



Time to Fix China's Arbitration

by Jerome A. Cohen



FOR A LONG TIME, I believed in the ability of the China International Economic and Trade Arbitration Commission (CIETAC) to deliver fair verdicts for foreign companies embroiled in business disputes with local partners and counterparties. This faith in the body that still handles the bulk of the international commercial arbitrations conducted in China was largely based on my positive initial experiences. However, more recent encounters have shaken my confidence. Now I fear that without a concerted effort at reform, the credibility of China's leading arbitration institution will slip away.

Back in the mid-1980s, when CIETAC did not yet allow foreigners to serve as arbitrators, I became the first foreign lawyer to appear before it as a dailiren, or advocate, for a foreign company. The Chinese law professor representing the local party to the dispute immediately challenged my

right to do so, on the ground that I was not licensed to practice law in China. (As a foreigner, I could not be.) The presiding arbitrator, however, promptly rebuffed the challenge, admonishing my counterpart to read CIETAC's Arbitration Rules, which clearly permitted anyone—Chinese or foreign, lawyer or non-lawyer—to serve as an advocate.

Perhaps such an encouraging start colored my view of that arbitration and subsequent CIETAC proceedings. Before the first hearing, I had not known what to expect. Of course, I hoped that CIETAC would prove to be a better alternative than the courts. In those days, foreigners knew little about Chinese courts, but generally believed, as did many Chinese, that the

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courts suffered from both lack of professional competence and the distorting influences of guanxi, local protectionism, corruption and politics. The arbitrators before me offered a refreshing contrast, for they seemed to be competent, fair, honest and independent.

Over the next decade, experience with CIETAC as both advocate and arbitrator reinforced that favorable impression, which I often voiced in both publications and lectures. Being an optimist, I thought that if an institution called an "arbitration commission" could establish apparently admirable dispute-resolution tribunals in China, perhaps an institution called a "court" could some day do the same.

Occasionally, some foreign and Chinese lawyers politely hinted that my positive appraisal of CIETAC was naive. But understandably, no one sought to refute me in public when to do so would involve him in controversy and perhaps damage his "rice bowl." Frankly, however, I had neither the time nor the inclination to look into the matter, since I had not yet personally encountered any disillusioning experience with CIETAC and had several friends working there. Moreover, foreign legal scholars have tended to focus on the troublesome problems of enforcing an arbitration award in Chinese court rather than on the institutional and procedural problems of obtaining a fair award in the first place.

UNFORTUNATELY, IN RECENT years my CIETAC experience, as both advocate and arbitrator, has dimmed my earlier optimism. There

is a pressing need to undertake a comprehensive investigation of CIETAC's practice—not merely its rules—in order to enhance transparency and thereby speed the process of reform.

My hope is that CIETAC, which has made many improvements in response to Chinese and foreign suggestions, will cooperate with both official and non-governmental efforts to address the serious problems of institutional integrity that confront it, and will not seek to suppress justifiable criticism. How CIETAC copes with these issues will determine its future reputation and its prospects in a market where it now must compete—not only with foreign arbitration organizations but also domestic ones, the best of which have shown themselves to be commendably sensitive to ethical and other institutional considerations.

Here are 10 recommendations that urgently require the consideration of CIETAC and the international business and legal communities:

- CIETAC *should not use its own personnel as arbitrators.* One of CIETAC's biggest defects is its persistent selection of its own personnel as arbitrators, especially presiding arbitrator. This creates an obvious opportunity for the exercise of administrative influence and even control over the arbitration panel and its decision.

This practice can also involve its staff in conflicts of interest even when no CIETAC influence is exercised behind the scenes. The world's best arbitration organizations, including Stockholm's (which has often mentored CIETAC staff), do not permit this practice. I am happy to note

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that the Beijing Arbitration Commission (BAC), which now handles over twice as many cases, most of them domestic, as CIETAC, also rejects this practice. Today there is no shortage of able potential arbitrators in China, both Chinese and foreign, and CIETAC should open its roster to a new generation of experts.

• *A national of a third country should serve as presiding arbitrator.* Many more foreign companies would select CIETAC arbitration if they believed that not more than one member of a three-person panel would be a Chinese national.

Today, some sophisticated international lawyers know that CIETAC will honor an arbitration clause that calls for the presiding arbitrator to be from a third country, but this encouraging new development is not widely known and CIETAC seems reluctant to publicize statistics regarding its use. Furthermore, unless the parties specify in their contract, the presiding arbitrator, whether appointed by agreement of the parties or by CIETAC in the absence of such agreement, is most probably going to be Chinese.

This is what worries many foreign companies, particularly those who know of cases in which the presiding arbitrator and the arbitrator appointed by the Chinese party, both Chinese nationals, have rendered decisions that could not be justified by their foreign arbitrator colleague.

CIETAC would enhance its fairness and its attractiveness by amending its rules to require that the presiding arbitrator in international and foreign-related cases always be from a third country unless the parties agree otherwise.

Moreover, regardless of the presiding arbitrator's nationality, CIETAC should do more to enable the parties to agree on the presiding arbitrator, for example, by requiring each party to submit lists of names of persons they could accept, as the BAC now does. The idea should be to diminish the arbitration organization's role in this important selection, which would reduce the opportunity for behind-the-scenes negotiations with CIETAC that reportedly take place over this important decision.

• *The presiding arbitrator should be a respected legal expert familiar with the relevant business background.* The presiding arbitrator, of course, is the main figure in each arbitration. Not only is his vote often decisive on the merits, but he is frequently called upon to take the lead in important rulings in the course of the proceedings, especially during the hearing when rulings need to be made quickly. Yet I have taken part in more than one CIETAC case in which the presiding arbitrator—a CIETAC official with over a decade of administrative experience—appeared to lack a clear understanding of contract law and procedural matters, as well as the business

environment of the dispute.

Of course, some CIETAC administrators have made excellent presiding arbitrators. They should continue to serve as such, not for CIETAC, but for other arbitration organizations, Chinese and foreign. Whether or not my two previous recommendations are adopted, in order to maximize confidence in the quality and fairness of the arbitration, it will continue to be crucial to appoint a presiding arbitrator who is both an acknowledged legal expert and at home in the business background of the dispute.

- *CIETAC should limit the number of cases in which someone can serve as an arbitrator at any one time.* An arbitrator who serves on too many cases for the same arbitration organization runs the risk of losing his independence to that organization. This is especially true if the organization appoints the arbitrator or introduces him to a party to the dispute. In those circumstances, the arbitrator inevitably becomes too familiar with the commission staff and, in order to sustain his income, too reliant on their favor.

This is wholly apart from the question of whether an arbitrator who takes on too many cases has the time and energy to do a competent job. Out of concern for this problem, the BAC now prohibits its arbitrators from handling more than 10 cases simultaneously. CIETAC should apply such a limit to foreigners as well as domestic experts. Certainly, one can debate how many cases are "too many," but 10 a year might be an appropriate limit.

- *CIETAC should prevent its arbitrators from serving as advocates in other CIETAC*

cases. I have served as both advocate and arbitrator before both CIETAC and other international arbitration organizations. Such alternation of roles is generally permitted in international practice. Yet I am struck by the BAC's recent amendment of its rules to require all those who serve as its arbitrators to cease serving as advocates in other cases before it.

The new rule is based on the assumption (which reportedly reflects BAC's experience) that allowing Chinese lawyers to alternate roles within the same arbitration organization breeds incestuous familiarity among advocates, arbitrators and commission staff. This, in turn, fosters opportunities for irregularities and diminishes institutional integrity.

This may be my most controversial suggestion, since it can drastically reduce the income of arbitration specialists, foreign as well as domestic. Yet, as BAC believes, even if foreign organizations find it unnecessary, given the nature of Chinese society and the small arbitration community, such a reform is warranted at present in order to prevent a "You scratch my back, I'll scratch your back" ethos from damaging the impartiality of arbitrators.

- *Advocates as well as arbitrators must fully disclose conflicts of interest.* Not long ago I served as advocate for a foreign claimant in a Beijing CIETAC case which resulted in a hearing that my client and I deemed grossly unfair. A week later, we discovered that the advocate for the respondent, had, without public announcement, become a vice chairman of CIETAC shortly before the hearing.

That meant the presiding arbitrator, a

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deputy secretary general of CIETAC, was the subordinate of the other side's advocate. Nevertheless, at the outset of the hearing, when the presiding arbitrator asked whether the parties wished to disqualify any arbitrator, neither the presiding arbitrator nor the new vice chairman thought it necessary to reveal this crucial fact.

The claimant brought this blatant impropriety to the attention of the commission by means of a memorandum demonstrating that no other major international arbitration organization in the world would countenance this practice. CIETAC then reluctantly ordered replacement of the presiding arbitrator with a very able Chinese lawyer who is not on its staff. A new hearing had to be held, which put both parties, especially the foreign claimant, to great additional expense.

To avoid repetition of this sad incident, CIETAC should require advocates as well as arbitrators to reveal in writing and in advance of the hearing all of their professional and organizational responsibilities plus any other facts that might bear upon the impartiality of the arbitrators. The guanxi net can be very wide in the relatively small group from which advocates, arbitrators and administrators are drawn. If, for example, a law professor who serves as an advocate happens to be supervising the doctoral thesis of an arbitrator or

CIETAC administrator, that surely should be revealed to the opposing party. Moreover, if CIETAC is at fault because of negligent or intentional failure of its personnel to make a necessary disclosure, it should compensate the parties for the damage it has caused them, and the personnel involved should be appropriately disciplined.

● *CIETAC should enhance the confidentiality of its proceedings.* Every dispute-resolution institution must keep confidences. This is certainly true of an international commercial-arbitration organization, which promises the parties complete confidentiality unless the parties agree otherwise. An arbitration organization that fails to honor that promise fails to inspire confidence.

Yet it is extremely difficult to live up to this ideal. Discretion is an acquired discipline. Human beings like to gossip with friends, exchange information with classmates and share their problems with family. They sometimes reveal secret information for corrupt or political motives, and sometimes, fortunately, "whistle-blowers" expose wrongdoing within the organization. Whatever the reasons, I know from personal experience that CIETAC leaks, and at various levels.

But what can be done about it? Obviously, the importance of preserving confidentiality must be repeatedly brought

home to leaders, arbitrators and staff. Every opportunity must be seized to remind them of their obligation, which has long been spelled out in legislation and in the commission's rules and ethical standards.

I believe it is necessary to provide more significant sanctions than currently exist and to apply them against those who breach confidentiality without justifiable excuse. I emphasize the words "without justifiable excuse," since CIETAC personnel should not be discouraged from continuing to reveal institutional and individual irregularities that would otherwise never be made public.

• *More stringent standards should be applied to prevent arbitrators from engaging in ex parte contacts regarding their cases.* A related and even more substantial challenge to CIETAC's integrity is the illegal and unethical practice of certain arbitrators privately discussing their case with unauthorized persons, whether officials, lawyers or others.

Such contacts are usually hard to detect without the assistance of the state security or public security agencies, but it is common knowledge that they take place. A much-admired law professor told me that, rather than appear as an expert witness in a CIETAC hearing, instead he informally discussed the issues with the arbitrators. "That's still the Chinese way," he said with a self-conscious giggle.

Chinese lawyers working on a case in another forum in which I was serving as an arbitrator unsuccessfully tried to get me to discuss it with them. Moreover, it is even believed, based on confidential assertions made by both CIETAC staff and Chi-

nese lawyers who have themselves served as CIETAC arbitrators, that CIETAC has on occasion ordered its Chinese arbitrators to change the outcome of their proposed award, i.e., not merely to alter the form of the award but the result!

Plainly, it is time for some higher authority to investigate the truthfulness of such disturbing allegations. But CIETAC need not await the report of such a investigation. It can immediately make clear to its arbitrators, leaders and staff that such practices will no longer be tolerated, that existing laws, rules and ethical standards will be strictly enforced and that punishments will be increased and applied to CIETAC personnel and others. And surely, CIETAC should immediately cease interfering with proposed awards.

• *CIETAC staff should not draft awards for arbitrators.* It is widely believed that CIETAC staff draft awards for some Chinese arbitrators, thereby enabling them to handle many more cases than they otherwise would. Although judges in many countries enjoy the help of their law clerks, and arbitrators everywhere may need confidential research and other assistance, I believe that arbitrators should draft their own awards. Otherwise, it becomes all too easy for them to make decisions without having to confront the intellectual difficulties that stand in their way.

My mentor, American Supreme Court Justice Felix Frankfurter, used to say that "some opinions simply won't write," meaning that one who actually has to spell out the reasons for his decision sometimes has to change his mind. Before the hearing, CIETAC does not require arbitrators to

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face up to the issues in dispute, as the International Chamber of Commerce does in requiring the arbitrators to agree with the parties and their advocates on highly detailed "terms of reference." Surely, after the hearing, CIETAC should not make it easy for the arbitrators to avoid the issues by drafting the award for them. The BAC requires arbitrators to do their own work.

✱ *CIETAC should require a dissenting arbitrator to write an opinion and make it available to the parties and their advocates.* An even more important measure for assuring that arbitrators render reasoned and fair decisions is to require every dissenting arbitrator to draft an opinion supporting his views and to make it available to the parties and their advocates together with the award of the majority. Otherwise there is no effective restraint on the factual and legal assertions of the majority.

Although judicial review is possible in a proceeding to enforce or set aside an award, the scope of such review is inevitably limited, and no judge can know the case as well as an arbitrator. Moreover, the dissenting opinion, in addition to challenging the dissenter to justify his negative vote, may make possible more adequate judicial review of an award that deserves serious scrutiny.

Yet CIETAC does not permit dissenting

opinions to be made available to the parties and their advocates, even if the dissenter wishes to write one. This, as I can testify from personal experience, is frustrating not only for the losing party but also for the minority arbitrator. Again, CIETAC would do well to follow the example of the BAC. Since March 1, 2004, it has required dissenters to attach an opinion to the award.

I HAVE RAISED these recommendations in the good-faith belief that transparency and the criticism that it makes possible foster law reform and fair dispute resolution. I do not pretend to have all the facts or all the answers. Indeed, there are many more questions to ask.

CIETAC representatives, who have shown themselves to be extremely sensitive to criticism, will undoubtedly have much to say in response to these recommendations, as will other Chinese and foreign experts. I hope that CIETAC's new rules, which are expected this spring, will take them into account.

In any event, I welcome a healthy discussion of the merits. It is time, in the interest of China's economic development, its efforts to create a rule of law and its cooperation with the world, to bring these issues out of the shadows. ■