

# Successful commercial arbitration in China

Author: Jim Harrowell AM, Partner

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## China's commercial arbitration system has matured over the past 20 years. It provides an avenue for foreign individuals and corporations to obtain resolution of commercial disputes.

While the use of enforcement procedures in China can, at times, be slow and frustrating, it is possible to obtain recovery under judgments obtained from Chinese courts, successfully and cost-effectively.

China recognises that most disputes involving foreign parties will be dealt with by arbitration rather than litigation, and places importance on the Chinese court system's support of the arbitration process -- to demonstrate that the rule of law exists for commercial parties, thereby encouraging trade and investment.

In fact, it can be easier in China for a foreign party to secure enforcement of a judgment based on an arbitration award than trying to enforce a judgment obtained in litigation, where there can be seemingly endless delays based on attempts to dispute or overturn the initial judicial decision.

### Structure of the Chinese arbitration commission

China's first arbitration commission was established in 1956. Following its ratification of the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) in 1986, China modernised its arbitration processes, renaming its primary arbitration commission the China International Economic and Trade Arbitration Commission in 1988. It is now well known throughout the world as CIETAC, although since 2000 this body has sometimes also been known as the Arbitration Court of the China Chamber of International Commerce (CCOIC).

CIETAC has its primary base in Beijing, with two arbitration sub-commissions in Shanghai and Shenzhen. It also has nearly 20 liaison offices in different regions, also covering specific business sectors.

CIETAC has shown real commitment to supporting specific business sectors. As an example, after the creation of the model wool contract (the standard contract most commonly used for the sale of wool from Australia and New Zealand to China), a specialist wool arbitration panel was established with arbitrators experienced in both the legal and technical issues involved in the wool trade. Similar panels have been established for financial disputes.

Since 1988, CIETAC has shown a determination to be regarded as a credible and efficient arbitration body and to be independent of government.

To carry out its work CIETAC has three specialist committees:

- an advisory committee, responsible for research on arbitration procedures, substantive legal issues, advisory opinion, and also reviewing the arbitration rules and training of CIETAC arbitrators;
- an editorial committee responsible for editing arbitral awards and publishing yearbooks; and
- a committee responsible for CIETAC's panel of arbitrators, which reviews the qualifications and performance of arbitrators, and makes recommendations regarding panel appointments.

In the early 1990s CIETAC made a major change by admitting to the CIETAC panel a number of foreign arbitrators, to further enhance the skills and experience of the panel. To dispel any perception of bias, parties are allowed to choose a member of the arbitration panel who is one of their own nationals. There are seven Australians currently appointed as foreign arbitrators to the CIETAC panel.

More recent amendments to the CIETAC rules, effective since May 2005, provide for:

- the conduct of CIETAC arbitrations outside the Peoples' Republic of China at any location agreed by the parties; and
- allowing the parties to agree on an arbitrator or arbitrators outside the CIETAC panel of arbitrators.

These changes have moved CIETAC as a body closer to organisations such as the International Chamber of Commerce (ICC) in terms of its rules, practices and procedures.

### CIETAC's procedures

The primary role of CIETAC is to provide an infrastructure for parties nominating its arbitration process as the dispute resolution procedure for their agreements. The vast majority of contracts drawn by Chinese parties provide for arbitration using CIETAC.

The Chinese Government has also permitted some other domestic arbitration bodies (for example, the Shanghai Arbitration Commission) to conduct international arbitrations. Six foreign members have been appointed to the Shanghai commission, including one Australian.

## Successful commercial arbitration in China (cont)

The primary role of CIETAC is to provide the infrastructure to support the delivery of arbitration services to parties who have nominated CIETAC and its arbitration roles for the resolution of disputes in their contracts.

While under the CIETAC rules there is provision for parties to agree on one arbitrator, it is still generally the practice that three arbitrators will be appointed to determine a dispute. Each party can nominate one, the parties can then agree on the appointment of the chair or third arbitrator, however, usually the parties leave that decision to CIETAC and most chairs are appointed by CIETAC.

The rules and procedures of CIETAC are very similar to those of most other arbitral bodies. It provides a conduit through which the parties correspond in relation to arbitration on procedural matters leading up to the arbitration hearing.

CIETAC also provides high-quality arbitration facilities in Beijing, Shanghai and Shenzhen. Parties can have access to all necessary technology during an arbitration hearing.

CIETAC also has a significant educative role both inside and outside China in relation to the merits of arbitration, the quality of arbitration in China, and arbitration practices and procedures.

An examination of the outcomes of CIETAC arbitrations clearly demonstrates a balance, and that foreign parties can succeed in pursuing their rights through a CIETAC arbitration.

While parties may seek additional time, CIETAC will generally press parties to meet timetables so an arbitration award is delivered within six months of the formation of the tribunal for the matter. CIETAC has had considerable success in keeping parties and arbitrators to these timetables.

CIETAC does seek to combine arbitration with a conciliation process, and arbitrators may push parties to consent to the arbitrators' playing a conciliator role. However, at any time any party may determine that the conciliation process is either fruitless or not required, in which case the arbitrators will revert to their arbitration role.

CIETAC also offers to convert a settlement into a consent award, appointing an arbitrator to make an award in accordance with terms of the settlement agreed between the parties.

This process is recommended in circumstances where parties may need to enforce the terms of settlement. It avoids the need of having to commence proceedings to formally prove the terms of settlement in countries which have ratified the New York Convention — it will be a simple matter registering the award as a judgment.

### Local knowledge and procedures

While CIETAC is a credible and efficient arbitration body, as with every jurisdiction, local knowledge of practices and processes is very important.

Key issues that need to be considered to effectively represent a party in a CIETAC arbitration include the following.

#### *Language*

While the parties can agree to conduct an arbitration in English, most arbitrations will be conducted in English and Mandarin. It is therefore vital to have good-quality interpreting services, both for oral submissions and in translating documents. To avoid confusion, you can take your own interpreter to the hearing (while CIETAC can provide interpreters, it is always easier to work with someone you know).

As courtesy to the arbitrators, pleadings, statements and submissions should be provided in both English and Chinese.

#### *Pleadings*

The CIETAC rules do not require parties to plead their case in any particular structured or formal way. Often the case will commence with a narrative document which may contain facts, evidence and legal submissions setting out the parties' contentions. It can be very helpful to the arbitrators to take a more structured approach, as would normally be done in the points of claim/points of defence



## Successful commercial arbitration in China (cont)

### *Evidence and submissions*

The distinction between evidence and submissions can become blurred.

While these practices are not mandatory, it is strongly recommended that you present a client's case by:

- preparing a statement and attaching documents relied upon. The person preparing the statement will rarely be questioned or cross examined (and there is no rule which can require the maker of the statement to attend for it to be admissible); and
- preparing detailed written submissions which address both the evidence and the legal principles to be applied. It can be helpful to attach copies of the source of the legal principles (for example, the UN Convention on the Sale of Goods), and copies of any cases which may be referred to. Since China is not a common law country, the submissions need to make clear how the cases assist the arbitrators.

### *Choice of arbitrator*

Make sure that you are properly briefed on the background of persons you are nominating to be an arbitrator. It's worth noting you can nominate one of the Australians on the panel.

### Further considerations

As noted above, CIETAC awards are enforceable by registration as judgments in countries that have ratified the New York Convention.

It is very important to ensure that Australian clients who are confronted with a claim being referred to arbitration by CIETAC do take the process seriously. Ignoring the claim can result in a default award and the prospect that the Chinese party will have the award registered as a judgment in an Australian court. The grounds to oppose registration and/or set aside registration of an arbitration award are very limited.

To enforce an award in China requires registration of the award as a judgment. The party then has similar options as exist in Australia: seizing goods,

winding-up in the case of a company, or bankruptcy for individuals. Orders can also be obtained to prevent disposal of property to avoid enforcement.

An important point to note is that under Chinese law a judgment must be enforced very promptly or it goes stale — in the case of enforcement against a company, within six months, and against an individual, 12 months.

CIETAC has a very helpful website and the staff of CIETAC are very willing to provide assistance and advice on the commission, its facilities and processes.

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### For further information, please contact:

Jim Harrowell, Sydney	+61 2 9391 3211	<a href="mailto:jharrowell@hunthunt.com.au">jharrowell@hunthunt.com.au</a>
Ashley Pelman, Melbourne,	+61 3 8602 9213	<a href="mailto:apelman@hunthunt.com.au">apelman@hunthunt.com.au</a>
Robin Lonergan, Brisbane	+61 7 3292 9710	<a href="mailto:rlonergan@macrossans.com.au">rlonergan@macrossans.com.au</a>
Egils Olekalns, Adelaide	+61 8 8414 33	<a href="mailto:eolekalns@hunthunt.com.au">eolekalns@hunthunt.com.au</a>
Darren Miller, Perth	+61 8 9488 1300	<a href="mailto:darren.miller@marksandsands.com.au">darren.miller@marksandsands.com.au</a>
Guy Abel, Hobart	+61 3 6231 0131	<a href="mailto:gabel@hunthunt.com.au">gabel@hunthunt.com.au</a>
Peggy Cheong, Darwin	+61 8 8924 2600	<a href="mailto:pcheong@huntnt.com.au">pcheong@huntnt.com.au</a>
Debra Allan, Newcastle	+61 2 4925 5500	<a href="mailto:dallan@hunthunt.com.au">dallan@hunthunt.com.au</a>
Candy Ding, Shanghai	+86 21 6249 354	<a href="mailto:cding@hunthunt.com.au">cding@hunthunt.com.au</a>