

Arbitration Law in China, John S. Mo [Hong Kong: Sweet & Maxwell Asia, 2001, xlii + 715 pp, hardback, HK\$1,595, US\$234]

The accession on 11 December 2001 of the People's Republic of China (PRC) as the 143rd full member of the World Trade Organisation (WTO) was achieved amid great political and media theatre. In common with all major multilateral treaties, the Agreement Establishing the World Trade Organisation, together with the Protocol of Accession, which commits the PRC to comply with the requirements of paramount WTO agreements¹ and a number of auxiliary agreements, imposes fundamental legal obligations on the PRC. Such obligations will, however, be meaningless without mechanisms to ensure their effective enforcement, not only at the government-to-government level but also at the level of disputing parties to contracts. In the words of the doyen of English language commentators on China arbitration, Jerome A. Cohen:

“Many governments, WTO officials, multinational companies and legal experts are concerned that China's entry may overload the WTO's dispute settlement institutions if PRC companies and their foreign business partners fail to implement mutually satisfactory means of settling their trade and investment contract disputes and therefore ask their respective governments to take up their cause in the WTO.

...

This puts a premium on the further development of appropriate legal institutions inside ... China for resolving international business disputes.”²

Undoubtedly, China will need to further address aspects of its Arbitration Law of 31 August 1994 in order to bring it into line with law and practice in other sophisticated arbitral jurisdictions. If party autonomy – and hence a continuing growth in the popularity of arbitration – is to mean anything in China, it will be necessary to reconsider the current (albeit linguistically subtle) legislative bars to *ad hoc* arbitration and institutional arbitration under the auspices of international bodies such as the International Chamber of Commerce. This is not a necessity which applies only to commercial transactions, however. For example, Beijing's victory in winning the right to host the XXIXth Olympiad in 2008 brings with it, among other things, an obligation to permit the establishment on Chinese soil, for the duration of

¹ The General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs).

² J. A. Cohen, “Dispute Resolution in China: Putting the House in Order” (2001) No 10 *China Law and Practice* 36, 36.

the Beijing Olympic Games, of arbitral panels of the Ad Hoc Division of the Lausanne-based Court of Arbitration for Sport (CAS) to adjudicate disputes (eg with regard to disqualification for breach of doping regulations) between athletes and the Olympic authorities. Yet the Arbitration Law recognises neither *ad hoc* arbitration in China, nor the right of parties to choose institutional arbitration under the auspices of non-Chinese arbitral institutions such as the International Chamber of Commerce, nor the holding of arbitrations in China under a foreign procedural law.³

It is in this context of pressure for institutional change and arbitral pluralism in China that Dr John S. Mo's book arrives. It is a major volume and users will inevitably draw comparisons as to its utility with the only other comparable commentary on arbitration in China in the English language, *International Arbitration in the People's Republic of China: Commentary, Cases and Materials* by Cheng Dejun, Michael J. Moser and Wang Shengchang.⁴ Three comparisons with this book may be favourably made with regard to the Mo volume. Firstly, each chapter consists of numbered paragraphs, which makes for greater ease in referencing. Secondly, Chapter 1 is devoted in large part to an historical treatment of arbitration in China prior to 1 September 1995, when the Arbitration Law took effect, and thus facilitates an understanding, particularly for novices to this field of study, of how the Arbitration Law changed China's arbitral landscape. Thirdly, the materials set out in the appendices are easier to find, though this is not universally so.⁵

As one might expect, the book deals in chronological order with each stage of arbitral proceedings, from the making of arbitration agreements to the setting aside and enforcement of arbitral awards. It also discusses the Med-Arb (mediation-arbitration) process as applied in China and two specific types of arbitration, for labour and farming disputes. Cheng, Moser and Wang also discuss labour arbitration, but a treatment of farming arbitration is new. Whilst the latter may not be of particular interest to English-language commercial practitioners, its inclusion makes for completeness and will be of benefit to researchers of Chinese arbitration law, both academic and otherwise. The final chapter discusses alternative dispute resolution by reference to negotiation and mediation. The appendices set out the provisions of relevant arbitral instruments, including the Arbitration Law, the rules of the China International and Economic Trade Arbitration Commission (CIETAC) and the China

³ This issue will be the subject of an interesting article by G. Tucker et al in a forthcoming issue of *Arbitration*, the journal of the Chartered Institute of Arbitrators, London.

⁴ (Hong Kong: Butterworths Asia, 2000). The second edition of this work was reviewed by this author at (2000) 30 HKLJ 544.

⁵ Appendix 7, "Selected Judicial Interpretations of the [National Supreme Court] Concerning Arbitration", does not contain a list of the 34 interpretations, leaving the time-pressed reader to trawl through this Appendix.

Maritime Arbitration Commission (CMAC), and the Provisional Model Arbitration Rules of Arbitration Commissions.

There are, however, a number of weaknesses of treatment of particular topics by the author and in places assertions made are at least apt to confuse the uninitiated reader. A number of examples follow.

The author makes the surprising assertion⁶ that Article 7 of the Arbitration Rules of CIETAC permits the parties to arbitrate under the UNCITRAL Model Law on International Commercial Arbitration.⁷ This provision of the CIETAC Arbitration Rules clearly envisages the possible adoption by the parties of another set of (presumably Chinese)⁸ arbitration rules. It does not permit parties to treat a piece of foreign arbitral legislation as the rules governing their reference. It has nothing to do with any system of procedural law and does not provide for the ousting of the Arbitration Law. There appears to be a misunderstanding of the fundamentally different characters and functions of arbitration legislation and arbitration rules.

A second source of confusion is the use of the author's own translation of the Arbitration Law in preference to an official English translation of the Law, even though such a translation is available.⁹ Differences of phraseology, terminology, emphasis and linguistic subtleties are apt to cause difficulties and errors both in the giving of advice and in imparting learning. It is to be noted that the author, wisely, gives an express disclaimer of any liability arising from the use of his translation. The problem of inconsistent translation also arises in relation to the UNCITRAL Model Law commented on previously.¹⁰

The Arbitration Law is undoubtedly a modernising instrument which has gone a long way towards preparing China for private adjudicatory dispute resolution in commercial cases in the twenty-first century. It is also far more internationalist in outlook than anything that came before. The author cites Chinese scholars as asserting that the Arbitration Law is consistent with the Model Law (which is open to some debate) or that it has followed the spirit

⁶ At p 41.

⁷ Hereinafter "the Model Law", which is not part of the law of China. By contrast, the Model Law is the applicable international arbitration law of Hong Kong.

⁸ Such as the Arbitration Rules of CMAC or one of over 140 "domestic arbitration commissions" scattered around China. Art 16 of China's Arbitration Law requires an arbitration agreement to designate an arbitration commission to handle the reference, while Art 11 requires such a commission to be established in accordance with Chinese law, thus ruling out arbitration under the auspices of foreign institutions and *ad hoc* arbitration in China.

⁹ Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, *Arbitration Laws of China* (Hong Kong: Sweet & Maxwell Asia, 1997).

¹⁰ The author states in a footnote that the translation of Article 7 of the CIETAC Arbitration Rules given at page 41 is the official English version, yet the wording differs from the version of Article 7 reproduced in Appendix 2 (at p 580) which is the official version. One must surmise that the version used in the footnote is once again the author's own translation.

of the Model Law (which is to some degree correct). In the light of China's WTO membership and its commitments to make its dispute resolution systems WTO compliant, the PRC government and Chinese scholars will undoubtedly be interested in studying how successful the Model Law has been in the 41 jurisdictions that have enacted it to date¹¹ and whether it is a possible model for future mainland arbitration legislation. The book would have benefited from some comparative discussion of the Arbitration Law and the Model Law, both for completeness and as a means of setting the scene for such study.

Another area of interest to international and cross-border practitioners is the attitude of Chinese courts towards the enforcement of awards made overseas and awards made in Hong Kong. The former are enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (assuming that the jurisdiction of origin is a party to the Convention), while the latter are enforceable under the Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards 1999. Common rules and principles apply under both instruments. A matter of considerable controversy, however, has been the differences of approach to the refusal of enforcement on public policy grounds as between, on the one hand, Chinese courts and, on the other, foreign courts and the courts of Hong Kong. Foreign and Hong Kong courts treat public policy (or, approximately, *ordre public*) as an objective and exceptional, and therefore restricted, ground for refusing enforcement. Enforcement must offend the most fundamental concepts of morality and justice of the jurisdiction where enforcement is sought in order to justify refusal to enforce.¹² Chinese courts have treated public policy, however, as consonant with "public and social interest", which appears to be much wider than public policy and has led to refusal of awards on grounds that are tantamount to local protectionism or the upholding of the interests of the Communist Party. This has been the subject of much criticism by overseas commentators and is referred to by the author in Chapter 11 on the enforcement of awards, in the separate but similar contexts of enforcement of overseas and Hong Kong awards. The discussion is, however, somewhat superficial and amounts to an opportunity lost.

There is useful discussion of the Med-Arb process in Chapter 8. This chapter would have benefited from some comparative discussion of the position in Hong Kong, where Med-Arb is possible by agreement of the parties under

¹¹ UNCITRAL, *Status of Conventions and Model Laws* (as at 28 Oct 2002), available at <http://www.uncitral.org/en-index.htm>.

¹² *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974) (Us Court of Appeals, 2nd Circuit).

sections 2A and 2B of the Arbitration Ordinance (Cap 341). This is the subject of an isolated section at the end of Chapter 14, which reviews alternative dispute resolution in China. Even so, the discussion of the Hong Kong provisions is cursory.

The use of nomenclatures of the author's own creation that are inconsistent with those either having official status or commonly accepted by other authors, whether in English¹³ or in English translation,¹⁴ is something of an irritant. It is also a source of confusion to the neophyte in Chinese arbitration and mediation. Among the offending names are "Beijing Mediation Centre for International Commercial Disputes" for Beijing Conciliation Centre, "Basic Court" for the lowest tier People's Courts, "Intermediate Court" for the Intermediate People's Courts and "National Supreme Court" for the Supreme People's Court. The "Supreme Court of Beijing" is presumably the Beijing Higher People's Court. Some poor attention to detail and cross-referencing in the editing is also apparent.¹⁵

In conclusion, this is a useful addition to the practitioner's and researcher's library, though it is clear that some caveats and double-checks should be observed. The author is urged to take these points on board for the second edition, which will be far more reliable and authoritative as a result.

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¹³ Such as Cheng, Moser and Wang (n 4 above).

¹⁴ Such as Wang Sheng Chang, *Resolving Disputes in the PRC: A Practical Guide to Arbitration and Conciliation in China* (Hong Kong: FT Law & Tax Asia Pacific, 1996) and the official editors (from CIETAC and CMAC) of the *China International Commercial Arbitration Yearbook* (Beijing: China Int'l Com Arb YB).

¹⁵ Examples of this include references to the Civil Procedure Law, which is dated both 1991 and 1994 (it is in fact 1991) and, in an otherwise very welcome Chapter 9 on simplified arbitration proceedings, Art 84 of the CIETAC Arbitration Rules is stated to apply Chapter III of the Rules (Summary Procedure) equally to foreign-related and domestic arbitrations (it is in fact Art 74).

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