

ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA

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1. Overview

1.1 Legal framework

1.1.1 The People's Republic of China (**PRC**)¹ Arbitration Law 1994 (**PRC Arbitration Law**) was promulgated by the Standing Committee of the National People's Congress of the PRC on 31 August 1994 and came into force on 1 September 1995.

1.1.2 In the PRC, civil legal disputes that are not resolved through pre-action negotiations between the parties can be finally resolved by either litigation or arbitration. As a matter of principle, jurisdiction over civil cases will be exercised by the PRC People's Courts.²

1.1.3 Arbitration is the preferred method of dispute resolution for foreign parties and foreign-invested enterprises (**FIE**)³ in the PRC for the following reasons:

- proceedings brought before the ordinary PRC People's Courts can be risky, particularly for foreign parties and FIEs. Judges may be inclined to follow the instructions of PRC administrative bodies which may protect the interests of the local party or may be susceptible to outside influences;
- whilst it is theoretically possible under PRC law to agree to submit a dispute to the jurisdiction of a foreign court, the judgments of most foreign courts are still not recognised and not enforceable in the PRC due to a lack of reciprocity;
- arbitration offers the parties a means of resolving their disputes in private, whereas most PRC People's Court proceedings are public; and
- arbitration also offers more flexibility to parties in relation to procedures and formalities such as the adoption of proceedings in a foreign language.

1.2 Distinction between domestic, foreign-related and foreign arbitration in the PRC

1.2.1 There is a crucial distinction between domestic arbitration, foreign-related arbitration and foreign arbitration in the PRC. These concepts have developed separately over time and, as discussed in paragraph 3.1.1 below, the PRC Arbitration Law maintains a distinction between how domestic and foreign-related arbitration is treated under PRC law.

¹ The following refers to the law of the People's Republic of China with the exclusion of the law of Taiwan and the Special Administration Regions of Hong Kong and Macao.

² PRC Civil Procedure Law 2007 (**PRC Civil Procedure Law**), art 6.

³ For further discussion on FIEs, see paragraph 1.2.5 below.

Domestic arbitration

- 1.2.2 Rules pertaining to domestic arbitrations apply to all circumstances in which there are no foreign elements to the dispute. Consequently, domestic arbitral proceedings will not form a major focus of this chapter.

Foreign-related arbitration

- 1.2.3 Rules relating to foreign-related arbitrations apply in circumstances where there is a “foreign interest” in the dispute, but where the arbitral proceedings are governed by an arbitral institution that is established in the PRC.
- 1.2.4 There is no definition of “foreign-related arbitration” in the PRC Arbitration Law, but a definition of the term “foreign-related dispute” can be located in other sources of PRC law. According to Article 304 of the Opinions on Certain Questions Concerning the Application of the Civil Procedure Law issued by the PRC Supreme People’s Court on 14 July 1992 (**Opinions**), a dispute involves a “foreign interest” where:
- one or both parties are foreigners, foreign entities or foreign organisations;
 - the legal circumstances relating to the conclusion, modification or termination of a contractual relationship took place in a foreign country; or
 - the subject matter of the dispute is located in a foreign country.
- 1.2.5 A FIE that is incorporated as a legal person in the PRC constitutes a PRC domestic entity. Therefore, as a general rule, any arbitration in which a FIE is a party should be considered to be domestic and governed by the provisions of the PRC Arbitration Law that relate to domestic arbitration rather than a foreign-related arbitration, unless any of the circumstances set out in paragraph 1.2.4 apply in relation to the other party. The mere fact that a FIE is invested in by a foreign party is not sufficient to transform the dispute into one involving “foreign interests”.

Foreign arbitration

- 1.2.6 Rules pertaining to foreign arbitrations apply in circumstances where there is a dispute with foreign interests that is conducted by a foreign arbitral institution (on which see paragraph 2.4 below) or an ad hoc arbitration that takes place outside of the PRC.

2. The role of arbitral institutions

2.1 Non-recognition of ad hoc arbitration in the PRC

- 2.1.1 In order to be valid and binding, Article 16 of the PRC Arbitration Law requires an arbitration agreement to contain a designated arbitral institution that will govern

the arbitration. This requirement applies to both domestic and foreign-related arbitration in the PRC.

2.1.2 An arbitration agreement providing for ad hoc arbitration will be considered to be invalid (due to failing to fulfil the requirements in Article 16 of the PRC Arbitration Law) and will not prevent a PRC People's Court from accepting jurisdiction to hear a dispute arising between the parties to it. As a result, ad hoc arbitration is not practised in the PRC.

2.1.3 As to possible exemptions regarding the enforcement of ad hoc awards made under foreign arbitral proceedings,⁴ see paragraphs 11.2.8 to 11.2.10 below.

2.2 Domestic arbitral institutions (arbitration commissions)

2.2.1 It is widely acknowledged that the term "arbitration commission" that is used in the PRC Arbitration Law refers to the more commonly used term "arbitral institution". Based on the wording of Article 10 of the PRC Arbitration Law, commentators have concluded that reference to an "arbitration commission" is to an arbitral institution that is established in the PRC.⁵

2.2.2 Before the introduction of the PRC Arbitration Law, domestic arbitral institutions were not independent from government authorities. The PRC Arbitration Law aimed to reform arbitration in the PRC, to transform it into a more commercial form of dispute resolution that was independent from judicial and administrative interference. As a result, the structure of domestic arbitral institutions was amended, and any domestic arbitral institutions that did not comply with the new provisions of the PRC Arbitration Law were abolished.

2.2.3 Under the PRC Arbitration Law, domestic arbitral institutions may be set up directly under the provincial governments of provinces and autonomous regions⁶ and are organised by the local Chamber of Commerce at the provincial level.⁷ They may also be established in other municipalities with districts.⁸ However, in contrast to arbitral institutions organised under the previous law, the PRC Arbitration Law expressly provides that domestic arbitral institutions must be independent from

⁴ As to the meaning of "foreign arbitration", see paragraph 1.2.6 above.

⁵ See, for example, Tao and von Wunscheim, "Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions", *Arbitration International* (Kluwer Law International, 2007, vol 23, issue 2) p 310.

⁶ PRC Arbitration Law, art 10(1).

⁷ *Ibid*, art 10(3).

⁸ *Ibid*, art 10(1).

administrative authorities. There must be no subordinate relationships between domestic arbitral institutions and administrative authorities.⁹

- 2.2.4 Following the entry into force of the PRC Arbitration Law, more than 200 domestic arbitral institutions have been established in the PRC, including the Beijing Arbitration Commission, Shanghai Arbitration Commission, Guangzhou Arbitration Commission, Shenzhen Arbitration Commission and Wuhan Arbitration Commission.
- 2.2.5 Since the promulgation of a PRC State Council notice in 1996 (which was implemented in Chapter VII of the PRC Arbitration Law), domestic arbitral institutions are also entitled to administer foreign-related disputes, if so agreed by the parties.
- 2.2.6 While the legislation requires a strict legal separation between the administrative authorities and these domestic arbitral institutions, it should be noted that, in reality, these legal safeguards are not always effective. Not all domestic arbitral institutions are free from judicial and administrative interference. Local protectionism and political influence are common problems. Parties should strongly consider choosing a foreign arbitral institution (if possible) or one of the reputable foreign-related arbitration commissions (such as CIETAC, discussed below at paragraph 2.3.4).

2.3 Foreign-related arbitral institutions

- 2.3.1 Foreign-related arbitral institutions were established to administer foreign-related disputes.
- 2.3.2 In contrast to the organisational structure of domestic arbitral institutions,¹⁰ the PRC Arbitration Law requires foreign-related arbitral institutions to be organised and established by the China Chamber of International Commerce.¹¹
- 2.3.3 A distinction concerning the manner in which domestic and foreign-related arbitral institutions may govern arbitral proceedings arises in regard to the restrictions upon who may be appointed as an arbitrator by those arbitral institutions. Foreign-related arbitral institutions may appoint arbitrators from “among foreigners with special knowledge in the fields of law, economy and trade, science and technology,

⁹ *Ibid*, art 14.

¹⁰ See section 2.2 above.

¹¹ PRC Arbitration Law, art 66(1).

etc".¹² However, domestic arbitral institutions must appoint arbitrators from among "righteous, upright persons", who must meet a list of express conditions.¹³ This demonstrates the reduced flexibility and autonomy that a domestic arbitral institution may exercise in certain circumstances, in comparison with a foreign-related arbitral institution.

- 2.3.4 The best known foreign-related arbitral institution is the China International Economic and Trade Arbitration Commission (**CIETAC**), which was established in 1956 to resolve economic and trade disputes between a foreign entity and a PRC entity. CIETAC is also one of the largest arbitral centres in the world. It is headquartered in Beijing with Sub-Commissions in Shanghai (established in 1989), Shenzhen (established in 1990), Tianjin (established in 2008), and Chongqing (established in 2009).
- 2.3.5 Before the adoption of the PRC Arbitration Law, CIETAC and the China Maritime Arbitration Commission (**CMAC**) were the only arbitral institutions in the PRC that were qualified to administer foreign-related arbitral proceedings.¹⁴ These two arbitral institutions survived the reforms under the PRC Arbitration Law and remain distinct from domestic arbitral institutions. Even though domestic arbitral institutions are now able to hear international cases, CIETAC maintains its leading position in international arbitration with a high volume of cases. In addition, CIETAC and CMAC have extended their sphere of competence so as to encompass domestic as well as foreign-related disputes, if so agreed by the parties.¹⁵
- 2.3.6 Arbitration before CIETAC is governed by the CIETAC Arbitration Rules. Over the years, these rules have been amended several times. The latest revision, effective as of May 2005, introduced further amendments to modernise the CIETAC Arbitration Rules. One of the innovations is that the parties are not only entitled to agree on the application of other arbitral rules, such as the UNCITRAL Arbitration Rules 1976,¹⁶ but also on modifications to the CIETAC Arbitral Rules.¹⁷ Another version of the CIETAC Arbitration Rules is expected in 2012.
- 2.3.7 In light of the recent expansion in the roles of both domestic arbitral institutions (into foreign-related disputes) and foreign-related arbitral institutions (into

¹² *Ibid*, art 67.

¹³ *Ibid*, art 13.

¹⁴ CMAC only administers maritime disputes.

¹⁵ CIETAC Arbitration Rules, art 59–66.

¹⁶ For the full text of the UNCITRAL Arbitration Rules 1976, see CMS Guide to Arbitration, vol. II, appendix 3.1.

¹⁷ CIETAC Arbitration Rules, art 4(2).

domestic disputes), the traditional distinction between these two forms of arbitral institution has diminished considerably. A positive aspect of this development is the increased competitive relationship between foreign-related and certain domestic arbitral institutions, which can be expected to result in an improvement in the quality of arbitration in the PRC.

- 2.3.8 As a result of this expansion, the main distinction between domestic and foreign-related arbitrations under the PRC Arbitration Law is now focussed upon the nature of the underlying dispute, rather than on the arbitral institution that is administering the arbitral proceedings. This distinction is particularly apparent in relation to the enforcement of awards (see further section 11 below). Consequently, references in this chapter to an “arbitral institution”, unless expressly stated otherwise, shall encompass both domestic and foreign-related arbitral institutions.

2.4 Foreign arbitral institutions

- 2.4.1 There is no definition of “foreign arbitral institutions” under law in the PRC. Reference to a “foreign arbitral institution” is, therefore, considered to cover arbitral institutions that are established outside of the PRC, such as the ICC, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Stockholm Chamber of Commerce, Zurich Chamber of Commerce, DIS and LCIA.
- 2.4.2 There are currently no foreign arbitral institutions operating in the PRC and it is rare for a foreign arbitral institution to administer an arbitration that has its seat in the PRC. This results from the fact that in the past, a foreign award made in the PRC by a foreign arbitral institution was very unlikely to be acknowledged and enforced in the PRC. However, despite the challenges that have traditionally been faced by parties seeking to enforce awards rendered in arbitral proceedings that are governed by foreign arbitral institutions with their seat of arbitration in the PRC, recent case law indicates that the judiciary in the PRC may be demonstrating a changing attitude to such circumstances. See further the discussion at paragraph 11.2.11 below.
- 2.4.3 However, there are certain circumstances in which the parties may agree that their arbitral proceedings shall be governed by a foreign arbitral tribunal. Parties to a contract involving “foreign interests” are entitled to agree on arbitration before a foreign arbitral institution.¹⁸ The circumstances in which a foreign interest may arise in a dispute are set out in paragraphs 1.2.3 and 1.2.4 above.

¹⁸ PRC Contract Law, art 128.

3. Scope of application and general provisions of the PRC Arbitration Law

3.1 Scope of application

3.1.1 The PRC Arbitration Law maintains what PRC legal scholars describe as a “dual track system”,¹⁹ which distinguishes between domestic and foreign-related arbitration. Chapter VII of the PRC Arbitration Law contains special provisions for foreign-related arbitration. Where matters arising out of an arbitration are not expressly covered by Chapter VII, the other provisions of the PRC Arbitration Law shall apply to all arbitral proceedings which have their seat of arbitration in the PRC.²⁰ In practice, the arbitral rules of the relevant arbitral institution (for example, the CIETAC Arbitration Rules, which are the most commonly used institutional arbitral rules for foreign-related disputes) are more detailed and supplement the provisions on arbitral procedure described in the PRC Arbitration Law.

3.2 General principles

3.2.1 The PRC Arbitration Law is not based on the Model Law (1985),²¹ although certain provisions reflect the fundamental principles of modern international arbitration, such as procedural fairness and the independence of arbitrators.²² Unlike the Model Law (1985), the PRC Arbitration Law does not endeavour to recognise the contractual freedom of the parties to resolve their disputes, but instead attempts to protect the “legitimate rights and interests of the parties and to safeguard the development of the socialist market economy.”²³

4. The arbitration agreement

4.1 Formal requirements

4.1.1 It is only possible for FIEs or any domestic PRC parties to avoid litigation before a PRC People's Court if the parties to the dispute have entered into a binding agreement to submit that dispute to arbitration. Such an agreement can be entered into before or after the dispute has arisen in the form of a valid arbitration clause in a contract or as a separate, stand-alone arbitration agreement. A PRC

¹⁹ Wenying, “Distinct Features of Arbitration Law in China: An Historical Perspective”, *Journal of International Arbitration* (Kluwer International, 2006, vol 23, issue 1) p 64.

²⁰ PRC Arbitration Law, art 65.

²¹ For the full text of the Model Law (1985), see CMS Guide to Arbitration, vol II, appendix 2.1.

²² PRC Arbitration Law, art 1 and 14.

²³ *Ibid*, art 1.

People’s Court shall decline jurisdiction over a dispute if the parties have concluded a valid arbitration agreement in respect of the dispute in question.²⁴

- 4.1.2 An arbitration clause contained in a contract or, alternatively, a stand-alone arbitration agreement must be in writing.²⁵ Under the law of the PRC, “in writing” includes by letter, telegram, telex, fax, electronic data interchange and email.²⁶ Reference to an arbitration clause contained in standard terms and conditions is sufficient, provided that the general terms and conditions have been validly incorporated into the contract.²⁷

Requirements under Article 16 of the PRC Arbitration Law

- 4.1.3 A valid arbitration agreement must contain the following particulars:
- an expression of the intention to apply for arbitration;
 - the matters for arbitration; and
 - a designated arbitral institution.²⁸
- 4.1.4 If the issues to be decided in the arbitration are not clearly stipulated in the arbitration agreement, and the parties fail to clarify the position through a supplemental agreement, the arbitration agreement shall be invalid.²⁹
- 4.1.5 As referred to in paragraph 2.1 above, ad hoc arbitrations are not permitted under the PRC Arbitration Law. There is currently a debate in the PRC as to whether or not an arbitration agreement which only refers to the arbitral rules of a specific arbitral institution, but which does not expressly provide for the jurisdiction of that specific arbitral institution, constitutes an agreement to pursue ad hoc arbitration or institutional arbitration.
- 4.1.6 The Interpretations of the PRC Supreme People’s Court concerning Some Issues on the Application of the PRC Arbitration Law of 23 August 2006, effective as of 8 September 2006 (**Interpretations**) provide guidance for circumstances in which an arbitration agreement contains errors that could potentially invalidate it under Article 16 of the PRC Arbitration Law. In particular, the Interpretations state that

²⁴ *Ibid*, art 5 and 26.

²⁵ *Ibid*, art 16.

²⁶ PRC Contract Law, art 11 and Interpretations of the PRC Supreme People’s Court concerning Some Issues on the Application of the PRC Arbitration Law, 23 August 2006, art 1.

²⁷ PRC Contract Law, art 39 and 40.

²⁸ PRC Arbitration Law, art 16.

²⁹ *Ibid*, art 18.

where the name of an arbitral institution as agreed in the arbitration agreement is not accurate, but the specific arbitral institution can nevertheless be determined, it shall be deemed that the arbitral institution has been designated.³⁰ The Interpretations also state that an arbitration agreement will not be invalid if the arbitral institution is clearly identifiable by the arbitral rules contained in the arbitration agreement.³¹ The Interpretations – and their effect upon potentially deficient arbitration agreements – suggest a relaxation under PRC law of the requirement that the parties must expressly designate an arbitral institution in their arbitration agreement. Nevertheless, to ensure that the validity of the arbitration agreement is upheld, it is advisable for parties to expressly name a competent arbitral institution in their arbitration agreement.

4.2 Arbitrability

4.2.1 Under the PRC Arbitration Law, contractual disputes and disputes over property rights between citizens, legal persons and other organisations are arbitrable.³² FIEs can, therefore, be party to arbitral proceedings under the PRC Arbitration Law, provided that they are validly incorporated in the form of a legal person.³³ In practice most FIEs, such as Sino-foreign equity joint venture companies and wholly foreign-owned enterprises, are validly incorporated in the form of a legal person under PRC law.

4.2.2 The following disputes are non-arbitrable under the PRC Arbitration Law:
 — marriage, adoption, guardianship, support and succession disputes; and
 — administrative disputes that, according to mandatory laws, shall be settled by administrative organs.³⁴

4.3 Separability

4.3.1 The question of whether or not an arbitration clause contained in a contract is valid shall be considered separately from the question of whether or not the contract itself is valid. An arbitration agreement shall exist independently and shall not be affected by the amendment, rescission, termination or invalidity of the main contract.³⁵

³⁰ Interpretations, art 3.

³¹ *Ibid*, art 4.

³² PRC Arbitration Law, art 2.

³³ *Ibid*, art 1 and 2.

³⁴ *Ibid*, art 3.

³⁵ *Ibid*, art 19.

- 4.3.2 In international practice, the validity of an arbitration agreement is usually determined by the arbitral tribunal. However, under the PRC Arbitration Law, this question is reserved for determination by either the arbitral institution or the PRC People's Court.³⁶

5. Composition of the arbitral tribunal

5.1 Composition of the arbitral tribunal

- 5.1.1 An arbitral tribunal may be comprised of one or three arbitrators, as agreed by the parties.³⁷ The PRC Arbitration Law is silent as to what happens if the parties cannot come to an agreement on the number of arbitrators. This issue is resolved differently depending on which institutional arbitral rules are applicable.
- 5.1.2 If an arbitral tribunal is comprised of three arbitrators, each party shall select an arbitrator, or authorise the chair of the arbitral institution that is governing the arbitral proceedings to appoint an arbitrator on its behalf. A third arbitrator shall then be selected jointly by the parties or be nominated by the chair of the arbitral institution in accordance with the joint mandate of the parties. The third arbitrator shall be the presiding arbitrator.³⁸
- 5.1.3 If the parties agree to have a sole arbitrator, that arbitrator shall be selected jointly by the parties or shall be nominated by the chair of the arbitral institution in accordance with the joint mandate of the parties.³⁹
- 5.1.4 If the parties fail to agree on the method of formation of the arbitral tribunal or fail to select the arbitrators within the time limit specified in the applicable arbitral rules, the arbitrators shall be appointed by the chair of the arbitral institution that is governing the arbitral proceedings.⁴⁰

Composition of the arbitral tribunal under the CIETAC Arbitration Rules

- 5.1.5 Under the CIETAC Arbitration Rules, the arbitral tribunal shall be composed of one or three arbitrators. Unless the parties agree otherwise, the default position under the CIETAC Arbitration Rules is that the arbitral tribunal shall be composed of three arbitrators.⁴¹

³⁶ *Ibid.*, art 20. See also paragraphs 6.1.1 and 9.2.1 below.

³⁷ PRC Arbitration Law, art 30.

³⁸ *Ibid.*, art 31.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, art 32.

⁴¹ CIETAC Arbitration Rules, art 20.

- 5.1.6 The members of the arbitral tribunal are generally selected by the parties from a panel of CIETAC arbitrators. Currently, CIETAC's panel of arbitrators consists of 998 arbitrators, including 218 non-PRC nationals from more than 30 different countries. In foreign-related disputes, non-PRC nationals can be appointed as arbitrators.⁴² As a result of the 2005 revision of the CIETAC Arbitration Rules, the parties are also entitled to appoint arbitrators who are not listed on CIETAC's panel of arbitrators. However, any such appointment must be confirmed by the Chair of CIETAC.⁴³
- 5.1.7 In practice, the majority of the arbitrators, including the chair of the arbitral tribunal, are usually PRC nationals. This is due to the fact that CIETAC tends to appoint PRC nationals as arbitrators when called upon to appoint an arbitrator (e.g. if CIETAC is acting as the appointing authority or if the parties cannot agree upon the appointment of an arbitrator).

5.2 Procedure for challenging and substituting arbitrators

- 5.2.1 The parties shall have the right to challenge an arbitrator in one of the following circumstances:
- the arbitrator is a party in the case or a close relative of a party or an agent in the case;
 - the arbitrator has a personal interest in the case;
 - the arbitrator has another relationship with a party or an agent in the case which may affect the impartiality of arbitration; or
 - the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.⁴⁴
- 5.2.2 A party must submit its reasons for challenge of the arbitrator before the first hearing or, if it becomes aware of a reason for challenge of the arbitrator after the first hearing has taken place, it must submit its reasons as soon as possible but in any event before the conclusion of the final hearing of the arbitral tribunal.⁴⁵ The decision to remove an arbitrator will be made by the chair of the arbitral institution or, if the chair of the arbitral institution is serving as an arbitrator, the decision will be taken by the arbitral institution collectively.⁴⁶

- 5.2.3 A substitute arbitrator shall be appointed on account of an arbitrator's withdrawal.⁴⁷

⁴² See paragraph 2.3.3 above.

⁴³ CIETAC Arbitration Rules, art 21.

⁴⁴ PRC Arbitration Law, art 34.

⁴⁵ *Ibid*, art 35.

⁴⁶ *Ibid*, art 36.

⁴⁷ *Ibid*, art 37.

5.2.4 Once a substitute arbitrator has been appointed, a party may request that the arbitral tribunal hears the dispute afresh. The arbitral tribunal will decide whether to continue the arbitral proceedings or to restart the arbitral proceedings.⁴⁸

5.3 Request for arbitration

5.3.1 Article 23 of the PRC Arbitration Law sets out the requirements for the request for arbitration. The request for arbitration must contain details of:

- the parties concerned;
- the parties' legal representatives;
- the parties' registered addresses;
- the claimant's arbitration claim and the facts and reasons on which that claim is based; and
- any evidence, sources of evidence, and the names and residences of witnesses, if any.

5.3.2 A copy of the arbitration agreement must be attached to the request for arbitration.⁴⁹

5.4 Arbitration fees

5.4.1 In the course of enacting the PRC Arbitration Law, the State Council promulgated the Arbitration Fee Collection Measures of Arbitration Commission on 28 July 1995 (**Measures**). As a general principle, pursuant to the Measures, the arbitration fees shall be borne by the losing party.⁵⁰ However, the arbitral rules of relevant foreign-related arbitral institutions contain differing fee schedules and these will apply.

5.5 Arbitrator immunity

5.5.1 If an arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent,⁵¹ and the circumstances are serious, or if the arbitrator has embezzled funds, accepted bribes or been involved in malpractice for personal benefits, or perverted the law in the course of the arbitration,⁵² he or she shall assume legal liability according to PRC law and the arbitral institution shall remove his or her name from the register of arbitrators.⁵³

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, art 22.

⁵⁰ Measures, art 9; CIETAC Arbitration Rules, art 46.

⁵¹ PRC Arbitration Law, art 34(4).

⁵² *Ibid.*, art 58(6).

⁵³ *Ibid.*, art 38.

6. Jurisdiction of the arbitral tribunal

6.1 Competence to rule on jurisdiction

6.1.1 The arbitral institution is not exclusively competent to decide upon the validity of an arbitration agreement.⁵⁴ Each party can submit a request for a ruling on the validity of an arbitration agreement either to the arbitral institution or to a PRC People's Court. If one party requests the arbitral institution to make a decision and the other party applies to the PRC People's Court for a ruling, the decision of the PRC People's Court shall prevail. However, where a party has failed to object to the validity of an arbitration agreement prior to the first oral hearing before the arbitral tribunal, or where an arbitral institution has made a decision on the validity of an arbitration agreement, the PRC People's Court shall not accept an application for a ruling on the validity of the same arbitration agreement.⁵⁵

6.2 Power to order interim measures

6.2.1 Either party can apply for interim protective measures before an arbitral tribunal in the PRC.⁵⁶ However, neither the arbitral tribunal, nor the arbitral institution governing the arbitral proceedings, have the power to order interim measures. Instead, it will forward the application to the competent PRC People's Court which has sole jurisdiction to award interim measures.⁵⁷ Available interim protective measures include orders preserving property and evidence.⁵⁸ It is not possible under PRC law to apply for injunctions requiring specific performance of a party's contractual obligations, or cease and desist injunctions.

7. Conduct of proceedings

7.1 Commencement of arbitration

7.1.1 Articles 24 and 25 of the PRC Arbitration Law contain certain procedural provisions on the commencement of the arbitral proceedings, specifically, those provisions that relate to the acceptance or refusal of the application for arbitration by the arbitral institution. After an arbitral institution accepts an application for arbitration it shall notify the claimant within five days.⁵⁹ The arbitral institution must deliver a copy of the arbitral rules and details of the arbitral tribunal to the claimant. It must

⁵⁴ *Ibid*, art 20.

⁵⁵ PRC Arbitration Law, art 20; Interpretations, art 13.

⁵⁶ PRC Arbitration Law, art 28(1).

⁵⁷ *Ibid*, art 28(2).

⁵⁸ *Ibid*, art 28, 46 and 68.

⁵⁹ *Ibid*, art 24.

also deliver a copy of the request for arbitration and details of the arbitral rules and the arbitral tribunal on the respondent.⁶⁰ After receiving a copy of the application for arbitration, the respondent shall submit a statement of defence and/or a counterclaim to the arbitral institution. The arbitral institution will then serve a copy of the statement of defence and/or a counterclaim on the claimant. Failure on the part of the respondent to submit a defence will not affect the progress of the arbitral proceedings.⁶¹

7.1.2 Under the CIETAC Arbitration Rules, a party can appoint either a PRC or a non-PRC national to act as its representative in the arbitral proceedings.⁶²

7.2 Language of arbitration

7.2.1 Under the CIETAC Arbitration Rules, as a matter of principle, the arbitral proceedings shall be conducted in Chinese. However, the parties can agree to conduct the arbitral proceedings in a foreign language.⁶³

7.3 Multi-party issues

7.3.1 PRC law is silent on third-party participation in arbitration. Under PRC law, parties must agree to an arbitration agreement or arbitration clause for it to be effective and, therefore, only those parties that have expressly consented to refer their dispute to arbitration will be bound by it. There are a limited number of exceptions to this, which are set out in the Interpretations and include:

- where two or more legal entities merge, the merged entity will be bound by the arbitration agreements entered into by its predecessor(s);⁶⁴
- if claims or debts are transferred or assigned in whole or in part, the related arbitration agreement will be binding on the transferee or assignee, unless otherwise provided by the parties, or if the party is unaware of the existence of a separate arbitration agreement;⁶⁵
- if an individual who is party to an arbitration agreement dies, the arbitration agreement will bind the beneficiary who succeeds to the deceased's rights and obligations in the arbitrable matters;⁶⁶ and
- if a legal entity changes its legal form or name, the newly formed legal entity will be bound by the arbitration agreements entered into by the former entity.

⁶⁰ *Ibid*, art 25(1).

⁶¹ *Ibid*, art 25(3).

⁶² CIETAC Arbitration Rules, art 16(2).

⁶³ *Ibid*, art 67.

⁶⁴ Interpretations, art 8.

⁶⁵ *Ibid*, art 9.

⁶⁶ *Ibid*, art 8.

7.3.2 There are no specific requirements in PRC law for a valid multi-party arbitration agreement and so parties should follow the rules of the applicable arbitral institution that has been designated to govern their arbitral proceedings.

7.4 Oral hearings and written procedures

7.4.1 The PRC Arbitration Law also contains several procedural provisions in relation to oral hearings and the procedure to render an award.⁶⁷ Normally, the arbitral tribunal shall hold an oral hearing to hear the arbitration, but, if the parties agree, the arbitral tribunal may conduct the arbitration on the basis of written submissions only.⁶⁸

7.5 Default by one of the parties

7.5.1 If a claimant fails to appear before the arbitral tribunal without giving reasons, the arbitral tribunal may deem that the claimant has withdrawn the application for arbitration. Should a respondent fail to appear without giving reasons, the tribunal may make a default award. The same powers apply if either party leaves a hearing prior to its conclusion.⁶⁹

7.6 Confidentiality

7.6.1 The arbitral tribunal shall not conduct any oral hearings in public. If the parties agree to a public hearing, the arbitration may proceed in public, except in cases involving state secrets.⁷⁰

8. Making of the award and termination of proceedings

8.1 Choice of law

8.1.1 As the PRC Arbitration Law is a procedural law, it does not provide any guidance as to which substantive law should be applied to the dispute. This question is subject to the applicable laws and regulations of the substantive law.

Contractual disputes

8.1.2 Contractual disputes shall be governed by the law chosen by the parties, unless a choice of law is not permitted. According to Article 126 of the PRC Contract Law, if the contract involves a foreign element the parties are free to agree on the governing law unless mandatory PRC law shall apply. The PRC Contract Law does not contain a definition of a contract involving foreign elements. The definition of

⁶⁷ PRC Arbitration Law, art 39.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, art 42.

⁷⁰ *Ibid.*, art 40.

a “dispute involving foreign interests” in Article 304 of the Opinions⁷¹ is usually applied accordingly. In practice, this means that in most cases a foreigner or foreign entity must be a party to the contract in order to be permitted to choose a foreign law as governing law. Also in this respect, FIEs are not regarded as foreign parties⁷² so that a contract between a FIE and a PRC domestic entity or a contract between two FIEs shall be generally subject to PRC law.

- 8.1.3 Mandatory PRC law provides that certain contractual transactions (and subsequently, disputes arising out of such transactions) must be subject to the law of the PRC even if the contract involves a foreign element, e.g. even if a foreigner or foreign entity is a party to the contract. Such contractual transactions are:
- joint venture contracts on the establishment of a Sino-foreign equity joint venture company or Sino-foreign co-operative joint venture company;⁷³
 - contracts on the exploration and exploitation of natural resources to be performed on the territory of the PRC;⁷⁴
 - contracts on the transfer of equity interests in a Sino-foreign equity joint venture company, Sino-foreign co-operative joint venture company or wholly foreign-owned enterprise;⁷⁵
 - contracts on the operation by a foreign natural person, foreign legal person or any other foreign organisation of a Sino-foreign equity joint venture company or Sino-foreign co-operative joint venture company established in the PRC;⁷⁶
 - contracts on the purchase by a foreign natural person, foreign legal person or any other foreign organisation of equity interests held by a shareholder in a non-foreign-invested enterprise in the PRC;⁷⁷
 - contracts on the subscription by a foreign natural person, foreign legal person or any other foreign organisation of increased registered capital of a non-foreign-invested limited liability company or company limited by shares in the PRC;⁷⁸
 - contracts on the purchase by a foreign natural person, foreign legal person or any other foreign organisation of assets of a non-foreign-invested enterprise in the PRC;⁷⁹ and

⁷¹ See paragraph 1.2.4 above.

⁷² See paragraph 1.2.5 above.

⁷³ PRC Contract Law, art 126.

⁷⁴ *Ibid.*

⁷⁵ Rules of the Supreme People’s Court concerning the Application of Law in Civil and Commercial Disputes, 23 July 2007 (**Rules**), art 8, item 4.

⁷⁶ *Ibid.*, art 8, item 5.

⁷⁷ *Ibid.*, art 8, item 6.

⁷⁸ *Ibid.*, art 8, item 7.

⁷⁹ *Ibid.*, art 8, item 8.

— other contracts mandatorily governed by the law of the PRC as provided for in the laws or regulations of the PRC.⁸⁰

8.1.4 In the absence of an agreed choice of law, the arbitral tribunal will apply the rules on conflict of laws provided by PRC law. Under PRC law, the law governing foreign-related contracts in civil and commercial matters shall refer to the substantive law in the relevant country or region, excluding the conflicts of law analysis and procedural law.⁸¹ As a matter of principle, in the absence of an agreed governing law, the law of the country or region having the most significant relationship with the contract shall be the governing law.⁸² The PRC rules on conflict of laws contain detailed criteria defining the most significant relationship for different types of contracts.⁸³

Non-contractual disputes

8.1.5 The law applicable to non-contractual disputes is stipulated in the PRC Law on the Application of Laws to Foreign-related Civil Relationships of 28 October 2010 (**Application Law**). The Application Law also confirms the right of the parties to a dispute to choose the applicable law in a foreign-related civil relationship.⁸⁴ However, the Application Law contains certain provisions on the mandatory application of a certain law, e.g. in cases of real estate property rights,⁸⁵ negotiable instruments⁸⁶ and pledges.⁸⁷

8.2 Timing, form, content and notification of award

8.2.1 An award shall specify:

- the arbitration claim;
- the facts of the dispute;
- the reasons for the decision;
- the results of the award;
- the allocation of arbitration fees; and
- the date of the award.⁸⁸

⁸⁰ *Ibid*, art 8, item 9.

⁸¹ *Ibid*, art 1.

⁸² *Ibid*, art 5, s 1.

⁸³ *Ibid*, art 5, s 2, items 1–17.

⁸⁴ Application Law, art 3.

⁸⁵ *Ibid*, art 36.

⁸⁶ *Ibid*, art 39.

⁸⁷ *Ibid*, art 40.

⁸⁸ PRC Arbitration Law, art 54.

- 8.2.2 If the parties agree that they do not wish for the facts of the dispute and the reasons for the decision to be specified in the award, the same may be omitted.⁸⁹
- 8.2.3 A unanimous vote of the arbitral tribunal is not required, but instead awards are made by the majority decision of the arbitral tribunal.⁹⁰ Dissenting arbitrators may or may not sign the award.⁹¹
- 8.2.4 Arbitral tribunals may grant interim awards during the arbitration on specific facts of the dispute which have become clear.⁹²
- 8.2.5 Under the CIETAC Arbitration Rules, in foreign-related disputes, the award shall be issued within six months from the date on which the arbitral tribunal is constituted. This time period can be extended by the Chair of CIETAC upon the request of the arbitral tribunal.⁹³

8.3 Settlement

- 8.3.1 The arbitral tribunal can recognise settlement agreements between the parties through an award reflecting the terms of the settlement or through a written conciliation statement.⁹⁴

8.4 Power to award interest and costs

- 8.4.1 In arbitral proceedings, the reasonable legal fees of the winning party shall generally be borne by the losing party.⁹⁵ This is distinct from litigation in the PRC where, apart from certain disputes concerning the protection of intellectual property rights, a winning party shall generally bear its own legal fees. In exceptional cases, the arbitral tribunal may award additional and other reasonable expenses actually incurred.
- 8.4.2 Interest may be awarded. The interest rate will depend on the law applicable to the dispute. The arbitral tribunal has the discretion to decide whether or not to award interest on claims awarded to a party.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, art 53.

⁹¹ *Ibid.*, art 54.

⁹² *Ibid.*, art 55.

⁹³ CIETAC Arbitration Rules, art 42.

⁹⁴ PRC Arbitration Law, art 49 and 51.

⁹⁵ See, for example, CIETAC Arbitration Rules, art 46.

8.5 Termination of the proceedings

8.5.1 In addition to termination by a final award, arbitral proceedings can be terminated by default or settlement.

8.6 Effect of the award

8.6.1 The award becomes effective and legally binding on the day that it is made.⁹⁶

8.7 Correction, clarification and issue of a supplemental award

8.7.1 If there are typographical or mathematical errors in the award, or if the award omits certain matters which have been decided by the arbitral tribunal, the parties can apply for a correction within 30 days of receipt of the award.⁹⁷ If entire claims have been omitted from the award, the parties can apply for a supplementary award.

9. Role of the courts

9.1 Jurisdiction of the courts

9.1.1 The PRC People's Courts have a very limited role in arbitration except in relation to challenging and enforcing awards, as set out section 10 below.

9.2 Stay of court proceedings and rulings on jurisdiction

9.2.1 Where a party commences proceedings in the PRC People's Court where it has concluded an arbitration agreement, the PRC People's Court shall not accept the case, unless the arbitration agreement is void.⁹⁸ In the event of a dispute over the validity of an arbitration, either the PRC People's Court or the arbitral institution shall give a ruling and if one party requests the PRC People's Court to rule and the other requests the arbitral institution, the PRC People's Court shall give the ruling.⁹⁹

9.3 Interim protective measures

9.3.1 Where a party seeks interim measures of protection of evidence in a foreign-related arbitration, the relevant arbitral institution is required to submit the application to the Intermediate People's Court where the evidence is located.¹⁰⁰

⁹⁶ PRC Arbitration Law, art 57.

⁹⁷ *Ibid*, art 56.

⁹⁸ PRC Arbitration Law, art 5. See section 4.1 above on the requirements for a valid arbitration agreement.

⁹⁹ PRC Arbitration Law, art 20. See also paragraph 6.1.1 above.

¹⁰⁰ PRC Arbitration Law, art 68. See also paragraph 6.2.1 above.

10. Challenging and appealing an award through the courts

10.1 Appeals

10.1.1 As a matter of principle, it is not possible to appeal against an award before an arbitral tribunal or a PRC People's Court.¹⁰¹

10.2 Applications to set aside an award

Awards concerning domestic disputes

10.2.1 Whilst there is no right to appeal, there are certain circumstances in which awards rendered by an arbitral tribunal in the PRC that relate to domestic disputes can be set aside by a competent Intermediate People's Court. The competent Intermediate People's Court will be the court at the place in which the arbitral institution that governs the arbitral proceedings is located.¹⁰² If one party applies for the enforcement of an award and the other party applies to have the award set aside, the competent People's Court shall rule to suspend the enforcement proceedings until a ruling has been made concerning the application for setting aside the award.¹⁰³

10.2.2 A party may apply to the Intermediate People's Court to have a domestic award set aside within six months from the date of receipt of the award.¹⁰⁴ When making an application to set aside a domestic award, that party must produce evidence to demonstrate that one of the following circumstances has arisen:

- there is no arbitration agreement;
- the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitral institution;
- the formation of the arbitral tribunal or the arbitration procedure was not in conformity with statutory procedure;
- the evidence on which the award is based was forged;
- the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or
- while arbitrating the case, the arbitrators committed embezzlement, accepted bribes, or made an award that perverted the law.¹⁰⁵

¹⁰¹ PRC Arbitration Law, art 9. The corresponding provision in the CIETAC Arbitration Rules is Article 43(8).

¹⁰² PRC Arbitration Law, art 58(1).

¹⁰³ *Ibid*, art 62.

¹⁰⁴ *Ibid*, art 59.

¹⁰⁵ *Ibid*, art 58.

10.2.3 In contrast to foreign-related awards, a domestic award can be set aside upon substantial review of the merits of the case. For example, this may occur if crucial evidence is found to be insufficient or if the application of the law is found to be erroneous.

Awards concerning foreign-related disputes

10.2.4 For foreign-related awards, either party may apply to the PRC People's Court within six months from the date of receipt of the award.¹⁰⁶ The grounds for setting aside are set out in Article 258 of the PRC Civil Procedure Law.¹⁰⁷

10.2.5 According to Article 258 of the PRC Civil Procedure Law, a foreign-related award will only be set aside if:

- the parties have neither included an arbitration clause in their contract, nor subsequently entered into a written arbitration agreement;
- the party applying to set aside the award was not requested to appoint an arbitrator or to take part in the arbitral proceedings, or the party was unable to state its opinions due to reasons for which it was not responsible;
- the formation of the arbitral tribunal or the arbitration procedure was not in accordance with the relevant arbitral rules; or
- the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitral institution.

10.2.6 The award may also be set aside if the PRC People's Court determines that the execution of the award would be contrary to public policy.¹⁰⁸

10.2.7 In an application to set aside a foreign-related award, the Intermediate People's Court will only review whether the relevant procedural requirements have been fulfilled and will not re-examine the merits of the dispute.

11. Recognition and enforcement of awards

11.1 Domestic awards and foreign-related awards rendered in the PRC

Procedural issues applicable to both domestic and foreign-related awards

11.1.1 The PRC Arbitration Law contains an express obligation upon the parties to perform the award.¹⁰⁹ Where one party fails to do so, the other party may apply

¹⁰⁶ *Ibid*, art 59.

¹⁰⁷ *Ibid*, art 70.

¹⁰⁸ PRC Civil Procedure Law, art 258, which provides that a court may refuse to enforce an award if it is against the "social and public interest" of PRC.

¹⁰⁹ PRC Arbitration Law, art 62.

to the PRC People's Court for enforcement in accordance with the PRC Civil Procedure Law.

- 11.1.2 An application for the enforcement of both domestic and foreign-related awards must be filed with the Intermediate People's Courts within two years from the last date upon which the losing party must comply with the terms of the award.¹¹⁰ In addition to filing the enforcement application, the party seeking enforcement must also provide the original or a certified copy of both the award and arbitration agreement and evidence to support its application.¹¹¹
- 11.1.3 In order to avoid the risk of contradictory decisions concerning the setting aside and non-enforcement of an award in the same case, where an application to set aside an award has been rejected by the competent court,¹¹² the enforcing court cannot refuse to enforce such award on the same ground(s) on which the earlier court rejected the application to set aside the award.¹¹³
- 11.1.4 As discussed in paragraphs 2.3.7 to 2.3.8 above, domestic arbitral institutions and foreign-related arbitral institutions are both permitted to render domestic and foreign-related awards, if agreed by the parties. As this distinction between the jurisdiction of domestic and foreign-related arbitral institutions has now been removed, the key consideration for the enforcement of an award in the PRC is the underlying nature of the dispute, rather than the identity of the arbitral institution governing the arbitral proceedings.

Enforcement of a domestic award

- 11.1.5 The enforcement of domestic awards can only be refused by the enforcing court in accordance with the provisions of Article 63 of the PRC Arbitration Law (in connection with Article 213 of the PRC Civil Procedure Law).¹¹⁴ The grounds for setting aside domestic awards are:
- the parties had not included an arbitration clause in their contract, or had not subsequently reached a written agreement on arbitration;
 - the matters decided upon in the award exceed the scope of the arbitration agreement or the limits of authority of the arbitral institution governing the arbitration;

¹¹⁰ Interpretations, art 29, PRC Civil Procedure Law, art 215.

¹¹¹ Interim Provision of the Supreme People's Court on Certain Issues Concerning Enforcement by the People's Court, 8 July 1998, art 20 and 21.

¹¹² See section 10.2.2 above.

¹¹³ Interpretations, art 26.

¹¹⁴ For the definition of "domestic arbitration", see paragraph 1.2.2 above.

- the formation of the arbitral tribunal or the procedure for arbitration is not in conformity with statutory procedure on arbitration;
- the main evidence for ascertaining the facts is insufficient;
- there are manifest errors in the application of the law; or
- the arbitrators committed acts of malpractice for personal benefits and perverted the law in the arbitration of the case.¹¹⁵

11.1.6 In addition, a PRC People's Court can refuse to enforce a domestic award where it determines that the execution of the arbitration award would be contrary to the social and public interests of the PRC.¹¹⁶

Enforcement of foreign-related awards

11.1.7 The grounds for refusing enforcement of an award relating to foreign-related disputes that have been rendered by an arbitral tribunal in the PRC are identical to those for setting aside such an award (as set out in paragraph 10.2.5 above).¹¹⁷

11.1.8 If a party seeks to enforce a legally binding foreign-related award, and the party against whom the application is sought or that party's property is not within the territory of the PRC, then the party seeking enforcement shall apply directly to a competent foreign court for the recognition and enforcement of the award.¹¹⁸

11.1.9 If the competent Intermediate People's Court refuses to enforce the award, this shall be reported to the Higher People's Court, which must seek the approval of the PRC Supreme People's Court if it intends to declare the award to be unenforceable.¹¹⁹

11.2 Foreign awards

11.2.1 This section concerns the enforcement of awards that have been rendered outside of the PRC either by a foreign arbitral institution or an arbitral tribunal that was established on an ad hoc basis.

11.2.2 In the event that either of the parties does not voluntarily comply with the terms of a foreign award, a party seeking to enforce that award in the PRC will need to

¹¹⁵ PRC Civil Procedure Law, art 213.

¹¹⁶ *Ibid*, art 258.

¹¹⁷ PRC Arbitration Law, art 71, in connection with PRC Civil Procedure Law, art 258.

¹¹⁸ PRC Arbitration Law, art 72.

¹¹⁹ See the Circular on Relevant Issues on Handling Foreign-related Arbitral Awards and Foreign Arbitral Awards by People's Courts issued by the PRC Supreme People's Court on 28 August 1995 in connection with the PRC Supreme People's Court's Opinions on Certain Issues Concerning Setting Aside of Foreign-related Arbitral Awards by the People's Courts, 23 April 1998.

apply to the competent PRC People’s Court for enforcement. The competent court for the enforcement of a foreign award is the Intermediate People’s Court at the place of the respondent’s domicile or where its property is located.¹²⁰ The Intermediate People’s Court shall handle the matter pursuant to the terms of any international treaties concluded or acceded to by the PRC, or in accordance with the principle of reciprocity.¹²¹

- 11.2.3 An application for the enforcement of a foreign award must be accompanied by either the original or a certified copy of the award and arbitration agreement, with Chinese translations thereof that have been verified by a PRC embassy or consulate, or a notary public in the PRC.¹²²
- 11.2.4 With effect from 22 April 1987, the PRC became a contracting state to the New York Convention.¹²³ However, in its Declaration of Accession, the PRC made a reciprocity reservation. As a result, the PRC is only obligated to recognise and enforce awards made in the territory of another contracting state of the New York Convention. Awards rendered in the PRC are not eligible for enforcement inside the PRC pursuant to the New York Convention.¹²⁴
- 11.2.5 According to the second reservation made by the PRC, the PRC will only apply the New York Convention to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under national PRC law. To date, this reservation has never been invoked in practice due to the broad interpretation of the term “commercial disputes” contained in the 1987 PRC Supreme Court Notice.
- 11.2.6 Apart from the above limitations on reciprocity and commerciality, the competent Intermediate People’s Court can only refuse the enforcement of a foreign award for the reasons provided in Article V of the New York Convention (e.g. for serious procedural deficiencies or violations of public policy (*ordre public*) in the PRC). According to the Circular on Relevant Issues on Handling Foreign-related Awards and Foreign Awards by People’s Courts issued by the PRC Supreme People’s Court on 28 August 1995 (**Circular**), if the competent Intermediate People’s Court

¹²⁰ PRC Civil Procedure Law, art 267.

¹²¹ *Ibid*, art 267.

¹²² Interim Provision of the Supreme People’s Court on Certain Issues Concerning Enforcement by the People’s Court, 8 July 1998, art 21.

¹²³ CMS Guide to Arbitration, vol II, appendix 1.1.

¹²⁴ Supreme People’s Court Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 April 1987 (**1987 PRC Supreme Court Notice**).

refuses to enforce a foreign award, this fact shall be reported to the Higher People's Court. If the Higher People's Court intends to also declare the award to be unenforceable, it must first seek the approval of the PRC Supreme People's Court.

- 11.2.7 The Circular was issued to prevent local courts from refusing the enforcement of foreign awards in order to protect the local party. Before 1995, some PRC People's Courts had refused to acknowledge and enforce foreign awards. The probability of enforcing a foreign award against a PRC individual or a PRC entity was estimated to be approximately 50% during the 1990s,¹²⁵ but has since increased significantly. Between 2000 and 2007, a total of 12 foreign awards were not enforced by PRC People's Courts: five of these awards had been issued despite the lack of an arbitration clause, in one case there were no assets available for enforcement in the PRC, two awards were refused due to procedural deficiencies and the remaining four were refused because the statute of limitations for application of enforcement had expired.¹²⁶
- 11.2.8 As discussed in section 2.1 above, the PRC Arbitration Law does not recognise agreements to ad hoc arbitration.¹²⁷ However, the PRC Arbitration Law is silent on whether or not international arbitral proceedings (seated outside of the PRC) can be conducted on an ad hoc basis.
- 11.2.9 On 3 December 1999, the Beijing Higher Court issued an opinion stating that an ad hoc award is enforceable in the PRC under the New York Convention if the award has been issued in another contracting state to the New York Convention and the law of that state recognises ad hoc arbitration.¹²⁸
- 11.2.10 Article 16 of the Interpretations confirms that an ad hoc arbitration governed by foreign law and conducted outside of the PRC will be recognised and enforceable by the PRC People's Courts. However, some courts in the PRC may still be reluctant to recognise and enforce foreign ad hoc awards.
- 11.2.11 A foreign award made in the PRC by a foreign arbitral institution was, in the past, very unlikely to be acknowledged and enforced in the PRC. However, on 22 April 2009, the Ningbo Intermediate People's Court in Zhejiang Province upheld an ICC

¹²⁵ Randall Peerenboom, "Seeking Truth From Facts: An Empirical Study of Enforcement of Awards in the PRC", *American Journal of Comparative Law* (49 Am. J. Comp. L. 249, 2001) p 254.

¹²⁶ Speech by Wan E'xiang, Deputy Chief Justice of the Supreme People's Court of China, on 6 June 2008 at the 50th Anniversary Symposium of the New York Convention, available at: [<http://www.rucil.com.cn/article/default.asp?id=798>] (accessed 6 January 2012). Chinese text only.

¹²⁷ PRC Arbitration Law, art 16 and 18.

¹²⁸ [http://www.gzac.org/info_view.asp?VID=699] (accessed 6 January 2012). Chinese text only.

award by labelling it as non-domestic, despite the fact that the award was made in Beijing (**Ningbo Case**).¹²⁹ In the Ningbo Case, the court rejected the respondent's challenge to the validity of an award that had been rendered in favour of a Swiss claimant by an ICC arbitral tribunal seated in Beijing. The main reason for the court reaching this decision was that the respondent had failed to object to the jurisdiction of the ICC arbitral tribunal prior to the first oral hearing in the arbitration. In effect, the PRC People's Court upheld and enforced the award, despite the fact that it was issued by an ICC-administered arbitral tribunal seated within the PRC.

11.2.12 The court in the Ningbo Case reached its conclusion from a procedural point of view, i.e. due to the respondent's failure to challenge jurisdiction at the appropriate stage of the arbitral proceedings, rather than providing substantive reasoning to confirm that an award rendered by a foreign arbitral tribunal within the PRC should be upheld and enforced by a competent PRC People's Court.

11.2.13 It is still too early to conclude whether the decision in the Ningbo Case is the start of a change in the relevant jurisprudence in general and whether this decision has reduced the risk that an award that has been made by a foreign arbitral institution within the PRC could be acknowledged and enforced in the PRC. Thus, it is still advisable to stipulate in an arbitration agreement that arbitral proceedings that are to be administered by a foreign arbitral institution shall be held outside of the PRC.

Enforcement of an award made under the Washington Convention (ICSID)

11.2.14 The PRC has been a contracting state to the Washington Convention (ICSID) since 1993.¹³⁰ According to the Washington Convention (ICSID), if an investor from a contracting state has made an investment in another contracting state, disputes relating to that investment can be submitted for arbitration to ICSID. However, the PRC has made a reservation to the Washington Convention (ICSID) and, as a result, ICSID arbitration is only a valid option against the PRC if the dispute relates to compensation for expropriation.

11.2.15 Any award rendered by an ICSID arbitral tribunal within the scope of the above limitation must, in theory, be enforced by a PRC People's Court as though the award were a final judgment of a PRC People's Court. The PRC People's Courts are obligated to enforce an ICSID award immediately, without the necessity of following any recognition or enforcement procedure.¹³¹ However, it is currently unclear whether the PRC People's Courts will enforce such awards in practice.

¹²⁹ [http://www.gzac.org/info_view.asp?VID=2843] (accessed 6 January 2012). Chinese text only.

¹³⁰ For the full text of the Washington Convention (ICSID), see CMS Guide to Arbitration, vol II, appendix 1.2.

¹³¹ Washington Convention (ICSID), art 54 (see CMS Guide to Arbitration, vol II, appendix 1.2).

12. Concluding thoughts and themes

12.1.1 Due to the difficulty in recognising and enforcing foreign judgements from ordinary courts of law in the PRC, arbitration is likely to remain the preferred option for the settlement of international commercial disputes with counterparties located in the PRC. Furthermore, with the PRC's increasing role in international commerce, international arbitration in the PRC is likely to continue growing as a method of resolving PRC-related international commercial disputes. As such, it is likely that the PRC foreign-related arbitral institutions will maintain their prominence within the PRC.

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