Doing Business in China
an Australia in the Asian Century White Paper Initiative

Summary
Business and consumer links between Australia and China are overwhelmingly positive. But in recent years this has resulted in higher numbers of commercial disputes. This paper sets out a strategy for minimizing the frequency and severity of Australia-China commercial disputes.

The Doing Business in China initiative will be a pathway to achieving the objectives of the Australia in the Asian Century White Paper, which states that “Businesses in Australia and the region will have well-developed working relationships based on a good understanding of each other’s legal institutions, commercial practices and corporate governance standards” (objective 18).

The Australian Government – in close partnership with the private sector – is seeking to better inform Australian companies and individuals of the risks of doing business with China. The Government is also taking steps to enlarge the space for arbitration in Australian-China commercial disputes. The key recommendations of the paper are that:

- the Australian Government – in close partnership with the private sector – seek to better inform Australian companies of the risks of doing business with China, and how to manage them, through an outreach campaign involving Government and private sector participation; and
- the Australian Government promote the use of arbitration clauses in commercial contracts, as a means of commercial dispute-resolution.

Issue
Business and consumer links between Australia and China are going from strength to strength. But in recent years increased trade has resulted in greater numbers of commercial disputes. The Australian Government is concerned about the difficulties that Australian companies and individuals are having in resolving these disputes. These difficulties arise by virtue of a number of factors, including: a lack of understanding of the domestic Chinese legal system; the apparently limited avenues through which such disputes can be resolved in a prompt, fair and transparent manner through Chinese courts; structural and legal issues relating to arbitration in China; and the exercise of prosecutorial discretion. The Australian Government is frequently called upon to intervene in commercial disputes. Very often it is unable to assist.

The Australian Government has been exploring ways that the severity and frequency of Australian-China commercial disputes can be minimised. In so doing, it has engaged closely with private-sector bodies with experience operating in China –
including AustCham Beijing, the Australia-China Business Council (ACBC) and the Law Council of Australia – to find an effective and durable solution to this challenge.

The Australian Government recognises that disputes can have many sources. Sometimes fault may rest with one party, sometimes both, and sometimes the fundamental source rests in differing understandings and assumptions. There are benefits to both parties familiarising themselves with the cultural differences that exist between Australia and China before entering into business agreements as one strategy to reduce the chance of conflict arising. However, against this backdrop, this paper focusses on some particular contracting and dispute-resolution practices that can, as part of a broader strategy, help to protect and promote the legitimate interests of Australian businesses.

The Nature of Australia-China Commercial Disputes
Generally speaking, the Australian Government is called upon to intervene in two types of commercial disputes.

1. Disputes between Australian importers and Chinese exporters; and
2. Disputes arising in the course of Australian businesspeople conducting business in China.

In regard to disputes between Australian importers and Chinese exporters, the Government is aware of a number of cases in which Australian companies have received goods from Chinese suppliers that are significantly substandard, or are altogether different, from what had been ordered. One recent case involved an Australian company that had ordered a large shipment of fertilizer, which, upon its arrival, was discovered to be contaminated soil. In another case, an Australian company that had ordered a container of fully refined paraffin wax for candle making received an inorganic powder not suitable for any wax applications.

Less frequently, there have also been cases in which disputes have arisen between Australian exporters and Chinese importers – for example the rejection of export shipments following a significant fall in commodity prices.

Most Australian companies involved in import-export disputes are small-to-medium enterprises (SMEs), with very little experience importing from China. A significant problem is that these enterprises are more likely to enter into informal business arrangements. At the same time, they are less likely to undertake thorough due diligence enquiries into the companies with which they do business, and are less likely to seek legal advice in drafting contracts.

Particularly problematic are instances where orders are made online. In these circumstances, a standard terms and conditions of purchase may be offered, but there is no opportunity to negotiate effective or more favourable dispute-resolution clauses. Although the validity of these online agreements may not be beyond doubt, when business relations turn sour, companies that have assumed the risk of
accepting online terms and conditions may find themselves both financially and legally limited in their options for redress.

Australians engaged in business activity in China have become the subjects of civil – and in some cases criminal – proceedings. These claims and charges arise as a result of business disputes and often involve Chinese Australians.

Where commercial disputes have resulted in civil claims, Australians have been prevented from leaving the country by Chinese law. Under Chinese laws relating to the entry and exit of foreigners, “persons who, as notified by a people’s court, shall be denied exit owing to involvement in unresolved civil cases.” These cases can involve lengthy delays and a lack of transparency in the Chinese judicial system.

The Government is particularly concerned about those cases where criminal charges arise as a result of business disputes. In cases involving Australians, criminal sentences have been given for misstating registered capital or having undocumented loans – actions that do not attract criminal charges in Australia. In the most serious cases, allegations of fraud, bribery, embezzlement or other ‘economic crimes’ have resulted in lengthy prison sentences. The Australian Government is currently providing ongoing consular support in relation to a number of these cases. They indicate that many Australian companies and businesspeople lack a thorough understanding of the domestic Chinese legal environment.

Dispute-Resolution in China
There are no specific restrictions on the manner in which international commercial disputes ought to be resolved in China. The three primary methods for resolving disputes are negotiation/conciliation, arbitration and litigation.

The Australian Government receives very piecemeal information about the circumstances that surround Australia-China commercial disputes. What is clearer, however, is a widespread problem when Australian companies and individuals fail to recognise and address properly the transactional risks of doing business in China.

Australian companies need to place a far greater emphasis on undertaking appropriate due diligence before entering new arrangements or embarking upon new business relationships. By being sensible and prudent about whom they are doing business with; by taking steps to ensure that they are part of a business network that has experience in China; and recognising that good business relationships are built upon firm foundations, including a good commercial contract; Australian companies are likely to avoid many commercial disputes in China. But if a dispute does arise, anecdotal evidence suggests that Australian companies sometimes struggle to achieve good outcomes through negotiation and litigation.

Negotiation

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1 Law of the People’s Republic of China on Control of the Entry and Exit of Aliens, Chapter V, Article 23.
Negotiation is the most commonly employed means of dispute-resolution in China. The Chinese preference for non-juridical methods of dispute-resolution is reflected in regulations and government departmental rules that require negotiation or conciliation as a preliminary method for settling disputes.

In negotiating commercial disputes, Australian companies tend to place a significant emphasis upon the legal rights and obligations of parties to a commercial dispute. Breach of contract generally results in termination of the contract and damages for any losses incurred. But in China, a greater emphasis is placed on preserving business relationships or using personal connections to assist in resolving disputes. This different emphasis can frustrate Australian companies, leading to the escalation of a dispute. This is particularly the case when a focus on the preservation of contractual relationships includes an expectation that rights and obligations should be renegotiated or fulfilment periods extended. Alternatively, a lack of familiarity with - and in some cases doubts as to the effectiveness of - formal processes in China has led many foreign investors in China to resolve disputes by negotiation more readily than in their home markets.

This ability to renegotiate earlier agreements opens up the possibility for pressure to be placed upon Australian businesses to accept new - and potentially less favourable - terms. The Australian Government is aware of instances where Australian businesspeople have been harassed, bullied and assaulted in the course of negotiations - most likely as a strategy to gain concessions through duress. In such circumstances, there is considerable scope for negotiations to deteriorate, and for disputes to escalate.

Given these difficulties, a central objective of this initiative is to: inform Australian companies and individuals of the differences in legal traditions between Australia and China; assist them to identify when negotiations have failed; and provide information that helps them to transition smoothly into more formal methods of dispute-resolution.

**Litigation**

There has been a considerable increase in commercial litigation in China in recent years. While the quality of Chinese court litigation is improving, it continues to suffer from serious shortcomings, and the service remains variable. Many courts are well below developed country standards – particularly in provincial areas. Judges may have minimal legal training and may be susceptible to local protectionism.

The outcome of any dispute can also be difficult to predict as there is no system of binding precedent in China and judgments do not have persuasive effect. An equally important consideration is that foreign lawyers and law firms cannot litigate in China and court proceedings are mandatorily conducted in Chinese - just as Australia restricts the practice of foreign lawyers and conducts court proceedings in English.

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Although the Supreme People’s Court has an ongoing campaign to improve enforcement, domestic-court judgments can be difficult to enforce – sometimes owing to local protectionism. Further, enforcement of foreign-court judgments is possible in principle but may be challenging. To enforce a foreign court judgment it is necessary to demonstrate either that (i) there is a bilateral enforcement treaty between China and the country where the judgment was rendered; or (ii) reciprocity between China and that country (i.e. that the foreign legal system from which the judgment originates enforces Chinese judgments). Australia does not have such a reciprocal arrangement with China and judgments from Taiwan, Hong Kong and Macau are also subject to special rules.

**Arbitration in China**

International arbitration has emerged in recent years as an effective – though perhaps underutilized – dispute-resolution mechanism in China. A number of attractive features of arbitration – including the ability to choose local and foreign arbitrators and the transparency of its proceedings and rules – have made it an increasingly prevalent feature of China’s legal landscape. After arbitration proceedings have been commenced, the Tribunal may suggest that the parties undertake a negotiation / mediation process; this is commonly referred to as "arb-med".

Under Chinese law, arbitration can only take place if the disputing parties reach an agreement in writing to submit their dispute to arbitration. If the dispute is to be heard within China, the clause must also specify the arbitral institute, and specify that ad hoc arbitration is not allowed. This emphasizes the importance of companies insisting upon the inclusion of an arbitration clause in commercial contracts *at the time of concluding a contract*.

There are other restrictions under Chinese law on the circumstances in which a dispute may be resolved by arbitration. Furthermore, certain types of dispute may have to be resolved onshore, within mainland China; in general, only foreign-related disputes may be resolved offshore.

In certain circumstances, there are also restrictions on the choice of governing law of a contract with a Chinese entity. In general terms, foreign-related contracts may be governed by a foreign law; but certain exceptions apply, for example, Sino-foreign joint venture contracts must be governed by Chinese law. As well, Chinese law will govern the contract if the foreign law conflicts with the social and public interests of the People’s Republic of China.

In order for a contract / dispute to be foreign-related, it must satisfy one of the following conditions:

1. At least one of the parties to the dispute must be foreign: for companies this is the place of incorporation (so any companies incorporated under the laws of
mainland China including JVs incorporated in China and Wholly Foreign-Owned Enterprises are not foreign) and for individuals it is determined by nationality;

. The subject matter of the dispute is located outside mainland China e.g. it concerns land or goods outside mainland China although the cross-border element cannot be artificial; or

. The occurrence, modification or termination of the civil-legal relationship between the parties takes place outside mainland China: this suggests that if the contract is executed, amended or terminated outside mainland China it will be foreign-related, although relying on this limb alone may be risky.

It is essential that Australian businesses seek their own legal advice in relation to these issues.

The Enforcement of Domestic Arbitral Awards
Although historically the grounds for challenging domestic arbitral awards were broad and potentially permitted the court to review the merits of the case, the new Civil Procedure Law (effective 1 January 2013) (CPL) has narrowed the scope of review. This is seen by many commentators as a step in the right direction in relation to enforcement of domestic arbitral awards in China.

The Enforcement of Foreign-Related Awards
If a foreign-related dispute is arbitrated within mainland China, its enforcement in China will also be governed by the CPL. But, the grounds upon which enforcement of a foreign-related award can be refused are more narrow than those for domestic awards, and essentially parallel those set forth in the United Nations Convention on the Recognition of Foreign Arbitral Awards, discussed below. In addition, the pre-reporting system (discussed with respect to foreign awards) also applies to enforcement of foreign-related awards.

The Enforcement of Foreign Arbitral Awards
China acceded to the New York Convention in 1987. The Convention provides for the mutual recognition of arbitral awards between signatory countries. Despite this – and despite the increased popularity of arbitration in China – there is a perception that the enforcement of foreign arbitral awards in China remains problematic.

Pursuant to the New York Convention, the enforcement of arbitral awards in China (as in other countries) can be refused on a number of relatively narrow grounds – including that enforcement would be contrary to public policy. The Chinese courts have generally interpreted this public-policy exception in line with article 274 of the CPL, which provides that a court may refuse the enforcement of an arbitral award if it determines that the award is against the ‘social and public interest’ of China.

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5 Ibid.
6 Ibid, Article V(2)(b).
The enforcement of awards, however, is less problematic than commonly thought – particularly in urban areas.\(^7\) This is due to a number of factors including China’s being a party to the New York Convention, its arrangements with Hong Kong and Macau relating to the enforcement of arbitral awards and the so-called reporting system which is an effective aid to securing enforcement.\(^8\)

The legislative structure for enforcement of both foreign-related and foreign-arbitral awards in China is now pro-arbitration, and the grounds for refusing enforcement of these awards is in line with international practice.

**Choosing an Arbitral Body**

In theory, arbitration of foreign-related disputes can take place anywhere in the world. In practice, where they have a choice, parties to Australia-China commercial disputes typically agree – at the time of concluding a commercial agreement – to arbitrate in Hong Kong or Singapore. The arbitral rules and institutions most commonly chosen to govern and administer the proceedings are the Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) or the China International Economic and Trade Arbitration Commission (CIETAC). The Australian Centre for International Commercial Arbitration (ACICA)\(^9\) is also seeking to promote Sydney as a regional centre for arbitration in Asia.

There are a number of important differences between onshore and offshore arbitration in China-related disputes. Onshore arbitration can only be conducted using mainland Chinese Arbitration Commissions, such as CIETAC, and for the arbitration agreement to be valid, the institution must be specified. No foreign institution is able to administer arbitration in China. Finally, ad hoc arbitrations are not permitted in China and arbitral awards that are rendered in ad hoc arbitrations conducted within China are not enforceable.

These differences have often led foreign parties to pursue arbitration offshore where possible – particularly at the HKIAC or SIAC. Nevertheless, which arbitral body is best suited to resolve a dispute will depend on a combination of convenience, cost and the facts of the particular case. Two separate issues arise for agreeing between the

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\(^7\) See, above n 4, 14-15.

\(^8\) The ‘reporting system’ applies to foreign and foreign-related arbitral awards in mainland China. Under this system, the lower courts are authorised to order enforcement of an offshore award (or a foreign-related award rendered in mainland China); however, if the court decides to refuse enforcement, it must refer the case to a higher court to confirm the decision. Thus, the Supreme People’s Court must agree if recognition or enforcement is refused. Further, the new CPL provides that the Supreme People’s Court must provide its reasoning if it is minded to refuse enforcement. This system has largely removed the power of local courts to unilaterally refuse to recognise or enforce foreign-related arbitral awards and eliminates the influence that ‘local protectionism’ has in enforcement.

\(^9\) The ACICA is Australia’s only international arbitral institution. It has recently signed an agreement with the Abu Dhabi Commercial Conciliation and Arbitration Centre to promote each other as favourable locations for arbitration. The agreement promotes the ACICA as a neutral option for resolving disputes and aims to attract more UAE commercial disputes to Australia. The ACICA may be interested in pursuing similar partnerships in China.
parties: the choice of rules to govern any arbitration, and the seat (venue) of that arbitration.

While the Australian Government supports the use of arbitration as a preferred method of commercial dispute-resolution with Chinese parties, it does not endorse one arbitration body over another – whether onshore or offshore. Rather, it seeks to inform Australian individuals and companies about the range of arbitration bodies available, and leave it to companies to decide which best suits their commercial needs.

The choice of arbitral institution carries with it a number of significant ramifications, including:

- if parties cannot agree on an arbitrator (or the chair of a 3-person panel) then usually the arbitration institution elected by the parties will decide; and
- unless the parties specify otherwise, the choice of institution will determine the seat of arbitration – which is often the default location for hearings, and will also determine the applicable procedural law and courts system exercising supervisory jurisdiction over the arbitral process (which includes granting interim relief).

These are important considerations for Australian companies deciding upon a preferred location for arbitration with their Chinese counterparts. A further important consideration will be who the arbitrators are that will preside over the hearing.

**The China International Economic and Trade Arbitration Commission (CIETAC)**

CIETAC is the principal, government-sponsored arbitral body in China – and has been the most important for foreign investors in China. CIETAC has improved markedly over recent years as a location for arbitration in Asia, as it has responded to criticisms and market demands by amending its arbitration rules. These revisions have reflected two general trends: convergence with best practices; and providing more autonomy and flexibility for parties.

As of 2005, CIETAC’s arbitration rules have been in general compliance with international norms and standards, with the most recent revision being in May 2012. Parties are now free to agree upon a range of matters, including:

- the language of arbitration;
- where arbitration is to take place (including the possibility of Australia);
- the applicable law; and
- the number and nationality of arbitrators, although they must be selected from CIETAC’s panel of approved arbitrators, unless the parties agree

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otherwise (for foreign-related disputes, the panel includes several Australian arbitrators).

CIETAC now boasts a well-educated and highly professional panel of arbitrators capable of dealing with complex international commercial disputes in a fair and professional manner. Furthermore, its locations in the capital city (Beijing) and economic hubs (Chongqing and Tianjin) have tended to insulate CIETAC from local protectionism and many of the other difficulties that courts and local arbitration commissions face in provincial areas. CIETAC also has re-vamped sub-commissions in Shanghai and Shenzhen, the result of a split in 2012 between CIETAC and its previous sub-commissions in those cities (see below).

Despite the considerable improvements in CIETAC arbitration in recent years, a number of problems persist. These include:

- where Chinese law governs the dispute, foreign lawyers must rely on PRC co-counsel to present the Chinese law issues to the tribunal;
- pay for foreign arbitrators is low, thus limiting the number of foreigners willing to serve as chief arbitrator;
- ad hoc arbitration is not allowed;\(^\text{11}\) and
- awards have been scrutinized by CIETAC (although other arbitral bodies, including the ICC and the HKIAC, also scrutinize awards).\(^\text{12}\)

Most problematic is the rift between CIETAC headquarters in Beijing and its former Shanghai and South-China (Shenzhen) sub-commissions. The disagreement arose around May 2012 when the former two sub-commissions refused to adopt CIETAC Beijing’s 2012 Arbitration Rules. They both declared independence from CIETAC Beijing. The South China sub-commission subsequently announced it had changed its name to the South China Economic and Trade Arbitration Commission or the Shenzhen Court of International Arbitration (SCIA). The Shanghai sub-commission announced in April 2013 that it would be called the Shanghai International Economic and Trade Arbitration Commission or the Shanghai International Arbitration Centre (SHIAC).

CIETAC Beijing responded with announcements in August and December 2012 that the two sub-commissions would no longer have any authority to administer CIETAC arbitrations. It has established new venues to administer CIETAC arbitrations in Shanghai and Shenzhen.

\(^{11}\) Ad hoc arbitration is not administered by an arbitral body and requires the parties to make their own arrangements for selection of arbitrators, designation of rules, applicable law, procedures and administrative support. Ad hoc proceedings can be more flexible, cheaper and faster than administered proceedings. The absence of administrative fees alone makes ad hoc arbitration attractive to many small companies.
The dispute has raised concerns regarding the future of CIETAC arbitration, particularly in regard to:

- the enforceability of arbitral awards rendered by the former CIETAC Shanghai and South China sub-commissions;
- the uncertain legal status of new Shenzhen and Shanghai as independent arbitral bodies; and
- the suitability of the arbitration rules of each institution, in light of the facts and circumstances of a given dispute.

In regard to the former, there is uncertainty as to whether awards granted in arbitration proceedings overseen by the former CIETAC sub-commissions would enjoy the same level of recognition by Chinese courts.

It is unclear at present how this will be resolved. Given the current positions of the sides, the split may represent a long-lasting change in the structure and operation of CIETAC. For the time being at least, it would be prudent for Australian companies seeking to arbitrate at CIETAC to nominate CIETAC Beijing as their preferred institution to ensure the highest chance of their award being enforced by the courts.

**Hong Kong International Arbitration Commission (HKIAC)**

The HKIAC is one of the most well-established arbitration institutions in Asia. It offers both a low-cost ‘unmanaged’ arbitration process using the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and a more expensive ‘administered’ arbitration using its own HKIAC Rules.

The former makes unmanaged arbitration at the HKIAC highly attractive for smaller commercial disputes or where there are likely to be future business dealings between the parties. The latter option is substantially more expensive. But the HKIAC manages the whole arbitration process – including the appointment of a panel, the number of arbitrations, expedited procedures (which offer an award within 6 months where the dispute involves an amount less than US$250,000) and administration.

The HKIAC is also a popular choice for arbitration in Asia for cultural and historical reasons. Hong Kong carries with it the advantages of a good command of English; a common-law tradition; an appreciation of western concepts of law; a strong rule of law; a competent judiciary; and a strong legal infrastructure. Ad hoc arbitration is permitted in Hong Kong, unlike in mainland China. In 2011, Hong Kong abolished the distinction between international and domestic arbitration – making Hong Kong significantly more user-friendly, particularly for foreign parties.

The HKIAC also serves as a useful middle-ground location for arbitration between China and foreign parties. The HKIAC is widely accepted in China and arbitrators are
more experienced with China-related disputes. The HKIAC is well connected to Chinese legal institutions, and in 2009, the Supreme People’s Court of China confirmed the enforceability of Hong Kong arbitral awards. Consequently, Chinese courts should readily enforce HKIAC awards.

**Singapore International Arbitration Centre (SIAC)**

Singapore – like Hong Kong – is a well-established location for arbitration in Asia. It is also a party to the New York Convention and enjoys a physical, legal and political infrastructure that is highly developed, skilled and of high integrity. It has adopted the UNCITRAL Model Law to apply to international arbitrations – the practical effect being that arbitrations in Singapore are conducted in a legal environment that minimises interference by the courts.

The SIAC is Singapore’s principal international arbitration body, and in 2010, was listed by the *Choices in International Arbitration Survey* as the preferred arbitral association in Asia (an accolade traditionally resting with the HKIAC). The SIAC administers most of its cases under its own rules and a closely managed type of arbitration similar to that of the HKIAC – but it is considerably more expensive. Nonetheless, the highly managed style of SIAC makes it attractive in disputes where the question of resources is less important, and where the opposing party is unknown or is unlikely to cooperate.

**Australian Centre for International Commercial Arbitration (ACICA)**

ACICA is Australia’s only international arbitration institution, and is seeking to establish Australia as a competitive location for international arbitration in Asia. ACICA’s membership includes prominent practitioners and academic experts in the field of international and domestic commercial arbitration and all forms of dispute-resolution. ACICA’s Arbitration Rules - incorporating the Emergency Arbitrator Provisions - were developed to speed up the resolution of cross border and international commercial disputes, and provide parties with greater flexibility, including an option to seek emergency interim measures of protection from an emergency arbitrator before the arbitral tribunal is constituted. ACICA has also developed the Appointment of Arbitrators Rules 2011, which establish a streamlined process through which a party can apply to have an arbitrator appointed to a dispute seated in Australia.

**Enhancing the Role of Arbitration in Australia-China Commercial Disputes**

There are a number of reasons why arbitration is not more widely used by Australian companies conducting business with and in China. These include:

- a lack of knowledge about arbitration options;
- a mistrust of international arbitration – particularly in China-based arbitral bodies;
- the failure to include well-drafted arbitration clauses in commercial contracts; and
- the absence of a framework for commercial dispute-resolution best practice.
There are a number of strategies the Australian Government intends to support to address these issues and enhance the role of arbitration in Australia-China commercial disputes. These include:

1. **A Commercial Dispute-Resolution Outreach Campaign**

A significant cause of China-Australia commercial disputes – particularly between Australian importers and Chinese exporters – is a lack of knowledge regarding the risks of conducting business with and in China, and the most effective ways to mitigate or minimize those risks.

In response, the Australian Government has launched the *Doing Business in China* Commercial Disputes Resolution Initiative. The first stage of the initiative will involve outreach to Australian companies through business events, workshops and seminars aimed at driving home the message of the *Doing Business in China* initiative to Australian companies.

Also as part of the initiative the quality of the information provided by the government to Australian companies and individuals on doing business in China has been enhanced by a dedicated *Doing Business in China* webpage. The page is hosted by Austrade.

The site provides information and links to specialised advice on doing business in China from other relevant areas of Government. For instance:

- The **Attorney-General’s Department** provides general advice on the importance of receiving professional legal advice; and the benefits of alternative dispute-resolution, including arbitration;
- **IP Australia** provides advice on IP protection issues;
- DFAT’s **Consular Policy Division** provides advice on the limits of consular support, and the unique problems faced by Australians of Chinese origin in commercial disputes; and
- **Austrade** provides advice on precautionary measures such as seeking trial shipments; employing local agents to consolidate, sample and verify goods on shipping; and engaging Chinese advisors.

Most importantly, the site makes clear what the Australian Government can – and can’t – do for Australian businesses involved in commercial disputes with Chinese companies.

A point of central importance is that business should obtain their own legal advice on appropriately managing and mitigating the legal risks in cross-border trade in general, and doing business with China specifically. Considerable experience and expertise on the questions can be found within the Australian legal profession. The Law Council of Australia has strong ties with the China Law Society and the All-China
Lawyers Association. These organisations provide a useful conduit through which to share best practice. Furthermore, the Law Council of Australia is in the process of setting up its Beijing office and is interested in taking forward fresh initiatives.

Many larger legal practices in China are seeking to improve their services to small- and medium-sized enterprises – a component of which could include seminars on doing business in China. These could be coupled with seminars hosted locally in Australia. Further events could also be hosted by business organisations like AustCham; and the Australia-China Business Council (ACBC). Options to push the dispute-resolution initiative are plentiful, and a keen interest has been demonstrated by the private sector to be closely involved.

2. **The Promotion of Arbitration Clauses and Best Practice Guidelines**

A significant step towards minimizing Australia-China commercial disputes is creating common understandings of how best to avoid and deal with disputes. The second part of the *Doing Business in China* Commercial Disputes Resolution Initiative will involve the promotion of arbitration clauses in commercial contracts and best practice guidelines.

A common theme in Chinese-policy development is the tendency to test ideas in particular regions or provinces before considering them on a national scale. In April 2013, the Australian Government concluded an MOU with the Guangdong Provincial Government to establish the Australia-Guangdong Business Cooperation Council. Part of the mandate of the council is to “help to resolve difficulties encountered in business relations between Australia and Guangdong.” Working in partnership with the Guangdong Provincial Government, the Council may provide an opportunity to promote arbitration clauses and best practice guidelines for Australia-Guangdong commercial disputes. The involvement of the Council will not extend to the Council playing an active role in the resolution of commercial disputes.

**Other Dispute-Resolution Options**

Although arbitration has particular strengths as an option for cross-border commercial disputes, provision for other forms of dispute-resolution can have a useful role to play. These can have advantages in certain contexts. For example, mediation, properly framed, is much quicker and hence a good option where speedy resolution is of the essence. Parties should seek advice on the possible relevance of these other options, and how best to factor them into contractual arrangements.

**Conclusion**

Increased business and consumer links between Australia and China are overwhelmingly positive and Australian businesses continue to seek opportunities to be part of China’s growth and development. At the same time, commercial disputes continue to bring challenges for both Australia and China. A great deal can be done, however, to minimise the frequency and severity of these disputes. For many Australian SMEs, navigating the Chinese dispute-resolution system alone rarely yields favourable outcomes. Through providing easily accessible information to Australian companies about the risks of doing business in and with China; equipping
them with knowledge of best practice when it comes to commercial disputes; and giving them an understanding of how arbitration works - and how to prepare for it - many commercial disputes may be more easily resolved.

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