How to Efficiently and Effectively Resolve Cross- Border Business Disputes

By Ms Wang Fang, Deputy Secretary General, CCPIT Mediation Center for the webinar on 24 Nov 2021.

Good morning, thanks for introducing. This is a very interesting topic because there have been disputes regarding CE certificate for face masks since the start of the pandemic. My presentation will cover Chinese court system, arbitration and mediation and how to prevent such dispute in future.

Fundamentally, mediation, arbitration and litigation are often chosen by the business when facing cross borders commercial disputes. Given the challenges nowadays due to the pandemic, it is getting even more challenging for international business to solve their disputes. This presentation will be focusing on the prevention and resolution of business disputes for Icelandic and Chinese business.

Litigation in the Chinese courts.

China is a civil law jurisdiction. The pyramid of Chinese courts are four levels, the district court, the intermediate court, the high Court and the Supreme Court. A case is possible heard before either the district court or the intermediate court depending on the value of the claim. The values [of cases] under 500 million Chinese Yuan, roughly equivalent to 700 million Euro will be heard in the intermediate courts. In the past years, it observed that the Chinese courts have significantly improved the efficiency due to the application of technologies for remote court hearings and simplified case filing procedures. The laws that deal with commercial disputes include The Civil Code (especially the parts concerning contracts, property and land) and The Civil Procedures rules. Since all of the law are made in Chinese, as well as the rule that only Chinese nationals may be allowed to act as lawyer in the courts, it is necessary for international business to have Chinese lawyers acting on their behalf in the courts.

However, international business have to be prepared for a long period of the court's proceedings because cross border disputes generally involve evidence from other jurisdictions and the facts can be complex too. In such scenarios, Chinese courts do not limit the time scale of the court's proceedings. Further, all of evidence must be authenticate by the Justice Department and Chinese embassy in the foreign jurisdiction. This could be time consuming and money wasting.

Arbitration in China

In China, among the hundreds of arbitration institutes, there are two major arbitration institutions, China international Economic and Trade Arbitration Commission and Beijing Arbitration Commission. Most of international disputes are settles at either of them. Each has their own set of rules.

In pursuance to file an arbitration case, it is prescribed by law that an agreement to arbitration must be inserted in the main contract or agreed in separate with clear and unequivocal expression. Or, the case will not be admitted by the arbitration institutions in China. Arbitration awards are binding and enforceable through applying to the local court of the domicile of the respondent.

Yet, international business should be aware, arbitration is “one- off” if comparing to cases in the courts. There’s no proceeding for appealing to the courts against the award. The remedy for the “losing” parties is only to set aside the award on the limited grounds prescribed by the Arbitration Act (1995), including no arbitration agreement; the disputed matter is above the jurisdiction of the arbitration institute; forged evidence; crucial evidence was concealed; corruption of the arbitrator; public policy.

In addition, the arbitration does not necessarily occur in China. China is a member country of New York Convention, a non- domestic award is enforceable through the enforcement application made to the Intermediate court in the domicile of the respondent.

Mediation in China

Mediation has a long history in the country. Similar to arbitration institutes, hundreds of mediation institutes are set up across the country. CCPIT Mediation Center is a standing organization dedicated to independently and impartially helping Chinese and foreign disputants to resolve disputes arising from commercial and maritime transactions. Since its establishment in 1987, headquartered in Beijing, the mediation center has set up 58 sub-centers in China major cities, which has formed a mediation network covering the whole country. The mediation center has set up joint mediation centers and has established partnership relations with renowned dispute resolution organizations around the world in order to co-mediate disputes between Chinese and foreign parties. The mediation center has already established cooperation with 21 dispute-resolution organizations in the world.

Mediation is considered “face-saving” and “win-win” for which it is chosen by a large number of business to settle their disputes. In addition to the two merits, mediation [in China] is flexible, economic and efficient. Parties to mediation can co-decide what rules to be used in the meetings, who will be the mediator; how long should the meeting last; what language will be spoken etc. Besides, It is money saving because mediation does not require counsel to attend and remote mediation meetings are strongly supported and recommended (CCPIT Mediation Center offers online mediation service for home and international applicants and respondents). This is particularly crucial at the present, international travels are subject to unprecedented number of restrictions, i.e, an applicant may not file a case in a Chinese court but will easily to do so by resort to mediation.

In China, a mediation agreement itself is not enforceable like court judgment and arbitration award. But it is possible to apply to the local court for an order of court which renders the agreement enforceable. Some courts welcome the applications but unfortunately some seem to be reluctant unless the dispute was filed at court in the first place.

There’s a special advantage of the use of mediation, resolving disputes in which laws are not available. Laws are rigorous stringent, facts have to be proven and evidence shall be adduced. While some cases are lack of evidence and facts are not unable to be discovered. Should a disputant unfortunately falls into this circumstance, he/she would have to spend enormous time

to discover the facts and collect evidence. But in the end, it might still fail. Now let's see an example, a case settled in our center.

Two Chinese companies had several oral agreements as to a construction programme in Africa. The applicant acted as agent of respondent during the tendering process for which the applicant had spent large sum of money. When the business relationship broke down, the respondent refused to pay the costs incurred to the applicant. The applicant tried to file its claim against the respondent at the respondent's local court and arbitration institute but both applications were barred due to insufficient facts and evidence (Notably, the applicant visited the premises of the respondent headquarters whose conducts caused remarkable harassment which constituted damage to the respondent's public image). The applicant went to us and filed its case. The center reviewed the case and admitted in the following. An initiation to mediation was sent to the respondent which accepted. Both parties were offered to choose their mediator according their own preferences and they made decisions. When the first mediation meeting commenced, the atmosphere was intense the parties behaved as if enemies to each other. The mediator, who was well trained at the center, discovered the facts, issues as well the keys to solve the whole matter. Within 2 working days, the parties reached a settlement agreement of which the obligations were duly performed (the respondent agreed to pay a reasonable sum recompense to the applicant in promise of no harassment will be made and no legal actions will be filed). Were the parties not to join mediation, they would not solve the dispute in such "win-win" solution since the applicable laws (such as law of contract and evidence) were extremely hard to apply and evidence of the case were far below the judicial standards. In the end, the applicant would be left no remedies at all.

Lastly, I'd offer some tips. First, make sure the terms of your contract are clear, most importantly, insert the "CE" clause and the liabilities in case of breaching. This is the basis for your claim in the court room and it will be a great barging power during mediation process. Second, choose the right way of solving problem with comprehensive consideration over mediation, arbitration and litigation by assessing time and economic costs might be spent. Third, when dispute occurs, react to it as soon as possible and don't wait it till the lapse of the limitation period. But when it is missed, mediation will still be available. Finally, always remember the rule- too good to be truth. A product advertised with price unreasonably below the market value, or a salesman offers its attractive promises which you can't obtain from any other, you might need to be cautious and apply appropriate logics- "is it too good to be true?".

This is my presentation today and thanks for listening. A special "thank you" to the hosts of this online event, the Chinese embassy and the Icelandic Federation of Trade. I am looking forward to seeing you again in China or Iceland soon in future. Now I pass the floor to moderator.