MANAGING DISPUTES BETWEEN US & CHINESE FIRMS

by

Hayley Henley

Submitted in partial fulfillment of the

requirements for Departmental Honors in

the Department of Finance

Texas Christian University

Fort Worth, Texas

May 7, 2018

MANAGING DISPUTES BETWEEN
US & CHINESE FIRMS

Project Approved:

Supervising Professor: Robert Rhodes, J.D., LL.M.

Department of Management, Entrepreneurship, and Leadership

Paul Irvine, Ph.D.

Department of Finance

ABSTRACT

This thesis was undertaken to evaluate the avenues that US firms have at their disposal when seeking to manage commercial contract disputes with Chinese companies. As the level of trade between these two nations continues to rise, there is an increasing amount of capital at risk, and it is imperative that US firms have a reliable means of recovering damages from their Chinese counterparts. The goal of this project was to provide a holistic view of the options available, and to arrive at a recommendation that provides value to both attorneys and businesspeople. Relevant case law, national law, treaties, and law reviews were analyzed to determine the most effective means of resolving disputes. Ultimately, the study found arbitration to be the most attractive avenue, though pursuing litigation in China can also be effective in some cases.

Introduction

In every business transaction, there is an inherent degree of risk. For every opportunity that an exchange can produce a profit, there is inevitably a possibility that things will go awry. The smart company will not only be excited about the potential, but will purposefully and effectively manage the risk involved. The core of this paper is about mitigating such risks.

When a business transaction is domestic, meaning that both parties reside in the US, the risk involved is more easily managed than that of an international transaction. Assume there is a domestic (US) transaction and one of the parties breaches the contract. Also assume that one of the parties has been financially harmed. Should the harmed party initiate a lawsuit, and win, there still exists the issue of enforcing the judgment. In the US, the Full Faith & Credit Clause requires that each state enforce judgments from its sister states.[1] So, assuming that the judgment is from a different state from the state where the defendant resides, the US guarantees relatively easy enforcement, thereby diminishing the risk involved in a domestic contract.

However, should the other party to the contract reside outside the US, the risk becomes infinitely greater. There exists no international equivalent to the Full Faith and Credit clause, meaning, should a transaction that crosses national lines go awry, that there is no guarantee that a foreign court will actually enforce a judgment issued in the US The purpose of this paper is to explore how US firms can best manage this risk involved with

1. U.S. Const. art. IX, § 1

international transactions, specifically those transactions involving China, its largest trading partner.

International Environment Surrounding the Enforcement of Foreign Judgments

As international trade skyrockets and the world's economies become increasingly interdependent, legal disputes that cross national borders are more common than ever. Considering the billions in capital that are tied up in international contracts, having a reliable means of settling claims across borders is critical. The traditional means has been litigation, but achieving justice through the courts is complex when more than one nation is involved. Even if a plaintiff receives a favorable judgment in his home country, it is not guaranteed that the court of the defendant's home country will enforce that judgment. It is worth noting that enforcement of foreign judgments generally pertains to commercial matters, as most nations prefer extradition to enforcement when dealing with criminal cases.[2] The ability to have judgments enforced, should a deal go south, impacts the decisions firms make about whether to invest internationally. As goods, services, and capital cross national borders more than ever before, we must answer this question: what obligations does a country have to honor the judgments or arbitral awards of another country? [3]

Bilateral Treaties

The most concrete of these obligations come in the form of bilateral treaties, often called reciprocal recognition treaties. These agreements, entered into by two countries,

2. Ralf. "Recognition and Enforcement of Foreign Judgments."
3. Ortiz-Ospina and Roser, "International Trade."

state the conditions under which they will honor one another's judicial decisions. Bilateral treaties are normally reached between nations with similar ideological backgrounds, as their legal systems are more likely to be comparable.[4] In cases where such a treaty applies, the decision of the foreign court is taken as law, so long as a few base requirements are met. The most common of these requirements is that the court where the decision was issued had jurisdiction, though which country's definition of jurisdiction is to be used varies by treaty.[5]

Knowing that judgments will be automatically enforced takes away one of the many uncertainties involved in international trade. So, as competition for foreign investment and trade becomes increasingly fierce, it is no surprise that the number of reciprocal enforcement treaties is on the rise.[6] France has over forty such treaties; China thirty-three, though none with its largest trading partners.[7] However, the United States is not party to any such treaty. It would be easy to assume that this is solely the decision of the United States, but the most pressing reason for a lack of enforcement treaties is actually that other nations view US liability awards to be excessive.[8]

Comity

In the absence of a bilateral treaty, whether a country will impose a foreign judgment depends largely on whether it subscribes to the principle of comity and, if so, how it chooses to implement this principle. Comity, which underlies almost every case in

4. Ralf. "Recognition and Enforcement of Foreign Judgments."
5. Ibid.
6. Sprengel "Enforcement of Foreign Judgments."
7. Ibid.
8. "Enforcement of Judgments." U.S. Department of State.

which one country enforces a judgment issued in another, is loosely defined as the mutual recognition of legislative, executive, and judicial acts.[9] The idea of comity originated in the Dutch Republic of the 1600s, when Ulrich Huber used the phrase "*comitas gentium*", which means "civility of nations", to justify applying foreign law. Then, comity was a decision freely made by one state out of respect for the sovereignty of another. Its interpretation in the US has evolved over the centuries from a courtesy to an obligation and, according to Joel R. Paul, is now mostly a principle of respect for market forces, rather than other nations.[10] In 2007, a court noted of comity that "[a]lthough comity eludes a precise definition, its importance in our globalized economy cannot be overstated."[11] Comity, as implemented in the US, has allowed a nation with no binding reciprocal enforcement treaties to be considered as legally secure a trading partner as one can have.

Generally, if a foreign judgment is not in direct conflict with American law, and the original court had proper jurisdiction, a US court will almost certainly enforce it. The exact requirements for enforcing foreign judgments are decided by each of the states, but there is little material difference between any two states' policies in practice. The Uniform Foreign Money Judgments Act (UFMJ), first written by the Uniform Law Commission in 1962, has now been adopted by thirty-two US states.[12] The act gives five main criteria that need to be satisfied in order to uphold the principle of comity. The court where the judgment was issued must have had both personal and subject matter jurisdiction, and must

9. Garner, ed. *Black's Law Dictionary*.
10. Paul, "The Transformation of International Comity."
11. Dodge, "International Comity in American Law."
12. "Uniform Foreign Money-Judgments Recognition Act." Proceedings of National Conference of Commissioners on Uniform State Laws

be part of an impartial system that recognizes due process. The judgment itself must not be fraudulent, contrary to any previous agreement between the parties, or repugnant to the policy of the US state where enforcement is sought. To even be considered for enforcement, the foreign judgment must be "final, conclusive, and enforceable where rendered".[13] One of the questions not answered in the text of the statute is whether to use the American requirements for jurisdiction, or those of the country in which the judgment was issued. In practice, courts have normally upheld using the foreign jurisdiction requirements, so long as they are not drastically different from those of the US Most other nations also rely on some derivation of the principle of comity when a bilateral treaty does not exist, though they may not describe it as such. The United Kingdom, for example, has similar criteria to the US for enforcing judgments not bound by any treaty or agreement, though they generally refer to this as a "doctrine of obligation".

Multilateral Agreements

Between the explicit bilateral treaties and evasive principle of comity, there are multilateral conventions, which represent agreements between three or more nations regarding the enforcement of judicial decisions. The 20th century has seen a shift toward these sorts of treaties, beginning with the post-WWII push for international cooperation, and continuing with globalization, and the rise of international trade. The most important of these are the Hague Convention on Choice of Court Agreements, and the Brussels Convention and ensuing Brussels Regulation.

13. Florida Code §55.603 (2017)

The Hague Convention, which was completed in 2005 and entered into force in 2015, was the product of the Hague Conference on Private International Law.[14] It is a convention on choice of court agreements in commercial cases and is the most widely accepted multilateral treaty in this area, having thirty-three signatories, including the US and China (though neither of them have ratified the convention).[15] The convention provides a framework for forum selection clauses, which are sections of a contract that designates where the parties will resolve any disputes that arise between them. If a forum is specified by the contract, the convention gives that forum jurisdiction over the case, and requires that any other party to the convention must enforce the judgment reached by the designated court.

A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

Comparisons have been drawn between the Hague Convention in the litigative realm and the New York Convention, which will be discussed later, in the arbitral one, as both are attempts to reduce legal uncertainties in the interest of promoting international trade. Unfortunately, the Hague Convention has been unable to achieve the widespread acceptance that has made the New York Convention so effective, and the world remains without a uniform framework for forum selection and the enforcement of judgments.

---

14. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Hague Conference on Private International Law
15. "Status Table: Statute of the Hague Conference on Private International Law."

It is worth noting that the majority of Europe has, for the past five decades, had some form of agreement on the mutual enforcement of judgments. In 1968, the Brussels Convention was signed by all members of the European Economic Community, obligating the mutual enforcement of civil and commercial judgments among those six members (the convention now applies to all fifteen nations who were members of the European Union before 2004).[16] Its requirements for enforceability are similar to those of the UMFJ, though its enforcement procedure allows for more examination than those outlined in most bilateral treaties. The United Kingdom acceded to the Brussels Convention in 1978. In 2001, the European Union passed the Brussels I Regulation, largely superseding the Brussels Convention. A recast version of this legislation was adopted by the EU in 2012, meaning that the most current form of Europe's multilateral enforcement treaty applies to 27 nations.[17] The contents of the Brussels Convention, Regulation, and Recast Regulation regulate not only the enforcement of judgments, but also jurisdiction. There are no huge differences between them, only changes made to modernize the legislation and expedite the enforcement process. Inter-European trade is less risky than other international because of the Brussels Regulation being well-enforced. As part of the Brexit negotiation process, the UK will have to either negotiate a bilateral treaty on jurisdiction and enforcement with the EU, or allow itself to be governed by the Brussels Convention, which is not restricted to EU members. There could be serious impacts on trade with the UK if European firms can no longer be sure that their judgments will be enforced by a British court.

Environment Surrounding International Commercial Arbitration

16. Résimont" Jurisdiction and Enforcement of Judgments Post-Brexit: State of Play."
17. Ibid.

Though litigation is the traditional route to solving commercial disputes, increasing global trade and the prominence of nations like China, which lack reliable avenues to enforce foreign judgments, have precipitated the need for an alternative. International commercial arbitration has arisen as a more privatized choice for resolving transnational disputes. Arbitration offers, in many cases, a higher level of enforceability, giving firms greater capital security for cross-border investments.[18] This enforceability arises from both the higher level of control granted to firms in arbitration setting, as well as the more widely acceded to body of international law surrounding the enforcement of arbitral awards. Separate from bilateral or multilateral treaties on the enforcement of judgments, there are a large number of conventions and treatises on the mutual enforcement of arbitral awards.

The most influential of these is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly called the New York Convention.[19] According to the Renaud Sorieul, secretary of the UN Convention on International Trade Law, the New York Convention is "the cornerstone of the international arbitration system".[20] Originally passed in 1958, the convention was ratified by the US in 1970, and by China in 1987. There are now at least 153 nations who are members of the New York Convention, making it the most widely accepted codification of the arbitration process, as well as one of the most universally impactful treaties in force today. Because of the New York Convention, almost every nation has a common legal framework for

18. *Corporate Choices in International Arbitration: Industry Perspectives*.
19. "The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958."
20. *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

enforcing arbitral outcomes, allowing for a consistency not found anywhere outside the EU for litigative outcomes.[21]

The convention outlines the circumstances and process by which a member of the convention must enforce the arbitral awards of another member of the convention, and the cases in which it can refuse to do so. Notably a nation may to refuse to enforce an award if "The recognition or enforcement of the award would be contrary to the public policy of that country."[22] One of the most famous refusals to enforce an award came in the case of *United World vs. Krasny Yakor,* in which a Russian court refused to enforce an amount awarded by the ICC in Paris. They decided that the award was so large that it would force the Russian firm into bankruptcy, negatively affecting the Russian economy and, thus, public policy.

Despite the liberal terms of the convention itself, some nations, the US and China included, have attached restrictions to their participation in it. The US restrictions are similar to the Chinese policy of reciprocity: the US will only enforce awards from nations who are also signatories of the convention, or who have shown that they would enforce awards from the US China's restrictions are even more far-reaching, only allowing the convention to apply to awards that both come from another signatory nation and arise from a relationship that can be considered commercial under Chinese law.[23] Despite the restrictions, and despite its being an unprecedented piece of international law, the New

21. Davidson, Amanda. "The New York Convention 1958 Half a Century On: Is It Still Effective?"
22. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, § 5-2 (UNCITRAL 1958).
23. Gregory and Chiu. "Enforcing Foreign Arbitral Awards in China: Commercial International Arbitration Clauses in U.S.-China Contracts."

York Convention had achieved, by a 2013 estimation, a 90% success rate for the enforcement of arbitral awards.

Price Waterhouse Cooper conducted a survey to examine the success of international commercial arbitration in various industries. It found that multinational corporations are investing more than ever in in-house arbitration services, seeing it as the preferred mechanism for resolving international disputes. The number one fear among legal departments, though, was the "judicialization of arbitration", which corporations see as threatening the relative freedom and lack of regulation that have characterized the arbitration space up to this point.[24] Their fears seem to be becoming reality, with the increasing adherence to the New York Convention and other international agreements like it bringing more structure to arbitration than ever before. What is not clear is why this is seen as a negative, as any measure of reliability and consistency concerning legal outcomes and their enforcement eliminates capital risk, making the profits of multinational corporations more secure.

Methodology & Plan for Completion of Project

This paper seeks to explore the best ways to mitigate a certain type of risk in a specific category of transactions. The risks are those posed to the capital of US firms by the failure of foreign courts to enforce judgments from either a traditional litigation process, or from arbitration. The transactions we are concerned with are those of a commercial nature between the United States and China. To advise US firms on how to best protect their interests in these transactions, this paper will analyze two main areas.

24. *Corporate Choices in International Arbitration: Industry Perspectives*.

First, we will explore the realities of the Chinese legal environment and the unique challenges it presents to a US firm, examining both historical and cultural factors, as well as relevant case law. Then, we will aim to determine whether the arbitral alternative is a viable one and, if so, provide the specific choices of forum, arbitration firm, and the like that will give a US company the best chances of success. This paper will also note where both litigation and arbitration seem to be headed, giving some indication of how our findings are likely to change in the coming decades. Our main goal will be to present a well-backed and practical recommendation on how to best lower risk when entering into a transaction with China, and to provide the empirical implications of lowering this risk on international trade.

The Chinese Legal Environment

Before exploring the unique challenges presented by entering into transactions with China, and attempting to recommend the best way of combating them, we must first understand the Chinese legal environment as it stands today. The constitution of the People's Republic of China (PRC), which was ratified in 1982, provides for a civil law system This means that decisions are based on codified statutes, rather than being impacted by prior judicial opinions, as is the case in common law countries like the US and UK The highest court of the land is the Supreme People's Court, which takes cases by choice, similar to the US Supreme court. Beneath it are the Higher, Intermediate, and Basic People's Courts, along with a system of specialized courts for trying specific types of

cases.[25] Applications to have a foreign judgment enforced are to be sent to the Intermediate People's Court of the proper jurisdiction.[26]

It is important to understand that the Chinese judiciary has been and continues to be used as a weapon and tool of the current regime. On a level far above the slowly evolving political leanings of the US Supreme Court, the decisions of Chinese courts have a tendency to be an extension of the policies favored by Beijing. This level of executive branch influence and politicization, combined with a civil law system which can ignore prior decisions, allows for similar cases to be met with incredibly divergent decisions.

Though criminal proceedings fall in outside the scope of this paper, it is also worth noting that the PRC is under almost constant fire from NGOs and other nations for the human rights violations perpetrated and allowed by its court system. State-run media and extensive vehicles for government supervision of the public allow for due process to be thrown out the window in some cases. There is a history in China of lawyers themselves being jailed for "subversion of state power" and similar charges. Over 200 have been detained in the past 2 years, and many have been subsequently convicted in trials that international community condemns.[27] The commercial side of the Chinese legal system is significantly less controversial, likely because the Chinese government would like to maintain its position as an economically powerful nation, and doing so requires some semblance of a fair court system.

25. "Legal System of China."
26. Tsang. "Chinese Bilateral Judgment Enforcement Treaties."
27. Rauhala and Denyer. "China Jails Yet Another Human Rights Lawyer in Ongoing Crackdown on Dissent."

China is widely seen as a challenging legal environment for businesses, both for some well-founded reasons and a few misguided ones. While corruption concerns and the inability to enforce a foreign judgment or successfully argue a case domestically are real, the current leanings of the regime are toward pragmatism, and the judiciary is showing signs of increasing its power. [28]For our purposes, it is best to more closely examine the challenges presented by the Chinese legal system specifically when seeking the enforcement of a judgment.

Litigative Avenues to Resolving Disputes with China

When seeking to resolve a legal dispute with a Chinese firm, or when structuring a contract that will guide the resolution of any problems that arise, litigative action is usually the first path that comes to mind. The US firm, who we assume is the plaintiff, might eschew the US legal system altogether and simply file suit against a Chinese defendant in a Chinese court. Alternatively, the firm might file a suit in a US court and, should it receive a judgment, seek to have that judgment enforced by a Chinese court. This is the path that would seem most logical, and the path we will discuss first.

Filing a Claim in the US

When seeking to understand why the Chinese legal environment presents such a challenge to US businesses in the realm of enforcement, it is important to begin by understanding China's principle of reciprocity. This principle is often seen as a controversial requirement for the enforcement of comity. Reciprocity asks whether there is

28. Taisu. "The Pragmatic Court: Reinterpreting the Supreme People's Court of China."

a precedent for mutual enforcement between two nations. Basically, would they do for us what they are asking us to do for them? China, when considering a judgment from a nation with whom they do not have a bilateral treaty, enforces foreign judgments based on this principle of reciprocity. While the US also uses this principle in determining whether or not to enforce a foreign judgment, it looks for presumed reciprocity, whereas China requires that reciprocity be factual.[29] Chinese enforcement law requires that the judgment in question "not violate basic principles of Chinese law, state sovereignty and security, or public interest", and that, critically, there be a factual history of reciprocity between the two states. Chinese courts have tended to take a skeptical view on the existence of reciprocity.[30]

In fact, December 2016 was the first time China had enforced a foreign judgment based on the rule of reciprocity rather than a bilateral treaty.[31] Several months later, a Chinese court recognized another judgment, this time from the US, also on the basis of reciprocity.[32] While this could easily be taken as a sign of turning tides, the specific circumstances of these cases say otherwise. The December 2016 judgment was from Singapore, and the enforcement was handed down by the Nanjing Intermediate People's Court (Jiangsu Court). The case itself was relatively minor, involving a Swiss and a Chinese firm, and was enforced by a low-level Chinese court. The second, US judgment that was enforced was that of the Wuhan case (*Liu Li v. Tao Li and Tong Wu).* While

29. Chong and Yang. "Chinese Court Enforces a Foreign Judgement for the First Time on the Basis of Reciprocity."
30. Tsang. "Chinese Bilateral Judgment Enforcement Treaties."
31. Poon. "First Time PRC Court Recognizes a US Court Judgment Based on Principle of Reciprocity."
32. Harris. "China Enforces United States Judgment: This Changes Pretty Much Nothing."

seemingly revolutionary, the case involved a dispute between two Chinese nationals over the sale of a US stock. The individuals involved were all PRC citizens and had a history of crime in China, giving the Wuhan courted strong incentive to enforce a judgment against them. The court found reciprocity based on the California district court's enforcement of a money judgment issued by the Higher People's Court of Hubei Province, leaving questions as to whether China now sees itself as having factual reciprocity with the US as a whole, or just California. Considering the set of circumstances that led to the enforcement, and the fact that there has not yet been another decision like it, we can draw no conclusions on whether the Wuhan decision represents a change in China's policy on foreign judgments.

Considering the previous discussion on the principle of comity, to which both nations subscribe, and China's additional requirement of reciprocity, it would seem logical that the US would enforce Chinese judgments based comity, thereby fulfilling China's requirement of reciprocity and creating a legal environment of mutual enforcement. In this environment, it would make sense for US firms to file suits against Chinese defendants in US courts, and seek enforcement in China. However, we have seen that this is not the legal reality. It would be unwise to chance millions or more in capital on the hope that a Chinese court would repeat an action it has taken exactly once (enforcing a US judgment on the basis of reciprocity), and even then, under a very specific set of circumstances. Though the Wuhan case might signal a softening in China's reciprocity requirement, we will not know for sure until decades from now.

Filing a Claim in China

Having established that attempting to have one's US judgment enforced by a Chinese court is a nearly useless endeavor, we will explore a second litigative avenue of

dispute resolution: filing a lawsuit directly in China. This avoids altogether the question of having a foreign judgment enforced, but presents a unique set of challenges. Without even digging into the data, one might guess that it would be more difficult to obtain a favorable judgment from a Chinese court than an American one. This does turn out to be true for several important reasons. First, the US party must contend with an entirely foreign legal system, meaning that obtaining a law firm well-versed in both the language and in Chinese law is paramount. Additionally, the US party should take care that the contract is written in Chinese and specifies China as the forum of choice.[33] This creates the greatest chance of securing a judgment, though there is still significant, if diminishing, cultural bias to contend with, as Chinese courts, especially local ones, are most concerned with economic benefit to their community.[34]

Should a US firm take this route and successfully secure a judgment from a Chinese court, it would then be concerned with the collectability of that judgment. The court decision makes no difference if the US firm never actually receives the funds or property it is said to be owed. Under China's Civil Procedure Law (CPL), execution of court decisions must be completed within one year of initiation.[35] This execution is usually carried out by a specific division of the Chinese court, though not every court has such a division.[36] The PRC was heavily criticized for a worryingly low execution rate (between 65 and 75 percent) for civil judgments beginning in the late 1980s. After updates to the CPL, the latest of which was in 2012, rates seem to have risen, though finding accurate

33. Harris. "China OEM Agreements: Why Ours Are in Chinese."
34. Cohen. "Settling International Business Disputes with China: Then and Now."
35. Chen, Li and Otto, eds. *Implementation of Law in the People's Republic of China*
36. Ibid.

statistics is near impossible. Foreign plaintiffs in particular face obstacles to collecting their judgments. The execution divisions of local courts are motivated to execute those judgments that benefit their province, but may be less quick to force collection when the capital will be going to a foreigner.

We mentioned above one of the reasons the US has no bilateral treaties regarding the mutual enforcement of judgments: US monetary judgments are usually far larger in size than those issued by other nations.[37] This means that even a successful lawsuit in China would yield, on average, a smaller jjudgmentthan a similar one in the US. However, the size of the judgment is less important than the amount of capital actually recovered, and we have established that filing in the US will almost certainly get you no money back, while filing in China offers at least a reasonable chance of a favorable resolution.

Filing a Claim in a Third-Party Nation

A third litigative avenue that should be mentioned is that of suing a Chinese firm via the court system of a third-party nation[38]. This option would be viable only in the specific circumstance that the Chinese firm has assets in the nation in question, and the third-party court accepts jurisdiction of the case[39]. Though this is a difficult set of requirements to fulfill, this avenue is becoming more useful as the economy globalizes, as Chinese firms now are more likely to have assets in several countries. For example, if a Chinese firm has assets in Korea, the US-based plaintiff could secure a money judgment

37. "Enforcement of Judgments." U.S. Department of State.
38. Harris. "Suing Chinese Companies for Product Liability."
39. Ibid.

in the US, convert it to a Korean judgment, and use that to collect against the Chinese firm's Korean assets.

The Viability of the Arbitral Alternative

Establishing the general inefficacy of attempting to litigate a dispute with a Chinese firm matters little if we are unable to offer a viable alternative. Fortunately, China has shown a high level of respect for the New York Convention, which it ratified in 1987.[40] This means that arbitral awards are, barring unusual circumstances, honored by Chinese courts. Because of this, arbitration as a means of dispute resolution between Chinese and foreign firms is on the rise. In 2014, 1,785 foreign-related cases were arbitrated in China, an 11.8% increase from the previous year[41]. This does not include cases involving Chinese firms that were arbitrated elsewhere. While arbitration seems to offer the most favorable chances of recovering damages from a Chinese company in the event of a dispute, there are some important choices which greatly impact the success a US firm has in its arbitration.

Choice of Forum

Once arbitration has been chosen as the method of resolution, should disputes arise, the next choice that must be made is one of location. Most arbitration agreements contain a "choice of forum" clause that is similar to what one would find in any other contract. Naturally, both parties would prefer to arbitrate on their own turf, where human bias and

40. *Annual Report on International Commercial Arbitration in China (2014)*
41. Ibid.

knowledge of local customs are likely to serve as advantages. As a result, a neutral location is typically chosen.

If China is chosen as the forum for arbitration, it should be noted that Chinese arbitration law, rather than the New York Convention, will apply. Chinese law dictates that any commercial arbitration that occurs within the country must be administered by a state-run institution.[42] The largest of these institutions is the China International Economic and Trade Arbitration Commission (CIETAC), though this it splintered in 2012, leaving mounds of legal confusion over enforceability and jurisdiction that are still being resolved.[43] Aside from said confusion, a 2010 study by the School of International Arbitration at the University of London found that CIETAC was one of the most undesirable arbitral institutions in the world, largely due to confusing procedures, though there are also allegations of bias.[44] Other state-run institutions did not fare much better.

It is no surprise, then, that many disputes between Chinese and US firms are settled in Singapore or Hong Kong. These nations provide convenience for the Asian firm, and an arbitral environment that is less foreign for the US firm than CIETAC or its ilk would be. The Singapore International Arbitration Center (SIAC), especially, has emerged as a regional leader in recent years.[45] However, by arbitrating outside of China, one runs the risk of an arbitral award not being enforced. Thanks to their its adherence to the New York

42. Arbitration Law of the People's Republic of China, § 2-10
43. Tzhori and Zhang. "Supreme Court Issues Long-awaited Clarification on CIETAC Breakaway."
44. Mistelis and Friedland. *School of International Arbitration*.
45. Izor and D'Agostino. "Arbitration in Asia at Full Gallop."

Convention, this is rare in China's larger cities, where most arbitral awards would be enforced, but it is a concern when dealing with firms that reside in more rural jurisdictions.

Success Rates

Though many have assumed that cultural bias would limit success when arbitrating in China or a neighboring country, this has not proven true. An arbitral tribunal is made up of either one or three arbitrators. In most large Asian arbitration institutions, there are three, with one being chosen from an approved list by each party, and a third appointed by the institution itself. [46] This generally ensures balance among the panel. In 2006, China actually made biased arbitration a crime, allowing arbitrators who made decisions based on personal biases to be imprisoned for up to seven years.[47] This communicates how seriously impartiality in arbitration is being taken by the Chinese government, which understands that reliable dispute resolution is a necessity if investment and foreign trade in the nation is to continue to grow. The most common complaint among US firms who have arbitrated in Asia is that the procedures were foreign and difficult to comply with, not that there was any sort of bias with which to contend.[48]

Cost and Enforcement

Forum is the largest factor in determining the cost of arbitration. Western arbitration firms tend to be more expensive, while arbitrating at any institution Asia usually represents a savings of over half when compared to litigating a case in China. Among the commonly

46. "Using International Arbitration to Resolve Disputes in China."
47. Xiaosong "Crime Liability of Arbitrators in China: Analysis and Proposals for Reform."
48. Harris. "Arbitration In China: Different, Yes; Biased, Probably Not."

used arbitration institution for Chinese cases, the most cost-effective choice will vary based on the size of the case. For example, CIETAC is among the cheapest institutions for small awards, while Singapore's SIAC offers lower cost arbitrations for those with amounts in dispute over $1 billion.[49] As a general rule, arbitration will be cheaper than litigation, but the margin of savings will vary based on size, choice of forum, and complexity of the case.

Another advantage of receiving an arbitral award is enforceability. On average, 86% of foreign arbitral awards are enforced in Chinese courts, with rates being higher in more urban areas.[50] The PRC appears to honor the New York Convention across the board, enforcing arbitral awards at similar rates, regardless of country of origin. The average time to have an arbitral award enforced was slightly less than one year, with the average time for collection after that being about the same.[51] Even if the forum of choice is not China, a firm can still expect to receive its award, and to do so in less than 24 months.

Recommendation

The most important conclusion to be drawn from this research is the current disutility of pursuing a claim against a Chinese company via litigation in the United States. Despite the groundbreaking Wuhan case, the requirement of reciprocity still makes it nearly impossible to enforce a US judgment in a Chinese court. Unfortunately, attorneys and businesses continue to waste time and resources pursuing such judgments, only to find them useless for receiving the money the court has said they are owed. Until there is a well-

49. "Fee Schedule-China International Economic and Trade Arbitration Commission."
50. Utterback, Ronghui, and Blackwell."Enforcing Foreign Arbitral Awards in China – a Review of the past Twenty Years."
51. Ibid.

documented history of Chinese courts enforcing US money judgments, it will remain unwise to pursue this avenue of dispute resolution.

The analysis presented also suggests that the smart company, which wants to purposefully and effectively manage risk, should plan to use international arbitration as its method of dispute resolution. Having established that suing in the US is unhelpful, and having examined the various hurdles and drawbacks to litigation in China, arbitration emerges as the most reliable means of actually recovering capital from a Chinese firm. The New York Convention, and China's proven respect for it, allow US companies at least a fair shot at receiving a favorable judgment that can then be enforced with relative ease. Hong Kong and Singapore, as well as China itself, are acceptable forums, though the specifics of the contract should be taken into account when choosing a location. Obtaining counsel with extensive knowledge of the procedures and customs of arbitrating in Asia will also be critical to success. Overall, US firms can expect to spend less than they would on comparable litigation, and to have a significantly higher chance of a money judgment being enforced and paid.

Critical to this analysis is the underlying assumption that the firms involved have a contract to begin with. Both litigation and arbitration are made easier by the preexistence of a document detailing the course of action that will be taken, should a dispute arise. It is difficult to negotiate choice of forum, or to decide which law will govern an arbitration once the disagreement has already occurred. In the case that the US firm decides to litigate in China, there must be a contract written in Chinese to have any chance of winning a money judgment. Additionally, a contract decreases the likelihood that either litigation or arbitration will ever be needed, as even the threat of arbitration can influence firms to meet

requirements. So, regardless of the avenue of dispute resolution chosen, it is always advisable to have a contract to govern the relationship of the parties.

As evidenced by China's enforcement of a handful of foreign judgments over the past few years, Beijing's interpretation of reciprocity, and attitude toward foreigners in general, may be shifting. Enforcement of foreign judgments could be commonplace ten years from now, as a result of the judiciary's new pragmatic outlook and the Chinese government's desire to be an attractive place to do business. Arbitration, on the other hand, could become more expensive as demand continues to rise. This research points to arbitration as the appropriate method for solving commercial disputes between US and Chinese firms right now, but more holistic analysis of the intricacies of both arbitration and the Chinese legal system is needed to predict what may happen in the future.

Bibliography

Annual Report on International Commercial Arbitration in China (2014). PDF. China Academy of Arbitration Law.

Arbitration Law of the People's Republic of China, § 2-10 (2007).

Chen, Jianfu, Yuwen Li, and Jan Michiel Otto, eds. *Implementation of Law in the People's Republic of China*. The Hague: Kluwer Law International, 2002.

Chong, Ik Wei, and Samuel Yang. "Chinese Court Enforces a Foreign Judgement for the First Time on the Basis of Reciprocity." Clydeco.com. April 19, 2017.

Cohen, Jerome A. "Settling International Business Disputes with China: Then and Now."*Cornell International Law Journal* 47 (2014): 558-68. http://www.lawschool.cornell.edu/research/ILJ/upload/Cohen-final.pdf.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, § 5-2 (UNCITRAL 1958).

Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Hague Conference on Private International Law. e*ntry into force,* August 20,1979

Corporate Choices in International Arbitration: Industry Perspectives. PwC; Queen Mary University of London; School of International Arbitration. 2013. https://www.pwc.com/gx/en/arbitration-dispute-resolution/.

Davidson, Amanda. "The New York Convention 1958 Half a Century On: Is It Still Effective?"*International Arbitration Quarterly*, December 2014, 8-10. http://www.hfw.com/downloads/HFW-International-Arbitration-Quarterly-Bulletin-December-2014.pdf.

Dodge, William S. "International Comity in American Law." *Columbia Law Review* 115, no. 8 (December 2015): 2071-099. https://columbialawreview.org/content/international-comity-in-american-law/.

"Enforcement of Judgments." U.S. Department of State. Accessed May 05, 2018. https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

"Fee Schedule-China International Economic and Trade Arbitration Commission." Cietac.org. 2015. http://www.cietac.org/index.php?m=Page&a=index&id=191&l=en.

Florida Code §55.603 (2017)

Garner, Bryan A., ed. *Black's Law Dictionary*. 10th ed. West Group, 2014.

Garvey, Sarah, and Karen Birch. "Brussels Regulation Recast: Are You Ready?" Allenovery.com. March 18, 2015. http://www.allenovery.com/publications/en-gb/Pages/Brussels-Regulation-recast-an-update.aspx.

Gregory, Keith M., and Lulu Chiu. "Enforcing Foreign Arbitral Awards in China: Commercial International Arbitration Clauses in U.S.-China Contracts." Lexology. June 28, 2013. https://www.lexology.com/library

Harris, Dan. "Arbitration In China: Different, Yes; Biased, Probably Not." Above the Law. February 17, 2016. https://abovethelaw.com/2016/02/arbitration-in-china-different-yes-biased-probably-not/.

Harris, Dan. "China Enforces United States Judgment: This Changes Pretty Much Nothing." Chinalawblog.com. September 08, 2017. https://www.chinalawblog.com/2017/09/china-enforces-united-states-judgment-this-changes-pretty-much-nothing.html.

Harris, Dan. "China OEM Agreements: Why Ours Are in Chinese." Chinalawblog.com. December 09, 2016. https://www.chinalawblog.com/2009/07/china_oem_agreements_we_like_o.html.

Harris, Dan. "Suing Chinese Companies for Product Liability." Chinalawblog.com. March 4, 2014. https://www.chinalawblog.com/tag/suing-chinese-companies/.

Izor, Sean, and Justin D'Agostino. "Arbitration in Asia at Full Gallop." Kluwer Arbitration Blog. February 10, 2014. http://arbitrationblog.kluwerarbitration.com/2014/02/10/arbitration-in-asia-at-full-gallop/.

"Legal System of China." Pkulaw.com. Accessed May 06, 2018. http://en.pkulaw.cn/Legal/Display_1.aspx.

Michaels, Ralf. "Recognition and Enforcement of Foreign Judgments." In *Max Planck Encyclopedia of Public International Law*. Heidelberg and Oxford University Press, 2009. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.

Mistelis, Loukas, and Paul Friedland. *School of International Arbitration*. School of International Arbitration at Queen Mary University of London. 2010. http://www.arbitration.qmul.ac.uk/research/2010/.

"The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958." New York Arbitration Convention. Accessed May 06, 2018. http://www.newyorkconvention.org/.

Ortiz-Ospina, Esteban, and Max Roser. "International Trade." Our World in Data. 2018. Accessed May 05, 2018. https://ourworldindata.org/international-trade.

Paul, Joel R. "The Transformation of International Comity." *Law and Contemporary Problems*71, no. 19 (October 6, 2008). https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1477&context=lcp.

Poon, Anthony K.S. "First Time PRC Court Recognizes a US Court Judgment Based on Principle of Reciprocity." Bakermckenzie.com. September 19, 2017. http://www.bakermckenzie.com/en/insight/publications/2017/09/prc-court-principle-reciprocity/.

Rauhala, Emily, and Simon Denyer. "China Jails Yet Another Human Rights Lawyer in Ongoing Crackdown on Dissent." The Washington Post. November 21, 2017. Accessed May 06, 2018. https://www.washingtonpost.com/world/another-chinese-human-rights-lawyer-is-going-to-jail/2017/11/20

Résimont, Nicolas. "Jurisdiction and Enforcement of Judgments Post-Brexit: State of Play." Stibbe. March 29, 2017. https://www.stibbe.com/en/news/2017/march/jurisdiction-and-enforcement-of-judgments-post-brexit-state-of-play.

Sprengel, Anke. "Enforcement of Foreign Judgments – Getting The Deal Through – GTDT." Getting The Deal Through. October 2017. Accessed May 05, 2018. https://gettingthedealthrough.com/area/46/enforcement-foreign-judgments/.

"Status Table: Statute of the Hague Conference on Private International Law." HCCH.net. October 19, 2016. https://www.hcch.net/en.

Taisu, Zhang. "The Pragmatic Court: Reinterpreting the Supreme People's Court of China."*Columbia Journal of Asian Law* 25 (2012).

Tsang, King Fung (Dicky). "Chinese Bilateral Judgment Enforcement Treaties." *Loyola of Los Angeles International and Comparative Law Review*, June 1, 2017.

Tzhori, Michelle, and Vincent Zhang. "Supreme Court Issues Long-awaited Clarification on CIETAC Breakaway." Shibolet.com. September 20, 2015. http://www.shibolet.com/cietac-breakaway/.

U.S. Const. art. IX, § 1

"Uniform Foreign Money-Judgments Recognition Act." Proceedings of National Conference of Commissioners on Uniform State Laws, Monterey, California. 1962. http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf.

United Nations. United Nations Commission on International Trade Law. *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Vienna: UNCITRAL Secretariat, 2016.

"Using International Arbitration to Resolve Disputes in China." Faegrebd.com. September 16, 2005. https://www.faegrebd.com/using-international-arbitration-to-resolve-disputes-in-china.

Utterback, Meg, Li Ronghui, and Holly Blackwell. "Enforcing Foreign Arbitral Awards in China – a Review of the past Twenty Years." Kwm.com. September 15, 2016. http://www.kwm.com/en/knowledge/insights/enforcing-foreign-arbitral-awards-in-china-20160915.

Xiaosong, Duan. "Crime Liability of Arbitrators in China: Analysis and Proposals for Reform."*Pacific Rim Law and Policy Journal* 23, no. 2 (April 2014): 343-93. http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1366/23PRLPJ0343.pdf?sequence=1.