

RESOLVING FOREIGN-INTEREST BUSINESS DISPUTES IN THE PEOPLE'S REPUBLIC OF CHINA: II

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In the last issue of Letter of the Law we introduced the topic of resolving foreign interest business disputes in the People's Republic of China (PRC), concluding that the most viable form for resolution currently in PRC is arbitration, particularly under the rules of the Chinese International Economic and Trade Arbitration Commission (CIETAC). In this second part, we examine some of the pros and cons of the CIETAC system.

At first glance, CIETAC is like many other international commercial arbitration centres around the world, whether in Sweden, the United States, Canada or elsewhere. It has sophisticated Rules and a panel of 1,000 arbitrators, including some foreign nationals. Headquartered in Beijing, CIETAC handled 981 cases in 2006, 442 of which involved foreign interests doing business with PRC entities.

To keep up with the times, CIETAC conscientiously updated its Rules in 1988, 1994, 1995, 2000 and 2005 to make its services more attractive to foreign nationals. With the 2005 Rules in place, CIETAC offers an excellent mechanism for resolution of business disputes for those doing business in the PRC.

Under CIETAC's Rules all a foreign company needs to do to avail itself of the Commission's services is:

- stipulate in a contract that arbitration is the method of dispute resolution for disputes arising under the contract
- nominate CIETAC as the facilitating organization
- adopt CIETAC's Rules for the arbitration.

The Rules determine the process from that point forward.

On the surface it appears that CIETAC offers an effective and familiar way of resolving business disputes. It has adopted a system that has proven very popular in several Western jurisdictions, including Canada (e.g. B.C. International Commercial Arbitration Centre in Vancouver), Sweden

(Swedish Arbitration Institute in Stockholm), France (International Chamber of Commerce), the United States (The American Arbitration Association, International Division) and Taiwan (Taiwan International Arbitration Centre). Although the 2005 CIETAC Rules are very encouraging, they do present some difficulties.

Under CIETAC's Rules, unless the parties agree otherwise, there are to be three arbitrators: one appointed by the PRC national entity, one by the foreign national entity and the third, the chairperson, by mutual agreement (or, failing that, by CIETAC appointment). The process looks workable but the experience and concern is that the foreign national entity will often find itself in arbitrations where two of the decision-makers are PRC citizens, and the third from outside the PRC. The experience to date shows that this reduces the chance of a foreign party achieving success in a CIETAC arbitration, regardless of the strengths of its case.

CIETAC's Rules also provide that any arbitration must be conducted in Mandarin, unless the parties stipulate another language in their arbitration clause. But, even when English is the language of the arbitration, PRC nationals have successfully had the provision interpreted to apply only to the arbitration itself, not to any written submissions or communications taking place prior to the arbitration. The consequence is that, if the use of English is not stipulated (or not clearly stipulated), a foreign national may have to have voluminous materials translated into Mandarin, always running the risk that much can be lost in the translation.

In addition, the old ways, or their lingering effects, die hard. There is still a fear that, when the majority of the arbitration panel are two PRC nationals, their ultimate decision is often not theirs at all but those of PRC government officials imposing a ruling that favours the PRC national.

Finally, there is the question of enforcement of an arbitral award. That must be done through the courts and, as noted in Part 1 of this article, the prospect of a foreign national receiving fair, just and transparent treatment there is dim. On the bright side, there is a track record of PRC interests responding positively to CIETAC decisions and voluntarily paying arbitral awards made against them.

Although the PRC government has recognized the need to provide a dispute-resolution mechanism that is friendlier toward foreign investors, the systems it has established to date—a new court system and a reinvigorated arbitration system through CIETAC—are less than perfect. The court system has generally been criticized as offering a reduced prospect of success to a foreign national regardless of the strength of its case, and the arbitration system is far from transparent. Nonetheless, many observers believe the PRC is making encouraging and positive progress in developing a satisfactory dispute-resolution process.

So how does one resolve business disputes in China? If there is nothing about resolving disputes in the contract that a foreign company enters into at the outset of its investment in the PRC, then the foreign company may be out of luck. Without an enforceable arbitration clause, the only remedy left would be the PRC court system which, as noted above, is not a preferred forum for foreign interests. With arbitration being the only reasonably viable dispute-resolution mechanism in the PRC, any Western interest thinking of investing in that country should make certain that the dispute-resolution mechanism specified in its contract meets the requirements of the CIETAC Rules. Furthermore the dispute-resolution clauses must be well-drafted to protect the foreign national's interests and to avoid the pitfalls associated with the PRC dispute-resolution system.