

## **DISPUTE RESOLUTION OF FOREIGN DIRECT INVESTMENT IN CHINA**

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### **ABSTRAK**

Praktek korupsi di zaman modern ini masih melukai upaya penyelesaian sengketa penanaman modal asing di Indonesia. Namun sebenarnya pada saat ini Indonesia sedang menjadi negara tujuan menarik bagi kegiatan penanaman modal asing, terutama bagi produsen barang-barang manufaktur, hal ini tidak lain disebabkan karena sumber daya alam Indonesia yang mendukung kegiatan perekonomian. Dalam tulisan ini ditunjukkan agar dapat memacu pengembangan sistem hukum di Indonesia terutama dalam hal penanaman modal asing dan untuk membahas mengenai bagaimana penyelesaian sengketa pada penanaman modal asing dalam kaitannya dengan *Chinese Regime* dan pengaruh akan budaya Cina pada metode negosiasi, mediasi, arbitrase. Dalam penulisan ini juga dibahas mengenai upaya penyelesaian sengketa melalui litigasi, penegakan hukum dari putusan arbitrase asing serta penegakan hukum terhadap hasil keputusan pengadilan asing, dalam kaitannya dengan *Chinese Regime*.

**Kata Kunci:** metode negosiasi Cina, putusan arbitrase asing, putusan pengadilan asing.

### **ABSTRACT**

*Corruption activity in this modern era keeps hurting the implementation of foreign investment in Indonesia, especially for the dispute settlement aspect. Unfortunately, today, Indonesia is one of the interesting place for foreign investment destination, especially for consumer goods manufacturers. This situation happened because of Indonesia's great resources which is totally supportive to business development activity. This article was intended to spur the development of Indonesia's legal system, especially about foreign investment, and also to explain how the dispute resolution on foreign investment in Chinese Regime perspective, including considerations of how Chinese culture and settlement in foreign investment, methods of negotiation, mediation, arbitration. It will also be discussed how the practice of the settlement of disputes through litigation also the enforcement of foreign arbitral awards and the enforcement of a foreign court related to Chinese Regime.*

**Keywords:** Chinese regime negotiation method, foreign arbitral awards, foreign court.

### **INTRODUCTION**

Concerning all companies entering the market in China are required to apply a legal entity under Chinese Law. Meanwhile in 1986, China is signatory of 1958 New York Convention, therefore, foreign arbitration awards are technically enforceable in China, but it is not really easy to enforce the foreign awards, due to time consuming and often subject to local protectionism (Potter, 1995:30). This paper will analyse Chinese FDI Dispute Resolution Regime and its practical obstacles, both alternative dispute resolution and litigation.

This paper also will analyse the popular question which always arise in FDI issue namely in what extent Chinese law applies the New York Convention on Recognition and the Enforcement of Arbitration

Awards, mainly when the awards go against domestic Chinese companies.

In my opinion, Chinese paradigm prefers amicable consultation to try to solve the dispute arising in Foreign Direct Investment contract. If the informal and extrajudicial ways fail, then prevailing party may refer to the dispute to the international arbitration or People's Republic of China (PRC) Court to settle their conflict. Based on party autonomy principle, PRC law permits the parties to FDI contract to provide for the conduct of an arbitration either inside China or overseas. Thus, for the result, an arbitral award or foreign judgement is possible to recognize and enforce in China, even though, it is unavoidable situation that there is some obstacles in practical mechanism. Based

on The report, 2010-2012 World Investment Prospects Survey, was released at the 2010 United Nations Conference on Trade and Development (UNCTAD) World Investment Forum (WIF) in Xiamen, Fujian province, China remains the most popular destination for Foreign Direct Investment (FDI) in the world. China obviously had succeeded attracting a significant amount of FDI. Foreign investors are enthusiastic to invest in China, but many are not sure about the proper methods for dispute resolution if a deal does not go as expected as in the contract (White III, 2003).

While the overwhelming majority of FDI projects in China are successful, inevitably investments go unpleasant, and then the parties need to be resolved in the best interests among parties. It is shown that China continues to improve its quantity and quality in the international investment world. International investors working in China are delivered the issue of how to avoid, prevent, and resolve investment disputes in China.

Sometimes it is easier to start than to continue in order to stay contract alive. Foreign business people were continually frustrated by the inadequacy of regulatory regime, and multitude of practical obstacles (Potter, 1995), lack of transparency and obscurity of the law, accessible regulations, administrative and political control in the form of uncoordinated laws and policies at different levels of the Chinese bureaucracy (Davis, 2003) and inconsistent interpretations of the law (Kennedy, 2006:251). Undoubtedly, these main problems create an environment of "business disenchantment" regarding the Chinese investment market and may lead to a dispute among parties then it is needed to resolve.

Moreover, when 'West' meets 'East' in investment contract, both of the parties, especially the party from host country must recognize the etiquette, culture, language, interest, and law regime background and practise, resolving commercial dispute. Therefore, before foreign investors enter the Chinese market, they should consider many unique Chinese cultural and legal concepts. Therefore, first, the foreign enterprises are require to understand the basic concepts of Chinese culture to understanding how to handle arbitration or litigation issues in their dispute resolution.

When cross-border investment contract lead to cross border controversies, typically, the arbitration awards are far easier to enforce the across national boundaries than are the judgments of national courts (Henry Litong, 2009) since more than 140 countries which have ratified the New York Convention on Recognition and the Enforcement of The Arbitration

Awards, are treaty bound to enforce foreign arbitral awards. Commonly, arbitration is the most favourable method for international commercial transaction and the vastly preferred method of dispute resolution for non-Chinese businesses doing invest in China.

### **Cultural and Dispute Resolution Considerations**

The Impact of the Chinese Culture and Business Affairs to FDI Negotiations. It is really important to recognize Chinese culture to see the effectiveness of negotiate in and out of business deals in China. Unknowledgeable foreigners are often got confused by the way Chinese attorneys and also businessmen cultivate long lasting relationships and negotiate business transactions. Thus, before negotiating a project or venture in China, a few concepts must be understood by potential foreign investors and their legal advisor.

*First, Face.* Saving face is by far become the most important concept in Chinese society. Face is a Confucian concept which means "prestige" and "personal character." A loss of face can be extremely detrimental to one's ability to adequately negotiate a deal. Straight to the point directly and confrontational behaviour are an inherent part of most foreign legal and business systems. However, "Chinese negotiators consider direct and confrontational behaviour as impolite, offensive and losing face." Thus, some of Chinese people are particularly sensitive and will take offense rapidly to any comments that could cause them to lose face. Therefore, when negotiate with Chinese counterparts, foreign investors and their attorneys must be aware of the concept of face during negotiations, or else cultural confusions could lead to greater frustrations, in due course undermining the investment or venture opportunity.

*Second, Guanxi.* *Guanxi* is another idea of Chinese culture which will certainly take part in a major role in business and legal relationships and negotiations in China. *Guanxi* is a special relationship individuals have with each other in which each is able to make unlimited demands on the other. Most business and professional relationships tend to start and establish by the way of *guanxi* connections. The moral sense of obligation is one party normally has to fulfil with requests, unless the request it self is impossible, or outside one's means to perform it. If a refusal of a *guanxi* based request occurs, then the requesting party will lose face.

*Third, Flexibility, Compromise, and Patience.* Reasonableness is considered a constant of everyday life. However, the idea of reasonable contract terms is

not similar as in most western common law systems. Generally, Chinese contract negotiations are broadly based and take general principles rather than detailed set of laws explicitly establish into the commercial contract. For example the Chinese step back from an actual contract and begin negotiations by presenting a letter of understanding that outlines general principles, meanwhile United States managers often put off because they want to get more details, not enthusiastic to the rhetoric of the preambles, but the foreigners prefer to build a relationship based on contractual specificities. On the other side, Chinese emphasizes friendly introductions as a way of establishing their relationship. Therefore, the Chinese places social precepts such as mutual benefit, social harmony and long-term objectives as their guiding principles in observing the spirit of the transaction in their commercial relationship. This concept is ingrained deeply in Chinese societal history and culture.

Therefore, it is flexibly and reasonably for both parties make compromises. Since the Chinese parties handle contracts by establishing a very general, the contract can be amended at different times. This situation may seem rather terrifying to the foreigners, but it is common in Chinese business contract.

The foreign investor must also be trained to be patient. The Chinese consider patience as a worthy asset. Moreover, Chinese negotiators take a very leisurely approach step when negotiating investment contracts and ventures. Chinese consider important on poise, reason, and self-control.

The Consultation Mechanism and also Friendly Negotiation in Harmony of Confucianism (Lee, 1985: 9). Consultation with lawyer is the most important part for foreign investors before and also during the process of FDI negotiations. Uniquely, in Chinese tradition, if the parties do the consultation with the lawyers, it triggers a mistrust sense among parties who are involved in the negotiations. Lawyers are normally needed after the FDI contract has already been negotiated. Consequently, when a problem with the contract arises, or when a problem arises during the life of the investment or venture, the Chinese party always prefer to settle the dispute by amicable consultation. This informal consultation has been the main method for settling disputes for thousands years and it is required as starting point procedure for most Chinese FDI while a dispute arises, even though China is a member of the International Centre for Settlement of Investment Disputes (ICSID) and has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New

York Convention of 1958). This kind of consultation is the most natural form of dispute resolution for Chinese enterprises, since Chinese culture and attitudes favour harmony and good relationships between people and enterprises. Hence, most Chinese would prefer a compromise than impose by other. While Chinese regulations and laws do not explicitly explain how to conduct the consultation process, at the first time, both parties must agree to start doing consultation among parties to settle on the rights and liabilities, and also to obtain the truth circumstances.

To be binding, both parties should be pleasant and satisfied with the final result of the contract. The unsatisfied party may break a promise on the contract and has an option to other dispute settlement methods, such as arbitration or litigation.

The Mediation Method. While consultation is the favourable method for resolving FDI disputes in China, mediation or conciliation is the second most preferred method. Here, to avoid confusion, mediation will be used for ease of understanding and reading. Mediation or conciliation is a consensus based dispute resolution process in which the parties to a dispute meet with a third party mediator to discuss mutually acceptable options for resolution of the dispute. The mediators give some input into the resolution of the dispute in the sense that the mediator encourages the parties to consider options for resolution. Similar to consultation, the origins of mediation are “deeply rooted” in Chinese regime business society. One of the unique characteristics of arbitration in China is that proceeding before the international arbitration bodies usually involve mediation or conciliation. According to the Arbitration Law of People’s Republic of China 1994, if the informal efforts are unsuccessful, the arbitrators are then permitted to resume the arbitral proceedings and render an award.

Mediation has important place in both arbitration proceedings and also in litigation proceedings. The Court can try mediation way during the proceedings and invite prevailing parties and persons to assist (Article 85 and also 87 The Civil Procedure Law of The People’s Republic of China year 1991). The general principle is the court mediated agreement are legally binding as the same as a court judgment (Pryles, 2006:93).

Therefore, the relation among the consultation, mediation in the frame of Confucian philosophy are strongly coloured in China’s modern business practices and also the FDI negotiation mechanism. Mediation is like a pre-arbitration or pre-litigation process to avoid disputes between friends. When the

informal consultation mechanism is unsuccessful or inappropriate for the particular FDI dispute, therefore the party may request mediation. Mediation is an effective and efficient method for a foreign investors to saving the time and cost.

Arbitration. If the parties are really unable to settle their dispute through negotiation or mediation, arbitration method will obviously be the next step in the process. Arbitration has an important role in dispute resolution in PRC (People's Republic of China) since arbitration is the preferred method for resolving investment dispute between Chinese and foreign investors. Based on freedom of choice in FDI contract which involve a foreign party and Chinese entity, PRC law permits the parties to FDI contract to provide for the conduct of an arbitration either inside China or overseas.

In recent years, China has over 200 arbitration institutions which are handling international and domestic commercial disputes, although the majority of cases handled by these arbitration institutions. The Chinese International Economic and Trade Arbitration Commission and also the Hong Kong International Arbitration Centre are the two popular arbitration institutions in mainland China and Hong Kong that handle foreign transaction disputes. In recent years, the International Chamber of Commerce which is known as ICC have also been active in China while the Arbitration Institution of the Stockholm Chamber of Commerce remains attractive to many companies for China-related dispute resolutions (Ye, 2007).

Many Chinese company have shown a preference for arbitration in Hong Kong which has adopted UNCITRAL Model Law, and has established a well-equipped and efficient arbitration centre. According to Singapore International Arbitration Centre (SIAC) data report, prevailing party from Hong Kong and Mainland China jurisdiction placed the third largest parties who has used SIAC to settle their commercial disputes (The 2010 SIAC CEO's Annual Report).

The National People's Congress, the legislative body of the PRC, enacted the Arbitration Act of the People's Republic of China on 31 August 1994. The Act came into effect on 1 September 1995 (the CAA 1994). The CAA 1994 applies to both domestic and international (foreign-related) arbitration in China. It provides many the principles of modern arbitration and also clarifies the basic principles of China's arbitration. According to the Arbitration Act 1994, arbitrators must decide the case in accordance with the rules of law. Arbitration award should be compliance with law, fairly and reasonably make the award on

the basis of respecting the contractual agreement of the parties and with reference to the international practice. Arbitration *ex aqua et bono* is not allowed in China (Moser, 2009:Chi-5). Under the CAA 1994, arbitration agreement is the basis for arbitration.

A valid arbitration agreement is the prerequisite for the arbitration institutions to accept the cases. Arbitration agreement between the parties excludes the jurisdiction of courts unless it is void. Arbitration should be independent and not be subject to any interference from administrative authorities, social organizations or individuals.

An arbitral award is final and binding on both parties, and has *res judicata* effect, for instance the arbitral awards can be enforced by courts. During arbitral proceedings, the arbitral tribunal may carry out conciliation in accordance with the parties' free will (Article 88 of Civil Procedure Law of The People's Republic of China 1991).

Traditionally, arbitration in China is a two-pronged regime: domestic arbitration and also international arbitration. The dividing line between them is that the latter involves the foreign elements. One of the salient features of the CAA 1994 is that it accords the international arbitration a special treatment. As mentioned above Arbitration in China is combined with conciliation. In case a valid arbitration agreement exists, the court shall refer the parties to arbitration and ensure the enforceability of arbitration agreement. Upon the request of the parties, the court shall rule on the effect of the arbitration agreement and offer property preservative measures or interim measures of protection of evidence. Courts may grant or reject the application for setting aside.

Other, the Courts may stay the setting aside procedure and remit the award to the arbitral tribunal for re-arbitration in order to eliminate the grounds for setting aside. Courts may also grant or refuse the enforcement of an award in accordance with the grounds for refusal prescribed by the law or the Convention which the PRC has acceded to. Thus, the principle of the maximum amount of court assistance with the least interference has also been affirmed by the Act.

As far as the international commercial arbitration is concerned, China has done the adoption of the voluntary arbitration and the final award system. In 1959, it is established 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 of the international arbitration cases were submitted to CIETAC and CMAC for arbitration. Therefore, before the CAA 1994, the international arbitration in China means no more than the arbitral proceedings conducted by CIETAC and CMAC. After the CAA 1994, other arbitration institutions may also accept international cases. CIETAC, based on the autonomy of the parties and the practical need of the commercial related, extended its jurisdiction further to all domestic cases the parties submit by agreement in its Arbitration Rules 2000 (effective as from 1 October 2000).

By virtue of CIETAC Arbitration Rules 2000, the arbitral proceedings may be conducted in any other places (including foreign country) other than the places where CIETAC and its Sub-Commissions are located. Nonetheless, up to now no arbitration proceedings have taken place in the places other than the three places above-mentioned.

### **Litigation**

Ironically, in the middle of August 2009 at the Symposium of Chief Justice on The Rule of Law at Beidaihe, Hebei Province, Shen Deyong, vice president of the Supreme People's Court, publicly admitted that there is a general mistrust against the judiciary system in China by the public.

Therefore, foreigners are anxious of potential bias when litigating in China (Moser, 1994:182). Rule of law is still developing in China. The court system is still predominantly state controlled and opaque in character. Many Republic of China People's Court justices and attorneys have relatively inadequate legal training, and prejudice against foreigners in the People's Republic of China Court system. Foreign litigants face additional problematic factors such as rapidly changing and volatile laws. Moreover, Mandarin Chinese is really required as the official Chinese language, in all court proceedings, and also foreign parties can only be represented by Chinese counsel. Moreover, Chinese judicial procedure is slow working and sometimes arcane. Court proceeding can be lengthy and more expensive. Collectively, these factors could cause considerable hardship and uncertainty in the litigation mechanisms for foreign investors.

On the other hand, not surprisingly, in recent years the People's Republic of China Courts have gained popularity, though litigation in the People's Republic of China Courts as the last alternative of

dispute resolution for foreign invested enterprises in China. Since People's Republic of China Courts are becoming viable alternatives, particularly for intellectual property related matters, debt recovery, product liability and labour disputes. These varieties of cases now involve more and more foreign litigants in People's Republic of China Courts. In 2006, more or less 23,000 court cases involved foreign parties (Supreme Court Report 2006). China's court system principally consists of the Supreme People's Court, the Provincial High Courts, Intermediate People's courts, and local district courts. Under the China's Rules of Civil Procedure, foreign-related disputes are usually handled by the Intermediate People's courts (Article 19 of Civil Procedure Law of The People's Republic of China and Article 1 of Opinion on Several Issues regarding the Application of PRC Civil Procedure Law (issued by The Supreme Court). China has approximately eighty Intermediate People's Courts which have gained experiences in handling foreign-related disputes. Cases are decided within two instances of trial in the people's courts. This means that, for a judgment or order of first instance of a local people's court, a party may bring an appeal only once to the people's court at the next level, and the people's procurator may challenge a court decision to the people's court at the next level (Article 10, 147 and 158 of Civil Procedure Law). Additionally, judgments or orders of first instance of the local people's courts at various levels become legally effective if, within the prescribed period for appeal, no party makes an appeal. Any judgments and orders rendered by the Supreme People's Court as court of first instance shall become effective immediately (Article 141 and 147 of The Civil Procedure Law of The People's Republic of China 1991).

In addition, the important rule inside FDI is all companies entering the market in China are required to establish a legal entity under Chinese Law due to following legal basis: 1. Article 145 China Civil Code. The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, and the law of the country to which the contract is most closely get connected shall be applied; 2. Article 150 China-Civil Code. The application of foreign laws or international practice in accordance with the provisions of this chapter shall not violate the public interests of the PRC; 3. Article 126 China-Law Obligation. Parties to a foreign related contract may select the applicable

law for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract fail to select the applicable law, the contract shall be governed by the law of the country with the closest connection there to. For a Sino-foreign Equity Joint Venture Enterprise Contract, Sino-foreign Cooperative Joint Venture Contract, or a Contract for the Sino-foreign Joint Exploration and Development of Natural Resources which is performed within the territory of the People's Republic of China, the law of the PRC applies.

Article 109 of The Civil Procedure Law of The People's Republic of China 1991 announced that If a dispute arises between the parties, the dispute should in first instance be resolved through friendly consultations to the extent possibility. If such as consultation failed then the dispute may be settled by arbitration method or be referred to the PRC's court. Usually the signatory parties use litigation as the last alternative to solve their dispute.

Not only, the signatory parties available to refer to the People's Republic of China Court as dispute settlement, but also the third party. The following describe cases have involve the foreign investment enterprise chasing the local factory to stop it from producing unauthorized copies or outright fakes (Nee, 2009:436). The Beijing No. 2 Intermediate People's Court in 2003 held that Toyota's trademark is not infringed upon by the China's Geely Group. Toyota alleged that the logo of Geely's Merry Model car was confusingly similar to the logo of Toyota, since Toyota obtained trademark registration in China. The use of slogans by defendants for Geely's Merry model car for instance Merry Car, Toyota Power mislead the consumer and so that constituted the trademark infringement and unfair competition. The People's Republic of China Court ignored the the fact which shown the result of a survey aubmitted by the plaintiff wherein nearly 67% among 317 consumers surveyed thought the Merry brand was logo of Toyota, on the other side only 6,9% recognized the Merry logo belongs to Geely Group production. According to this case, it shown weaknesses of the protection for foreign party in FDI who refer to the People's Republic of China Court to resolve their dispute.



Toyota Logo



Merry Logo by Geely Group  
"Merry Car, Toyota Power"

### Enforcement of Foreign Arbitral Awards

Foreign arbitral awards may be enforced in China pursuant to the following basis: *First*, Domestic Law. Under article 269, a party request for enforcement is permitted to apply directly to Intermediate People's Court in the place where the party against whom enforcement is required either has its legal resident or has assets. In the absent of an applicable international treaty or other agreement, People's Republic of China Court will decide on the application for enforcement based on reciprocity. Moreover, the usual public policy grounds for refusal to enforce a foreign award will also apply (Pryles, 2006:105).

*Second*, The New York Convention. With respect to recognition and enforcement of foreign arbitral awards, China became a member state to the New York Convention of Recognition and Enforcement of Foreign Arbitral Awards of 1985 to enforce a foreign arbitral award rendered in member state (The Supreme Court on Implementation of Convention on the Recognition and Enforcement of Foreign Arbitral Awards Adopted by the PRC, 1987). Therefore, a foreign party in arbitration may apply to a People's Republic of China Court to enforce a valid arbitration award rendered by a foreign arbitration in a signatory state of Convention. China has accede through the Supreme Court Notice on 10 April 1987, provides the basis for implementation of this convention in China, as well as two reservations, namely reciprocity reservation and commercial reservation. Therefore, based on reciprocity principle, China would apply the convention only with respect to arbitral awards made within territory of another contracting state. According to commercial reservation, China has consequence only dispute arising out of defined legal transaction considering to be commercial relations of a contractual and non-contractual nature under PRC law, including FDI transaction.

*Third*, International Agreements or Investment Treaty Arbitration. China signed judicial agreements which is providing for the mutual recognition and enforcement of the arbitral awards. Some of these agreement relevant because they are possible for other signatory state to these agreements are not member of New York convention 1958. Moreover to resolve a dispute by arbitration, foreign investors may also have a recourse against the Chinese state where a bilateral investment Treaty (BIT) is exist between China and the state which the foreign investor is a national, BITs create comprehensive protections under international law and usually include a commitment by each contracting state (host state).

However, the lack of enforcement of a foreign award in China is frequently pointed out in arbitration issues. Similar to arbitration systems worldwide, the arbitration committee is not empowered to enforce the award. The step of enforcement is to be done through the courts. As a result, the prevailing party most often must apply to a court to have the award recognized and enforced. Foreign awards that are not paid voluntarily also may be filed with a court to compel enforcement. As China acceded to the New York Convention 1958, awards are enforceable in other signatory countries on the basis of reciprocity principle. While in principle the same should apply in China, in practice, enforcement is problematic.

### **Obstacles**

Unavoidable, there are complaints by foreign invested enterprises with respect to enforcement foreign arbitral awards in China. It is not easy to have a foreign arbitral award recognized and enforced in China. The enforcement of arbitration awards and judgments in China was a concern largely due to the local protectionism and other related obstacles. This kind of issue has received a great deal of attention from the Chinese authorities, and in recent years, various approaches have been adopted in attempts of improving the situation. Below are some obstacles regarding enforcement a Foreign Arbitral Award Enforced in China:

*First*, In The Name of Public Policy (Henry, 2009). In accordance with New York Convention 1958, China as a signatory can refuse to enforce foreign arbitral awards by invoking public policy. The problem is that the term public policy is not defined under Chinese Law. Nevertheless, for a foreign-related or foreign arbitral award, social public interests are the same as the State's sovereign interest. Indeed, it is not easy to create standard of criteria public policy, however, it is not the whole cases were considered on the basis of public policy contained subjective values. The two cases below provide at least some standards about criteria of public policy under Chinese Law with respect to the enforcement of foreign arbitral awards. In Case 2, it appears that administrative regulations, for instance State Administration on Foreign Exchange Regulations, do not constitute public policy. To the contrary, in Case 1, a violation of public policy seems to require proof of an affront to the higher social public interest as a whole, whether it relates to moral order of country. It is likely that China's judicial judgment toward foreign arbitral award will continue to evolve in appositive way.

Obviously, these improvements, leading to positive atmosphere in investment climate.

This case established law about refusal to enforce a foreign related award on public policy ground. In 1977, an US musical group has signed a contract to perform a concert in China, but the concert was delayed due to what authorities considered to be the objectionable content of the performance. Chinese authorities asserted that US performers had breached the contract by performing heavy metal music which was not approved by Ministry of Culture of China. After not being paid for the concert, the US band commenced an arbitration in mainland China laid on the CIETAC arbitration clause in the contract. The CIETAC arbitration tribunal awarded damages to the US band. Finally, Supreme People's Court of China (SPC) held that the performance violated the social public interest of China and Ministry of Culture's suspension of concert was caused by the breach of contract of the performing party and the CIETAC arbitral award could not be enforced without causing damage to social public interest of China. Therefore based on Paragraph 2 article 260 The Civil Procedure Law of The People's Republic of China (1991), the SPC refused to enforce the award.

In 1999, A Japanese company commenced an arbitration against a Chinese state owned enterprise based on the Arbitration Institute of the Stockholm Chamber of Commerce's rules. Japanese company alleged that SOE had assumed the obligation to pay back certain debt owed to the Japanese company by Hong Kong company, and so that the SOE was delinquent in repaying this debt. SOE challenged the arbitration award in China's Haikou Intermediary Court after the Stockholm Arbitration tribunal ruled in favour of The Japanese company. SOE disagreed argued that the arbitral award violated the arbitral award violated the public policy of China because there is no approval from State Administration on Foreign Exchange which it is compulsory term to repayment of foreign debt to Japanese company. SPC held that the foreign arbitral award was enforceable and could not be vacated on the ground that it violated the public policy in China.

*Second*, Unable to Locate Assets (Ye, 2007). The most frequent complaint with respect to enforcement is the prevailing party or the local People's Republic of China Courts are unable to locate the asset of the party against whom the award is rendered to enforce the award. Unable to locate the asset appears to be a practical problems and it is possible happen in any other jurisdictions, but suspension in getting

a foreign arbitral award recognized can evolve into bigger problems, this issue can become an even bigger problem in certain circumstances.

*Third, Time Limit.* The prevailing party that in a foreign arbitration proceeding is required by China's Civil Procedure Law to file for an application of enforcement within six months of the date that the award was achieved. An application must be filed with the Intermediate People's Court which is the party against whom the application for enforcement is made has his or her residence or where his or her asset is located. In fact, foreign parties of FDI often are unaware of this legal requirement. The award will not be able to recognize or enforce in China in condition the application is filed with the People's Republic of China Court after the six-month time period.

*Fourth, Pre-Reporting System.* In accordance with a notice issued by the Supreme Court, "if an Intermediate People's Court decides not to recognize a foreign arbitral award, it must report to a Provincial High Court for review. If the Provincial High Court agrees with the Intermediate People's Court that the award should not be recognized, it is required to report the case to the Supreme People's Court for final determination." In this term, there is no time limit with respect to the final review by the Supreme People's Court. As a result, it often causes substantial delay in recognition and enforcement for a foreign arbitration or judgment award. In accordance with CAA 1994 (The Arbitration Act Of The People's Republic of China) an international award cannot be set aside on merits, while a domestic award may be set aside on the basis of the statutory substantial mistakes. As far as China International Economic and Trade Arbitration Commission (CIETAC) award is concerned, up to now, only one award has been set aside by the court.

However, some awards do have been remitted to the tribunal for re-arbitration. In order to strictly implement the CAA 1994 and the CCPL 1991, and to ensure legitimacy of litigious and arbitral activities, the Supreme People's Court on 23 April 1998 issued the official document concerning setting aside of the award *The Supreme People's Court Notice on the Relevant Issues Concerning Setting-Aside by the People's Court of the Foreign-Related Arbitral Awards*, No. FA/40/1998 (Notice 40/1998). By issuing this judicial interpretation, the PRC has established an internal control mechanism—the pre-reporting system, by which the actions for setting-aside of the foreign-related award is effectively monitored. Any People's Court seeking to set aside the foreign-related

award 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 decision to set aside the foreign-related award must, in turn, report its decision to the Supreme People's Court prior to finalizing the decision to set aside. As such, the Notice 40 Year 1998 is actually a supplement to the CAA 1994.

*Local Protectionism.* Foreign companies are afraid that local courts in China might have the tendency to protect local interests. In the past, these concerns were valid, as China is a vast country. China's "local interest" could become an issue even between two Chinese companies if they are not from the same location as China does not have the same type of state or federal court system that the United States enjoys to deal with issues involving different states within the country.

Additionally, while the People's Republic of China Courts are allowed to enforce a court judgment or an arbitral award including a foreign arbitral award outside its own jurisdiction, for instance if one party wins a case in the court of a city, but the assets of the party against whom the judgment or arbitral award is rendered is located other city, the court in still can enforce the judgment or award without going through the court in other city (Article 207 and 210 of The Civil Procedure Law of The People's Republic of China 1991). This process effectively helps remedy this problem to a certain extent.

*Fifth, Lack of Statistics.* There are no official statistics regarding how many foreign awards are enforced in Chinese jurisdiction. Based on a research, there are eight arbitration awards respectively made by the arbitration institutions in Sweden, London, Germany, and Korea that were successfully enforced in China Court. People's Republic of China Courts rejected two arbitration awards issued by arbitration institutions in London on the grounds of procedural irregularity that China has failed to recognize (Case HeiGaoShangWaiTaZi No. 1, October 14, 2005).

*Sixth, Corrupt Practices.* Bribery always appear in every discussion about disputes settlement. Despite vigorous efforts to eradicate official corruption and the severe penalties for being caught, bribery appears to continue as an everyday occurrence (Nee, 2009:418-419). The People's Republic of China Courts handle almost 20,000 corruption cases each year based on Annual Report of Supreme People's Court presented to The National Congress, in July 2004.

However, after five years, the amount of corruption in China cases really decreased dramatically in 2009.



Prosecutor-General Cao Jianming that prosecutors has investigated more than 2,700 judiciary workers suspected of graft and malpractice for personal gains last year. Cao pledged the authority will never relax its efforts in stamp out judicial corruption. Moreover, Huang Songyou, former Supreme People's Courts 's vice president was convicted of taking more than 3.9 million Yuan (about 574,000 USDollars) of bribes from 2005 to 2008. Judiciary officer will be punished if they are found meddling and intervening court cases, giving bribes to law enforcement personnel, beating or verbally abusing petitioners and over-running timetables to enforce court rulings (Xinhua, 2010).

Corrupt practise in Chinese FDI causes acutely problems for the foreign investor. On the one hand, the investors must engage with the laws of its own country in order preventing the bribery by foreign officials. On the other hand, the Foreign Invested Enterprises and their Chinese companies must comply with Chinese Anti-Bribery Laws, which include both criminal and civil elements. It is a crime in China to bribe a state functionary. Moreover, Chinese laws provide a separate offence for bribery as an economic crime, which covers the bribery of non-governmental staff. The law for prevention of Unfair competition prohibits bribery in order to obtaining or retaining commercial activities in China, including FDI sector (Nee, 2009:419).

### **Enforcement of Foreign Court in China**

Once People's Republic of China Court receives an application or request for recognition and enforcement of foreign judgement, it will be review the judgement pursuant to the relevant treaty or in accordance with the principles of Chinese Law or violates a state sovereignty, security or the public interest the court will refuse to recognize or enforce the judgement (Article 268, The Civil Procedure Law of The People's Republic of China 1991).

After the review described above, the court finds that a judgment can be recognized and enforced, it will rule to recognize the judgement and also, where appropriate, it will issue an order to enforcement. A People's Republic of China Court will not enforce a foreign judgment if a People's Republic of China Court also has jurisdiction and has accepted the case (Pryles, 2006:94).

Similar with the enforcement of an international arbitration award, enforcement of foreign judgment in China is a popular problem involved with many countries in the world, East or West. Singapore is one of the Asian countries, is doing well in this respect.

Enforcement of a foreign court in China is really difficult (Ye, 2007) because it appears that there is only one foreign court judgment being recognized and enforced by People's Republic of China Court. That was an Italian court judgment on insolvency as some assets of the Italian company were located in China (Wu Han, 2003).

Below is one case which is related to enforcement of foreign court in Joint Venture contract which is one of the type of Chinese Foreign Direct Investment contract. The conflict arose between AmWij and Shenzhen Widget. AmWij insisted that all dispute arising under the joint the contract be settled in the United Stated court. Shenzhen Widget required the Chinese People's Court to be vested over exclusive jurisdiction to settle the dispute under joint venture contract. For the other option, Shenzhen Widget proposed that all dispute be settled by arbitration (Moser and McKenzie, 1994:181-183). It is entirely understandable that AmWij has proposed to see all disputes that resolved in its home country's court and not tenable under PRC's Law. The Civil Procedure Law of The People's Republic of China announced that dispute arising in related to contracts for the establishment of equity joint ventures, co-operative joint ventures, exploration and development of natural resources may not be dealt by foreign judgments. The mechanism provides availability to the parties to the joint venture for the resolution of disputes provided in the Joint Venture Law (Article 14, The Civil Procedure Law of The People's Republic of China 1991) and its Implementing Regulations. If a dispute arises between the prevailing parties in the Foreign Direct Investment contract, the dispute should in first instance be resolved through friendly consultations to the extent possible. If the friendly and informal way is not work, then the dispute may be settled by international arbitration or be referred to litigation settlement by the PRC's court (Article 109, The Civil Procedure Law of The People's Republic of China 1991).

In theory, a prevailing foreign party may seek an enforcement of a foreign judgments including commercial disputes in China by applying to an Intermediate People's Court for enforcement if there is no judicial assistance treaty between China and the relevant foreign country. As alternative, under China's Civil Procedure Law, a foreign party is permitted to re-litigate its case in China if its winning foreign court judgment is not recognized and enforced in China on the ground a lack of judicial assistance treaty or on the basis of reciprocity. Regarding to the reciprocity

principle, People's Republic of China Court may consider enforcing a foreign judgment (Article 318 of Opinion on Several Issues regarding the Application of PRC Civil Procedure Law). Therefore, the foreign party will take the risk that the result of the decision handed down by the People's Republic of China Court is possible completely different from its foreign court judgment. Hence, unless it is a straight-forward matter such as debt recovery, having a case re-litigated in People's Republic of China Court is not a desired option.

## CLOSURE

### Conclusion

If a dispute arises between the prevailing parties in Foreign Direct Investment contract, the dispute should in first instance be resolved through friendly consultations to the extent possible. If it is impossible use the amicable way then the dispute may be settled by international arbitration or be referred to the PRC's court. Based on party autonomy principle, PRC law permits the parties to FDI contract to provide for the conduct of an arbitration either inside China or abroad.

As matter of law China has adopted to a certain extent flexible approach to International arbitration. Even though it is possible, there are some obstacles in practical matter in order to the recognition and enforcement of an arbitral international and foreign judgment award in China, for instance the silent law definition of public policy, corrupt practices and procedural complexities.

Whereas enforcement of foreign arbitration awards and judgments in China seems to be unpredictable with all of the coming risks that has been mentioned, I believe that China constantly to make sustainable improvement in its legal system and adapt quickly to international standards and procedures in cross-border enforcement. For instance, one of the case obviously objective court decisions, the enforceable and unenforceable of arbitral awards were considered on certain values of Chinese Law, though in it was against the Chinese company.

### Recommendation

The businessmen of Foreign Direct Investment really hope that some of the current legislation able to overcome the main obstacle which potentially to decrease quantity and quality of Foreign Direct Investment life.

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