

Managing Business Disputes in Today's China: Duelling with Dragons

Edited by MICHAEL J. MOSER

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As foreign business in China grows, so, too, do Sino-foreign business disputes. This volume, in the words of editor Michael Moser is a “general introduction to the practice of managing business disputes in today’s China,” intended as a practical guide for businesses and lawyers. The book collects 12 essays by lawyers at six major Western law firms who are experienced in resolving Sino-foreign business disputes, including Moser, who has written or co-authored four of the chapters. Overall, it is a clear examination of important aspects of Sino-foreign dispute behaviour

The book is constructed around a “scenario” of a failed Sino-foreign joint venture to create a power project in a Chinese province that pulls together in one horror story events that have all occurred in real-life transactions. Although the power plant has been completed according to the required documentation, the necessary permits to begin operation are being withheld. The host province has transformed its Power Bureau into a competitor of the joint venture whose plant duplicated the joint venture plant’s imported technology without permission. Also, a new regulator has appeared, as have various new laws that hamper a participating state-owned trust and investment company from honouring its obligations. Other issues are breach of contract by the joint venture’s technical manager, bribery by the joint venture’s Chinese consultant, and allegedly unlawful conduct by the joint venture’s general manager.

The book’s extensive scope includes surveys of dispute settlement options, informal dispute settlement approaches, possible options for arbitration inside and outside China (including investor–state arbitration), and litigation in China. All-important issues of enforcement are separately analysed, as are disputes involving intellectual property, employment and labour, and corruption and bribery. A last chapter succinctly summarizes major themes.

Within the limited space of this review, only a few salient issues can be raised. Richard Chalk and John Choong concisely review alternative approaches to dispute settlement: negotiation, mediation or conciliation, litigation, arbitration and administrative proceedings. Patrick Norton’s chapter on informal dispute settlement is a valuable analysis of appropriate tactics that highlights the importance of gaining information and insights into individuals and institutions that may be significant if difficulties arise. Norton notes the difficulty of identifying “the real decision making structure on the Chinese side” (p. 25) and the problems of relying on local consultants. The need to commence negotiations from the bottom up in the government hierarchy is rightly stressed, a valuable corrective to the still-current myth that frustrated foreign investors should begin at the top as early as possible. The most important emphasis in this chapter, rightly echoed elsewhere in the book, is the frequent serious disconnect between central government laws and policies and the conduct of local governments with their own agendas,

A chapter co-authored by Moser and Nadia Darwazeh analyses the Chinese International Economic and Trade Arbitration Commission (CIETAC), now one of the world’s busiest commercial arbitration centres (pp. 60–61). It notes that CIETAC’s practice of allowing arbitrators to blend arbitration with conciliation has been criticized; that there is a strong likelihood that a tribunal appointed under CIETAC rules will be made up mainly of Chinese nationals unless the parties have otherwise agreed to appoint arbitrators from outside the panel of Chinese and foreign arbitrators maintained by CIETAC, as well as a chief arbitrator who will not

be of the nationality of either party, in both cases subject to confirmation by CIETAC. Also, foreign arbitrators are not well remunerated for participation, and CIETAC's administrative charges may be very high in disputes in which large amounts are at stake. Attention is rightly given to important practical details such as choosing the language of the proceedings and whether an inquisitorial or adversarial approach should be specified in a well-drafted arbitration agreement.

Some other aspects of CIETAC's procedures and methods are not critically discussed. One issue is the nationality of experts who may be appointed to assist an arbitral tribunal. In this reviewer's experience in two cases, the tribunals appointed Chinese experts who exhibited prejudice in favour of the Chinese parties, one outrageously so. More broadly, the book fails to mention sharp criticisms of CIETAC that have been forthrightly raised by Professor Jerome Cohen ("Time to Fix China's Arbitration," *Far Eastern Economic Review*, Jan.–Feb. 2005). Also, it is unfortunate that the authors did not draw fully on their extensive experience to provide more observations on what foreigners could expect from the methods, approaches and relevant cultural attitudes of the Chinese arbitrators and lawyers they will encounter.

A detailed survey by Moser and Peter Yuen of arbitration outside China includes comparison of CIETAC rules with those of other major international institutions, and usefully alerts readers to possible Chinese attitudes toward practices that differ from those in China. The authors also note that the tendency to reach a decision based on "fairness and reasonableness," which often appears in international arbitration institutions outside China, may be greater in China and may "sweep aside the legitimate expectations of the parties" (p. 93).

The chapter on enforcement by Friven Yeoh echoes common criticism of the difficulty of enforcing both foreign awards and awards by Chinese arbitration tribunals in "foreign-related" matters. Local courts are not accountable for their actions in enforcement cases, they are often ignorant of the law and "sometimes, judges are motivated by local protectionism and are reluctant to enforce an award against a local Chinese entity" (p. 268). Also, local courts often delay the reports they must send to the Supreme People's Court of cases in which they decide not to enforce an award, and there is no time limit within which a ruling must be reached even when the matter is reported upward (pp. 268–69). The chapter concludes that "the chances of a successful enforcement process remain somewhat mixed" (p. 289) citing, among other factors, "local protectionism, political interference and the lack of judicial independence" (p. 290).

Managing Business Disputes in China concludes with a realistic "end word": "The methods and procedures for resolving business disputes between Chinese and foreign companies remain a work in progress" (p. 305). It usefully captures for businesses and their advisors the current state of that ongoing project, and should also interest scholars and other observers of China who are interested in the legal and business culture that can influence the conduct and outcomes of Sino-foreign business disputes.

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Courts and Criminal Justice in Contemporary China

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Courts and Criminal Justice in Contemporary China is neither a comprehensive study of the court system nor a study of the general practice of criminal justice in China. It