vienna

TaylorWessing e|n|w|c
Schwarzenbergplatz 7
1030 Vienna
T. +43 (0)1 716 55

Warsaw

TaylorWessing e|n|w|c
ul. Mokotowska 1
00-640 Warsaw
T. +48 (0)22 584 97 40

^Ω Representative offices

Thank you for your attention!



Dr. Thomas Pattloch, LL.M.Eur.
Partner, München

- > **IP law, including licensing**
- > **Applications for IP protection, Litigation & Dispute Resolution**
- > **Practice Area China and Greater China**

Thomas Pattloch specialises in industrial property rights and technology transfer with a particular focus on China. He provides comprehensive assistance and advice with regard to all aspects of Chinese industrial property law, covering inter alia strategic establishment of industrial property rights in China, enforcement of rights and assisting clients in particularly sensitive fields of technology, competition-related aspects of license agreements, drafting of software and technology license agreements, designing R&D projects as well as IP transactions. Furthermore, he advises on target-oriented IP strategies for developing markets in China und Greater China. His remit also comprises assistance in fighting product piracy in China and Asia.

Thomas went to law school in Munich. Afterwards, he did his doctorate at the University of Passau, with a thesis on Chinese IP rights, and was a research assistant with the Asia department of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law . After obtaining his doctorate degree, he practised law in Shanghai. Before joining Taylor Wessing he was the European Commission's IP Officer in Beijing, China.

Thomas regularly publishes technical papers on IP rights in China and frequently speaks at international seminars and events. He is the author and co-author of several specialist books on Chinese law including also contract negotiations in China. A speaker of Mandarin, Thomas maintains close links to Chinese partners and institutions.

Contact

T: +49 (0)89 210 38 222

E: t.pattloch@taylorwessing.com