

Arbitration in China – Practical advice to avoid pitfalls and risks

Dr. Björn Etgen
Partner – Head of China Practice

18 September 2009

BEITEN BURKHARDT

百达律师事务所

Why arbitration ?

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a **binding** decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

Principal characteristics :

- **Arbitration is consensual** - Arbitration can only take place if both parties have agreed to it.
- **The parties choose the arbitrator(s)**
- **Arbitration is neutral** - In addition to their selection of neutrals of appropriate nationality, parties are able to choose such important elements as the applicable law, language and venue of the arbitration. This allows them to ensure that no party enjoys a home court advantage.
- **Arbitration is a confidential procedure**
- **The decision of the arbitral tribunal is final and generally easy to enforce**

Why arbitration? – Fees for CIETAC arbitration







Amount of Claim (RMB)	Arbitration Fee (RMB)	Court Fee (RMB)
1,000,000 Yuan or less	3.5% of the Claimed Amount, minimum 10,000 Yuan (RMB 45,000)	2.5% of the claimed amount (RMB 13,800)
1,000,000 Yuan to 5,000,000 Yuan	35,000 Yuan plus 2.5% of the amount above 1,000,000 Yuan (RMB 145,500)	2.5% - 0.8% of the claimed amount (RMB 46,800)
5,000,000 Yuan To 10,000,000 Yuan	135,000 Yuan plus 1.5% of the amount above 5,000,000 (RMB 220,000)	2.5% - 0.8% of the claimed amount (RMB 81,800)

Each case, when being accepted, shall be charged an additional amount of RMB 10,000 as a Registration Fee.

Which arbitration clause for which contract ?

- **Nature of contract ?**
 - Today we are looking only at **commercial contracts** (e.g. sale, purchase, lease, service, consulting, joint venture, equity transfer, merger & acquisition contracts), since e.g. for labor contracts different rules apply.
- **Domestic or international (foreign related) contract ?**
 - Rule of thumb: at least one foreign party = foreign related contract
- **Applicable law to the contract ?**
 - Means the law which either the contract parties have explicitly agreed shall apply to the contract or the law which according to prevailing mandatory legislation applies to the contract
 - Rule of Thumb: If in a commercial contract all parties are PRC natural/legal persons, in most cases PRC law will apply (and you can not choose another law and no foreign arbitration commission/institute!). If however PRC and foreign parties are involved, you have a choice: foreign law can apply to the contract (some exceptions apply, e.g. joint venture contracts)

Which arbitration clause for which contract ?

Choice of arbitration commission \ Type of contract	International commercial contract: (subject to PRC law or foreign law)	Domestic commercial contract, subject to PRC law
International arbitration institute		
China International Economic and Trade Arbitration Commission		
Local Chinese arbitration commission		

Where do I find model clauses for arbitration agreements?

General model clauses can be found e.g. on the websites of the various arbitration institutes that you eventually choose as appointed arbitration institute. The model clauses are often available in several languages to help you achieve language consistency (this is of utmost importance if your contract is drafted in more than one language!). Here are some websites you may refer to:

CIETAC (China International Economic and Trade Arbitration Commission)

http://www.cietac.org/english/model_contracts/model_contracts.htm

CEAC (Chinese European Arbitration Centre)

<http://www.ceac-arbitration.com/a-Model-Arbitration-Clause.21.0.html#c32>

HKIAC (Hong Kong International Arbitration Centre)

http://www.hkiac.org/HKIAC/HKIAC_English/main.html

SIAC (Singapore International Arbitration Centre)

<http://www.siac.org.sg/mclauses.htm>

International Arbitral Centre of the Austrian Federal Economic Chamber

http://portal.wko.at/wk/format_detail.wk?angid=1&stid=328039&dstid=8459&opennavid=0

What is important when drafting the arbitration clause ?

When adopting a model clause of your chosen arbitration institute please bear **always** in mind:

- Under PRC laws, the clause **must mention the correct and complete name and place of the arbitration commission as well as the specific arbitration rules to be applied** (sometimes, one arbitration institute has several locations (e.g. CIETAC), so you must mention the location (city))
- You must not provide in the arbitration clause that the dispute may either be referred to the arbitration institution for arbitration or to an ordinary court for settlement because this could render the arbitration agreement invalid

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. The arbitral award is final and binding upon both parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission (“CIETAC”) for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. **There shall be three (3) arbitrators.** The arbitral award is final and binding upon both parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)
- Who shall appoint arbitrators? (the parties, the arbitration institute or someone else?)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. There shall be three (3) arbitrators. One (1) arbitrator shall be appointed by the claimant, one arbitrator shall be appointed by the respondent. The chairman of the arbitration tribunal shall be appointed by the chairman of CIETAC. The arbitral award is final and binding upon both parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)
- Who shall appoint arbitrators? (the parties, the arbitration institute or someone else?)
- Do I need a multi-party arbitration clause (e.g. if there are more than two (2) parties to a contract)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. There shall be three (3) arbitrators. One (1) arbitrator shall be **jointly** appointed by the claimants, one arbitrator shall be **jointly** appointed by the respondents. **Multiparty arbitration shall be permitted.** The chairman of the arbitration tribunal shall be appointed by the chairman of CIETAC. The arbitral award is final and binding upon **the** parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)
- Who shall appoint arbitrators? (the parties, the arbitration institute or someone else?)
- Do I need a multi-party arbitration clause (e.g. if there are more than two (2) parties to a contract)
- (Exclusion) of nationality/nationalities for arbitrators (this may add to the neutrality of the tribunal's decision making)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. There shall be three (3) arbitrators. One (1) arbitrator shall be jointly appointed by the claimants, one arbitrator shall be jointly appointed by the respondents. Multiparty arbitration shall be permitted. The chairman of the arbitration tribunal shall be appointed by the chairman of CIETAC. **The chairman of the arbitration tribunal shall neither be of Austrian nor Chinese nationality.** The arbitral award is final and binding upon the parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)
- Who shall appoint arbitrators? (the parties, the arbitration institute or someone else?)
- Do I need a multi-party arbitration clause (e.g. if there are more than two (2) parties to a contract)
- (Exclusion) of nationality/nationalities for arbitrators (this may add to the neutrality of the tribunal's decision making)
- Language(s) of arbitration in general and e.g. language(s) in which documents may be submitted during arbitration proceedings (this may be a substantial cost/time factor)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. There shall be three (3) arbitrators. One (1) arbitrator shall be jointly appointed by the claimants, one arbitrator shall be jointly appointed by the respondents. Multiparty arbitration shall be permitted.

The chairman of the arbitration tribunal shall be appointed by the chairman of CIETAC. The chairman of the arbitration tribunal shall neither be of Austrian nor Chinese nationality.

The language of the arbitration proceedings shall be English.

The arbitral award is final and binding upon the parties.”

What may be useful to add to a CIETAC model clause?

When adopting a model clauses for a commercial (domestic or foreign-related) contract, also the following points may be worthwhile considering:

- Number of arbitrators (generally one (1) or three (3) arbitrator(s), also depending on the complexity and contractual value of a given matter)
- Who shall appoint arbitrators? (the parties, the arbitration institute or someone else?)
- Do I need a multi-party arbitration clause (e.g. if there are more than two (2) parties to a contract)
- (Exclusion) of nationality/nationalities for arbitrators (this may add to the neutrality of the tribunal's decision making)
- Language(s) of arbitration in general and e.g. language(s) in which documents may be submitted during arbitration proceedings (this may be a substantial cost/time factor)
- Agreement on costs for arbitration fees and ancillary costs (in particular travel and legal fees)

CIETAC model clause

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission’s arbitration rules in effect at the time of applying for arbitration. The place of arbitration shall be Beijing. There shall be three (3) arbitrators. One (1) arbitrator shall be jointly appointed by the claimants, one arbitrator shall be jointly appointed by the respondents. Multiparty arbitration shall be permitted.

The chairman of the arbitration tribunal shall be appointed by the chairman of CIETAC. The chairman of the arbitration tribunal shall neither be of Austrian nor Chinese nationality.

The language of the arbitration proceedings shall be English.

The arbitral award is final and binding upon the parties.

The costs of the arbitration, including all reasonable expenses and lawyers fees shall be borne by the losing parties”

Examples of problematic arbitration clauses

9. Arbitration

9. Арбитраж

9.1 Buyer and Seller shall make their best efforts to settle all disputes, controversies or differences by mutual discussion and negotiation in a cooperative spirit and only upon the failure of such discussion or negotiations conducted in good faith, shall they resort to Arbitration. Any dispute, controversy or difference which may arise between Buyer and Seller out of or in connection with or in relation to the Contract or for the breach thereof, and which cannot be settled by mutual agreement, shall be considered in the Arbitration defendant Party's country.

9.1 Покупатель и Продавец должны предпринять все усилия для разрешения всех споров, противоречий и разногласий посредством взаимного обсуждения и проведения переговоров в духе сотрудничества и только при провале такого обсуждения или переговоров, проведенных при полном доверии, они должны обратиться в Арбитраж. Любые споры, противоречия и разногласия, которые могут возникнуть между Покупателем и Продавцом из или в связи или в отношении к контракту или его невыполнением и которые не могут быть урегулированы взаимным соглашением, должны рассматриваться в Арбитраже страны стороны-ответчика.

Examples of problematic arbitration clauses

16. 仲裁：一切因执行本合同所发生或于本合同有关之争执，双方应友好协商解决，如双方协商不能解决时，此争议应提交设在北京市的國際商業仲裁委員會，按照其仲裁委員會仲裁程序暫行規則進行仲裁。仲裁委員會所裁定為最終裁決，對雙方均有約束力。仲裁費用由敗訴一方負擔。

ARBITRATION: ALL DISPUTES IN CONNECTION WITH THIS CONTRACT OR THE EXECUTION THEREOF SHALL BE AMICABLY SETTLED THROUGH NEGOTIATION, IN CASE NO SETTLEMENT

CAN BE REACHED BETWEEN THE TWO PARTIES, THE CASE UNDER DISPUTE SHALL BE SUBMITTED TO FOR ARBITRATION IN ACCORDANCE WITH RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE. THE PLACE OF ARBITRATION IS BEIJING, CHINA. THE DECISION MADE BY THE ARBITRATION COMMISSION SHALL BE ACCEPTED AS FINAL AND BINDING UPON BOTH PARTIES. THE FEES FOR ARBITRATION SHALL BE BORNE BY THE LOSING PARTY.

Examples of problematic arbitration clauses

- 20.2 Should the parties fail to agree on a mediator in accordance with Article 20.1., or should the mediator fail to settle the Dispute within sixty (60) days from appointment, either party may submit the dispute for final settlement **by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce** by three arbitrators appointed in accordance with said rules.

Translation of Chinese version:

- 20.2 If the parties fail to agree on a mediator in accordance with Article 20.1, or if the mediator fails to resolve that Dispute within sixty (60) days after being appointed, either party may submit the **Dispute to China International Economic Trade Arbitration Commission (CIETAC)** for final dispute resolution by means of arbitration according to rules by three (3) arbitrators designated according to the rules of CIETAC.

No valid arbitration clause – and now ?

- It does generally not render the contract entirely invalid but means that there is no valid arbitration agreement for such contract
- Consequently, you likely lose the chance to submit a contractual dispute to arbitration (unless the parties involved agree – after a dispute arose – on a valid arbitration agreement, which in practice is rather unlikely)
- You most probably then have to file a lawsuit with the ordinary courts for litigation – problems:
 - requirement to deposit a security (cash) which can be up to the amount of the claim when a foreign party is the claimant
 - many documents may have to be translated and legalized (time consuming and expensive)
 - enforcement of a foreign judgement (only a few treaties between China and other countries)
 - Litigation – other than arbitration – is almost always a “several-instance” procedure and may be less impartial than arbitration depending on the actual circumstances of a disputed case

Enforcement of arbitration awards

- China is, as Austria and a number of other major countries party to the “UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (“New York Convention”).
- The New York Convention substantially limits the reasons, why a court can refuse to enforce an award.
- **But remember:** This works both ways: A New York Convention award against an Austrian company could easily be enforceable in Austria!

Thank you for your attention

BEITEN BURKHARDT

百达律师事务所