

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

Meaghan Vander Schaaf is the current chair of the International & Immigration Law Section Council. She includes in this issue her thank you to those who have helped this year.

In a recent issue of Crain's Chicago Business, in an opinion column, Fiona McEntee and Matthew Bragg state that they feel that: "Growth of our startup community has been stifled by an outdated immigration system that often prevents immigrant entrepreneurs from establishing and growing their startups." They indicate that many other industrial countries have a specific immigration option for startup

founders, which does not exist under the current immigration code.

They point out that the centers for business development at the universities in Illinois have generated "nearly 1,400 startups" since 2010, raising more than 1.9 billion dollars and creating nearly 5,000 jobs. They contend that 40 percent of these university-born startups have been created by students who were born outside of the United States. I would encourage readers to submit their thoughts on this and similar topics.

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Message From the Chair

BY MEAGHAN E. VANDER SCHAAF

It has been an honor to serve as the chair of the Immigration and International Law Section Council. In what is likely to be my last column as chair, I would like to take a moment to thank our section council members. Despite the unique challenges of this pandemic year, the Immigration and International Law Section Council dedicated their time and effort to creating constructive CLE programming, writing well-timed newsletter articles, providing thoughtful comment on proposed legislation, and actively participating in significant dialog during meetings. It was a

pleasure to work with such active leaders in the legal community. ■

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Editor's Comments

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by Ralph E. Guderian, a member of the ISBA International & Immigration Section Council. The article is a very extensive discussion of the People's Republic of China. A second installment will appear in the next issue of The Globe. With the article is a paraphrase of the ISBA position that expressions of opinion appearing in any article are those of the author and not necessarily those of the ISBA, the editor of The Globe nor of the members of the International & Immigration Law Section Council.

John R. Schleppenbach's article "International Bar Association Releases Revised Version of Widely-Used Rules on the Taking of Evidence," first appeared in the April 2021 issue of In the Alternative, the newsletter of the ISBA's section on

Alternative Dispute Resolution. He received his J.D. from the University of Illinois, College of Law. He practices in Chicago and is the editor of the ISBA Alternative Dispute Resolution newsletter.

As always, thank you to all of our authors and contributors. Anyone interested in expressing their views on the concept of a special immigration or visa category, or any other topics, please e-mail your comments to me at lfmatuszewich@mkm-law.com. ■

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'Made in China'

BY RALPH E. GUDERIAN

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Introduction. China is mysterious and colorful and massive. It has a population of 1.3 billion. It is known for its black and white panda bears which are doll like in appearance. Its history extends back over 5,000 years.

The People's Republic of China (PRC) was established in 1949 by the Chinese Communist Party (CCP). Its government is subordinate to the CCP and it serves to implement CCP policies. 2021 is the 100th anniversary of the CCP.

Factory of the world. When China entered the 21st century as an economic superpower, a new and growing urban middle class was enjoying the good life, full

of high-end consumer goods. However as for the rural population—still the overwhelming mass of China's people—the new prosperity was not reaching them at all. They were scratching a subsistence living, as they had been since ancient times.

As rural young peasants streamed into cities, they faced tough conditions. The feudal Hukou system still survived and every peasant had to officially remain in the village community in which he or she had been born. Thus, they were ineligible for state support and if they did not get the high paying employment for which they moved, and the majority did not, they were forced to take whatever casual work they could. Thousands of sweat shops sprang up around Chinese cities.

China emerged as the "factory of the world" it being dominant in manufacturing. This has helped China and urban Chinese people, however, other countries have been

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clearly forced out of traditional markets, businesses and jobs.

The factories in the cities, where more than 100 million Chinese men and women toil, and from which cameras, clothes, foot ware and every other sort of ware flow out to the world—as “Made in China”—are startling in their scale. Half of the world’s clothes and foot ware have a “Made in China” label in them. China also produces more computers than anywhere else in the world.

One facility—Foxconn works—in Guangdong province occupies as much space as a major airport. And it employs somewhere between 200,000 and 300,000 to work on its assembly lines, sleep in its dormitories, and eat in its company cafeterias.

Individual Chinese people. Deng Xiaoping when he took over as leader of the PRC in 1977 had the courage to base modernization on the initiative and resilience of the individual Chinese. All of the people of China are unified. China’s unity consists in its people’s coherence as Chinese, the unity of people who have lived in one part of the world for thousands of years, unity of history and habit.

To such people, accustomed to so profound a unity, the mere entry of a transient government means little. What the Chinese government is doing has nothing to do with the Chinese people. They are all Chinese and that is enough. The Chinese people have been nurtured in the spirit of freedom and individualism—born upon a vast land, rooted there, family to family, through centuries.

They have lived long and they have weathered everything long ago. They live, and have lived longer than people have ever lived, with the possible exception of India. They have a tradition of family cohesiveness, group effort, diligence, frugality and self-preservation. They are kind and clever people who are constantly finding ways to reinvent their lives. Additionally, they have a residual conviction of their innate superiority as shown by the superlative quality of Shang bronzes, Song paintings, and other aspects of Chinese heritage, and the impressive array of early Chinese discoveries and inventions far more than the well-known paper, printing,

gunpowder and compass.

Freer and more open economy. China’s former leader Mao Zedong’s orthodoxy had been one in which every enterprise (indeed every possession—every tool, every teaspoon; in theory every grain of rice) had been publicly owned. Every aspect of economic life had been centrally directed from Beijing, the capital of China.

Deng was now calling for a much freer and more open economy in which centralized direction would be drastically scaled down. Managements would operate with more autonomy; improvement in productivity would be rewarded with higher wages; energy and innovation would be incentivized.

Prior to this, setting up a business had been—quite literally—a crime. Trading for profit was intrinsically exploitative. By definition, it bought the workers labor at a price below its real “worth” (or it could not have been profitable); likewise, it charged customers above true cost. However, without this profit motive, why would anyone want to do business?

Western capitalism saw self-interest as conducive to the general good. Entrepreneurs might ultimately be out for themselves, but to that end they offered benefit to everyone, through consumer choice, competitive pricing and innovation.

If competition fosters creativity, it does so by rewarding enterprise, allowing those with drive and resourcefulness to “win.” Inevitably, though, it leaves the rest as “losers” in an inherently unequal system. In the West, under capitalism, these inequalities are usually accepted as it is argued that the whole of society benefits.

Similar values would now prevail in PRC, Deng proposed, albeit under state supervision.

Intellectuals (thinkers). Deng did not suddenly decide to open up China’s market. He was influenced by the perspective developed by China’s economists and other intellectuals (thinkers), many of whom came from the Chinese Academy of Social Sciences (CASS) in Beijing. It is China’s highest academic research organization in the fields of philosophy and social sciences with 4,000 full time researchers. And there are another dozen or so other think tanks in

Beijing alone—with 4,000 researchers.

Many Chinese government officials were against market reforms. Deng opted to grope for stones to cross the river—implementing incremental changes one step at a time. When there are obstacles, the shortest distance between two points can be a crooked line.

One economist, Professor Zhang Weiyang, who appears to have influenced Deng, has an allegory to explain China’s reforms. He tells a story about a village whose residents rely on horses to carry out all their chores. The village elders, who had tirelessly argued that their horses were better than the zebras used in a neighboring village, would harangue anyone who questioned their claim. Over time, however, the elders realized that the neighboring zebras were, in fact, superior to the idle and greedy horses which they had so actively promoted. So, after years of hailing the virtues of the horse, they decided to embrace the zebra. The only obstacle was converting the villagers who had been brainwashed over decades into worshipping the horse.

The elders developed an ingenious plan. Every night, while the villagers slept, they painted black stripes on a few horses. When the villagers awoke—shocked at the presence of evil beasts in their mist—the leaders reassured them that the animals were not really zebras, just the same old horses adorned with a few harmless stripes. The villagers gradually became accustomed to the presence of the strangely decorated animals in their midst. After a long interval the village leaders began to replace the painted horses with real zebras.

These prodigious animals transformed the village’s fortunes, increasing productivity and creating wealth all around. Only many years later—long after all the horses had been replaced with zebras and the village had benefited from many years of prosperity—did the elders summon the citizenry to proclaim that their community was a village of zebras, and that zebras were good and horses bad.

Deng effectively suspended communism in Special Economic Zones (SEZs) that he set up around great old ports where companies could operate freely. Not only would they be unhindered by the rigors of socialist central

planning, but also they would not have to worry about the sort of regulation that would have restrained them in the West. This was all but unregulated, laissez-faire capitalism.

Deng fulfilled the ultimate task of a leader—taking his society from where it is to where it has never been. By May 2014 the country had more than 15 million private enterprises, their capital totaling over \$17 trillion (100 trillion Juan).

More freedom demanded. Deng's modernizations also reversed four centuries of Chinese isolationism. In a bid to introduce new skills and insights and to bring a backward country up to date, students were sent to colleges and universities around the world. Overwhelmingly, they went to study scientific and technical subjects rather than more ideologically unsettling ones in the humanities and arts. Nevertheless, they lived in Western cities, went to the movies, read magazines and books, and spoke with fellow students in campus coffee bars. However, the communist party was not up for greater intellectual and artistic freedom in China itself—it knew that demands for political liberty would inevitably follow.

However, the more freedom people were allowed the greater the clamor grew for still more. Campus unrest increased through the second half of the 1980s. Public mourning in 1989 for the death of a reformist statesman turned into a widespread protest movement. Thousands of people—mainly students and intellectuals but also ordinary men and women from every walk of life—started camping out in Beijing's central Tiananmen Square. They called for urgent political reforms, including the recognition of basic human rights and press freedom. There were similar protests in hundreds of other Chinese cities. Martial law was declared with the backing of Den.

The order was given that the demonstrators must disperse however 100,000 still remained. They were branded counter-revolutionaries and terrorists despite the peaceful nature of their protests. People's Liberation Army (PLA) soldiers were sent to clear the square with tanks opened up with automatic weapons. Many protesters were killed.

Not a liberal democracy. Deng never intended that China should be a

liberal democracy. Additionally, Deng's commitment to economic development was starting to be attacked by those who want to reduce inequality and stop the pillage of China's environment.

The Chinese intellectual Cui Zhiyuan stated that China should not embrace a new ideology every generation (i.e., Western capitalism) and to encourage Chinese people to think for themselves. And they should draw on many sources to develop a new way "alternative modernity."

Accordingly, Chinese intellectuals are today proclaiming their independence from foreign models and plotting the future on their own terms. The quest according to political scientist Gan Yang is to draw on China's vast historical experiences and create a new idea of modernity rather than importing theories wholesale from abroad.

Thus, Chinese intellectuals are increasingly questioning whether liberal democracy is the right model for China in the long term, and, in the realm of foreign policy, are challenging the notion that nation states need to be marginalized by the stateless forces of globalization.

In 1989 two ideas were prevalent—one being nationalism the other being the need for a more transparent and democratic political system. Through the 1990s the Chinese government cultivated a sense of nationalism among the population, while discouraging the notion that China should aspire to universal ideals, like human rights or democracy.

Rapid industrialization and urbanization. In the 2000's many in China experienced a millennial optimism due above all to economic trends. It boasted the second largest economy in the world with 300 million of its people having recently risen out of poverty. It was en route to being home to the world's largest middle class. And it had multinational corporations with global reach. As noted before, it became the "factory of the world."

To support this rapid industrialization and urbanization, China had engaged in massive infrastructure projects. Indian novelist Amitav Ghosh described his first trip in 2006:

My first impression, like everybody who goes to China, especially every Indian who

goes to China, was one of astonishment. I went there from New York... We think of New York as the sort of big city, the big tall city. And you suddenly arrive [in Guangdong] and you realize that this place can accommodate a hundred New Yorks. For about 50 miles you drive through skyscraper after skyscraper, these amazing freeways and motorways. So it was just a sense of astonishment, that even though one had read so much already about all that's happened in China in terms of infrastructure, the actual reality of it doesn't strike you until you've actually seen it close up.

It should be noted that this industrialization is resulting in great pollution and environmental damage. China has more than 150 million cars and accounts for half of the whole world's coal consumption.

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This is the first installment of the article, the second installment will appear in the next issue of The Globe.

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International Bar Association Releases Revised Version of Widely-Used Rules on the Taking of Evidence

BY JOHN R. SCHLEPPENBACH

The autonomy of the parties to determine exactly how their dispute should be resolved has long been one of the attractive features of arbitration.¹ Within certain limits, the parties can spell out in their agreement the procedural rules they want to follow in the event of a disagreement between them, sometimes even in painstaking detail.¹ At the same time, however, most parties do not wish to customize every aspect of their arbitration proceedings, and therefore choose to incorporate the pre-existing arbitration rules of an arbitral institution in their agreement.² For example, the parties might choose rules from the American Arbitration Association or the International Chamber of Commerce to govern procedural issues like what written submissions will be permitted, what information will be exchanged between them prior to the hearing, and how that information will be exchanged.³ And to govern what evidence should be admitted or excluded at the arbitration hearing and how those determinations should be made, parties in recent years have increasingly chosen the IBA Rules.⁴ These rules, which were first promulgated in 1999, seek to

provide "an efficient, economical and fair process for the taking of evidence."⁵ A 2016 study found that they were used in about half of the international arbitration proceedings sampled.⁶ Accordingly, the IBA's release of a revised version of these rules in February 2021 could have a notable effect on the conduct of a significant number of arbitration proceedings.

The rules have only been revised once before since they came into existence in 1999, and many of those revisions were designed simply to reflect already-established evidentiary best practices.⁷ The 2020 revisions are similarly modest and primarily seek to address technological changes and recent developments.⁸ For example, Article 2 of the Rules now encourages the arbitral tribunal to consult with the parties on "the treatment of any issues of cybersecurity and data protection," along with other issues, at "the earliest appropriate time in the proceedings."⁹ Article 8 of the Rules deals reflects a change necessitated by the COVID-19 pandemic, providing that "[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that

the Evidentiary Hearing be conducted as a Remote Hearing."¹⁰ Such a hearing is be conducted pursuant "efficiently, fairly and, to the extent possible, without unintended interruptions."¹¹ On another timely note, the Rules now provide that evidence may be excluded on the grounds that it was obtained illegally.¹² (Arbitration enthusiasts no doubt recall heavy discussion of this issue in the wake of extensive public disclosure of materials illicitly gathered by Wikileaks.¹³ The new Article 9 provides discretion to exclude such evidence, taking into consideration circumstances like whether the party offering the evidence was involved in the illegality, whether the evidence has entered the public domain through public leaks, and considerations of proportionality.¹⁴

Perhaps less "of the moment" but equally impactful are changes to Article 3 dealing with the taking of documentary evidence. This Article now makes clear for the first time that, after a party has objected to a Request to Produce, the requesting party may respond to that objection.¹⁵ The tribunal will then consider that response, along with the objection, in ruling on the request, though it need no longer do so "in

consultation with the parties” under the revised rule.¹⁶ In addition, Article 3 now makes clear under that documents not in the language of the arbitration need only be translated if they are “submitted to the tribunal;” “[d]ocuments to be produced in response to a Request to Produce need not be translated.”¹⁷ Another potentially important clarification comes in Articles 4 and 5, which now state that revised or additional witness statements or expert reports may be submitted only when based on “developments that could not have been addressed in a previous” statement or report.¹⁸ The prior versions of these Articles had conditioned the submission of additional statements or reports on their responsiveness to “matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.”¹⁹

In short, though hardly a sea change in arbitral evidence taking, the 2020 revisions to the IBA Rules make some important and useful updates. Given the widespread

application of these Rules, arbitrators would do well to take note of their revision, as well as the potential trends in dispute resolution that the changes may reflect. ■

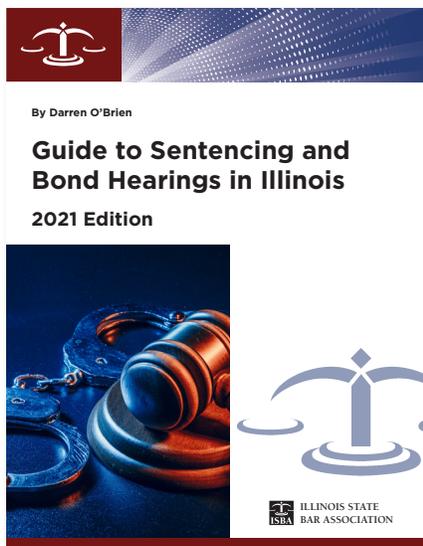
John R. Schleppenbach is counsel in the Trials, Investigations, and Securities Group at Dechert LLP in Chicago and serves as coach of the Willem C. Vis International Arbitration Moot team at Northwestern Pritzker School of Law. He is a former chair of the ISBA’s ADR Section Council and in his second year as editor of In the Alternative. Any opinions expressed herein are solely Mr. Schleppenbach’s and do not represent the views of Dechert LLP or the ADR Section Council.

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