



CROSS-BORDER DISPUTE WITH A CHINESE PARTY

**WHAT IS THE BEST METHOD OF CROSS-BORDER
DISPUTE RESOLUTION IN YOUR SITUATION?**

As China becomes stronger on international trade, it is not surprising that the number of cross-border disputes continues to increase. When dealing with a dispute with a Chinese counterparty, it is important for foreign companies¹ to carefully consider which method of cross-border dispute resolution is preferable.

Generally speaking there are four methods to resolve a cross-border dispute, namely: negotiation, mediation, arbitration and litigation. Important factors when choosing a method are parties' personal preferences, legal culture, judicial circumstances and relative bargaining positions. Precisely these factors may result in choosing a different method to solve disputes with a Chinese counterparty, rather than the method usually preferred when dealing with non-Chinese counterparties.

1. Negotiation

Negotiation may very well be the culturally preferable option, since saving “face” is an essential preoccupation of Chinese companies and senior personnel. As a consequence, the majority of commercial contracts in China have a standard clause stipulating that negotiation should be pursued before other dispute settlement mechanisms are used.

Whether negotiations can succeed strongly depends on the willingness of parties to preserve a working relationship and the ability of parties to overcome cultural differences and differences in business practices.

2. Mediation

For the same reason as for negotiation, mediation also is a traditionally preferred method to solve disputes in China. Mediation can avoid public exposure of the dispute as well as time consuming and costly procedures.

Mediation in China can be divided into three categories: mediation supervised by the people's court, mediation supervised by an arbitral tribunal and mediation without the supervision of a court or arbitral tribunal. The first two are conducted by particular institutions in accordance with statutory proceedings and the settlement agreements reached can have the same binding force as judicial judgements. The latter, mediation without supervision, can be informal or hosted by mediation institutions derived from

arbitration institutions (such as the Beijing Arbitration Commission) or by independent mediation institutions (such as the China Council for the Promotion of International Trade Conciliation Centre).

Unlike a court judgment or an arbitral award, the result of mediation via a mediation institution or informal mediation is not directly enforceable in China. China's Civil Procedure Law does, however, allow parties to apply to court for a judicial confirmation of a mediation agreement.

3. Arbitration

Enforceability, confidentiality and neutrality have been the strongest advantages of arbitration over litigation when resolving cross-border disputes. Importantly, arbitration is only possible if a valid arbitration agreement is present. Parties are free to choose the arbitration institution (which may be located inside or outside China) and parties can appoint one or three arbitrators (who can be industry experts).

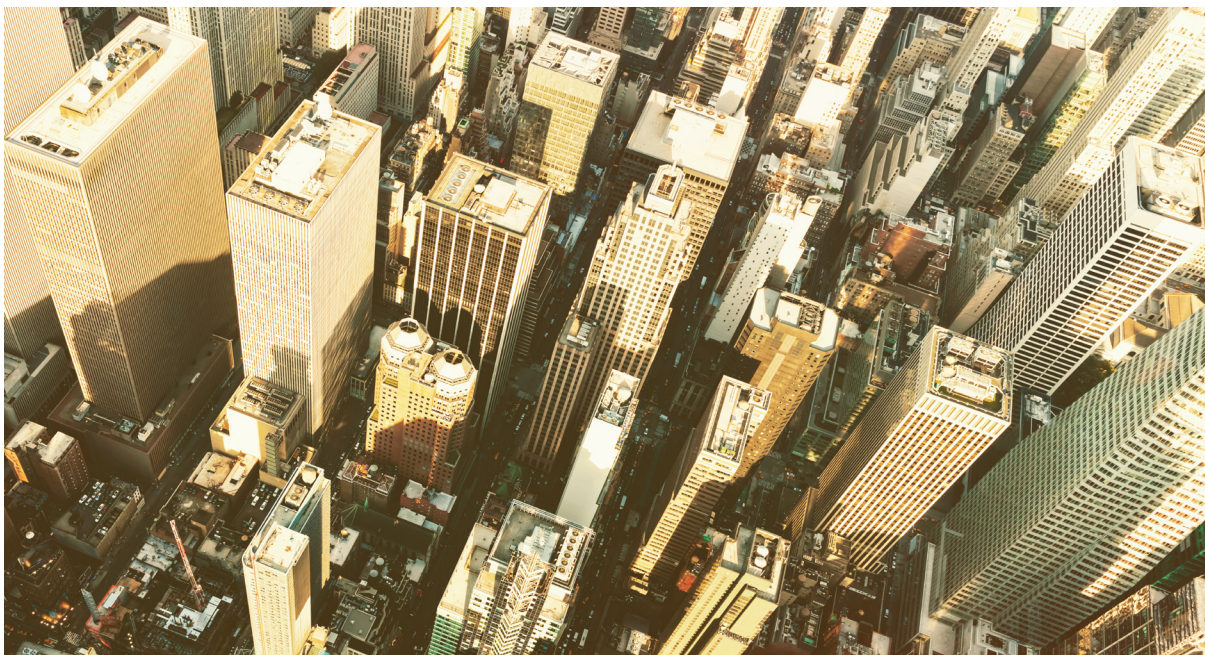
The choice of an arbitration institution located inside or outside China usually includes consideration of the following:

A. Parties can opt for an **arbitration institution located in Mainland China**, such as CIETAC and BIAC. The recognition and enforcement of such arbitration awards is based on Chinese domestic law rather than The New York Arbitration Convention.

It is important to note that CIETAC and BIAC have no power to enforce awards on their own authority. If a party fails to perform its obligations under an arbitration award, the other party can or should apply to the enforcement division of a competent Chinese court. This implies the same procedure as for regular Chinese court judgments in need of enforcement.

The scope of refusing the enforcement of an

¹ Please be informed that wholly foreign-owned companies, Sino-foreign equity joint ventures (EJV), Sino-foreign contractual joint ventures, which are incorporated under Chinese law, are considered Chinese legal entities (not foreign companies).



arbitration award under Chinese law is much wider than under the New York Convention. Furthermore, the parties involved may always apply to a foreign court to enforce the award rendered by CIETAC or BIAC based on The New York Arbitration Convention. This may be useful in the case that the other party (also) has assets located outside China.

B. Parties can opt for an **arbitration institution in Hong Kong** (e.g. HKIAC), **Macau or Taiwan**, which are geographically and culturally close to Chinese and which have significant experience dealing with Chinese-related arbitration cases. The recognition and enforcement of arbitration awards from the last-named regions in China will be based on the Reciprocal Enforcement of Arbitration Awards between the Mainland and Hong Kong, Macau or Taiwan.

When it comes to enforcement in China, this means that arbitration awards obtained from an arbitration institution in Hong Kong, Macau or Taiwan can be filed directly at the enforcement division of the court. In general, parties can successfully rely on the reciprocal relationship between China and Hong Kong, Macau or Taiwan. If the other party has assets outside China, it might still be useful to enforce the award in another country based on The New York Convention.

C. Parties can opt for **arbitrational institutions outside Asia**, such as ICC and LCIA.

On basis of The New York Arbitration Convention, to which for example The Netherlands and China are a

party, arbitration awards rendered by a commercial arbitration institution in The Netherlands are likely to be recognized and enforced by Chinese competent intermediate courts. The prevailing party should apply for an order to a competent court, which is in favor of the recognition and the enforcement of the award.

An award may be challenged only on limited grounds relating to procedural fairness, fraud and public policy. If the court intends to refuse the recognition and the enforcement a foreign arbitration award on one of these grounds, it has to report its opinion to the higher court within two months. If the higher court agrees on the lower court's decision, it has to report its comments to the Supreme Court. Then, the award can only be refused with the ultimate approval of the Supreme Court. Although the specific regulation demands that the court takes a decision within two months from the date it accepts the application; in practice it can take much longer. The assets of the other party may get out of reach during the application process.

If the intermediate court decides to recognize and enforce the award, the court is not required to report the decision to the higher courts. According to a Chinese government statistics, the majority of awards are recognized and enforced. Taking into account a high success rate, it is worthwhile to consider filing a China-related case to a foreign arbitration institution.

On the negative side it must be noted that when interim measures are approved by a foreign arbitration institution, the award (which contains a permission to attach) will not be recognized and enforced in China. This matter is not covered by The New York Convention and China has not entered into any multilateral treaties in this regard. Next to that, arbitration simply may not be suitable for the resolution of all disputes. It is, for example, only binding to the parties that signed an arbitration agreement or clause and one has to keep in mind that there is in principle no possibility of legal recourse (i.e. when a final arbitration award is given, the parties will be barred from airing the underlying claim in court).

4. Litigation

Litigation is regarded as a very last resort to solving a dispute, since resorting to public dissension directly affects the “face” and the reputation of a Chinese company. However, for the same reason, litigation can be an effective means of pressure.

Generally, parties to a contract are free to choose the litigation courts, which may be a competent Chinese court² or a foreign court. The following needs to be taken into account.

When the opposite party has assets in China, initiating litigation in China may be the better option for two main reasons. Firstly, the judgement can be executed directly by the Chinese court. Secondly, Chinese courts have exclusive power to grant interim measures. Interim measures can prevent the transfer of assets by the other party and they ensure recovery options in the event of the enforcement of a judgment. In some disputes, interim measures will give an incentive to settle a dispute by negotiation. In principle, Chinese courts will also recognize a judgment or written order rendered by a foreign court on the basis of:

1. the state of origin of the judgment or order and China having concluded a bilateral or multilateral treaty relating to the mutual recognition and enforcement of court judgments³, or judgments and orders otherwise being accepted on a reciprocal basis; and
2. the judgment does not contradict the basic principles of the Chinese law, nor violates state sovereignty, security and social and public interests of China.

At present, there is a small chance to enforce overseas judgements on reciprocity basis. However, in December 2016, the Nanjing Intermediate Court recognized and enforced a judgement granted by the High Court of Singapore in the Kolmar Group AG case. That was the first time a Chinese court enforced an overseas judgement on a reciprocal basis⁴. Furthermore, with the publication of “several opinions on the provision of judicial service and guarantee by People’s Court for the one belt one road construction” by the People’s Supreme Court, it is expected that Chinese courts will recognize and enforce more overseas judgements in accordance with the Chinese law in future.

5. Conclusion

The choice of the proper dispute resolution method depends on a variety of factors, including the countries involved, the party’s cultural preferences, future business perspectives, location of assets, relative bargaining positions et cetera. The best method of dispute resolution must be analyzed case by case. It is advisable to go through the options and their respective pros and cons, before cross-border contracts are concluded.

² China has a four-tier court system and a three specialized court system.

³ China entered into bilateral treaties, in which the recognition and enforcement of the commercial judgement is included, with Peru, Kuwait, Argentina, Tunisia, Morocco, Spain, Bosnia and Herzegovina, France, Algeria, Brazil, and United Arab Emirates.

⁴ China has a bilateral treaty with Singapore, in which the recognition and enforcement of the judgement is not included.

For further information, please contact:



Iris Kuijken
i.kuijken@burenlegal.com
T +86 21 6173 0388



Shanya Yang
s.yang@burenlegal.com
T +31 70 318 4206