

Odean Volker and Robert Carlton in The Asian Lawyer: How Are China's Arbitration Agreements and Awards Enforced in U.S. Courts'

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Much has been written regarding the enforcement of foreign arbitral awards in China, but relatively little consideration is given to the treatment in U.S. courts of awards entered by the China International Economic and Trade Arbitration Commission (CIETAC), or to the enforcement of CIETAC arbitration agreements.

In fact, CIETAC arbitral awards are rejected by U.S. courts at a higher rate than other awards subject to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention. While agreements to arbitrate are relatively well accepted, the reported decisions reflect a prevalence of waived agreements.

The enforcement rate for CIETAC arbitration agreements in U.S. courts is approximately 54 percent, though that is not because of the choice of arbitral institution or place of arbitration. When faced with the argument that arbitration in China would involve great expense of time and money, one U.S. court was direct and succinct, explaining that this is something that “should have been considered before [the party] signed the contract.”

The causes for refusal of enforcement of CIETAC arbitration agreements are instead often self-inflicted, with waiver of the right to arbitrate often cited by U.S. courts. If a business relationship was initiated with the expectation that disputes would be resolved by arbitration, that fact should be immediately brought to the attention of counsel. Locating and asserting an arbitration clause at the outset of a dispute is the most effective way to maintain the right to arbitrate.

One example of a self-inflicted injury is *Apple & Eve, LLC v. Yantai North Andre Juice Co., Ltd.*, where U.S. counsel for Yantai succeeded in persuading the court to enforce an arbitration clause that called for “arbitration in the country of defendant in accordance with the arbitration organization of the defendant country.” China counsel for Yantai then sought a ruling from a Chinese court that the arbitration clause was invalid. This request for relief, when viewed in isolation, was not unusual, but it was not viewed in isolation.

The Chinese proceeding was brought to the attention of the U.S. court, which was convinced that Yantai’s conduct waived its right to arbitrate. *Apple & Eve* exemplifies the importance of clear communication in the execution of a litigation strategy and in the preservation of the right to arbitrate.

Excerpted from The Asian Lawyer. To read the full article, please [click here](#) (subscription required).