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ARTICLES

PEOPLE'S REPUBLIC OF CHINA JOINT VENTURE DISPUTE RESOLUTION PROCEDURES

Thomas J. Klitgaard*

Since the adoption in July 1979 of the People's Republic of China law on joint ventures with Chinese and foreign investment, Chinese corporations and governmental entities have entered into 27 joint venture agreements with foreign investors, with a total estimated investment of at least \$260** million.¹ The joint ventures, entered into with investors from Switzerland, Hong Kong, Japan, France, West Germany, Singapore, and the United States,² involve such diverse projects as catering for international flights from Beijing; construction of elevator equipment; manufacture of furniture, electronic instrumentation systems, watch dials and hands, glucose and physiological salt ampules; bottling of wine; assembly of television sets; and construction of hotels.³ The Chinese are presently negotiating other joint venture projects, and it is

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** Unless otherwise indicated, in this article "\$" denotes U.S. dollars.

1. 7 BUS. CHINA 85, 150, 173 (1981); 8 Bus. China 6 (1982).

2. *Id.*; 7 BUS. CHINA 116, 117 (1981); CHINA BUS. REV., Mar.-Apr., 1981, at 22-23; 16 Mergers and Acquisitions 80 (Spring 1981).

In December 1980, China's Foreign Investment Control Commission stated that Chinese entities had entered into more than 300 joint ventures with foreign companies with investments totaling \$1.8 billion, of which \$1.4 billion came from foreign sources. However, these 300 joint ventures are for the most part joint management projects in which foreign firms provide capital and equipment while the Chinese supply the management, with profits being split pursuant to contract provisions. The China Business Review, March-April 1981, at 22. These "joint management" projects are not joint equity ventures organized under the joint venture law, which involve joint management, and are beyond the scope of this article.

3. 7 BUS. CHINA 116 (1981); CHINA BUS. REV., Mar.-Apr. 1981, at 22-23; 16 Mergers and Acquisitions, Spring 1981, at 80.

expected that in the future China will be negotiating joint venture agreements in connection with offshore oil exploration and development.⁴ Recently, two of China's pioneer joint ventures have reported a profit, which indicates that future unions of foreign investors in Chinese joint ventures may be both feasible and profitable.⁵

Disputes inevitably arise in joint ventures, both within the management of the joint venture and among the investors, and with third parties in China such as suppliers, government authorities, and labor organizations. This article will examine (a) the means of resolving these disputes, (b) the consequences of choosing one means rather than another, and (c) the enforceability of any award or judgment.

Before making an investment in a Chinese joint venture, the foreign investor will seek certainty in the methods of resolving disputes. Lack of certainty may be perceived as a drawback to making the investment. A number of writers have described the lack of precision and various ambiguities in the joint venture law and trade practices relating thereto.⁶ The purpose of this article is to provide investors with means of dispelling at least some of these uncertainties, thereby helping to secure their investments.

I. BASIC LEGAL INSTRUMENTS

A. Joint Venture law

The joint venture law permits foreign investors to incorporate

4. Two joint venture projects presently being negotiated are an oilseed project on Hainan Island with Singapore interests with an investment of \$30 to \$40 million and a knitwear factory in Shanghai with Hong Kong business interests with an investment of \$6 to \$7 million. *BUS. CHINA*, June 3, 1981, at 85.

Further, in mid-1981 the Guangdong Shipbuilding Corporation (Canton) advertised that it was interested in forming a joint venture with foreign investors to produce supply boats for offshore oil exploration. *CHINA MKT. INTELLIGENCE*, July 1981, at 7.

5. At the end of its first year of operation, Beijing Air Catering, a joint venture between the Civil Aviation Administration of China and China Air Catering (a Hong Kong consortium of Dairy Farm, Bank of East Asia, and Maxim's Caterers), announced a profit of \$296,000 on an investment of \$3.3 million. In 1981, the China-Schindler Elevator Co., a joint venture with Swiss and Hong Kong organizations to construct elevators in Shanghai, reported a profit of \$4 million during its first six months of operation, a return of 25 per cent on the \$16 million initially invested by both parties. *The Asian Wall Street Journal*, July 27, 1981, at 4, col. 2; 7 *BUS. CHINA*, 115 (1981).

6. See generally Note, *Joint Ventures in the People's Republic of China*, 14 *J. INT'L L. & ECON.* 133 (1979); Bosco, *Law of the People's Republic on Joint Ventures Using Chinese and Foreign Investment*, 6 *BKLN. J. INT'L L.* 217 (1980); Klingenberg and Pattison, *Joint Ventures in the People's Republic of China: The New Legal Environment*, 19 *VA. J. INT'L L.* 807 (1979); Tolbert and Thompson, *China's Joint Venture Law: A Preliminary Analysis*, 12 *VAND. J. TRANSNAT'L L.* 819 (1979).

themselves, within the territory of China, into joint ventures with Chinese companies, enterprises, or other economic entities, subject to approval by the Chinese government.⁷ The joint venture takes the form of a Chinese limited liability company.⁸ It is managed by a board of directors.⁹ The joint venture law specifies that the board of directors, in handling an important problem, shall reach decision through consultation by the participants on the principle of "equality and mutual benefit",¹⁰ but does not clearly set forth how the board of directors is to reach decision on fundamental business issues where there is no unanimous agreement. Further, the law does not resolve the question of whether the articles of association can provide that decision on these issues must be by majority vote of the directors, or whether minority directors may have a veto power.¹¹ The law does not require representation on the board of directors, or voting power, to be in direct proportion to equity contribution.¹² However, the joint venture law provides that disputes which the board of directors fails to settle through consultation "may be settled" through conciliation or arbitration by an "arbitral body" of China, or "through arbitration by an arbitral body agreed upon by the parties."¹³ It does not specifically preclude resolution of the dispute by the courts of China or of any other country which may have jurisdiction over the parties.

B. China-United States Trade Agreement

The Agreement on Trade Relations between the United States and the People's Republic of China dated July 7, 1979, further defines the methods by which business entities of the respec-

7. Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, reprinted in 18 INT'L LEGAL MAT. 1163 [hereinafter cited as "Joint Venture Law"], Article 1.

8. Joint Venture Law, art. 4.

9. Joint Venture Law, art. 6.

10. *Id.*

11. The 1980 China Construction Machinery Corporation-Jardine Schindler joint venture agreement and articles of association for an elevator construction company at Shanghai provided that the foreign joint venturers, though contributing only 25 per cent of the equity, had a veto power over management decisions. Article 12, Joint Venture Agreement; Section 8.7, Articles of Association. The articles of association stated that board of directors' resolutions relating to the issuance or amendment of board instructions and to the appointment of officers required a two-thirds majority vote which must include the vote of the Jardine Schindler director, and that resolutions relating to other business required a simple majority vote which must likewise include the Jardine Schindler director's vote. Sections 8.7.1 and 8.7.2, Articles of Association. 80-8 China Bus. Rep. 4 (1980); 80-9 China Bus. Rep. 8 (1980).

12. Bullitt, *An Exclusive Interview with Rong Yiren*, head of China International Trust and Investment Corporation (CITIC), September 14, 1979, reprinted in CHINA BUS. REV., Sept.-Oct. 1979, at 4, 5.

13. Joint Venture Law, art. 14.

tive countries may settle any disputes arising from commercial relations.¹⁴ It states that both governments encourage the prompt and equitable settlement of disputes arising from or in relation to contracts between their respective firms, companies, and corporations through "friendly consultations, conciliation or other mutually acceptable means."¹⁵ While the Trade Agreement does not define "other mutually acceptable means" and therefore does not expressly preclude judicial proceedings, it emphasizes arbitration by providing that if disputes cannot be settled through consultation, conciliation, or other mutually acceptable means, the parties may resort to arbitration in accordance with the applicable provisions of their contracts or other agreements.¹⁶ Importantly, the Trade Agreement provides that the arbitration may be conducted by an "arbitration institution" in the People's Republic of China, the United States, or a third country.¹⁷ It also provides that the arbitration institution may use its own procedural rules, the UNCITRAL (United Nations Commission on International Trade Law) arbitration rules, or other international arbitration rules if those rules are acceptable to the arbitration institution and to the parties.¹⁸

Finally, the Trade Agreement is an important instrument for enforcement of the arbitral award because it provides that each country shall seek to ensure that such awards are recognized and enforced by its competent authority where enforcement is sought in accordance with applicable laws and regulations.¹⁹ The Trade Agreement, however, does not say anything about the enforcement of judicial awards, or about the enforcement by China or the United States of agreements to arbitrate as distinguished from enforcement of awards.²⁰

14. Agreement on Trade Relations Between the United States of America and the People's Republic of China, reprinted in 18 INT'L LEGAL MATS, 1041-51 [hereinafter cited as Trade Agreement], Article VIII, para. 1.

15. Trade Agreement Article VIII, para. 2.

16. The "other agreements" to submit to arbitration typically are agreements to arbitrate entered into after the dispute has arisen. Because of the parties' potential hostility towards each other at this stage, these agreements may be extremely difficult, if not impossible, to negotiate.

17. Trade Agreement Article VIII, para. 2.

18. *Id.* A number of arbitral institutions, such as the London Chamber of Commerce, the Stockholm Chamber of Commerce, and the American Arbitration Association, are generally willing to utilize international arbitration rules in addition to (or in place of) their own rules.

19. Trade Agreement Article VIII, para. 3.

20. It is unclear whether the Trade Agreement applies to a wholly or partially owned foreign subsidiary of an American business enterprise which enters into a joint venture in China, or whether it extends to dispute resolution in a tripartite joint venture in which one of the parties, other than the United States and Chinese participants, may not have a similar treaty ensuring enforcement of arbitral awards.

II. DISPUTES AMONG JOINT VENTURERS

Dispute resolution provisions are often the last matters negotiated in the joint venture contract. The parties may view these provisions as secondary to negotiating the basic business aspects of the joint venture, and may not wish the suggestion of later substantial differences to intrude into the negotiation process. Nonetheless the dispute resolution provisions may become crucial to the subsequent success and performance of the joint venture. Obviously, the management of the joint venture will seek to negotiate mundane business problems through customary give-and-take procedures.²¹ Resort to formal dispute resolution procedures becomes necessary only when the issues are fundamental to the venture. At this point, the parties will seek to preserve their investment. For example, a basic question would be whether, and to what extent, management of the joint venture's operation should be turned over to the Chinese participants.²² Another fundamental question would be how to value the assets of the joint venture upon termination if the parties are unwilling to agree upon a method of valuation, and whether certain assets, such as goodwill, should be included in the value.²³

While the Chinese business custom is to avoid adversary pro-

21. In China, according to the experience of some American executives, all major management decisions must be cleared with the factory's Communist Party committee and by the local industrial bureau responsible for drawing up and supervising the factory's annual plan. See Stepanek, *Joint Ventures: Why US Firms Are Cautious*, CHINA BUS. REV., July-Aug. 1980, at 33; Lew, *Recent Legal Developments in U.S.-China Economic Relations*, 36 BUS. LAW. 1699, 1715 (1981).

22. The Great Wall Hotel of Beijing joint venture agreement between China International Travel Service and E-S Pacific Development and Construction Company, Ltd., provides that the foreign participant shall appoint the manager for the first three years of operation while the Chinese appoint the deputy manager, but that if at any time during the three years the deputy manager becomes capable of managing all facets of the hotel's operation, the foreign participant must turn over the manager's position to the Chinese deputy manager. Joint Venture Agreement, Chapter XI. Because the Great Wall Hotel involves a \$72 million capital investment, CHINA BUS. REV., Mar.-Apr. 1981, at 22, disputes over management may become crucial to the foreign venturer's return on capital. Extracts from the joint venture agreement for the Great Wall Hotel of Beijing are on file at the offices of the UCLA PACIFIC BASIN LAW JOURNAL.

23. It is unclear from the joint venture law whether certain types of disputes between the joint venturers ultimately can be resolved by arbitration or litigation. An example would be whether the joint venture should be terminated prior to expiration of the contract period because of heavy losses, or because of the failure of either the foreign party or the Chinese party to perform its obligations under the articles of association, force majeure, or other causes. The joint venture law provides that the contract may be terminated before the date of expiration by agreement between the parties and through authorization by the Foreign Investment Commission of the People's Republic of China, but makes no mention of the right of the parties, failing agreement, to resolve this fundamental issue by resorting to arbitration or litigation. Joint Venture Law, art. 14.

ceedings against business partners in favor of negotiation or compromise, the fact remains that the Chinese joint venture law recognizes that certain issues which the parties cannot resolve promptly, despite their good intentions, must be resolved by more formal, structured methods.²⁴

A. Friendly discussion

The first formal stage of negotiating any apparently irreconcilable dispute is called "friendly discussion."²⁵ This is nothing more than a recognition by the parties that there is a problem, and an attempt before going further to negotiate the issues. The friendly discussion may involve seeking the assistance of a third party to help mediate the differences, such as a Chinese trade or governmental entity.²⁶ However, the use of a third party is only a matter of Chinese custom and is not required by the joint venture law. No law specifies how long the friendly discussion must last, but it can be inferred from the Chinese joint venture law that the board of directors must at least have failed to reach agreement through consultation before more formal dispute resolution proceedings through arbitration may be used.²⁷

B. Conciliation

The joint venture law provides that disputes not settled through consultation may be settled through conciliation by "an arbitral body of China."²⁸ Because Article 14 does not expressly preclude other forums for conciliation, the international forums may properly be considered.²⁹

24. For early discussions of Chinese joint venture dispute resolution procedures, see Sterling and Soble, *Joint Venture Law and Dispute Resolution in China: A Framework for International Trade*, East Asian Executive Reports, September 1979, at 13; Reynolds, *The Joint Venture Law of the People's Republic of China: Preliminary Observations*, 14 INT'L LAW. 31, at 42-43 (1980); Lubman, *Institutional Changes in Trade with China*, in A NEW LOOK AT LEGAL ASPECTS OF DOING BUSINESS WITH CHINA (Practising Law Institute) 178-80 (1979).

25. Tang Houzhi, Chief, Arbitration Section, China Council for the Promotion of International Trade, *Arbitration in Chinese Commercial Law*, Proceedings of the Conference on Selling Technology to China, The National Council for US-China Trade, December 5-6, 1979, at 241.

26. Note, Holtzman, *A New Look at Resolving Disputes in U.S.-China Trade*, A NEW LOOK AT LEGAL ASPECTS OF DOING BUSINESS WITH CHINA (Practising Law Institute) 237, 249 (1979).

27. Article 14 provides that disputes between the parties to the joint ventures "which the board of directors fails to settle through *consultation*" may be settled through conciliation or arbitration (emphasis supplied).

28. Joint Venture Law, art. 14.

29. Article 14 specifically provides that arbitrations may be conducted by an arbitral body of China *or* by an arbitral body "agreed upon by the parties."

1. *Foreign Trade Arbitration Commission.* In China, the Foreign Trade Arbitration Commission (FTAC) of the China Council for the Promotion of International Trade (CCPIT) in Beijing is the arbitral forum which provides conciliation services in foreign trade.³⁰ The FTAC also exercises jurisdiction for the arbitration of disputes arising in foreign trade transactions.³¹ Before the arbitral tribunal is formed, the FTAC conducts the conciliation; afterwards, the tribunal does the conciliating.³² The FTAC conducts the conciliation proceedings according to a stated principle: the "prerequisite of a clear demarcation of the right and the wrong and ascertained liabilities in accordance with the state policies and laws."³³

The FTAC has no published rules for conciliation. Conciliation may take place through face-to-face discussions or through correspondence.³⁴ If the parties do not reach agreement, or if either party wishes to terminate the conciliation proceedings after a reasonable time, the FTAC will appoint an arbitral tribunal.³⁵ However, use of the FTAC's conciliation services does not necessarily constitute submission by the parties to FTAC arbitration proceedings. The parties may elect to conciliate the dispute before the FTAC but arbitrate it before another arbitral body.³⁶

In the alternative, the Chinese party may apply to the FTAC, and the other party may apply to an arbitral tribunal in its own country, to appoint joint conciliators. In 1976, the FTAC and the American Arbitration Association (AAA) developed a formal mechanism for joint conciliation of disputes whereby one Chinese conciliator is appointed by the FTAC and one American conciliator is appointed by the AAA. Either party may initiate the conciliation procedure by filing a request with the FTAC or the AAA. The conciliators may recommend a settlement, which the parties

30. Jen Tsien-Hsin, Secretary-General of the FTAC, and Liu Shao-Shan, Deputy Secretary-General, *Arbitration in China*, Proceedings of the Conference on Selling Technology to China, The National Council for US-China Trade, December 5-6, 1979, at 262, 263.

31. The CCPIT's Legal Affairs Department, the working organ of the FTAC, does much of the actual conciliation work. Jen and Liu, at 265.

32. *Id.*

33. *Id.* at 264.

34. *Id.* at 265.

35. *Id.*; see also Tang, *supra* note 25, at 242.

36. The Chinese people have a long history of seeking to settle all disputes through conciliation rather than through arbitration or litigation, and China's policy is to encourage conciliation whenever possible in foreign trade disputes. The FTAC's objective in conciliation is not only to obtain a reasonable settlement but also, through the settlement, to promote the development of trade relations between the disputing parties. Jen and Liu, *supra* note 30, at 264; Note, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L L. & ECON. 105, 123-130 (1977).

are at liberty to reject.³⁷ In the past, each party has been permitted to submit briefs to the joint conciliators highlighting the issues and facts in dispute, and has had the right to question the other party. The conciliation proceedings are not open to the public, and thus far the results have remained confidential. The use of the services of joint conciliators is not a submission to the jurisdiction of the FTAC or the AAA for arbitration if the conciliation fails.³⁸ In any event, neither the FTAC nor the AAA has any formal rules for conciliation or any published fee schedule for compensating the conciliators.³⁹

In 1981, the Foreign Economic and Trade Arbitration Commission (FETAC) of the CCPIT, in a joint communique with the AAA, stated that joint conciliation may be conducted not only under existing procedures but also under the new UNCITRAL conciliation rules, which were recommended by the U.N. General Assembly in December 1980 for use in international trade.⁴⁰ The UNCITRAL rules, however, do not supersede the more informal procedures available to the parties under the 1976 FTAC-AAA understanding.⁴¹

37. The 1977 joint FTAC-AAA conciliation procedures led to a widely publicized conciliation in a commercial dispute between an American corporation and a Chinese foreign trade organization. CHINA BUS. REV., Nov.-Dec. 1977, at 16. For a detailed discussion of the joint conciliation proceedings, see Holtzman, *supra* note 26, at 291-307; see also Choo, *Arbitration*, CHINA BUS. REV. Nov.-Dec. 1981, at 48, 51-52.

38. Holtzman, *supra* note 26, at 290.

39. The AAA has prepared draft procedures for joint U.S.-China conciliations, but at this writing those procedures have not yet been published.

40. Press release dated February 2, 1981, American Arbitration Association, at 2. In 1980, the Foreign Trade Arbitration Commission was renamed the Foreign Economic and Trade Arbitration Commission (FETAC) and reorganized to consolidate the authority of previously existing arbitration boards in China. BNA Daily Report for Executives, August 1, 1980, at 3. The FETAC's authority includes arbitration of disputes arising from foreign contracts with PRC entities, corporations, and other business enterprises, and disputes arising from joint ventures. *Id.* See also Ren Jianxin, Director, Legal Affairs Department, China Council for the Promotion of International Trade, *China's Foreign Economic and Trade Law Work Is Progressing*, a presentation at the conference on "Current Developments in Doing Business with the PRC" in New Orleans, January 28-30, 1981, sponsored by the National Council for U.S.-China Trade and the Law Center of Louisiana State University [hereinafter cited as Ren, *China's Trade Law Work*], at 7-8.

Hereafter, unless otherwise required by the context, this article will refer to the Foreign Trade Arbitration Commission ("FTAC") as the Foreign Economic and Trade Arbitration Commission ("FETAC").

41. In 1980, the CCPIT and the French Bureau of Industrial Property signed a Protocol for Settlement of Disputes Arising from China-France Industrial Property Trade, which provides that each party shall recommend to the corporations of its own country that disputes arising from transactions involving industrial property (including sales of patented inventions and technical know-how) be settled first by direct negotiation and, failing that, by "joint conciliation" conducted by a conciliation committee composed of an equal number of members designated by the CCPIT and the

2. *UNCITRAL*. The *UNCITRAL*⁴² rules provide that there shall be only one conciliator unless the parties agree to have two or three conciliators.⁴³ If the parties cannot agree upon a sole conciliator, or upon the third conciliator, either party may apply to an "appropriate institution or person" acceptable to both parties to make the appointment.⁴⁴ As with the FETAC-AAA joint procedure, there is no time limit for the appointment of the conciliator.

Under the *UNCITRAL* rules, the conciliation proceedings may be terminated unilaterally by any party upon written notice to the conciliator.⁴⁵ The conciliator may request, but not compel, the parties to submit written materials, provide evidence, attend meetings, and otherwise cooperate with him in the conciliation.⁴⁶ If it appears to the conciliator that there exist elements of an acceptable settlement, the conciliator formulates the terms of the settlement and submits them to the parties for their consideration.⁴⁷ A written settlement is binding upon the parties.⁴⁸

Absent agreement to the contrary, the *UNCITRAL* rules provide that the parties and the conciliators must keep confidential all matters relating to the conciliation proceedings, including any settlement agreement.⁴⁹ In subsequent arbitral or judicial proceedings, neither party may introduce evidence concerning admissions made in the course of the conciliation proceedings.⁵⁰

No party may initiate arbitral or judicial proceedings with respect to the subject of the conciliation until the conciliation proceeding has been terminated.⁵¹ The *UNCITRAL* rules authorize the conciliator to determine his own fees, which are borne equally by the parties,⁵² and to request a deposit of fees in advance.⁵³ The *UNCITRAL* Conciliation Rules are useful to the joint venturers

French Bureau of Industrial Property, and only last by arbitration. Ren, *supra* note 40, at 9.

42. Conciliation Rules of the United Nations Commission on International Trade Law, adopted December 6, 1980, reprinted in 20 INT'L LEGAL MATS, 300-306 (1981) [hereinafter cited as *UNCITRAL* Conciliation Rules].

43. *UNCITRAL* Conciliation Rules, art. 3.

44. *Id.* art. 4.

45. *Id.* art. 15(d).

46. *Id.* art. 11. The rules permit the conciliator to conduct the proceedings in such manner as he deems appropriate, taking into account the circumstances of the case, the wishes of the parties, and the need for a speedy settlement. *Id.* art. 7(3).

47. *Id.* art. 13(1).

48. *Id.* art. 13(3).

49. *Id.* art. 14.

50. *Id.* art. 20.

51. *Id.* art. 16. However, the rules permit a party to initiate arbitral or judicial proceedings during the conciliation when necessary, in the party's opinion, to preserve its rights. *Id.*

52. *Id.* art. 17.

53. *Id.* art. 18.

because of their clarity in providing time limits, detailed conciliation procedures, and the secrecy of the conciliation process.

3. *International Chamber of Commerce.* The International Chamber of Commerce, headquartered in Paris, has separate rules for conciliating as well as for arbitrating international trade disputes.⁵⁴ The ICC's conciliation rules—which might be unacceptable to a Chinese joint venturer, given Taiwan's membership in the ICC—are very summary and lack the specificity of the UNCITRAL rules. The president of the International Chamber of Commerce selects three conciliators, who need not be members of the ICC's Administrative Commission for Conciliation.⁵⁵ The conciliation procedure, like the UNCITRAL rules, looks to settlement; after examining the case, the conciliators submit the terms of a possible settlement.⁵⁶ The rules provide that nothing that transpires in conciliation shall affect the legal rights of any of the parties in arbitration or a court.⁵⁷ However, unlike the UNCITRAL rules, the ICC rules do not provide for secrecy of the proceedings. The ICC rules are silent on the place of conciliation.

The ICC's fees are based upon the amount of money in dispute, and if the sum in dispute is not fixed, the fees are fixed by the ICC's Secretariat.⁵⁸

C. Arbitration

If friendly negotiation and formal conciliation between Chinese and foreign joint venturers fail to resolve a fundamental dispute, the Chinese way of settling it would be through arbitration. This is the procedure emphasized in the Chinese joint venture law, which leaves the choice of the arbitral body—and presuma-

54. ICC Rules of Conciliation and Arbitration, reprinted in ICC ARBITRATION: THE SOLUTION WAY TO INTERNATIONAL BUSINESS DISPUTES, ICC Services S.A.R.L., Paris (Oct. 1977) [hereinafter cited as ICC Conciliation Rules], at 38.

55. ICC Conciliation Rules, art. 1.2. The Administrative Commission consists of one to three representatives from each member nation of the ICC. Taiwan, but not China, is a member and on occasion China has rejected the ICC rules for political reasons. However, as shown later in this article, China has accepted arbitration under the ICC rules in a recent joint venture agreement and thus presumably now would accept conciliation under those rules. See note 177 *infra*.

The ICC rules require that two of the three conciliators be, so far as possible, of the same nationalities as the parties, and that the third conciliator be of a different nationality. *Id.* art. 1.2.

56. *Id.* art. 4.1.

57. *Id.* art. 5.2.

58. The conciliation fees are based upon a sliding scale depending upon the sum in dispute, with charges ranging from three per cent of the first \$25,000 to .02% of sums over \$100 million. The fee for conciliating a dispute involving \$1 million would be \$13,250. Schedule of Conciliation and Arbitration Costs, ICC Conciliation Rules, p. 45, para. 2 (Jan. 1976).

bly the choice of the applicable arbitration rules, although the law is silent as to these—to be negotiated by the parties.⁵⁹ While the Chinese participant in the joint venture would be likely to suggest arbitration in China under Chinese rules, from time to time Chinese foreign trade purchase contracts for equipment, machinery, and other industrial items have accepted arbitration in the other party's country or in third countries under non-Chinese arbitration rules.⁶⁰

The choice of substantive law appears to be answered by the joint venture law itself, which specifies that "all the activities" of a joint venture "shall be governed by the laws, decrees and pertinent rules and regulations of the People's Republic of China."⁶¹ However, it is still open to argument whether the term "activities" of a joint venture is meant to refer to activities between the joint venture and other parties in China or the Chinese government, but not to disputes arising from the relationships between the joint venturers themselves which cannot be resolved by the board of directors.

The choice of arbitral tribunals and arbitral rules, which are not necessarily the same thing, will significantly affect the procedural rights of the parties in dispute resolution and, perhaps, the result. One of the benefits of arbitration is that it permits the parties to continue their commercial relations while at the same time resolving their disputes. Other advantages of arbitration are that the procedures do not inevitably involve a government tribunal and may save both time and money. Of course, what the parties desire is a fair resolution which leaves neither feeling aggrieved or prejudiced by the arbitral tribunal; but the inescapable fact is that arbitration pits the parties against each other in adversary proceedings. Therefore, it is important for the parties to appreciate the consequences of electing either to arbitrate under Chinese rules and before a Chinese arbitral body in China, or to arbitrate before an arbitral tribunal of another nation under international arbitration rules or the rules proposed by that forum.⁶²

59. Joint Venture Law, art. 14, *supra* note 7.

60. Third countries named as acceptable forums in the past include Japan, Sweden, Switzerland, France, England and Holland. Ren, *supra* note 40, at 8; Tang, *supra* note 25, at 241; Theroux, *Technology Sales to China*, 14 J. INT'L L. & ECON. 185, 238 (1980).

61. Joint Venture Law, art. 2.

62. For comprehensive general discussions of international arbitration procedures, see Evans and Ellis, *International Commercial Arbitration: A Comparison of Legal Regimes*, 18 TEX. INT'L L.J. 17 (1973); Ehrenhaft, *Effective International Commercial Arbitration*, 9 L. & POL'Y IN INT'L BUS. 1191 (1977); McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83 (1978); Aksen, *A Practical Guide to International Arbitration*, Proceedings of the Southwestern Legal Founda-

1. *Foreign Economic and Trade Arbitration Commission*. In 1954, the Government Administration Council of the Central People's Government established the Foreign Trade Arbitration Commission (now entitled the Foreign Economic and Trade Arbitration Commission or, simply, FETAC) within the China Council for the Promotion of International Trade (CCPIT).⁶³

The FETAC exercises jurisdiction over the arbitration of disputes arising from transactions in foreign trade, particularly disputes between foreign firms on the one hand and Chinese firms on the other.⁶⁴ However, the FETAC exercises jurisdiction only if the parties have stipulated in writing to submit the dispute to the Commission for settlement.⁶⁵

The FETAC is composed of 15 to 21 members, selected by the CCPIT for a term of one year, from among persons having special knowledge and experience in foreign trade, commerce, industry, agriculture, transportation, insurance and related fields, as well as in law.⁶⁶ The disputing parties each select an arbitrator from among the members of the FETAC.⁶⁷ The arbitrators so chosen jointly select an umpire from among the remaining members of the FETAC.⁶⁸ If the disputing parties so desire, they may jointly select a sole arbitrator from among the members of the Commission to act singly.⁶⁹

The FETAC rules provide that hearings are held in Beijing (Peking) but may be held elsewhere in China when necessary.⁷⁰

tion, "Private Investors Abroad - Problems and Solutions in International Business" (1976) at 51 [hereinafter cited as Aksent, *Guide to International Arbitration*]; Note, *A Survey of Arbitral Forums: Their Significance and Procedure*, 5 N.C. J. INT'L L. & COM. REG. 219 (1980) [hereinafter "Note, *A Survey of Arbitral Forums*"].

63. Decision of the Government Administration Council of the Central People's Government concerning the establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade adopted May 6, 1954, at the 215th Session of the Government Administration Council, para. 1 [hereinafter cited as Decision of the Administration Council]; see note 40 *supra*.

64. Decision of the Administration Council, para. 1.

65. Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade adopted March 31, 1956, at the Fourth Session of the China Council for the Promotion of International Trade [hereinafter cited as Provisional Rules], Rule 3.

66. Decision of the Administration Council, para. 3, *supra* note 63. A party initiates FETAC arbitration by written application to the Commission. The application states the plaintiff's claim and the facts and evidence upon which it is based, and must include the original documents relied upon such as contracts, correspondence between the parties, and other relevant documents. Provisional Rules, Rule 5, *supra* note 65.

67. Provisional Rules, Rules 4(c), 9.

68. *Id.* Rule 11.

69. *Id.* Rule 12. By agreement the parties may jointly delegate the choice of arbitrators to the Arbitration Commission Chairman, whereupon the Chairman may appoint a sole arbitrator to conduct the proceedings. *Id.*

70. *Id.* Rule 19.

The meetings are open to the public unless the tribunal determines, upon the request of either or both parties, to hold the hearings in closed sessions.⁷¹ However, there is no requirement that the Commission accede to these requests. The arbitration proceedings are held in Chinese.⁷²

The disputing parties may be represented by attorneys, who may be citizens of China or foreign nations.⁷³ The CCPIT, upon request, may provide Chinese attorneys from its legal staff to represent the foreign investor in the arbitration proceedings.⁷⁴

The FETAC rules require the parties to produce evidence in support of the facts upon which the claims are based, but do not provide for cross-examination of witnesses, testimony under oath, or obtaining documents by compulsory process.⁷⁵ However, the arbitral tribunal may consult experts from China or elsewhere to clarify questions concerning business practices.⁷⁶ If one of the dis-

71. *Id.* Rule 21.

72. *Id.* Rule 36. If any party, witness, or other person is unfamiliar with the Chinese language, the arbitral tribunal may designate an interpreter or may direct the party concerned to furnish one. *Id.*

73. *Id.* Rule 18.

74. Ren Jianxin, *Some Aspects of China's Work in Economy, Trade and Law*, Proceedings of the Conference on Selling Technology to China, The National Council for US-China Trade, December 5-6, 1979 [hereinafter cited as Ren, *Some Aspects of China's Work*, at 258. Assuming that any conflict of interest can be satisfactorily resolved, the assistance of CCPIT legal staff attorneys may be extremely valuable to the foreign investor for procedural matters during the course of the proceedings. The CCPIT has not published a fee schedule, but in Canton the Guangzhou Legal Advisors' Office present fee schedule for lawyers providing services to foreign citizens is 150-300 yuan per hour (\$84-\$168) for assistance in litigated matters not involving property, and from 299 yuan (\$112) per hour to 2 per cent of the disputed amount for litigated matters involving property. Further, in any case involving Chinese law where a Chinese lawyer is asked to participate with a foreign lawyer, the fees for the Chinese lawyer are based upon the standard of fees charged by the foreign lawyer. American Bar Association, International Law Section, Minutes of the Meeting of the Committee on the People's Republic of China, Washington, D.C., April 23, 1981, at 2-3.

Under China's "Provisional Regulations on Lawyers," promulgated August 1980 and taking effect January 1, 1982, the Chinese lawyer is an employee of the People's Republic, and his fees are collected by the legal advisory office by which he is employed. The qualifications for a lawyer in China are that such person "cherish the People's Republic of China" and "support the Socialist system." Articles 1, 2, 17, The Provisional Regulations on Lawyers of the People's Republic of China, promulgated August 26, 1980. See Cohen, *China's New Lawyers' Law*, 66 A.B.A.J., 1533 (1980); Randt, *Lawyers through the Chinese Looking Glass*, 12 J. Am. Chamber of Commerce in Hong Kong 15 (1981).

75. Provisional Rules, Rules 25, 26, *supra* note 65.

76. *Id.* Rule 27. The rules permit *ex parte* communications between the Arbitration Commission and any party on matters relating to the proceedings. *Id.* Rule 18.

Additionally, the tribunal can inquire on its own into other evidence. In 1979 Jen and Liu, describing the FTAC arbitration procedure, stated: "When handling cases, they [the FTAC and the Maritime Arbitration Commission] not only examine the statements of facts from the disputing parties, *but also listen to the views of other*

puting parties defaults by failing to appear at a hearing, the arbitral tribunal may, at the request of the party present, proceed with the hearing and render an award.⁷⁷ The rules provide that the award given by the arbitration commission is final, and that neither party shall bring an appeal to revise the award before a court of law or any other organization.⁷⁸ Thus, by agreeing to FETAC rules, the parties agree to waive all right of review.

One difficulty with the FETAC rules is that no provision is made for challenge to an arbitrator. The rules do not specify a time period within which the arbitration proceedings must be completed, but they do provide that the principal part of the award must be read to the parties at the closing session of the hearings, the balance of the award together with the reasons therefor to be set forth in writing within 15 days thereafter.⁷⁹

2. *American Arbitration Association* Because the China-United States Trade Agreement⁸⁰ permits arbitration by an arbitral tribunal in the United States, and because the Chinese accept joint conciliation by the AAA and the FETAC, presumably the Chinese joint venturer would be willing to consider arbitration before the AAA. The AAA is a widely recognized arbitral body with headquarters in New York City, and its commercial arbitration rules are applicable to international trade disputes.⁸¹ They are particularly attractive to joint ventures because they provide for speedy yet flexible arbitral procedures. The average time for

persons concerned, and make investigations on the market or on the spot whenever necessary and possible, which enables them to draw a clear line between the right and the wrong, to ascertain liability, to be fair and reasonable and truth seeking." Jen and Liu, *supra* note 30, at 262, 263-64 (emphasis supplied).

77. Provisional Rules, Rule 28, *supra* note 65.

78. *Id.* Rule 31. To initiate the arbitration, the plaintiff must pay 0.5% of the amount of the claim as a deposit for the arbitration fee. The arbitration tribunal determines the fee, which may not exceed one per cent of the total amount of the claim. The tribunal also determines whether the arbitration fee should be paid entirely by the losing party. *Id.*, Rules 6, 33. Additionally, the tribunal may direct the losing party to pay the other party's arbitration costs, which may not exceed five per cent of the sum awarded. *Id.* Rule 34. It is not clear whether these costs may include attorneys' fees.

79. *Id.* Rule 30.

80. Trade Agreement, *supra* note 14.

81. See Holtzman, *The Importance of Choosing the Right Place to Arbitrate an International Case*, Proceedings of the Southwestern Legal Foundation, Private Investors Abroad—Problems and Solutions in International Business (1976), at 220-21 [hereinafter cited as Holtzman, *The Importance of Choosing the Right Place to Arbitrate*]; Hollering, *Arbitration*, N.Y.L.J., August 13, 1981, at 1. The AAA rules state that the parties shall be deemed to have made the rules a part of their arbitration agreement whenever the agreement provides for arbitration by the AAA. Commercial Arbitration Rules of the American Arbitration Association, April 1, 1981 [hereinafter cited as AAA Arbitration Rules], § 1.

AAA arbitration of disputes is six months.⁸²

The AAA rules permit the parties to choose the place of arbitration, the language used, and the arbitrator, and to specify the method for appointing the arbitrator.⁸³ Absent agreement by the parties, the AAA rules provide that a sole arbitrator is to be selected by the parties from a national panel appointed by the AAA.⁸⁴ The AAA appoints the national panel, but the AAA commercial rules do not specify the qualifications for membership on the panel.⁸⁵

The rules permit the arbitrator to make an independent investigation of the facts, and to require the parties to produce such additional evidence as the arbitrator may deem necessary to understand the dispute.⁸⁶ The arbitrator may subpoena witnesses or documents on his own initiative if permitted by law, but is not required to limit his decision by the legal rules of evidence.⁸⁷

If a joint venturer defaults, the arbitrator may proceed with the arbitration.⁸⁸ Further, by submitting to arbitration under the AAA rules, each party is deemed to have consented that judgment upon the arbitration award may be entered in any United States federal or state court having jurisdiction.⁸⁹ The award must be made within 30 days after the hearing has closed.⁹⁰

The neutral members of the AAA arbitral panel serve without fee in most cases, but in prolonged or special cases the AAA may require the parties to pay an arbitrator's fee and will set the fee in a reasonable amount.⁹¹ Further, the AAA itself charges an

82. Note, *A Survey of Arbitral Forums*, *supra* note 62, at 221.

83. AAA Arbitration Rules, §§ 11, 14, 24 (by inference), *supra* note 81.

84. *Id.* § 13. The AAA submits to each party a list of persons chosen by the AAA from the panel. Each party has the right to cross off any names, number the remaining names in the order of preference, and return the list to the AAA within a specified time. The AAA then selects the arbitrator from the persons approved in both lists in accordance with the designated order. If for any reason the appointment cannot be made from the lists, the AAA will select the arbitrator from other members of the panel. *Id.* The arbitrator selected must disclose any bias or other circumstances likely to affect impartiality. The AAA determines whether the arbitrator is disqualified, and its decision is conclusive. *Id.* § 18.

85. *Id.* § 5. As of 1977, the panel consisted of more than 37,300 persons, including experts in all aspects of international trade. Holtzman, note 81, at 220.

86. *Id.* §§ 33, 31, note 81 *supra*.

87. *Id.* § 31. However, the rules prohibit communication with the sole (or third) arbitrator by any of the parties, except at oral hearings. AAA Arbitration Rules § 39.

88. *Id.* § 30, 31.

89. *Id.* § 47(c). However, the AAA recommends that the arbitration clause specifically provide that "judgment upon the award * * * may be entered in any Court having jurisdiction thereof." COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (1981).

90. AAA Arbitration Rules § 41, note 81, *supra*. The rules do not require the arbitrator to state his reasons for the award. *Id.* § 42.

91. *Id.* § 51. In setting the arbitrator's fee, the AAA takes into consideration the

administrative fee based upon the amount in dispute. The party seeking arbitration must pay this fee upon filing its notice of intention to arbitrate with the AAA regional office.⁹²

If the arbitration under the AAA rules, or any other rules, is held in the United States, the Federal Arbitration Act provides for special procedural benefits to each party.⁹³ The Act applies, *inter alia*, to contracts involving commerce with a foreign nation where the contract provides that any controversy arising out of the contract shall be settled by arbitration.⁹⁴ Assuming that a joint venture contract between an American corporation and a Chinese enterprise containing an arbitration clause would satisfy the foreign commerce requirement,⁹⁵ the Act permits either the American or the Chinese party to request a United States Federal District Court to enter an order compelling arbitration.⁹⁶

Under the Federal Arbitration Act, the arbitrator has the power to summon any person to appear before the arbitrator and give testimony and, where appropriate, to produce books, records, or other documents.⁹⁷ If the person fails to obey the summons, the district court may compel his attendance before the arbitrators or punish him with contempt for failing to comply with the summons.⁹⁸

extent of the arbitrator's services and "other relevant circumstances" of the case. *Id.* However, the rules do not specify what the "other relevant circumstances" include.

92. *Id.* §§ 7(b), 48. For a dispute involving \$1 million, the administrative fee is \$2,650. Where the amount in dispute is uncertain at the time of filing, the administrative fee is \$300, subject to later adjustment. Administrative Fee Schedule, AAA Arbitration Rules. In the award, the arbitrator may assess the arbitration fees and expenses against any party, not necessarily the losing party. *Id.* §§ 43, 50.

93. 9 U.S.C. §§ 1-13 (1976).

94. 9 U.S.C. §§ 1, 2 (1976).

95. *See Reynolds Jamaica Mines v. La Societe Navale Caennaise*, 239 F.2d 689, 693 (4th Cir. 1956): "A contract made by an American corporation with a foreign one, upon which it remains liable, and of which it is in fact both an essential party and the real beneficiary involves commerce with a foreign country." Apart from the foreign commerce requirement, the federal courts have held that actions brought under the Federal Arbitration Act require an independent jurisdictional basis. *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 970-71 (9th Cir. 1981); *but see Prima Paint v. Flood & Conklin*, 388 U.S. 395, 401, n.7 (1967); *Varley v. Tarrytown Associates, Inc.*, 477 F.2d 208, 209-10 (2d Cir. 1973). For a Chinese joint venture with American participants, the independent jurisdictional basis is found in the Trade Agreement, Article VIII, par. 3. *See Matter of Ferrara S.p.A.*, 441 F. Supp. 778, 780, n.2 (S.D.N.Y. 1977), *aff.* 580 F.2d 1044 (2d Cir. 1978).

96. 9 U.S.C. § 4 (1976). Absent a contract provision designating the method for appointing the arbitrators, the court (unless otherwise directed by the agreement) will appoint a single arbitrator. 9 U.S.C. § 5 (1976).

97. 9 U.S.C. § 7 (1976). *Local Lodge 1746, I.A.M. & A.W. v. Pratt & Whitney Div. U.A.C.*, 329 F. Supp. 283, 286-87 (D. Conn. 1971).

98. 9 U.S.C. § 7 (1976). *See Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960).

By submitting to arbitration under the AAA rules in the United States, the American joint venturer becomes subject to potentially significant discovery burdens

The Federal Arbitration Act permits any party, at any time within one year after the award, to apply to the district court for an order confirming the award, provided that the agreement to arbitrate states that a court judgment shall be entered upon the award.⁹⁹ A judgment confirming the award has the same effect as a judgment in a lawsuit and thus may be enforced against the losing party or its assets.¹⁰⁰

Additionally, either party may petition the district court for an order vacating the award on the grounds that the award was procured by corruption, fraud, or undue means, or that partiality by the arbitrators was evident, or on other specified procedural grounds amounting to lack of due process in the proceedings.¹⁰¹ The motion to vacate must be made within three months after the award is filed or delivered, thus providing a short statute of limitations for challenging the award.¹⁰² If the adverse party, such as the Chinese investor, is not a resident of the district in which the award was made, the notice of the motion to vacate may be served by the marshal in any district in which the Chinese party is found.¹⁰³

Thus, arbitration in the United States under the AAA rules cannot be considered apart from the Federal Arbitration Act, which provides for confirmation of the award with relatively lim-

that may be imposed upon him by the district court, but which may not have any significant effect upon the Chinese party if the Government of China refuses to recognize the court's process.

99. *Audi NSU A.U. Aktiengesellschaft v. Overseas Motors*, 418 F. Supp. 982, 985 (E.D. Mich. 1976) (a clause providing that the arbitral decision "shall be decided finally and binding upon the parties" is sufficient to show consent to entry of judgment). *See, however, Varley v. Tarrytown Associates*, 477 F.2d 208, 210 (2d Cir. 1973), holding that absent a specific contract provision for a court judgment to be entered on the arbitral award, the court had no jurisdiction to enter judgment; *accord Fotochrome, Inc. v. Copal Company, Limited*, 517 F.2d 512, 519, n.5 (2d Cir. 1975).

100. If an arbitral award is reduced to judgment in a foreign court, it may be enforced as a foreign money judgment in the United States, depending upon the provisions of the applicable state statute concerning the recognition of foreign court money judgments. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1318-19 (2d Cir. 1973), cert. den. 416 U.S. 986 (1974).

101. 9 U.S.C. § 10(a), (b), (c) (1976). The other grounds are that the arbitrators (a) were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior that may have prejudiced the rights of any party; (b) exceeded their powers; or (c) executed them so imperfectly that a mutual, final, and definite award upon the subject matter submitted was not made.

102. 9 U.S.C. § 12 (1976).

103. 9 U.S.C. § 12 (1976). Under the Federal Arbitration Act, if the parties agree to arbitrate under the rules of the AAA in a designated state, the parties thereby become amenable to suit in that state to compel arbitration or to enforce an arbitral award to the same extent as if the parties were physically present. *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Com.*, 360 F.2d 103, 107 (2d Cir. 1966). Thus, if the participants in a Chinese joint venture agree to arbitrate in New York, each party makes itself subject to the jurisdiction of the courts of New York.

ited judicial review of the merits, but with extensive review of procedural questions.

3. *London Court of Arbitration.* Chinese commercial contracts have accepted the London Court of Arbitration, a recognized international arbitral tribunal, as an appointing arbitral authority. In 1980, the London Court of Arbitration adopted new rules of procedure for international commercial arbitrations, effective January 1, 1981.¹⁰⁴ Failing agreement by the parties to appoint a single arbitrator, the London Court of Arbitration will appoint an arbitrator or arbitrators to decide the dispute.¹⁰⁵ If the parties have each nominated an arbitrator, the court will appoint those arbitrators and also select a third arbitrator, who acts as chairman.¹⁰⁶

The London Rules are particularly specific in delineating the jurisdiction of the arbitrator, empowering him to decide any question of law arising in the course of arbitration.¹⁰⁷ The arbitrator may order any party to furnish him with such additional details of that party's case, in fact or law, as he may desire.¹⁰⁸ Finally, the arbitrator may consider any evidence that he deems relevant, whether or not admissible.¹⁰⁹

The arbitrator decides the costs of the arbitration; absent agreement by the parties, he also decides who will pay the costs.¹¹⁰ He may also order that a party pay all or part of the costs incurred by the other party.¹¹¹

Under the English Arbitration Act 1979, the parties' joint venture arbitration clause may provide for appeal to the English High Court to determine any question of law arising during the arbitration.¹¹² Further, the Arbitration Act 1950 (which remains

104. International Arbitration Rules of the London Court of Arbitration, January 1, 1981 [hereinafter cited as London Rules].

105. London Rules, Rule 2(1), note 104 *supra*.

106. *Id.* Rules 2(2), 2(3). The London Rules do not specify from what group of persons it will select the arbitrator, providing only that all arbitrators shall be and remain at all times wholly independent and impartial. *Id.* Rule 3.

107. London Rules Schedule of Jurisdiction and Powers of the Arbitrator, Paras. A, B(6) [hereinafter cited as Schedule].

108. Schedule, para. B(8), *supra* note 107.

109. *Id.* Para. B(10). The arbitrator also determines the language and place of arbitration. *Id.* Para. B(5), (13). The London Rules provide that the arbitration hearings are private. Rule 7(2).

110. London Rules. Rule 10(3).

111. *Id.* The London Rules require that the arbitrator's fees be calculated by reference to the work done and be charged at a rate appropriate to the particular circumstances of the case, including its complexity. The Schedule of Costs provides that, in most cases, the arbitrator's fees as of January 1, 1981, will fall in a range of \$450 to \$1,800 per day for meetings or hearings, and \$90 to \$360 per hour for other work. Note (1), Schedule of Costs, London Rules.

112. An Act to Amend the Law Relating to Arbitrations and for Purposes Con-

partly in effect) permits the English Courts to set aside an award where the arbitrator has "misconducted" himself or the proceedings, or where the arbitration award has been "improperly procured."¹¹³ Misconduct may include serious mistakes of law by the arbitrator, or bias.¹¹⁴ Absent an agreement excluding judicial review, the parties may also appeal any question of law arising out of the arbitral award.¹¹⁵ However, the High Court is not required to entertain the appeal unless it finds that determination of the question of law could substantially affect the rights of one or more of the parties.¹¹⁶ If the High Court takes jurisdiction, it may order that the award be confirmed, altered, set aside, or returned to the arbitrator for reconsideration.¹¹⁷ Thus, by arbitrating in England under the London Rules, the joint venturers will receive at least limited judicial review.

4. *Stockholm Chamber of Commerce* Chinese commercial contracts frequently designate Sweden as the place of arbitration.¹¹⁸ Because it is a neutral country, Sweden is often said to be a preferred place to arbitrate disagreements in East-West trade.¹¹⁹ In some cases, the Chinese have accepted the Stockholm Chamber

nected Therewith, April 4, 1979, section 2(1) [hereinafter cited as Arbitration Act 1979]. The High Court will not entertain an application to review a question of law unless it is satisfied that determination of the question might produce substantial savings to the parties, and that the question of law is one on which the court might grant leave to appeal following completion of the arbitration. Section 2(2).

Until 1979, under the English "case stated" doctrine, either party or the arbitrator could request a ruling on any question of law from the High Court at any time during the arbitration proceeding. It was generally accepted that parties could not contract out of the "case stated" procedure, which often caused parties to incur substantial delays and expense, and which made England a relatively unattractive place to arbitrate international commercial disputes. The Arbitration Act 1979 eliminated the "case stated" procedure but left the parties with a limited right, by agreement, to seek judicial review of preliminary questions. Sections 1(1), 1(2). For an excellent discussion of the Arbitration Act 1979 and the burdens imposed by the "case stated" procedure, see Clark and Lange, *Recent Changes in English Arbitration Practice Widen Opportunities for More Effective International Arbitrations*, BUS. LAW., July 1980, at 1621 (hereinafter "Clark and Lange"); see also Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 87-105 (1980).

113. An Act to Consolidate the Arbitration Acts, 1889 to 1934, July 28, 1950 [hereinafter cited as Arbitration Act 1950].

114. Clark and Lange, *supra* note 112, at 1629.

115. Arbitration Act 1979, § 1(2), *supra* note 112.

116. *Id.* § 1(3).

117. *Id.* § 1(2).

118. Tang, *supra* note 25, at 241; Theroux, *supra* note 60, at 238; Choo, *supra* note 37, at 48, 50; Note, *Legal Aspects of China's Foreign Trade Practices and Procedures*, 12 J. INT'L L. & ECON. 105, 128-29 (1977).

119. Wetter, *East Meets West in Sweden*, 13 INT'L LAW. 262 (1979); see also Holtzman, *Dispute Resolution Procedures in East West Trade*, 13 INT'L LAW. 240-41 (1979); Note, *supra* note 62, at 235.

of Commerce as an "appointing authority" for selecting the arbitrator and administering the arbitration under UNCITRAL rules, but in other cases they have agreed to arbitration under the Chamber's rules.¹²⁰

The Stockholm Chamber of Commerce rules permit the parties to determine the number of arbitrators.¹²¹ If the parties specify a sole arbitrator, the arbitrator is appointed by the Chamber's Arbitration Institute.¹²² If they provide for three arbitrators, each party appoints one arbitrator and the Institute appoints the third, who is the chairman.¹²³ Absent agreement by the parties, three arbitrators are appointed, one each by the parties and one by the chairman of the Institute.¹²⁴

Apart from the selection of arbitrators, the Stockholm Chamber's rules are very cursory. They provide that the tribunal, guided by the wishes of the parties, shall determine the procedures to be followed and the time limits for arbitration.¹²⁵ The rules specifically incorporate the Swedish law of arbitration, which is set forth in the Swedish Arbitration Act of 1929.¹²⁶ The Act contains provisions which may not be waived by the parties or by the tribunal, despite the international nature of the case.¹²⁷

The Swedish Arbitration Act requires that the arbitration

120. See Tang, *supra* note 25, at 241; Records of the Arbitration Subcommittee, Legal Committee of the National Council for US-China Trade, 1050 Seventeenth Street, N.W., Washington, D.C., (on file at the headquarters of the National Council).

See also Optional Arbitration Clause For Use in Contracts in USA-USSR Trade - 1977, prepared by the AAA and the USSR Chamber of Commerce and Industry, reprinted in Delaume, *Transnational Contracts*, Vol. III, App. II, *International Commercial Arbitration*, 126 (1979), which provides for arbitration in Sweden under UNCITRAL Rules, with the Stockholm Chamber of Commerce as appointing authority (subject to certain exceptions), in USA-USSR trade disputes between businessmen.

121. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Rule 6. October 1, 1976 [hereinafter cited as Stockholm Rules].

122. *Id.* The Arbitration Institute is a three-member board appointed for a period of three years by the Executive Committee of the Stockholm Chamber of Commerce. The Stockholm rules require that the chairman be a judge having experience in commercial or industrial disputes, that one member be a practicing lawyer, and that one member be a person "who enjoys the confidence of the commercial community." *Id.* Rule 2.

123. *Id.* Rule 6.

124. *Id.*

125. *Id.* Rule 15.

126. *Id.* Rule 5. The Swedish Arbitration Act of 1929, Lag om skiljeman, 1929 No. 145, as amended with effect from July 1, 1976 [hereinafter cited as Swedish Arbitration Act], reprinted in *Arbitration in Sweden* (1977), Appendix 2, published by the Stockholm Chamber of Commerce.

127. For example, the Swedish Arbitration Act provides that if the award is not made within the period designated by the parties, the arbitration agreement lapses as to the dispute. Swedish Arbitration Act § 18, *supra* note 126.

It also provides that "[a]n arbitrator shall not be disqualified merely because a person tries to provoke him or attacks him by word or deed in an attempt to disqualify him." *Id.* § 5.

take place in Sweden, but does not require that the Swedish language be used.¹²⁸ Under the Act, it is the responsibility of the parties to produce evidence. The arbitrators may not make orders on penalty of fine, or use other means of constraint, to obtain evidence.¹²⁹ However, if a party wishes that a witness be heard in court under oath or that a person produce a document as evidence, the party may apply to a Swedish District Court for the appropriate order.¹³⁰ Provided that the arbitrators consider this procedure necessary, the Court will arrange for an examination or issue the order to produce on penalty of fine.¹³¹ Thus, the Act gives the arbitrators a veto power over the right of a party to request the court to compel testimony or the production of evidence.

The Arbitration Act provides that the parties are deemed to have consented to abide by the award, unless the arbitration agreement expressly reserves the right to appeal.¹³² However, the Act permits a party to sue in a Swedish court to set aside the award within 60 days from the date of receipt. Grounds for setting aside the award include, *inter alia*, that the arbitrators went beyond the issues submitted, that the arbitrators were disqualified or were improperly appointed, or that through no fault of a party there was an irregularity in the procedure which "in probability" may be assumed to have influenced the decision.¹³³

The Act specifies that the arbitrators may not withhold delivering the award until their compensation is paid.¹³⁴

5. *Zurich Chamber of Commerce* Because of its neutrality, Switzerland may also be attractive to the Chinese joint venturer as a forum for joint venture arbitrations.¹³⁵ The Zurich Chamber of Commerce will appoint a court of arbitration to resolve interna-

128. *Id.* § 4.

129. *Id.* § 14 (by inference), § 15.

130. *Id.* § 15.

131. *Id.*

132. *Id.* § 2.

133. *Id.* § 21. Additionally, an award is void if, *inter alia*, the award was not reduced to writing and signed by the arbitrators, or if when the award was given the arbitrators decided a question which was the subject of a pending court action. *Id.* § 20. It is unclear whether a party may frustrate arbitration in Sweden (resulting in a void award) if the party unjustifiably brings a court action on a claim subject to arbitration.

134. *Id.* § 23. Neither the Stockholm Rules nor the Swedish Arbitration Act contains a fee schedule for the arbitrators. The Act provides that, unless otherwise agreed between the arbitrators and the parties, the arbitrators' final award may fix the amount of their compensation. *Id.*

Unless otherwise agreed between the parties, the arbitrators' final award may also determine whether a party should be reimbursed for the arbitrators' compensation and the party's other costs, presumably including attorneys' fees. *Id.* § 24.

135. Some Chinese purchase contracts have specified Switzerland as the place of arbitration. See Theroux, *supra* note 60, at 238.

tional business disputes.¹³⁶ While access to the court of arbitration is limited to disputes where at least one party is a member of the Chamber, the Chamber's president may authorize the use of the court's services for arbitrating disputes between nonmember parties, either on the merits of each case or generally in advance.¹³⁷

The court of arbitration usually consists of three members.¹³⁸ The Chamber's president selects the umpire (the third arbitrator) from the members of the court, who are nominated by the Board of the Chamber of Commerce.¹³⁹ With the parties' consent or in special circumstances, the president may appoint another "suitable" person as the umpire.¹⁴⁰

The Zurich Rules permit the umpire to determine whether the proceedings shall take place orally or in writing, but they show a marked preference for written proceedings.¹⁴¹ The court of arbitration may not, on its own, compel witnesses to appear and give testimony, but must request assistance from the Zurich court to compel attendance.¹⁴² The arbitrators must give the parties the opportunity to discuss the results of the evidential proceedings

136. Conciliation and Arbitration Rules, arts. 1, 1.6, Zurich Chamber of Commerce, January 25, 1977 [hereinafter cited as Zurich Rules]. The Zurich Chamber of Commerce also provides a separate conciliation board for settling business disputes. Art. 1.5.

In conciliation proceedings the president of the Chamber nominates an unbiased person to serve as mediator, or if the parties so desire the president may serve as mediator. Art. 8. After examining the facts, the mediator proposes a settlement. Art. 12. If the parties reject the settlement, they are free either to apply to the Chamber to institute arbitration proceedings or to settle their dispute in another manner. Art. 13.

All parties bear equally the costs of the conciliation procedure. Art. 15.

137. Zurich Rules, art. 2, *supra* note 136. Obviously, if the foreign and Chinese parties to a joint venture agreement wish to specify arbitration in Zurich under the rules of the Zurich Chamber of Commerce, it would be prudent to obtain advance acceptance by the Chamber's president of any future arbitration.

The Zurich Rules specifically exclude arbitration of disputes between firms and their employees. *Id.*, art. 3.

138. *Id.* art 17, 20.

139. *Id.* art 19.

140. *Id.* Absent agreement by the parties on the selection of the other two arbitrators, the umpire selects them from a list of four compiled by the president. Art. 20. It is unclear whether those four must also be members of the court of arbitration nominated by the board.

The seat of the court of arbitration is at the Zurich Chamber of Commerce, but proceedings of the court may take place elsewhere. Art. 23. The court determines the language of the arbitral proceedings. Art. 22, 23.

141. *Id.* art. 29, 34. For example, the plaintiff's statement must exactly designate the evidence to be offered, and all documents at the plaintiff's disposal must be filed together with the statement of the claim. Art. 29.

142. Briner, *Switzerland*, (1978) 3 Y.B. COM. ARB. 193 (International Council for Commercial Arbitration). This article discusses and analyzes the Swiss Civil Code and the Zurich Code of Civil Procedure—both applicable to arbitration in Zurich.

before those proceedings conclude.¹⁴³ In a departure from the usual arbitration secrecy provisions, the umpire is permitted to publish awards of the court for scientific reasons, but must omit the names of the parties.¹⁴⁴

Pursuant to the Zurich Code of Civil Procedure, an appeal from the arbitrators' award may be taken to the Supreme Court of the Canton of Zurich. The Supreme Court may annul the award on grounds that it violated an essential rule of procedure, was arbitrary or based on findings contrary to the files, or constituted a clear violation of substantive law.¹⁴⁵

The rules of the Zurich Chamber of Commerce do not provide a fee schedule. The fees are set by the court of arbitration in amounts analogous to the lawyer's fee schedule issued by the Canton of Zurich Supreme Court.¹⁴⁶

6. *Geneva Chamber of Commerce.* Chinese commercial contracts have also provided for arbitration of disputes in Geneva.¹⁴⁷ The Geneva Chamber of Commerce and Industry appoints arbitrators to judge commercial disputes where the parties' contract designates it as the appointing authority.¹⁴⁸ Seemingly more lenient than the Zurich Chamber of Commerce, the Geneva Chamber of Commerce reserves the right, in exceptional cases only, to decline to act unless it has expressly accepted its appointment prior to the parties' entry into the arbitration agreement.¹⁴⁹

The Geneva Chamber of Commerce itself does not judge the dispute. The Chamber's arbitration directives state that all proceedings before an arbitral tribunal in Geneva are subject to the Swiss Intercantonal Arbitration Convention, and thus the directives contain no rules of procedure except those for selecting the arbitrator.¹⁵⁰

Absent a provision in the arbitration agreement, the Cham-

143. Zurich Rules, art. 37-*supra* note 136.

144. *Id.* art. 38.

145. Briner, *supra* note 142, at 202. If the Court of Arbitration believes that the award is not sufficiently clear, it may take steps to clarify the award. Zurich Rules, art. 26.

146. Zurich Rules, art. 39. The Court of Arbitration apportions the costs of the arbitration among the parties in accordance with the principles of the Zurich Civil Procedure Law. Art. 40.

147. Choo, *supra* note 37, at 50.

148. Arbitration Directives of the Geneva Chamber of Commerce and Industry, art. 2.1, June 1, 1980 [hereinafter cited as Geneva Arbitration Directives].

149. Geneva Arbitration Directives, art. 2.4, *supra* note 147.

150. *Id.* arts 2.2, 2.3, 3 through 9. Directives. Absent agreement by the parties, Geneva is the seat of the arbitral tribunal, unless it is more convenient to locate the seat in another Swiss canton adhering to the Swiss Intercantonal Arbitration Convention. Art. 9.2.

For establishing the arbitral tribunal, the Chamber charges a fee between \$160

ber of Commerce requests the parties to indicate how many arbitrators they desire.¹⁵¹ If the figures proposed by the Chinese and the foreign party do not agree, the tribunal will consist of three members.¹⁵² The Chamber appoints the third arbitrator or umpire,¹⁵³ and if the arbitration agreement provides for a single arbitrator, the Chamber selects the arbitrator.¹⁵⁴

The Intercantonal Arbitration Convention, which has unified the arbitration laws of most of the cantons, specifies mandatory arbitration rule provisions which may not be waived or altered by the parties or the tribunal.¹⁵⁵ For example, it entitles both parties to become acquainted with the documents in the file of the tribunal concerning the matter in dispute, and to attend any sittings for the taking of evidence.¹⁵⁶

The high court of common civil jurisdiction in the canton where the arbitration occurs may annul an arbitral award. Grounds for annulment are that the award is arbitrary, based on findings which are manifestly contrary to facts appearing on the file, constitutes a clear violation of law or equity, or is unintelligible or contradictory.¹⁵⁷ Annuling one section does not void the entire award unless the other items of the award are contingent upon the annulled section.¹⁵⁸

Except for actions for annulment, the convention permits a separate civil action to review the award on grounds of newly dis-

and \$2,120, depending upon the amount at issue and the extent of services provided, and reserves the right to exceed the limit in exceptional cases. Art. 10.1.

151. *Id.* art. 4.

152. *Id.*

153. *Id.* art. 5.3.

154. *Id.* art. 5.1.

155. Swiss Intercantonal Arbitration Convention, art. 1.3, reprinted in Schmitthoff and Crowley, II *International Commercial Arbitration*, p. 40 (1979) [hereinafter cited as Intercantonal Convention]. As of June 1, 1977, 16 cantons had subscribed to the convention (Basel-Landschaft, Basel-Stadt, Bern, Fribourg, Geneve, Graubunden, Nidwalden, Neuchatel, Obwalden, St. Gallen, Schaffhausen, Schwyz, Solothurn, Ticino, Vaud, and Valais) and nine, including Zurich, had not (Aargau, Appenzell-Ausserrhoden, Appenzell-Innerrhoden, Glarus, Luzern, Thurgau, Uri, Zug, and Zurich). See also Briner, *supra* note 142.

156. Intercantonal Convention, arts. 25.b, 25.c, *supra* note 155.

157. *Id.* arts. 36.f, 36.h. The convention specifies other grounds for annulling the award, including, *inter alia*, that (a) the arbitral tribunal was not properly constituted, (b) the tribunal erroneously declared itself to have jurisdiction, (c) the tribunal pronounced on points not submitted to it, (d) there was a breach of the mandatory procedural rules concerning the right to be heard, (e) the tribunal awarded one of the parties something other than what was claimed, without being legally authorized to do so, (f) the tribunal made its award after expiration of the time limit imposed within which to accomplish the arbitration, and (g) the fees of the arbitrators as fixed by the tribunal were manifestly excessive. Art. 36.

An action for annulment must be brought within 30 days after notification of the award. Art. 37.

158. *Id.* art. 40.2.

covered evidence. The civil action must be brought within 60 days from the date on which the claimant became aware of the grounds for review but not more than five years after notification of the award.¹⁵⁹ Thus, an award under the Intercantonal Arbitration Convention may take five years to become final, and this lengthy delay may be unacceptable to the joint venturers.¹⁶⁰

7. *Japan Commercial Arbitration Association.* Chinese purchase contracts with Japanese suppliers have provided for arbitration of disputes in the country of the defendant, thus recognizing Japan as an acceptable arbitral forum.¹⁶¹

The Japan Commercial Arbitration Association (JCAA), with headquarters in Tokyo, is an established Japanese arbitral tribunal. While the JCAA has adopted commercial arbitration rules applicable to international disputes, non-Japanese joint venturers or joint venturers without extensive business dealings in Japan may find the rules too restrictive. For example, the rules require that the arbitration be in Japan, that all documents, evidence, or other written material have Japanese-language translations attached (unless deemed unnecessary by the JCAA's Secretary or the tribunal), and that the award be in Japanese.¹⁶²

If the joint venturers do not agree on the number, method of selection, and nationality of the arbitrators, the JCAA will select a sole arbitrator, who must be a resident of Japan.¹⁶³ The JCAA has a panel of arbitrators, but the rules do not require that the selection be made from the panel.¹⁶⁴ If either party requests that the single arbitrator be of a different nationality than both parties,

159. *Id.* arts. 41.b., 42. To set aside the award, the aggrieved party must show that the arbitrators made the award "in ignorance of important facts in existence prior to the award or of evidence of decisive importance," and that it was impossible for the aggrieved party to present such facts or evidence during the proceeding. *Id.* art. 41.

160. If the action for review succeeds, the court will remit the case to the arbitral tribunal for a rehearing. Art. 43.

161. *Ren, supra* note 40, at 9. It may be undesirable in a joint venture agreement to provide for dispute resolution in the country of the defendant, because this provision permits the recalcitrant party to determine the locale and perhaps the rules of arbitration and may encourage that party to adopt unrealistic positions on the merits of the dispute in order to obtain a real or perceived procedural advantage. Thus, instead of being encouraged to settle or negotiate the merits of the dispute, a party may find it more expedient to spend its time maneuvering itself—or the other party—into the position of defendant.

162. Rules 3.2, 39, and 37, respectively, Commercial Arbitration Rules of the Japan Commercial Arbitration Association, February 1, 1971 [hereinafter cited as Japan Commercial Rules]. A party may request that the award be made in English, but if there is a discrepancy between the English and the Japanese version, the Japanese version prevails. Rule 37.

163. Japan Commercial Rules, Rules 15.2, 17-20, *supra* note 162.

164. *Id.* Rules 5, 18, 19.

the JCAA must comply with that request.¹⁶⁵

The arbitration proceedings are initiated by written request to the JCAA, which must include any documentary evidence to support the claim and a statement of the method of proof.¹⁶⁶ The hearings are closed to the public.¹⁶⁷ A party may petition the tribunal for the voluntary appearance of a witness or expert, but the rules do not require the tribunal to grant the request.¹⁶⁸ The tribunal may make an investigation of the facts only in the presence of the parties,¹⁶⁹ although at the parties' request the arbitrators have the power to decide the dispute without formal hearings.¹⁷⁰

If a party defaults, the arbitral tribunal may proceed with the arbitration.¹⁷¹ Also, the arbitrators may hear evidence when a party, having been duly notified of a hearing, is absent without just reason.¹⁷² However, the tribunal must notify the parties of any decision made in proceedings at which the parties were not present.¹⁷³

The arbitrators must make their award within 35 days from the conclusion of the hearing, stating their reasons for the award unless the parties agree otherwise.¹⁷⁴ The JCAA determines the remuneration for the arbitrators, which the parties are to bear equally.¹⁷⁵ The rules do not provide for assessment of attorneys' fees against the losing party.

Finally, the rules do not state that the decision shall be final or binding upon the parties. They only state, somewhat ambiguously, that when a party fails to abide by a decision the tribunal may take "necessary measures," without specifying the

165. *Id.* Rule 20. The rules disqualify any person who has a "beneficial interest" in the case. Rule 15.

166. *Id.* Rules 7(3), 7.2(4).

167. *Id.* Rule 30.

168. *Id.* Rule 26. The tribunal may refuse to hear a witness or expert where it deems the evidence irrelevant to the contention of the submitting party. The JCAA rules, while permitting a party to submit evidence in support of its own claim, are silent on the right of a party to submit evidence relating solely to the claim of the other party, either for rebuttal or explanation. The JCAA rules, like many other arbitration rules, make no provision for cross-examination. On the lack of cross-examination, see generally, Aksen, *supra* note 62, at 61.

169. Japan Commercial Rules, Rule 27, *supra* note 162. The rules require that all evidence be accepted in the presence of the parties, except where a party is absent in default. *Id.* Rule 26.

170. *Id.* Rule 33.

171. *Id.* Rules 9, 19.2, 24, 26.2.

172. *Id.* Rule 24.

173. *Id.* Rule 41.

174. *Id.* Rules 35, 36.

175. *Id.* Rule 41. The JCAA has a fee schedule for arbitration, not including arbitrators' remuneration, based upon the amount of money in dispute. Annexed Schedule of Fees, Japan Commercial Rules.

measures.¹⁷⁶

8. *International Chamber of Commerce.* Chinese officials have stated that China will not accept arbitration under the rules of the International Chamber of Commerce (ICC). However in 1980, China Construction Machinery corporation entered into a joint venture agreement with Schindler Holding AG and Jardine Schindler (Far East) Holdings, SA, which provided for arbitration in London in accordance with the ICC rules.¹⁷⁷

The ICC Court of Arbitration is the "appointing authority," but the court itself does not settle disputes.¹⁷⁸ The Court appoints, or confirms the appointment, of the arbitrators. If the parties do not agree on the number of arbitrators, the Court appoints a sole arbitrator, who is proposed by a National Committee of the International Chamber of Commerce.¹⁷⁹ In disputes which the Court deems to warrant three arbitrators, the Court requests each party to nominate an arbitrator.¹⁸⁰ If those two arbitrators do not select a third within a fixed time limit, the Court will appoint the third arbitrator,¹⁸¹ again proposed by a National Committee.

A unique, and occasionally criticized, feature of the ICC rules is the requirement for "terms of reference." Before proceeding with the case, the arbitrator, together with the parties, must draw up a document defining the issues to be determined, the particulars of the applicable procedural rules, a summary of the parties' respective claims, and such other particulars as may be

176. *Id.* Rule 47.

177. Article 16 of the Schindler joint venture agreement provides as to dispute settlement:

16.1 Any disputes arising among the parties to this agreement shall be settled by the board of the JVC [Joint Venture Company].

16.2 If the board should fail to resolve such a dispute, it shall be brought in principle before the ordinary court of domicile of the actual defendant.

16.3 However, *if one of the parties to the dispute so desire it shall be determined by arbitration in London in accordance with the arbitration rules of the International Chamber of Commerce* (emphasis supplied).

80-8 China Bus. Rep. at 4 (1980).

178. Rules of Conciliation and Arbitration of the ICC in force as of June 1, 1975, art. 2.1 [hereinafter cited as ICC Rules]. For an excellent description of current ICC arbitration practice, see Derains, *New Trends in the Practical Application of the ICC Rules of Arbitration*, 3 NORTHWESTERN J. OF INT'L LAW & BUSINESS, 39 (1981).

179. ICC Rules, art. 5, *supra* note 178. Each ICC member country has an ICC National Committee. The court designates a specific National Committee to submit the proposed sole or third arbitrator. Under ICC practice, the sole or third arbitrator, must always be of a different nationality than the parties. See Derains, *supra* note 178, at 49, 53.

180. *Id.* art. 5.

181. *Id.* art. 4

required to make the arbitral award enforceable in law.¹⁸² Some commentators consider this a time-consuming and redundant process which materially extends the period and costs of arbitration.¹⁸³ In reality it is similar to the familiar pretrial statement filed in complex judicial proceedings in the federal courts of the United States, and serves to clarify the issues. A party's failure to prepare or sign the terms of reference does not prevent the arbitration from taking place.¹⁸⁴

A frequent criticism of arbitration under the ICC rules is that the proceedings are disproportionately costly.¹⁸⁵ The rules impose an arbitrator's fee and an administrative fee, both of which are determined on a graduated scale according to the amount in dispute. In general, the graduated scale is higher than that provided by the FETAC, the AAA, or the JCAA. However, unlike the Swedish rules, it does provide a fee schedule which gives the parties notice of the potential fee.

Absent agreement by the parties, the Court of Arbitration determines the place of arbitration.¹⁸⁶ The arbitrators determine the language of the arbitration, paying due regard to the language of the contract.¹⁸⁷ The hearings are closed to the public, unless both the arbitrators and the parties agree otherwise.¹⁸⁸

The ICC rules provide wide discretion to the arbitrators, permitting them to establish the facts of the case "by all appropriate means."¹⁸⁹ The tribunal must hear the parties together in person, and in addition must hear any other person in the presence of the parties.¹⁹⁰ The ICC rules do not provide for direct or cross-examination of witnesses by the parties.

182. *Id.* art. 13.

183. McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW 211, 226 (1979); Note, *A Survey of Arbitral Forums*, *supra* note 62, at 225.

184. ICC Rules, art. 13.2, *supra* note 178.

185. One commentator has stated as to ICC fees:

"In even the simplest arbitration proceeding conducted before a three-member tribunal established under the auspices of the ICC, the cost of the arbitrators' fees and expenses and the ICC's administrative fees will exceed \$50,000, over and above such costs as attorneys' fees, travel expenses of the parties and the witnesses, the extensive documentary evidence required to be submitted in multiple copies, the cost of experts, etc." Goekjian, *Snags Imperil Arbitration in International Trade*, *The Legal Times of Washington*, April 23, 1979, at 14.

186. ICC Rules, art. 12, *supra* note 178. The Court will choose a country other than the home country of the parties. At present the ICC is establishing administrative centers for arbitrations, in addition to its facilities at Paris and Seoul, in London, New York and New Delhi and is considering the feasibility of opening administrative centers in Latin America and the Middle East. Derains, *supra* note 178, at 53-54.

187. *Id.* art. 15.3.

188. *Id.*

189. *Id.* art. 14.1.

190. *Id.*

An award must be made within six months after the parties sign the terms of reference, unless the Court of Arbitration, on its own initiative or on a reasoned request from the arbitrators, extends the time for an additional six months.¹⁹¹ More importantly, the ICC rules provide that the parties, by submitting to arbitration, are deemed to have waived their right to any form of appeal, so far as a waiver can be validly made.¹⁹²

The ICC rules permit the arbitration to take place anywhere in the world,¹⁹³ and thus frequently have been used for arbitrating international trade disputes.

9. *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.* The UNCITRAL arbitration rules, referred to in the China-United States Trade Agreement, are solely procedural and are not associated with any national or international arbitral tribunal. The parties may designate their own appointing authority,¹⁹⁴ and if they fail to do so, the Secretary General of the Permanent Court of Arbitration at The Hague designates the appointing authority.¹⁹⁵

Absent agreement by the parties, the rules state that three arbitrators shall be appointed, with each party designating one arbitrator.¹⁹⁶ If the two arbitrators do not agree upon the third arbitrator, the appointing authority may appoint the third arbitrator or submit a list of at least three names to the parties.¹⁹⁷ Each party may delete names and number the remaining names in the order of preference. The appointing authority then selects the arbitrator from the approved names, in accordance with the order of

191. *Id.* art. 18.2. If the dispute is not decided within an additional six months, the Court of Arbitration is permitted to determine how the dispute is to be resolved. It is unclear whether this means that the Court of Arbitration decides the merits of the dispute, or that it appoints other arbitrators, or that the arbitration simply starts all over again thereby prolonging the proceedings.

192. *Id.* art. 24.2. The rules require that the arbitrators "make every effort" to make sure that the award is enforceable at law, but it is unclear whether this would permit the arbitrators to testify in support of their award in a judicial proceeding seeking enforcement.

193. *Id.* art. 12.

194. Arbitration Rules of the United Nations Commission on International Trade Law, art. 6.2, adopted December 15, 1976, by the General Assembly [hereinafter cited as UNCITRAL Arbitration Rules].

195. UNCITRAL Arbitration Rules, art. 6.2, *supra* note 194. The American Arbitration Association is prepared to act as appointing authority and to provide administrative services (e.g., hearing rooms, notices of hearings, stenographic transcript arrangements, and interpreters), both inside and outside the United States, for arbitrators under the UNCITRAL rules. American Arbitration Association, *Procedures for Cases under the UNCITRAL Arbitration Rules* (1981), at 3-10.

196. For a detailed analysis of the UNCITRAL Rules, see Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Yearbook of Commercial Arbitration 172 (1977).

197. UNCITRAL Arbitration Rules, arts. 5, 7, *supra* note 194.

preference.¹⁹⁸ Any challenge to the arbitrators is decided by the appointing authority.¹⁹⁹

Absent agreement by the parties, the arbitrators determine the place and language of the proceedings.²⁰⁰ The party making the claim has the burden of proof.²⁰¹ The parties may present evidence in the form of written statements. During the proceedings the tribunal may require the parties to produce documents, exhibits, or other evidence within such period as the tribunal determines.²⁰²

If a party, after receiving notice, fails to appear at a hearing without sufficient cause, the arbitral tribunal may proceed with the arbitration.²⁰³ Also, if one party fails to provide documentary evidence without sufficient cause, the arbitral tribunal may make an award on the evidence before it.²⁰⁴

The rules do not specify the time period within which the arbitrators must make their award. Therefore, it is extremely important for the parties to designate this time period in the joint venture arbitration clause, lest delays in the arbitration ultimately defeat the purpose of the joint venture.²⁰⁵ Notably, the UNCITRAL rules specifically provide that the award shall be final and binding on the parties.²⁰⁶

The UNCITRAL rules contain no fee schedule, but require the fees to be "reasonable."²⁰⁷ The tribunal may determine which party bears the legal costs incurred by the parties in the arbitration.²⁰⁸

198. *Id.* arts. 7.3, 6.3. If the parties strike all three names or fail to return the list, the appointing authority designates the arbitrator. Art. 6.3.

199. *Id.* art. 12.1.

200. *Id.* arts. 16.1, 17.2.

201. *Id.* art. 24.

202. *Id.* arts. 24.3, 25.5. If a party wishes to present witnesses, it must give notice at least 15 days before the hearing to the other party of the names and addresses of the witnesses and the subjects upon which the witnesses will give their testimony. *Id.*

203. *Id.* art. 28.2.

204. *Id.* art. 28.3.

205. *Id.* art. 1. Article 1 of the UNCITRAL Arbitration Rules gives the parties the power to modify the Rules to provide, *inter alia*, for time limitations of the arbitration and for such other procedural changes as deemed appropriate.

206. *Id.* art. 32.2.

207. *Id.* art. 39.2. If an appointing authority designated by the parties has issued a fee schedule for arbitrators in international cases, the tribunal is required to take the schedule into account, but may deviate from it to the extent deemed appropriate.

208. *Id.* art. 40.1. The rules permit the tribunal to act as an *amiable compositeur* or to decide the case *ex aequo et bono*, but only if the parties have expressly authorized the tribunal to do so, and if the law applicable to the arbitral procedure permits such form of arbitration. *Id.* art. 33.2. Nonetheless, the rules require the tribunal in these cases to decide the dispute in accordance with the terms of the contract, taking into account the usages of trade. *Id.* art. 33.3.

The ICC rules likewise permit the arbitral tribunal to act as an *amiable com-*

The UNCITRAL rules allow the joint venturers great flexibility. The rules permit the joint venturers to select the arbitral tribunal, the place of arbitration (either China or another country), and the language of arbitration, and also provide international arbitral procedures acceptable to most industrialized nations.

D. Enforcement of arbitral award

Arbitration procedures are meaningless in practical effect if there are no means of enforcing the arbitral award. China's joint venture law is silent on the question of enforcement, providing only that disputes between the parties may be settled through arbitration. Thus, enforcement depends upon treaties, the laws of the country in which the arbitration takes place, and the cooperation of the parties.

1. *China*. In China, a FETAC arbitral award has the force of law.²⁰⁹ The CCPIT has stated that if a FETAC award is not executed by the responsible party within a fixed time, the other party may petition the Chinese courts to enforce the award in "accordance with law."²¹⁰ However, it is not clear what laws apply and whether the enforcement would simply be an *ad hoc* application to the court for relief.²¹¹ China's trade agreement with the United States provides that China will seek to ensure that arbitration awards entered in China, the United States, or other nations in disputes covered by the trade agreement are recognized and enforced by its competent authorities "in accordance with applicable laws and regulations," but, as noted above, the existence of applicable laws and regulations in China (apart from the Trade Agreement itself) is uncertain.

To date, China is not a member of any international convention (such as the New York Convention) for the enforcement of

positur. ICC Rules, art. 13.4, *supra* note 178. The Zurich rules permit the arbitrators to decide *ex aequo et bono*. Zurich Rules, art. 18, *supra* note 136.

209. Jen and Liu, *supra* note 30, at 269; Luk, Sawyer and Silkenat, *Legal Institutions in China 1979: Report of the Delegation to China of the Association of the Bar of the City of New York and the Council of New York Law Associates*, 35 REC. ASS'N OF THE BAR OF THE CITY OF NEW YORK 106, 117 (1980).

210. Jen and Liu, *supra* note 30, at 269.

211. In December 1979, FETAC officials minimized enforcement problems, stating:

In the twenty years and more since the founding of New China, there has never been a single [FETAC] case that has to be enforced by the People's Court. The Chinese foreign trade * * * enterprises are state-owned enterprises. They respect the arbitration awards. Where it is their obligation to execute an award, they will do it themselves. Jen and Liu, *supra* note 30, at 269; see also Liu Yiu-Chu, *Arbitration in the People's Republic of China*, CHINA BUS. REV., May-June 1977, at 12, 14.

awards made by arbitral tribunals in other nations.²¹² Thus, apart from treaties or trade agreements with other nations, there are no international obligations imposed upon China to enforce foreign arbitral awards.²¹³

2. *United States.* The China-U.S. Trade Agreement provides that the United States will seek to ensure that arbitral awards in either country are recognized and enforced by competent authorities in the United States.²¹⁴

As discussed previously, the Federal Arbitration Act permits any party to the arbitration, including the Chinese party, to apply to the United States federal district court for an order confirming the award at any time within one year after the award is made.²¹⁵ Thus, an arbitration in New York under the AAA rules, or under any other rules, involving a Chinese and an American joint venturer would be subject to the Federal Arbitration Act, provided the parties establish that their joint venture contract possesses the requisite jurisdictional nexus with United States foreign commerce.

The United States is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "Convention"). Under the Convention, each contracting state will recognize written agreements to arbitrate disputes and will "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."²¹⁶ Thus, a court in the United

212. The same FETAC officials, referring to foreign arbitral awards, stated:

Chinese corporations and enterprises will execute foreign arbitral awards so long as they are fair * * * and not in violation of the Chinese laws and policies. In the case of non-execution, the party requesting enforcement of the award may petition the relevant government departments of China or the China Council for the Promotion of International Trade to push the enforcement or appeal to the Chinese court to enforce it in accordance with law. Jen and Liu, *supra* note 30, at 269.

213. The Chinese-Japanese Trade Agreement, for example, provides that "both signatory countries are held responsible for the execution of arbitration rulings by concerned organs under terms provided for under the laws of the country being sought to make the ruling" People's Republic of China-Japan Trade Agreement dated January 5, 1974, 13 INT. LEGAL MATS., 872, 874 (1974). Thus, a foreign joint venturer that arbitrates a dispute with a Chinese venturer in Japan under the rules of the JCAA can obtain enforcement in China under the provisions of the Japanese Trade Agreement.

214. Article VIII, § 3, Trade Agreement, *supra* note 14.

215. 9 U.S.C. § 9 (1976); text *supra* note 99.

216. The Convention is reprinted in 9 U.S.C.A. (annual pocket part, 1981) at 134, and is implemented by the United States Arbitration Act, 9 U.S.C. §§ 201-208 (1970), which provides for enforcement of the Convention in the federal courts. *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032, 1037-38 (3d Cir. 1974); *Sumitomo Corp. v. Parakop Compania Maritime*, 477 F. Supp. 737, 740-41 (S.D.N.Y. 1979), *aff'd without opinion* 620 F.2d 286 (2d Cir. 1980). See generally Sanders, *A Twenty Years' Re-*

States has jurisdiction to enforce an arbitral award against a United States participant in a Chinese joint venture, where the award was entered against the United States party by an arbitral tribunal in England, Japan, Sweden, Switzerland, or any other signatory country, upon application by the Chinese joint venturer to the district court.²¹⁷ Under the Convention, the United States court may not question the integrity of the award unless the party against whom enforcement is sought proves specified fundamental infirmities in the arbitral proceedings, such as that the party was not given proper notice of the proceedings, or that the award has been set aside by a competent authority in the country in which the award was made, or that the enforcement of the award would be contrary to United States public policy.²¹⁸

The Federal Arbitration Act and the Convention permit enforcement of an arbitral award against citizens of nations, such as China, which have not signed the Convention, if those citizens participate in arbitral proceedings in one of the signatory countries and therefore become subject to, or receive the benefit of, the award. Thus, if an arbitral award is entered against a Chinese venturer in Sweden, the foreign joint venturer, whether American, Japanese, or a citizen of another signatory nation, may seek enforcement of the award against such assets of the Chinese joint venturer as may be found in the United States.

E. Litigation between joint venturers

The Chinese joint venture law does not preclude litigation in China between the joint venturers as a means of resolving disputes. In December 1981, the National People's Congress adopted a new civil procedural law which will regulate trial and enforcement procedures in China's emerging commercial court system (i.e., economic tribunals of the People's courts).²¹⁹ The

view of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 INT'L LAW. 289 (1978).

217. Compare *Imperial Ethiopian Gov't v. Baruch Foster Corp.*, 535 F.2d 334 (5th Cir. 1976). The other signatories to the Convention, listed at 9 U.S.C.A. § 201, include Austria, Belgium, Denmark, Egypt, France, Greece, Hungary, Israel, the Netherlands, Norway, the Philippines, Romania, and the Union of Soviet Socialist Republics.

218. Convention, *supra* note 216, art. V. The public policy limitation on enforcement of arbitral awards is construed narrowly, and is applied only where enforcement would violate the forum state's most basic notions of morality and justice. E.g., *Fotochrome, Inc. v. Copol Company, Limited*, 517 F.2d 512, 516 (2d Cir. 1975); *Parsons & Wh. Ov. Co., Inc. v. Societe G. De L. Du P. (R.)*, 508 F.2d 969, 973-74 (2d Cir. 1974).

219. Memorandum dated December 8, 1981, to members of the National Council for United States-China Trade, at 2. At the date this article goes to press, the official text of the new civil procedural law has not yet been made generally available; however, the Memorandum describes its basic terms.

new law contains special civil procedure provisions for litigation involving foreign organizations.²²⁰ It appears that the law will be put into effect for a trial period, then revised and submitted again to a later session of the National People's Congress.²²¹ However, until the new procedural law becomes settled, with clearly defined jurisdictional guidelines, litigation between the joint venturers in the Chinese courts may not be practical.²²²

Provided that jurisdiction can be obtained over the Chinese joint venturer or its assets, the foreign joint venturer may be able to bring suit against the Chinese joint venturer in federal or state courts of the United States. The China-United States Trade Agreement, while providing that each country will enforce arbitral awards, does not contain any provisions concerning the enforcement of court judgments. Litigation, apart from its normal risks, thus becomes the most uncertain means of resolving disputes between the joint venturers. Also, since litigation is often perceived as less friendly than arbitration, it may permanently end the good will between the parties.

III. DISPUTES WITH THIRD PARTIES IN CHINA

Equally vital to the profitability of a joint venture are the procedures in China for resolving disputes between the joint venture and third parties such as labor unions, suppliers, and governmental agencies, and disputes arising under maritime law.

A. Labor

The People's Republic has adopted special joint venture labor regulations.²²³ The joint venture must enter into a labor con-

220. *Id.*

221. *Id.*, at 3.

222. For a description of China's developing commercial court system, see Allan and Palay, *China Law*, *China Bus. Rev.*, Nov.-Dec., 1981, at 44-48. *Ren, supra* note 40, states at 6-7:

The economic tribunals of our people's courts have not been started long. According to need and possibility, they are progressively conducting hearings on cases involving . . . disputes arising from contracts, concluded between domestic corporations and enterprises, credits and loans, insurance, environmental protection, industrial property and so forth; . . . economic and trade disputes involving a foreign party. Generally, economic and trade disputes involving a foreign party shall be dealt with by the economic tribunals of medium people's courts . . . [T]he ruling made by the economic tribunal of a medium people's court on an economic or trade case involving a foreign party can only be submitted for appealing to the superior court at provincial, municipal or autonomous regional levels. Judgment made by the superior court is final and no further appeal is allowed.

223. Regulations on Labor Management in Joint Ventures using Chinese and Foreign Investment adopted at the Fifteenth Session of the National People's Congress Standing Committee of August 26, 1980 [hereinafter cited as Labor Regulations].

tract with the trade union organization that is formed in the joint venture. A relatively small joint venture may make individual labor contracts with staff members and workers. In each case, however, the contract must pertain to such matters as employment, dismissal, tasks of production, wages, working time, labor insurance and welfare, and labor discipline.²²⁴ The labor contract, when signed, must be submitted to the labor management department of the provincial, autonomous regional, or municipal people's government for approval.²²⁵

The Labor Regulations provide that labor disputes occurring in the joint venture should be solved by consultation by both parties.²²⁶ Of course, this presupposes that management has agreed on a position with respect to the labor dispute, and that among the Chinese and foreign members of the management there is no difference of opinion which must itself be arbitrated.²²⁷ If management fails to resolve the dispute, either management or labor may request arbitration by the labor management department of the province, region, or municipality where the joint venture is located.²²⁸

It is not clear from the Labor Regulations whether the labor management department's arbitration rules, such as may exist control the arbitral procedure, or whether arbitral rules agreed upon by the parties, or imposed by some other Chinese governmental agency, are to be used. Nor do the regulations provide for enforcement of the arbitral award, though presumably the labor management department would be able to require compliance by the Chinese parties.

The Labor Regulations provide that a party that does not agree to the arbitration may file suit in the People's court.²²⁹ This procedure, however, is fraught with uncertainties. First, it is unclear whether the suit is to prevent arbitration or to appeal the award. Second, it is unclear what procedures would be followed

224. Labor Regulations, art. 2, *supra* note 223.

225. *Id.* Also, the Joint Venture Law provides that "[p]rocedures covering the employment and discharge of the workers and staff members of a joint venture shall be stipulated according to law in the agreement or contract concluded between the parties to the venture" (emphasis supplied). Joint Venture Law, art. 6, *supra* note 7.

226. Labor Regulations, art. 14, *supra* note 223.

227. A joint venture labor dispute may become particularly divisive if the Chinese management takes sides with the Chinese laborers against the interests of the foreign investor.

228. *Id.* Apart from labor disputes affecting the work force as a whole, the regulations provide that the trade union may object to the dismissal or punishment of individual workers if it considers these actions unreasonable. The trade union seeks to resolve its objections through consultation with the board of directors. Failing a solution, the union may arbitrate the dismissal or punishment in the same manner as it would a trade dispute. *Id.* art. 6.

229. *Id.* art. 14.

by the court, and whether the court would have jurisdiction to compel either workers or management to perform the contract or to award damages. Finally, ambiguity exists as to whether there could be any appellate review of the court's decision.

In labor disputes, the People's State Bureau of Labor has the sole right to interpret the Labor Regulations, thus removing any issue concerning interpretation of the regulations from arbitration or court proceedings.²³⁰ In negotiating the joint venture's labor contract, detailed attention to the conditions for employment and termination would therefore be the most important dispute resolution procedure.²³¹

B. Suppliers

In December 1981, the National People's Congress adopted an economic contract law, which will become effective July 1, 1982.²³² The economic contract law will govern the relations between joint ventures and their suppliers in China.²³³ It specifies how contracts are formed, the terms that should be included in the contract, and the right to and extent of an award of damages for breach of the contract.²³⁴ The law applies to all day-to-day contracts which a joint venture may be expected to enter with persons or enterprises in China, including contracts for electric power, freight transportation, processing materials, the construction of facilities, and the purchase and sale of goods, as well as to bank loans, property insurance contracts, scientific and technological cooperation agreements, and lease contracts.²³⁵

If there is a dispute between the parties to the contract, the law requires the parties to consult with each other "on time" in

230. *Id.* art. 15.

231. The regulations imply that disputes arising from the employment of foreign workers and staff members are not subject to the regulations' arbitration procedures, providing that the employment, dismissal, resignation, pay, and welfare programs of foreign employees should be stipulated "in the employment contracts," which presumably are separate from the labor contracts signed with the trade union for the other workers. *Id.* art. 12. However, since the regulations do not state that they apply only to Chinese employees, the Chinese may contend that the regulations also apply in their totality to foreign workers of the joint venture.

232. PRC Economic Contract Law adopted December 13, 1981, art. 57 [hereinafter cited as "Contract Law"].

233. An economic contract is an agreement between legal persons for achieving a certain economic purpose and defining each person's rights and obligations. Contract Law, art. 2.

234. *Id.*, arts. 3 to 5, 9 to 11 (formation); arts. 12, 13, 17 to 26 (terms); arts. 32 to 47 (right to and amount of damages).

235. *Id.*, art. 8. Economic contracts are invalid where, inter alia, they (1) violate Chinese laws, state policies and planning; (2) violate state interests or public interests of society; (3) were assigned by means of deception and under coercion; or (4) were signed by an agent who exceeds his authority. Art. 7.

order to settle the disagreement.²³⁶ If the parties fail to settle, any party may request the state entity governing the contract for mediation or arbitration.²³⁷ However, the party seeking mediation or arbitration must submit the request within one year from the date when it knew, or should have known, that its rights were infringed.²³⁸ The state entity will not handle any case if the request is submitted after the expiration of the prescribed period.²³⁹ If an agreement is reached after mediation, the law requires the parties to implement the agreement.²⁴⁰

If the dispute proceeds to arbitration, the state entity issues a written final judgment.²⁴¹ If either party is not satisfied with the terms of the judgment, it may bring suit in the People's court within 15 days after receipt of the judgment.²⁴² This is an extremely short limitations period; if no suit is brought within the period, the adjudication is then "legalized,"²⁴³ which presumably means that it becomes final.

In the alternative, a party that does not wish to arbitrate the dispute may bring suit in the People's court.²⁴⁴ The new law does not provide a statute of limitations for bringing suit; thus, the party would have to risk that bringing suit within the one year permitted by the law for initiating arbitration would be deemed timely.

While silent on specific performance or other temporary or permanent injunctive relief, the economic contract law clearly provides for enforcement of a money award contained in a written mediation agreement, arbitration judgment or court verdict.²⁴⁵ If the losing party fails to pay the award within the "prescribed" time limit, which is not defined, the law provides that the People's banks, specialized banks, and credit cooperatives may deduct pay-

236. *Id.*, art. 48. The law does not specify what period satisfies the "on time" requirement.

237. *Id.*, art. 48.

238. *Id.*, art. 50.

239. *Id.*

240. *Id.*, art. 49.

241. *Id.* If part of an economic contract is held invalid, and if the remaining portion's validity is not thereby affected, the balance of the contract would still be valid and, presumably, enforceable. Art. 7.

242. *Id.*, art. 49.

243. *Id.*

244. *Id.*, art. 48.

245. *Id.*, art. 52. If a contract is declared invalid, the "party concerned"—presumably the party causing the invalidity—must return the property that it has acquired under the contract. Art. 16. Further, if both parties purposely sign a contract that violates state interests and the public interest of society, the property derived by each party from the contract will be seized and turned over to the government treasury. *Ibid.* Thus, it is important at the outset to ascertain, and obtain, all necessary governmental approvals for entry into a supply contract, lest there later be a substantial forfeiture.

ments from that party's accounts, or transfer funds from such accounts to make payments.²⁴⁶ However, the banks or financial institutions are not authorized to make this deduction or transfer until they receive notice from the court requesting them to implement the judgment.²⁴⁷ Therefore, it appears necessary for the aggrieved party to file an application with the court for an order directing the bank or cooperative to make the deduction, before these financial institutions would be entitled to do so.

Under the new Chinese economic contract law, resort to judicial proceedings by the joint venture may be a practical remedy. This will depend to a large extent upon the final provisions of the new civil procedural law, referred to above.²⁴⁸ It is unclear what specific arbitration rules will be applicable; however, it may be possible for the parties to specify these rules in their contract.²⁴⁹ The Foreign Economic and Trade Arbitration Commission (FETAC), because its jurisdiction is limited to disputes arising from transactions in foreign trade, probably would not be able to arbitrate a dispute between a joint venture and a local Chinese supplier.²⁵⁰

For disputes with foreign suppliers who deliver goods into China, the new economic contract law provides that regulations governing foreign economic contracts will be formulated separately with reference to the principles set forth in the new economic contract law and by international practice.²⁵¹ In any event, it is clear that the joint venture will now have defined remedies in litigation and arbitration, in addition to the use of the Chinese joint venturer's influence, to obtain a resolution of local supplier disputes.

C. Government

In China, disputes with the government are customarily resolved through negotiation, and it does not appear possible, given the present state of law, to bring suit against the government in the

246. *Id.*

247. *Id.*

248. *Supra*, n. 219.

249. A CCPIT official has stated that arbitration used by a Chinese joint venture to resolve disputes with local entities can be administered by China's Commission on Trade and Commerce, by economic commissions at all levels of government, or by one of China's industrial and commercial bureaus, but the nature of the arbitration is unclear. Interview with Ren Jianxin, director of the CCPIT Legal Department, and Tang Houzhi, chief of the CCPIT Arbitration Section, and other CCPIT officials, Beijing, China, January 23, 1980, by the legal delegation from the National Council for US-China Trade. The report of this interview is on file at the National Council for US-China Trade, 1050 Seventeenth Street, Washington, D.C.

250. Decision of Administrative Council, para. 1, *supra* note 63.

251. Contract Law, art. 55.

People's courts. Nor is it likely under existing Chinese practice that the government would be willing to arbitrate any dispute with the joint venture involving a governmental policy, such as repatriation of capital. Thus, it is best to resolve any uncertainties in advance while negotiating the Foreign Investment Commission's approval of the joint venture agreement.

D. Maritime disputes

The Maritime Arbitration Commission, established in 1958 within the CCPIT, takes jurisdiction of disputes in China arising from collisions between seagoing vessels, salvage claims, charters of seagoing vessels, and carriage by sea under bills of lading or other shipping documents, as well as disputes arising from maritime insurance.²⁵² The jurisdiction of the Maritime Arbitration Commission, like that of the FETAC, is limited to resolving disputes where the parties have agreed in writing, before or after the dispute, to submit it to the Maritime Arbitration Commission for settlement.²⁵³ The rules of the Maritime Arbitration Commission are nearly identical to those of the FETAC. If the parties do not agree to maritime arbitration, it is not clear what procedures, if any, will be available to them in a Chinese court.²⁵⁴

IV. SUMMARY AND CONCLUSIONS

A mere stipulation in the joint venture agreement that the parties will submit their dispute to resolution under the rules of a specified arbitral tribunal or at a specified place may not only have significant procedural consequences, but may result in a waiver of substantial procedural rights if the parties are not fully conversant with the rules and applicable laws of the forum.

The basic provisions to be considered in drafting a Chinese joint venture arbitration clause are the methods of selecting the arbitrators, the scope of judicial review of the arbitrators' decision, the types of evidence that will be considered by the arbitrators, the enforceability of the arbitral award, the potential costs of the arbitration, the location of the arbitration proceeding, the time within which an award must be made, and the language of the arbitration. Undoubtedly the negotiators of particular joint venture agreements may deem other arbitration procedures equally as im-

252. Provisional Rules of Procedure of the Maritime Arbitration Commission of the China Council for the Promotion of International Trade adopted January 8, 1959 [hereinafter cited as Maritime Rules], Rule 2.

253. Maritime Rules, Rule 3, *supra* note 252.

254. See the discussion of possible Chinese maritime litigation in the People's courts (and the role of the Chinese port authority in settling maritime disputes) by Dicks, *Some Aspects of Maritime Law*, in *LAW AND POLITICS IN CHINA FOREIGN TRADE* (Victor Li, ed. 1977), at 263 *et seq.*

portant and will wish to tailor their arbitration clauses accordingly, but in each instance the provisions listed in this article should be given primary consideration. This article has focused upon these important aspects of arbitration procedure.

In addition, the foreign joint venturer will wish to consider carefully how the joint venture's contracts with Chinese suppliers may be affected by the arbitration procedures set forth in China's new economic contract law, and how any subsequent court proceeding will be affected by China's new civil procedure law. These considerations often may be unique to the particular joint venture agreement.

The foreign investor in a Chinese joint venture will find that by giving substantial attention to dispute resolution procedures beforehand, it will have taken a significant step toward securing its investment.