

## Chapter 3

### ARBITRATION IN CHINA

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#### I. INTRODUCTION

##### A. Arbitration and Legislative Development since 1978

Disputes are an inevitable concomitant of international trade and cross-border investment. As the world has become more complex, countries are judged by the mechanisms that they put in place to resolve such disputes. Litigating cross-border business disputes in national courts poses various problems and uncertainties given the potential involvement of several different legal systems. Arbitration is today regarded as an indispensable tool designed to afford parties engaged in international trade and investment the requisite degree of certainty and confidence they rightly demand for dispute resolution in the international transactions.<sup>1</sup> Development of international arbitration norms is largely fueled by expectation of the global business community, and has been under heavy influence of the modernization and harmonization waves shaped by the New York Convention,<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration (the “ML”),<sup>3</sup> and International Chamber of Commerce Court of Arbitration Rules (the “ICC Rules”).<sup>4</sup>

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<sup>1</sup> For detailed discussion, see Fabien Gelin, “Arbitration and the Challenge of Globalization”, 17 (2000) *Journal of International Arbitration*, 117.

<sup>2</sup> The 1958 New York Convention, i.e. the Convention on Recognition and Enforcement of Foreign Arbitral Awards. The Convention has paid tremendous contribution to international arbitration by providing a unified platform across the globe for enforcement of arbitral awards.

<sup>3</sup> Model Law is drafted by United Nations Commission on International Trade Law (the “UNCITRAL”), for the purpose of harmonizing arbitration laws of different

Since 1978, with China entering into the era of “reform and opening up”, the drive towards economic modernization via the policy of attracting foreign investment has been pressing. Over the past three decades, in tandem with increased trade and investment opportunities, China has witnessed a corresponding rise in the number of commercial disputes, in particular Sino-foreign business disputes. Foreign investors who require reasonable assurance that their commercial interests will be adequately protected vis-à-vis their Chinese partners, call for an efficient, effective, and fair mechanism of dispute resolution to be established. Although China has promulgated an impressive body of laws and regulations concerning foreign trade and investment, their enforcement has been less than satisfactory. It has been argued that a judicial system rooted in an administrative governance society which is undergoing economic and political transformation such as China remains plagued by many pervasive shortcomings.<sup>5</sup> There are wider concerns about Chinese courts such as slow pace in processing cases, lack of professional judges, varying quality of law enforcement across the nation, influence of local politics and social pressures over judicial decisions, despite the continuing efforts that China has made in improving the quality of its judiciary.<sup>6</sup> These difficulties are compounded due to the fact that the judiciary could not be reformed in a manner and at a pace sufficient to satisfy the requirements of foreign investors. Traditionally, Chinese enterprises have preferred the settlement of disputes via the Chinese judicial process. However, there is also a general understanding among foreign investors that domestic judicial process is underdeveloped. Arbitration is then considered as an alternative to solve the problem at

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countries in the course of economic globalization. For a general account of the ML, see Holtzman and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989).

<sup>4</sup> The International Chamber of Commerce Court of Arbitration, being the earliest established arbitration institution in the world, is the forerunner of international arbitration rules. See, generally, Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3<sup>rd</sup> ed) (Ocean Publications, 2000).

<sup>5</sup> Donald Clarke, “Empirical Research into the Chinese Judicial System,” in Erik Jensen and Thomas Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003), pp. 164-192.

<sup>6</sup> Benjamin Liebman, “China’s Courts: Restricted Reform”, 191 (2007) *The China Quarterly*, pp. 620-643.

negotiations.<sup>7</sup> Chinese entities have since then relied heavily on the arbitral process for providing foreign cooperative partners with the confidence and reassurance required to encourage trade and investment.

In general, although Chinese entities prefer the settlement of disputes through domestic arbitration, foreign parties may not. This is not only owing to the relatively higher costs attached to overseas arbitration, but also the language barrier to Chinese entities contained therein. The growing tendency amongst foreign investors to seek international arbitration before a neutral arbitral body (such as the International Chamber of Commerce Court of Arbitration) has not alleviated the concerns of a Chinese business community that remains skeptical of receiving a fair hearing overseas. The government in Beijing then sought instead to tackle the problem through the development of a competent system of arbitration, by providing reputable arbitration laws and improving the prestige and competence of domestic arbitration commissions. A corresponding wave of reform was launched in 1994, when the *Arbitration Law* (the “AL”) was enacted beginning the trend of independent and voluntary arbitration in China as a means of facilitating economic development and attracting foreign investment. Provisions have been made to ensure that Chinese arbitration system is consistent with international standards. Of equal importance are the ongoing expansion of arbitration commissions in China and their inclusion of larger numbers of foreign legal and technological experts on the commission panel, a move designed not merely to help enhance their international character but also to wipe out the partisan concerns of foreign investors. These developments demonstrate the important role that arbitration plays in the development of the Chinese economy and its integration with the global economy. In consequence, instead of seeking recourse through people’s courts, arbitration has become the preferred method of resolving commercial disputes between Chinese and foreign parties.

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<sup>7</sup> Gu Weixia and Robert Morgan, “Improving Commercial Dispute Resolution in China”, 1 [2005] *Asian Dispute Review*, pp. 6-9.

## B. Sources of Regulations on Arbitration

### 1. 1994 Arbitration Law

Being a civil law jurisdiction, statute provides the primary source of law in China for the arbitration regime. The Arbitration Law was adopted on 31 August 1994 and came into force on 1 September 1995. The promulgation was praised as a “milestone in Chinese arbitration history”, and was acclaimed widely both at home and abroad.<sup>8</sup> This 80-article law is generally applicable to all arbitrations conducted within China over a wide range of economic disputes on the basis of voluntary agreement to arbitrate. It is divided into eight chapters, dealing with the contents of arbitration agreements, establishment of arbitral tribunals and procedural rules, as well as means to vacate and enforce arbitral awards. There are two main reasons for the promulgation of the AL. The first is that the rapidly changing economic and legal environment demand reform of the Chinese arbitration system. The second reason is that whilst commercial arbitration is increasingly used in China, but the outdated domestic arbitration regime has hindered its development.<sup>9</sup> To meet these needs, the law explicitly sets out the following four principles:<sup>10</sup>

- (a) Principle of party autonomy (*xieyiyuanze*): arbitration must be based on an agreement in writing;<sup>11</sup>
- (b) Principle of either arbitration or litigation (*huocaihuosong*): where parties have reached a valid arbitration agreement, the

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<sup>8</sup> See, for example, Michael J. Moser, “China’s New Arbitration Law”, 1 (1995) *World Arbitration & Mediation Report*, 9; Chen Dejun, “The New Milestone in the Arbitration History of Our Country,” 4 (1994) *Journal of Arbitration and Law*; Chen Min, “The Arbitration Act of the People’s Republic of China – A Great Leap Forward” in *China International Commercial Yearbook (1994-1995)*, pp. 77-101; Guiguo Wang, “The Unification of the Dispute Resolution System in China”, 2 (1996) 13 *Journal of International Arbitration*, pp. 5-44.

<sup>9</sup> Katherine Lynch, “The New Arbitration Law”, 16 (1996) *Hong Kong Law Journal*, 104.

<sup>10</sup> The basic principles are provided under Chapter 1 of the AL, entitled “General Provisions”.

<sup>11</sup> Article 4 of the AL.

agreement shall be honored and the court shall not accept the case;<sup>12</sup>

- (c) Principle of independence (*dulizhongcai*): arbitration shall be independently carried out and shall not be subject to administrative or judicial interference;<sup>13</sup>
- (d) Principle of finality (*yicaizhongju*): arbitral award shall be final, regardless of whether they are international or domestic.<sup>14</sup>

It is noteworthy that although the ML has never been officially adopted in China, it was said to have served as a guiding reference during the drafting of the AL.<sup>15</sup> The streamlined legislation and process, which is substantially shorter than those for ordinary civil procedures in the Chinese courts, have been nudging disputants not already disposed to arbitrate into the arbitral fora.

## 2. State Council Regulations

The State Council (the “SC”), being the highest executive branch of the state, can enact “administrative regulations” under the Chinese legislative jurisprudence.<sup>16</sup> As to arbitration, SC promulgated several notices for the purpose of implementing the AL, particularly for guiding the work of local arbitration commissions which took shape only after AL took effect in 1995.

In 1996, SC issued a notice concerning the arbitral jurisdiction of local arbitration commissions (the “1996 Notice”)<sup>17</sup> Prior to the promulgation of the AL, hundreds of economic contract arbitration commissions established within government agencies at various levels

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<sup>12</sup> Article 5 of the AL.

<sup>13</sup> Article 8 of the AL.

<sup>14</sup> Article 9 of the AL.

<sup>15</sup> Wang Shengchang, “The Globalization of Economy and China’s International Arbitration”, paper delivered at the seminar on “Globalization and Arbitration” in Beijing, jointly sponsored by the ICC and CIETAC, 15 October 2002.

<sup>16</sup> Li Yahong, “The Law-making Law: A Solution to the Problems in the Chinese Legislative System?”, 30 (2000) *Hong Kong Law Journal*, pp. 120-140.

<sup>17</sup> *Notice Concerning Several Issues to be Clarified for the Purpose of Implementing the PRC Arbitration Law*, issued by the General Office of the State Council in June 1996.

handled domestic arbitration cases. Foreign-related arbitration was then monopolized by China International Economic and Trade Arbitration Commission (the “CIETAC”) for general commercial disputes and China Maritime Arbitration Commission (the “CMAC”) for maritime disputes. The 1996 Notice entitles local commissions to arbitrate foreign-related disputes and by doing so, seeks to dilute the impression of “dual-track” division under the AL on basis of jurisdiction. On the other hand, foreign investment enterprises (including Chinese-foreign equity joint ventures, cooperative joint ventures and wholly foreign-owned enterprises) who previously found themselves within the domestic arbitration regime, can now submit their investment disputes to CIETAC under the new development.<sup>18</sup> Some local arbitration commissions have since then grown rapidly and accepted significant numbers of international cases,<sup>19</sup> although generally foreign parties are reluctant to select local arbitral bodies because of their inexperience with respect to handling of foreign-related arbitrations. International arbitrations are still largely conducted before CIETAC, which continues to pose practical challenges towards the SC-led blurring jurisdiction motive.

### 3. *Judicial Interpretations*

The Supreme People’s Court (the “SPC”), by publishing judicial interpretations, has been playing an important role in the regulatory landscape of Chinese arbitration, because of its double roles as both a *de facto* rule-making power-holder<sup>20</sup> and the highest judiciary in China. SPC has from time to time formed the view that part of the AL is too general and vague and thus, has issued many judicial interpretations for filling the practical gap.

Most of these judicial interpretations take the form of “replies” or “notices”, where the SPC give directives to lower courts for their handling of specific arbitration cases. An example of these “replies” is

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<sup>18</sup> CIETAC has expanded its jurisdiction to cover domestic disputes since 1998.

<sup>19</sup> For example, the Beijing Arbitration Commission.

<sup>20</sup> Article 33 of the Organic Law of People’s Courts. However, the scope of SPC’s interpretative power is not clearly defined between *interpreting law* and *making law* although there may be literal distinction that legislation is the act of making a law, while interpretation is the art of process of ascertaining the meaning of existing laws.

the SPC Reply to the Hubei Provincial High Court in 1999 concerning the effect of an arbitration clause undergoing contract assignment (the “Hubei Reply”).<sup>21</sup> As regards “notices”, the SPC, through issuing a series of notices in 1995 and 1998, established the “pre-reporting system” (*youxianbaogaozhidu*) among people’s courts on the enforcement of foreign-related and foreign arbitration. These notices are important because they provide that only the SPC has the final say in deciding whether to enforce foreign-related and foreign arbitration agreements and awards in China. In consequence, it is now mandatory to report to and obtain the approval of the upper level courts, and ultimately the SPC, for any decision that would revoke, or deny enforcement of a foreign-related or foreign arbitral agreement or award.<sup>22</sup>

Most recently, in September 2006, to consolidate its sporadic judicial replies and notices on specific arbitration cases, SPC published the very impressive interpretative document entitled the *SPC Interpretation on Certain Issues relating to the Application of the Arbitration Law* (the “SPC Interpretation”).<sup>23</sup> The newly issued judicial interpretation represents the latest, most comprehensive and systematic attempt by the SPC in codifying its past judicial opinions on arbitration and provides explicit clarification to certain issues that left vacuum by the AL, for example, the effect of defective arbitration agreements (such as those without a clear choice of arbitration institution). The 2006 Interpretation is highly regarded as the prelude for the future reform of the AL. The content indicates that the judiciary, in a rather purposeful and liberal manner, attempts to further encourage the development of arbitration in China to align with international norms and standards.

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<sup>21</sup> CIETAC(ed), *Symposium Essays on Economic and Trade Arbitration across the Taiwan Straits* (China Law Press, 2001), pp. 18-20.

<sup>22</sup> *SPC Notice on Some Issues Concerning Foreign-related Arbitration and Arbitration in Foreign Countries*, Fa Fa (1995) No. 18, *SPC Notice on the Fee and Time Limit of Recognition and Enforcement of Foreign Arbitration Awards*, Fa Shi (1998) No. 28; and *SPC Notice on Some Issues Concerning Setting Aside Arbitration Awards Related to Foreign Elements by the People’s Court*, Fa Fa (1998) No. 40.

<sup>23</sup> *SPC Interpretation on Certain Issues Relating to the Application of Arbitration Law*, promulgated by the SPC on 23 August 2006, and with effect on 8 August 2006.

#### 4. Arbitration Commission Rules

Rules of arbitration commissions do not carry the force of law under the Chinese legislative jurisprudence. However, arbitration is supposed to be carried out in accordance with a set of agreed rules, and due to the institutional arbitration system in China, it must be a set of rules of a chosen arbitration commission.<sup>24</sup> Hence, arbitration commission rules are broadly regarded as part of the legal framework of arbitration in China and the rules largely govern the arbitral proceedings.

As the earliest established arbitration institution in China, CIETAC has been playing an irreplaceable role in the Chinese arbitration system. Since its inception in 1956, CIETAC has amended its rules on seven occasions<sup>25</sup> to reflect the international trend of enhancing flexibility of arbitral proceeding. The most recent amendments were introduced in May 2012.<sup>26</sup> The CIETAC rules are mainly procedural rules concerning the formation of arbitral tribunal, conduct of hearings and production of evidence. These rules are important as they bind parties, counsels and arbitrators. Parties who choose CIETAC are governed by less stringent evidentiary burdens after comparison with those applicable to the courts. In more recent years, with a continuing effort to attract more caseload and improve competitiveness, CIETAC has expanded its jurisdiction to cover more disputes and engaged in the international trend of drafting specialized rules for catering specialized disputes. For example, in addition to arbitration rules for general commercial disputes, CIETAC has also published the *Arbitration Rules for Financial Disputes* (the “Financial Arbitration Rules”), with its most recent amendment taking place in 2008.<sup>27</sup> CMAC, which handles most of the maritime disputes in China, has also revised its rules on several occasions, the latest revision

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<sup>24</sup> Articles 16 and 18 of AL.

<sup>25</sup> The seven occasions took place in 1988, 1994, 1995, 1998, 2000, 2005, and 2012 respectively.

<sup>26</sup> The CIETAC rules were most recently revised on 3<sup>rd</sup> February 2012, effective as from 1 May 2012.

<sup>27</sup> The CIETAC Financial Arbitration Rules was first adopted in 2003, and were most recently amended in 2008, with effect from 1 May 2008.



having taken place in 2004.<sup>28</sup> It is possible that in future there are more specialized arbitration rules covering specialized areas of law, for example, securities and intellectual properties, to handle the increasingly complex and sophisticated commercial disputes.

At the same time, there have been more than 200 local arbitration commissions (the “LACs”) established as a result of the promulgation of the AL.<sup>29</sup> Most of them are situated in major cities. Each LAC then publishes its own set of arbitration rules. Therefore, arbitration rules of the Beijing Arbitration Commission (the “BAC”) are different from those of the Shanghai Arbitration Commission, and they may still be different to those of the CIETAC. Among the LACs, BAC has been recognized as a rising star of arbitration rule-maker in China drawing experience of both CIETAC and international arbitral bodies. The current BAC rules, which feature more autonomous and streamlined arbitral procedures, were amended in September 2007 and put into effect in April 2008.<sup>30</sup>

##### 5. *International Agreements*

Pursuant to Chinese jurisprudence, in cases where provisions of the international conventions signed by China are applicable, they will take precedence over counterpart provisions contained in domestic legislations save for the reservations that China has made during accession.<sup>31</sup> In the realm of arbitration, the New York Convention remains the most important framework as to China’s involvement in the international arbitration.

China acceded to the New York Convention in December 1986<sup>32</sup> and made two reservations in respect of the application. First, the application

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<sup>28</sup> The CMAC rules were most recently revised on 5 July 2004, effective as from 1 October 2004.

<sup>29</sup> Statistics released by CIETAC Research Institute (on file with the author).

<sup>30</sup> A brief of the 2008 BAC arbitration rules can be viewed at <http://www.bjac.org.cn/rule/index.html>.

<sup>31</sup> Article 142, General Principles of Civil Law.

<sup>32</sup> *Decision on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted by the National People’s Congress Standing Committee on 2 December 1986 and effective from 22 April 1987.

must be based on “reciprocity”, i.e. where a country is not a member state to the New York Convention, for recognition and enforcement of arbitral awards in China, parties will have to rely on relevant judicial assistance agreements which China has entered into with the relevant country or region.<sup>33</sup> In this respect, for example, a mutual agreement has been signed between Mainland China and Hong Kong on recognition and enforcement of arbitral awards. The agreement is significant because, after the reversion of Hong Kong to Chinese sovereignty on 1 July 1997, the New York Convention could not apply between China and Hong Kong as they are no longer two separate states albeit Hong Kong is authorized with a high degree of judicial autonomy under the “One country, Two Systems”.<sup>34</sup> Hence, the agreement has effectively paved the way for Hong Kong awards to be enforced in Mainland China, and vice versa. The second reservation that China has made relates to the restriction to a “commercial” dispute, i.e. arbitral awards must arise from disputes of a commercial nature, with the exception of investment disputes between foreign investors and the host nation which receives the investment.<sup>35</sup> Such disputes should then be under the auspices of the 1963 Washington Convention to which China became a party in February 1990.<sup>36</sup>

### C. Role of the Chinese Courts

The involvement of courts with respect to arbitration is necessary and unavoidable in China due to following reasons. First, courts, particularly the SPC, issue important judicial interpretations which

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<sup>33</sup> *Ibid.*

<sup>34</sup> See discussions *infra* on “Special Enforcement Arrangements between Hong Kong, Macau, and Taiwan”.

<sup>35</sup> *Supra* note 58.

<sup>36</sup> The Washington Convention (full name as Convention on the Settlement of Investment Disputes between States and Nationals of Other States) forms the basis for the International Center for the Settlement of Investment Disputes (ICSID) under the World Bank for resolving investment disputes between governments and foreign private investors. Article 25(1) of the Washington Convention provides that the jurisdiction of the ICSID shall extend to any legal dispute arising directly out of an investment between a contracting state (or any constituent subdivision or agency of a contracting state designated to the ICSID by that state) and a national of another contracting state.

constitute an important source of regulation on arbitration. The particular role of the SPC in the promotion and enhancement of arbitration has been highlighted in previous discussions. Moreover, in China, courts have the sole power to grant and enforce interim measures of protection to assist arbitration proceedings. These interim measures include property and evidence preservation orders upon party and arbitral tribunal's request.<sup>37</sup> Courts also exercise the final check over arbitral jurisdiction, i.e. to rule on whether the arbitration agreement or clause is existent or valid. Some authors conclude the above judicial involvement and cluster them as courts' *supportive* role towards arbitration.<sup>38</sup>

More powerfully, courts scrutinize arbitral awards, which they are asked to enforce or set aside. This is often summarized by arbitration commentators as courts' *supervisory* role over arbitration.<sup>39</sup> One of the outstanding features of the judicial scrutiny over arbitration in China is that different standards are applied to domestic and foreign-related awards under the dual-track system whereas domestic awards are more severely scrutinized. On the one hand, in line with Article V(2) of the New York Convention and international practice, courts in China can only examine procedural aspects of a foreign or foreign-related award, save for the public policy or social public interest ground where China does not have a fixed definition.<sup>40</sup> On the other hand, however, courts are empowered to review a domestic award both on its merits and on its procedures. AL states explicitly that, in addition to the legal grounds in respect of procedural issues, when a domestic award is presented to the court for enforcement, it can be set aside on the grounds of falsified evidence or concealment of evidence.<sup>41</sup> Accordingly, a party to a domestic award can refer to a mistake in the fact-finding process to achieve its purpose of having the award set aside, in addition to procedural irregularities. The reason courts in China have been granted the power to review the merits of domestic awards is untold in the legislative annotation on the AL, although many believe that it is mainly

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<sup>37</sup> Article 68, AL.

<sup>38</sup> For example, Jingzhou Tao, *Arbitration Law and Practice in China* (2<sup>nd</sup> ed) (The Hague: Kluwer Law International, 2008), paras 98-9.

<sup>39</sup> *Ibid.*

<sup>40</sup> See discussions *infra* on "Enforcement of Arbitral Awards in China".

<sup>41</sup> Article 58, AL.

due to the concerns that LACs are less experienced and sophisticated than CIETAC and CMAC and the quality of arbitral awards so rendered require substantive supervision.<sup>42</sup>

But CIETAC and CMAC, post the 1996 Notice on blurring jurisdiction, can hear domestic disputes as well. The design of the AL, when putting together the subsequent guidelines from the SC, creates practical confusion. There are further confusions when an award is to be enforced in Hong Kong under the mutual enforcement arrangement, because courts in Hong Kong will not review the merits of awards rendered in the Mainland, whether domestic or foreign-related. Hence, if the party against whom an application for enforcement of a Mainland domestic award is sought has property situated in both Hong Kong and the Mainland, the meticulous party may shop the forum and choose Hong Kong for enforcement so as to avoid the unbalanced judicial review across the border. It is hoped that this practical loophole can be rectified in the future.

## II. SPECIAL FEATURES OF ARBITRATION IN CHINA

### A. Institutional Arbitration Only

At the moment, only institutional arbitration is allowed in China. Article 16 of the AL requires that an arbitration agreement must contain a designated arbitration commission; otherwise the agreement will be invalid. Although the provision does not expressly exclude the possibility of *ad hoc* arbitration in China, but there are valid grounds why *ad hoc* arbitration is not admitted. First, an arbitration agreement submitting a dispute to *ad hoc* arbitration is not valid as the designation of an “arbitration commission” is one of the required components of a valid arbitration agreement under the AL. Secondly, an award made through *ad hoc* arbitration is not enforceable because it will be set aside or refused following an invalid arbitration agreement under Articles 58, 63, 70 and 71 of the AL. Indeed, in the recent case of *People’s Insurance Company of China, Guangzhou v. Guanghope Power* in 2003, the SPC

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<sup>42</sup> Daniel Fung and Wang Shengchang (eds), *Arbitration in China: A Practical Guide* (Sweet & Maxwell, 2003), para 2-84.

struck down an arbitration clause providing for *ad hoc* arbitration in China.<sup>43</sup> It is generally believed by the Chinese commentators that the institutional adherence in arbitration roots in the traditional Chinese respect to the power of office.<sup>44</sup> Thus, for the purpose of regulating arbitration institutions, Chapter II of the AL makes special provisions for the establishment, organization, and legal status of an arbitration commission.<sup>45</sup>

Regarding arbitrations conducted by foreign arbitration institutions seated in China, AL neither explicitly permits nor prohibits the practice.<sup>46</sup> The issue has been addressed, with particular focus as to whether an arbitration following the ICC Rules can be lawfully conducted within China and produces an enforceable award.<sup>47</sup> In this regard, Chapter II of the AL which deals specifically with arbitration commissions in China, sets out the requirements for the establishment of such commissions and makes it quite clear that they are to be organized by the local people's governments, registered with the local departments of justice, conform to a number of constitutional requirements, and be subject to supervision by the China Arbitration Association.<sup>48</sup> Chapter VII of the AL further provides for the establishment of foreign-related arbitration commissions (CIETAC and CMAC) by the China Chamber of International Commerce. The organization of foreign-related commissions must also conform to the requirements set out in Chapter II referred to above.<sup>49</sup> Accordingly, as a foreign arbitral body, it is difficult

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<sup>43</sup> *People's Insurance Company of China, Guangzhou v. Guanghope Power et al*, [Min Si Zhong Zi] No.29 of 2003.

<sup>44</sup> See, for example, Kang Ming, "Ad Hoc Arbitration in China", [2003] *International Arbitration Law Review*, 200.

<sup>45</sup> Articles 10-14 of the AL.

<sup>46</sup> "Conducting arbitration" in this context means to choose China as the seat of arbitration, regardless of whether the hearings take place in China.

<sup>47</sup> See discussions on the topic "ICC Arbitration in China", in the *Roundtable on Arbitration and Conciliation Concerning China*, ICCA Congress Series No.12, 12-14 May 2004, Beijing; compiled in Albert Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond: ICCA Congress Series No.12* (Kluwer Law International, 2005).

<sup>48</sup> Article 15 of the AL.

<sup>49</sup> Article 65 of the AL.

to see how ICC can be squeezed comfortably, if at all, within these provisions.

What is controversial under the unitary institutional system is that Chinese arbitration commissions play too active a role in the supervision of arbitration. Procedural autonomy of the parties is largely restricted to institutional arrangement of the rules of the relevant commission that administers the case. The scope of institutional review can be very wide, covering the effect of arbitral agreements, arbitral jurisdiction, qualifications of arbitrators, arbitral procedure, and finally, quality of arbitral awards. In the words of some leading Chinese authors, arbitration in China is monopolized by Chinese arbitration commissions.<sup>50</sup> Such institutional monopoly, however, entails inherent risks. Chinese arbitration commissions, lacking competitive pressures from external arbitral bodies and (*ad hoc* arbitration), are likely to be complacent and ultimately lose their competitive edge with the possible liberalization of the Chinese arbitration market in future where China needs to provide greater market access for foreign arbitration service providers in connection with its ongoing WTO commitment agenda.<sup>51</sup>

## B. Dual-track Arbitration

The second feature of the Chinese arbitration system is its dual-track division (*shuangguizhi*) between the domestic and foreign-related regimes. Arbitration in China has been clearly developed from these two tracks, with different arbitral procedures for each, and different standards of judicial review applying to each. In light of the term “foreign-related”, basic laws in China fail to give an explicit definition. Yet, inference can be sought from Article 178 of the *Several Opinions on the Implementation of the General Principles of Civil Law*, which provides that a foreign element will exist where:

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<sup>50</sup> Song Lianbin, “From Ideology to Rules: Several Issues Worthy of Attention in Revising the Arbitration Law”, 52 (2005) *Arbitration in Beijing*, pp. 6-7.

<sup>51</sup> As part of the commitments to the market access under Annex 9 of the Protocol on China’s Accession to the WTO, the arbitration market may need to be liberalized as the component of legal service market in China. See John Mo, “Reform of Chinese Arbitration System after the WTO”, 41 (2003) *China Law*; Wang Shengchang, “The Arbitration Law after China’s Accession to the WTO”, 37 (2002) *China Law*.

- (a) One party or both parties to the contract are foreign entities, foreign legal persons or stateless persons;
- (b) The subject matter of the contract is located in a foreign country;  
or
- (c) The act which gives rise to, modifies or extinguishes the rights and obligations under the contract, occurs in a foreign country.<sup>52</sup>

Besides the three criteria above, cases involving parties from Hong Kong, Macau and Taiwan are broadly referred to as foreign-related. This situation remains unchanged with regard to Hong Kong and Macau in the post-handover period. Thus, an arbitration would be deemed as “foreign-related” where it relates to disputes arising out of a contract with a foreign element.

Compared to Article 1 of the ML, a significant difference may be noted in respect of the criterion of the “foreign” element. Under Article 1(3)(c) of the ML, the parties may “create” an international element by expressly agreeing that the subject matter of the arbitration agreement relates to more than one country.<sup>53</sup> One should recognize that this is a subjective rather than objective test, which offers parties greater autonomies to tailor their arbitration to international regimes. However, the criteria envisaged are limited to objective situations.

AL covers both domestic and foreign-related arbitrations, with a set of principles that will equally apply to both regimes. Despite the unified attempt, it continues with the “dual-track” policy by differentiating foreign-related arbitration and treating them more favorably in comparison with domestic arbitration. For the purpose of the division, Chapter VII (Articles 65-73) of the AL particularly regulates the foreign-related regime and prescribes a series of privileges exclusively reserved to foreign-related arbitration.

- (a) Only the China Chamber of International Commerce (the “CCOIC”) has the privilege to establish foreign-related arbitration commissions (*Article 66*). Domestic arbitration

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<sup>52</sup> Similar judicial interpretations were issued by the SPC relating to the China Civil Procedure Law. See Article 304 of the *Opinions Relating to Several Issues Arising from the Implementation of the Civil Procedure Law*.

<sup>53</sup> See Article 1(3)(c) of the ML.

commissions are established on the basis of locality, subordinated to local justice administrations and hence, called local arbitration commissions (*Articles 10-15*).

- (b) Foreign-related arbitration commissions may decide upon their own organization structure. For example, the maximum number of members for a local arbitration commission is 16 (*Article 12*), but there is no exact limit for that of a foreign-related arbitration commission (*Article 66*).
- (c) Different rules govern the application for interim measures of protection in domestic (*Article 46*) and foreign-related (*Article 68*) arbitrations, where rules of the latter are more flexible and user-friendly.
- (d) As to level of court in exercising judicial support and supervision, for foreign-related regime, the jurisdiction to review the validity of an arbitration agreement (*Article 20*), order interim measures (*Article 28*), set aside (*Articles 58-61*) or enforce an award (*Articles 62-64*) is rested with the people's court at the intermediate level (*Articles 68, 70 and 71, making reference to Articles 258, 259 of the Civil Procedure Law*). In the case of domestic arbitration, the competent court is at the lowest basic level, except for setting aside of a domestic award which shall be applied to an intermediate people's court.
- (e) Last but not the least, on the grounds to exercise judicial supervision, for setting aside or refusing enforcement of domestic arbitral awards, the review involves even substantive matters such as the effects of the evidence on which the award is based (*Article 58*). However, in the case of a foreign-related award, the grounds for setting aside and denial of enforcement (*Articles 70 and 71, making reference to Article 260(1) of the Civil Procedure Law*) are limited within the scope of procedural aspects.

In addition to the provisional gaps differentiating the two tracks under the AL, there are basically two lines of arbitration commissions working in China as well. CIETAC and CMAC, which are nation-wide, have been traditionally referred to as foreign-related arbitration commissions. But there are many city-based LACs who sprung out only



after the AL took into effect in 1995. As aforementioned, since the 1996 State Council Notice, there is no longer jurisdictional bifurcation predicated on the two types of arbitration commissions and dual-track jurisdiction has largely been blurred. But other concerns remain. Although there are now more than 200 LACs competing with CIETAC and CMAC for the foreign-related arbitration market, it would be difficult for them to match CIETAC and CMAC as regards expertise and experience in dealing with finance, trade, transport and maritime disputes involving foreign parties. CIETAC and CMAC have not only had a wealth of experience in handling these sophisticated commercial matters but the panel of arbitrators consisting both of Chinese and foreign experts in these areas. Whilst CIETAC has led the way in increasing the number of foreign experts listed on its panel (from none in 1988 to three in 1989 to more than 300 today, nearly a third of total),<sup>54</sup> LACs have lagged behind. Few of them have appointed foreign nationals to their panels.

As the largest, oldest, and most experienced arbitration institution in China, CIETAC has been a critical actor in the Chinese arbitration system. The initial purpose of the CIETAC establishment is for settling business disputes arising from contracts and transactions between Chinese and foreign companies. For many decades, CIETAC has been representing the level of internationalization of the Chinese arbitration and moreover, been leading the evolution of arbitration practice in China. Many have argued for the irreplaceable role of CIETAC: (a) CIETAC has received the largest caseload of international arbitration in the world; (b) the rules and practices of CIETAC have significantly influenced not only the drafting of the AL, but also the rules and practices of the LACs.<sup>55</sup> CIETAC has recently revised its rules in 2012, and many of the changes will be illustrated in the chapter to reflect the efforts to converge with international norms and practices.

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<sup>54</sup> Available at the CIETAC website, <http://cn.cietac.org/Query/zhongcai yuanNewen1.asp>.

<sup>55</sup> From 1991 to 1994, the experts of CIETAC had been working hard for the drafting of the AL and had put forward many important proposals for the legislation of arbitration. After the AL was promulgated in 1995, the experts began to participate in the drafting of the plan for reorganization of LACS, their articles of association and ethical rules of the arbitrators.

### C. Harmonious Arbitration (Combining Arbitration with Mediation)

The combination of arbitration with mediation (the “Med-Arb”) is not only the outstanding feature of CIETAC arbitration, but also prevailing practice in all Chinese arbitration commissions. For long, mediation has been enjoying a prominent status in the dispute resolution system in China, which is originated in the indigenous Confucian culture and Chinese legal traditions. Thus, AL provides that if parties suggest mediation, the tribunal is obliged to conduct it.<sup>56</sup> The legislation fits exactly into the Chinese morality culture. According to the legislative annotations, the purpose for providing mediation is to help the parties maintain and promote their co-operations after the dispute is settled.<sup>57</sup> Interestingly, although there have been differences between “conciliation” and “mediation” in the international arbitration and dispute resolution literature,<sup>58</sup> in the context of Chinese arbitration, both terms have been used equally and interchangeably to describe the same scope, whether a third-party is involved in assisting parties’ amicable settlement.<sup>59</sup> For example, under the official translation of the CIETAC arbitration rules published on its website, the term “conciliation” is used. In respect of CIETAC’s arbitration practice, over fifty percent of the parties agreed to have Med-Arb. Statistics show that in the period from 1983 to 1988, about fifty percent of the CIETAC cases were settled through mediation by arbitrators; the figure maintained from 1989 to 2000.<sup>60</sup> These days,

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<sup>56</sup> Article 51 of the AL.

<sup>57</sup> The Legislative Affairs Commission of the National People’s Congress Standing Committee of the PRC (ed), *Arbitration Laws of China* (Sweet & Maxwell, 1997), 78.

<sup>58</sup> Mediation entails a third neutral party for helping the disputants achieve the amicable settlement while conciliation is friendly negotiations directly between the two disputing parties. Under provisions of the ML, only mediation is mentioned. For a deeper understanding on the differences, see, for example, James Peter, “Med-Arb in International Arbitration”, 8 (1997) *American Review of International Arbitration*, 83.

<sup>59</sup> See also Jun Ge, “Mediation, Arbitration and Litigation: Dispute Resolving in the People’s Republic of China”, 15 (1996) *UCLA Pacific Basin Law Journal*, pp. 123-4.

<sup>60</sup> See CIETAC website, <http://cn.cietac.org/Mediation/index.asp?hangye=1>.

CIETAC still enjoys a steadily successful rate in the range of twenty to thirty percent.<sup>61</sup>

In the latest updated Rules in 2012, CIETAC has established a very comprehensive system under its Article 45 with respect to the combined approach. First, mediation must be based on absolute free will and with the consent of both parties. The arbitral tribunal may mediate the case in a manner it considers appropriate.<sup>62</sup> In addition, none of the parties shall be prejudiced by the information revealed in the subsequent arbitration proceedings if mediation fails.<sup>63</sup> Parties will have two options following the mediation procedure:

- (a) If mediation fails or if the tribunal believes that further efforts to mediate will be futile, parties may request a termination of mediation and proceed with the arbitration,<sup>64</sup>
- (b) If mediation is successful and a settlement agreement has been reached during the arbitral process, parties may request the tribunal to make an arbitral award in accordance with the agreement thereof.<sup>65</sup>

Such “consented award” is then capable of being recognized and enforced under the New York Convention and national arbitration laws. In the words of Cheng, Moser and Wang, this brings about a magic transformation from a non-binding private dispute resolution agreement to a binding and enforceable quasi-judicial award.<sup>66</sup>

The 2012 CIETAC Rules confirm with the approaches taken in its 2005 Rules and allow parties to combine the mediation with arbitration both prior to and in the course of arbitral proceeding, and taking place either with or without the tribunal’s assistance.<sup>67</sup> Previous CIETAC measures only protected mediation within the arbitration proceeding,

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<sup>61</sup> *Ibid.*

<sup>62</sup> Article 45(2), CIETAC 2012 Rules.

<sup>63</sup> Article 45(9), CIETAC 2012 Rules.

<sup>64</sup> *See* Article 45(3) and (7), CIETAC 2012 Rules.

<sup>65</sup> Article 45(4), (5) and (6), CIETAC 2012 Rules.; *see also* Article 49 of the AL.

<sup>66</sup> Chen Dejun, Michael Moser and Wang Shengchang, *International Arbitration in the People’s Republic of China* (Butterworths, 2000), 58.

<sup>67</sup> Article 45(10), CIETAC 2012 Rules.

without taking into account parties' settlement efforts prior to the commencement of the arbitral hearing and outside the tribunal room.<sup>68</sup>

Although mediation has been much emphasized in Chinese arbitration, there are concerns regarding the confusing role between an arbitrator and a mediator assumed by the same person.<sup>69</sup> In particular, the Chinese harmonious approach stands in sharp contrast against the due process requirement of dispute resolution in the West where mediation and arbitration are taken as two entirely separate procedures and the mixing of which is perceived to be harmful for the neutrality and sanctity of arbitration. Such concerns are most relevant if mediation fails. Because parties involved in the mediation process are encouraged to be as frank as possible to present both their strengths and weaknesses in facts, an arbitrator who has attempted mediation may be influenced by allegations rather than evidence, and may consider matters not known to the other party. There are further concerns that these allegations may be subsequently used in arbitration which could endanger the arbitral award to be compromised.<sup>70</sup> As highlighted by a very recent Hong Kong judgment on enforcement of Med-Arb award from Mainland China, the impartiality of arbitrators who had been involved in mediation proceedings could be affected.<sup>71</sup> To allay the concerns on the independence and impartiality of mediator(s) and arbitrator(s) assumed by the same person(s), CIETAC makes some effort in its revised 2012 Rules. The Rules now provide for a CIETAC-assisted mediation process not to be carried out by its arbitral tribunal under Article 45(8).<sup>72</sup> As some practitioners comment on the revision, the latest CIETAC reform, to a certain extent, mirrors the approach of having accredited mediators to serve the Med-Arb process under the Hong Kong International Arbitration Center. Indeed, the new improvement will be conducive for striking a balance between amicable settlement and due process concerns and should help ensure the independence and impartiality of the mediators/arbitrators.

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<sup>68</sup> See, for example, Articles 41-43 of the 2000 CIETAC Rules.

<sup>69</sup> Wang Shengchang, "The Relation between Arbitration and Conciliation" [2004] *China Law* 49.

<sup>70</sup> Wang, "The Relation between Arbitration and Conciliation", 88.

<sup>71</sup> *Gao Haiyan v Keeneye Holding Ltd* [2011] HKEC 1626.

<sup>72</sup> Article 45(8), 2012 CIETAC Rules.

### III. INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE IN CHINA

#### A. Arbitration Agreements

For validity requirements, first, the arbitration agreement has to conform to the permissible scope of arbitration in China, which includes contractual disputes or other non-contractual commercial disputes.<sup>73</sup> It should be noted that labor and agriculture disputes are separately regulated and do not belong to commercial arbitrability under the Chinese law.<sup>74</sup> The crucial statutory provision that governs the validity issue is Article 16 of the AL, which lists the following four conditions:

- (a) In written form;
- (b) An expression of intention to arbitrate;
- (c) Matters for arbitration; and
- (d) A designated arbitration commission.<sup>75</sup>

The written requirement tends to clarify the issue of whether parties have actually consented to arbitration. However, AL fails to define what constitutes a written form or to what extent the written form is sufficient. Problematic situations often arise as to whether a non-signatory third party can be bound by the arbitration agreement, a situation that is seen frequently with the rising use of arbitration in China; in particular, to what extent the “written form” can be upheld in cases of contract assignment, agency relationship, etc. More controversial is the fourth condition, i.e. a “designated arbitration commission”, which has raised considerable concern and criticism for being overly rigid. Pursuant to Article 18 of the AL:

If an arbitration agreement has failed to set forth the arbitration commission to hear the matter or has failed to define it clearly, the parties may remedy the defect by a supplementary agreement.

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<sup>73</sup> Articles 2 and 3 of the AL.

<sup>74</sup> For example, labor arbitration is separately regulated by the *Labor Dispute Mediation and Arbitration Law*, effective as of May 2008.

<sup>75</sup> Article 16 of the AL.

In the absence of a valid supplementary agreement, the arbitration agreement is invalid.<sup>76</sup>

By virtue of the above, the choice of the arbitration commission must be specified. Moreover, it must be clearly specified or at least made clear in a supplementary submission; otherwise the arbitration agreement will be void. As such, the most typical defect in concluding an arbitration agreement in China would be incorrect or inconclusive reference to the choice of arbitral commission, often referred to as “defective or pathological arbitration clauses”.<sup>77</sup> These defects and pathologies may involve situations such as selecting two arbitration commissions together, providing merely the place of arbitration or institutional rules without nominating the arbitration commission, quoting incorrectly the name of the arbitration commission, etc. As a result of the over-rigid substantive mandates, parties are not only excluded the opportunity of using *ad hoc* arbitration in China, but their intention to arbitrate could be easily denied under the Chinese distinctive “defective-led-void” mechanism in regulating arbitral agreements.<sup>78</sup> AL fails to resolve these problems, bringing about much difficulty in arbitral practice and leaving wide room for judicial interpretations.

Since the promulgation of the AL, approximately thirty interpretative documents have been released by the SPC regarding the handling of defective arbitration agreements. In its latest attempt, the SPC Interpretation promulgated in 2006, codifies the existing arbitration rules and practices and provides further clarification to certain issues that have in the past led to technical challenges to arbitration agreements.

First, a more expansive scope of the “written agreement” has been introduced.<sup>79</sup> Besides “incorporation by reference”,<sup>80</sup> the SPC, in accordance with the Contract Law provisions, also recognizes the effect of arbitration agreements in circumstances of contract transfer and as

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<sup>76</sup> Article 18 of the AL.

<sup>77</sup> See Tao, *Arbitration Law and Practice in China* (2008), 34, 51.

<sup>78</sup> Song Lianbin, Zhao Jian and Li Hong, “Approaches to the Revision of the 1994 Arbitration Act of the PRC”, 20 (2003) *Journal of International Arbitration*, 174.

<sup>79</sup> Article 1 of the 2006 SPC Interpretation.

<sup>80</sup> *Ibid*, Article 11.

such can extend its effect to non-signatory third parties.<sup>81</sup> Moreover, many drafting defects with respect to “clear and unequivocal arbitration commission or institution” have been stated as remediable and operative. For example, according to Article 4 of the SPC Interpretation, prescribing the institutional rules will be sufficient to indicate the choice of the arbitral institution which administers the rules.<sup>82</sup> Moreover, unclear drafting in respect of the “arbitral institution” may be held valid so long as the institutional identity can be reasonably ascertainable from the surrounding context.<sup>83</sup> On the other hand, the SPC declares the inadmissibility of arbitration agreements which provide for multiple arbitration institutions or both arbitration and court litigation<sup>84</sup> and this has disappointed foreign practitioners where such kind of arbitration agreements can be recognized in many other jurisdictions.<sup>85</sup> There are also some contentious issues that the latest unified Interpretation fails to clear up the mist. Among them is whether to recognize the effect of arbitration agreements providing for *ad hoc* arbitration and foreign arbitration seated in China (such as ICC arbitration in China). Hence, although the most recent interpretations by the highest judiciary have liberalized the scope of validity requirements, the provisions remain to be fine-tuned.

## B. Applicable Law

In international commercial arbitration, finding the law applicable to the arbitration agreement is the pre-condition in determining its validity.<sup>86</sup> However, in many cases, parties may forget to spell out the governing law of their arbitration agreements. Where the jurisdictional challenge is brought before the people’s court, the Chinese judges used to apply universally the *lex fori* (the law of the reviewing court, i.e. the

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<sup>81</sup> *Ibid*, Articles 8 and 9.

<sup>82</sup> *Ibid*, Article 4.

<sup>83</sup> *Ibid*, Article 3.

<sup>84</sup> *Ibid*, Article 5,6, and 7.

<sup>85</sup> For example, Hong Kong and Singapore.

<sup>86</sup> For discussions on applicable laws in international commercial arbitration, see Julian D.M. Lew, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), pp. 99-134.

Chinese law) in determining the effect of the arbitration agreement.<sup>87</sup> Hence, arbitral jurisdiction may easily be turned down due to rigid requirements imposed on the validity of arbitration agreements by the AL. According to Article 145 of the Contract Law, parties can choose foreign law as the governing law only if the contract involves foreign elements.<sup>88</sup> Yet, AL fails to provide a conflict of law rule such as which law should be used to determine the validity of foreign-related arbitration agreements and the SPC tries to fill in the regulatory gap.

In 1999, the SPC first announced its opinion in a rather informal way that absent the parties' choice of law applicable to their arbitration agreements, the validity should be determined according to the *lex arbitri* (law of the place of arbitration).<sup>89</sup> Later, in a more formal manner, through Article 16 of its 2006 Interpretation, the SPC provided a detailed roadmap of the applicable law in determining the validity of an arbitration agreement that the people's court shall apply:

- (a) the "law" agreed upon by the parties; or
- (b) if the parties have not agreed on the "applicable law" of the arbitration agreement but have agreed on the place of arbitration (arbitral seat), the law of the arbitral seat, the *lex arbitri*; or
- (c) if the parties have not agreed on the arbitral seat or the arbitral seat is not made clear from the arbitration agreement, the law of the court that received the application of jurisdictional review, the *lex fori*.

The clarification accords with the general principle of party autonomy espoused under Articles 19 and 28 of the ML, which permits

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<sup>87</sup> Fung and Wang (ed), *Arbitration in China: A Practical Guide* (2004), para. 6-21.

<sup>88</sup> In addition to Article 145 of the Contract Law, Article 126 of the same law provides for the conflict of law rules for foreign-related contracts, "The governing law will be determined according to the choice of the parties; absent the choice, the law that has the closest connection to the contract is the applicable law".

<sup>89</sup> *Mitsubishi Co. Ltd (HK) v. Sanxia Investment Co. Ltd and Hubei Mechanical Engineering Co. Ltd.*, Zui Gao Fa Fa Jing Han [1999] No.143; reprinted in Zhu Jianlin, *Comments and Analyses on International Commercial Arbitration Cases* (Citic Publishing, 2002), pp. 375-7.



parties to freely select and determine both the substantial law and procedural rules to be followed during the arbitral proceeding.<sup>90</sup>

Finally, the applicable law rules have also been well followed in the revised CIETAC Rules in 2012, which emphasizes parties' free choice of applicable law to the arbitration agreement in a foreign-related dispute.<sup>91</sup> To add to the credit, the new CIETAC Rules, following the suit of the ML, distinguish between the applicable law of the arbitration agreement and that of the merits of the case, and generally follows the theory of *dépeçage* where arbitration agreement and substantive contract can be governed by different laws.<sup>92</sup>

### C. *Competence-Competence* and Arbitral Jurisdiction

The doctrine of *competence-competence*, literally “jurisdiction to decide jurisdiction”, means that an arbitral tribunal can rule on its own jurisdiction, including its jurisdictional challenges, subject to final decision by the court.<sup>93</sup> The doctrine has been widely accepted in modern arbitration laws and rules worldwide. In the Chinese arbitration system, however, the principle of *competence-competence* has been “painted with Chinese characteristics”—the arbitral tribunal is denied ruling on its own jurisdiction; rather, it is determined by the arbitration commission and subject to judicial review by the people's court. Article 20 of the AL provides that, “If a party challenges the validity of the arbitration agreement, it may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling, the people's court shall give a ruling.”<sup>94</sup> Accordingly, where an objection to the jurisdiction is submitted before the tribunal, the tribunal must report that to the arbitration commission

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<sup>90</sup> Article 19 of the ML gives the parties' the full freedom in choosing the procedural rules. Article 28 of the ML permits the parties full autonomy in selecting the law applicable to their substantive dispute.

<sup>91</sup> Article 5(3), 2012 CIETAC Arbitration Rules.

<sup>92</sup> Article 47(2), 2012 CIETAC Arbitration Rules.

<sup>93</sup> Alan Redfern and Martin Hunter, *Law and Practice of International Arbitration* (Sweet & Maxwell, 2004), 9.

<sup>94</sup> Article 20 of the AL.

and wait for the commission's decision on the jurisdiction before it can rule on the substance. Hence, the splitting workload of jurisdiction-ruling and merit-adjudicating between the commission and tribunal not only unduly delays the proceeding but also makes the tribunal subject to the commission.

Among the Chinese arbitration commissions, CIETAC was the first to openly criticize the defective practice of "commission-dominated" arbitral jurisdiction and had embarked on the reform in 2001. The CIETAC measure follows a three-step formula: (1) if the jurisdictional challenge is straightforward, the commission will rule on the jurisdiction directly. If the commission considers the jurisdictional dispute complicated or the surrounding facts yet to be ascertained, then (2) before the composition of the tribunal, the commission will render a "preliminary ruling" of the jurisdiction based on the *prima facie* evidence and wait for the tribunal's further ruling after it has examined the case details; (3) if the tribunal has been established, the commission will consult with the tribunal before it renders the "preliminary ruling". In either case of (2) or (3), should the tribunal find after its substantive hearing that no jurisdiction should be entertained, the tribunal shall then report its findings and opinions in writing to the commission. The commission will "confirm, revise or reverse" the preliminary ruling, and to render a new jurisdictional decision in accordance with the opinions of the tribunal.<sup>95</sup> Hence, the reform was seen as a series of technically remedial measures. These internal measures are designed to introduce the jurisdictional competence of the tribunal into practice although it is supposed to be within the legislative authority to rule only on the merits of the case.

In 2005, CIETAC officially introduced the jurisdictional autonomy of the arbitral tribunals through Article 6 of the amendment to its Rules:

The CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over

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<sup>95</sup> Wang Shengchang, "The Chinese Characteristic System of Competence-Competence in Arbitration: Achievements and Problems", 75 (2003) *Arbitration and Law*, pp. 236-7.

an arbitration case. *The CIETAC may, if necessary, delegate such power to the arbitral tribunal.*”

Where the CIETAC is satisfied by prima facie evidence that an arbitration agreement providing for arbitration by CIETAC exists, it may make a decision based on such evidence that it has jurisdiction over the arbitration case. *Such a decision shall not prevent the CIETAC from making a new decision on jurisdiction based on facts and/or evidence found by the tribunal during the proceedings that are inconsistent with the prima facie evidence.*<sup>96</sup>

By use of emphasis, the main development with respect to arbitral jurisdiction under the 2005 CIETAC Rules amendment is highlighted. The commission may now delegate the jurisdictional power to the individual tribunal. This shows CIETAC’s determination in advancing the tribunal’s *competence-competence*. Besides, the new Rules officially affirm the long-established “underground” practice of “joint” ruling on arbitral jurisdiction.

The 2012 CIETAC Rules confirm the practice under its 2005 revisions and in addition, makes the ruling of jurisdiction under the tribunal a more straightforward manner, either as a separate decision or incorporate it in the final arbitral award.<sup>97</sup> The move has been warmly welcomed by parties and legal practitioners in light of higher degree of protection of party autonomy and arbitral autonomy. Unfortunately, the liberalization is short of necessary details, i.e. under what circumstances the jurisdictional competence may be delegated. If it is a “necessity” test, then to what extent could the discretionary power be exercised by the commission, particularly in complex cases?<sup>98</sup> The 2005 Rules are silent on the crucial implementation part and the 2012 Rules still fail to provide an explicit answer, where CIETAC tribunals are still pushing for a move towards arbitral autonomy. Some writers suggest that CIETAC may need

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<sup>96</sup> Article 6 of the CIETAC Rules 2005, available at <http://www.cietac.org.cn/english/rules/rules.htm>.

<sup>97</sup> Article 6(3) of the 2012 CIETAC Rules.

<sup>98</sup> Tao Jingzhou and Zhao Jing, “CIETAC: Revising Its Arbitration Rules”, 1 (2005) 10 *Arbitration Newsletter of the International Bar Association*, 17.

more time to accumulate practical experience for supplementing the newly-introduced rules;<sup>99</sup> others argue that CIETAC's "intentional" omission may be justified as a "cautious approach for self-protection and not offending the legislative mandates".<sup>100</sup> The latter opinion may serve as a footnote to the "struggling" efforts by the top Chinese arbitration institution in aligning itself with international practice.

#### **D. Selection of Arbitrators and the Panel Arbitrator Tribunal**

Article 13 of the AL sets forth both the moral and professional qualifications for being an arbitrator in China: (a) an arbitrator must be a morally impeachable person who is regarded as upright and impartial by the public; (b) he/she must have sufficient years of expertise in some special areas such as law, trade and economics. The so-called "expertise" requires at least eight years of working experience as a staff member in the arbitration commission, a lawyer or judge, or possessing a senior professional title in law school or in the field of economics and trade.<sup>101</sup> Comparative research shows that China is among the few jurisdictions which set high level of professional competence of arbitrators on behalf of the parties.<sup>102</sup> On the other hand, Chapter 7 of the AL, which deals specifically with foreign-related arbitrations, stipulates under its Article 67 that foreigners may be appointed with special knowledge in the fields of law, economics and trade, science and technology.<sup>103</sup> The appointment of foreign arbitrators is thus not subject to the Article 13 restrictions on "expertise" and "established years" and there are no specific qualifications required of foreigners (including residents of Hong Kong, Macau and Taiwan) to serve as arbitrators in China. The criteria for foreign arbitrators thus appear more relaxed than the criteria for domestic

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<sup>99</sup> This view is expressed most recently by the current CIETAC Secretary General, Mr. Yu Jianlong, in his talk on the "Managing Business Disputes in China" Conference, held on 26 March 2007 in Harvard Club, New York.

<sup>100</sup> See Lian Lirong, "The Latest Developments in CIETAC's Arbitration Rules", available at [www.european-arbitrators.org/europeanarbitratorsfiles/content/papers.html](http://www.european-arbitrators.org/europeanarbitratorsfiles/content/papers.html).

<sup>101</sup> Article 13 of the AL.

<sup>102</sup> For example, to be an arbitrator in Taiwan, the candidate shall practise as a lawyer, judge, or accountant for more than five years.

<sup>103</sup> Article 67 of the AL.

arbitrators and the legislation was so designed for internationalization of China's foreign-related arbitrations.

Because of the institutional and dual-track features of the Chinese arbitration system, each arbitration commission then maintains its own panel lists, with one catering to domestic arbitration and the other to foreign-related disputes. Accordingly, there are no uniform standards for the enlisting of arbitrators among different arbitration commissions across the country; the AL merely provides the minimum standard on which basis each commission then develops its own qualifications for appointing arbitrators to the particular panels. For example, in addition to the Article 13 requirements under AL, CIETAC and CMAC have jointly promulgated the *Stipulations for the Appointment of Arbitrators* (the "Stipulations").<sup>104</sup> In its most recent version of 2005, the Stipulations require three more professional conditions for being a Chinese arbitrator on the panels of CIETAC and CMAC; that he/she (1) is willing to observe the Rules, including the Ethical Rules for Arbitrators<sup>105</sup> and other relevant regulations of CIETAC and CMAC; (2) has a good grasp of a foreign language and can adopt it as a working language; and (3) can guarantee the time to handle the cases under the Rules.<sup>106</sup> Following the dual-track distinction, the Stipulations also provide for different qualifications for the appointment of foreign arbitrators. In addition to the Article 67 conditions, foreign nationals are asked "to observe the rules and regulations of the CIETAC and to have some knowledge of Chinese".<sup>107</sup> These conditions provide some comparable requirements to the appointment of Chinese arbitrators so that discriminative impressions may be alleviated.

More distinctively, China adopts a panel arbitrator system where parties must appoint arbitrators from panels maintained by the arbitration

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<sup>104</sup> *Stipulations for the Appointment of Arbitrators*, jointly promulgated by CIETAC and CMAC on 1 September 1995, revised on 1 September 2000 and 24 January 2005 respectively.

<sup>105</sup> Once appointed, arbitrators must carry out their functions in accordance with the law and the *Ethical Rules for Arbitrators*, accessible at [http://www.cietac.org.cn/index\\_english.asp](http://www.cietac.org.cn/index_english.asp).

<sup>106</sup> Article 2 (1) of the *Stipulations*, at <http://www.cietac.org.cn/shiwu/zhongcaishiwu.asp?type=sw4>.

<sup>107</sup> Article 2(2)(5) of the *Stipulations*.

commission which administers the case. The CIETAC Rules, before the 2005 revision, required the parties to choose arbitrators from within the panel list that is relevant to the nature of the case, i.e. domestic or foreign-related. For LACs, the same closed-panel approach has also been unanimously taken under the current rules of the Beijing Arbitration Commission and Shanghai Arbitration Commission. International experience shows that while it is not uncommon for an arbitration institution to form its own standards for arbitrators and appoint qualified persons as members of its own panels, panel members are only listed on a basis for suggestion and thus parties are free to appoint other persons whom they think are most appropriate in handling their cases.<sup>108</sup> Academics and foreign commentators have discussed various aspects of Chinese arbitration procedure that hinder the principle of party autonomy, criticizing in particular the procedure of arbitrator appointment from a closed panel list.<sup>109</sup> Moreover, many arbitrators on the panel list are staff members of the administering arbitration commission, or Chinese government officials (including retired officials).<sup>110</sup> This may give rise to a perception that any party involved in arbitration against Chinese state-owned enterprises will be at a disadvantage.

In the meantime, there are counter arguments that given the fledging level of rule of law in China, the panel system can help control the quality of arbitrators. The CIETAC Research Institute studied the arbitral power and concluded that there are adequate reasons for the implementation of the closed panel system in China.<sup>111</sup> The studies show

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<sup>108</sup> The Hong Kong International Arbitration Center (HKIAC), for example, establishes a panel of arbitrators. Besides the panel members, the HKIAC also maintains a database of other arbitrators who, although not meeting the Panel Selection Committee's criteria for inclusion on the panel, may yet be suggested to parties in suitable cases. Most importantly, parties are allowed to appoint arbitrators from outside the institutional panels and databases.

<sup>109</sup> Sarah Catherine Peck, "Playing By a New Set of Rules—Will China's New Arbitration Laws and Recent Membership in the ICC Improve Trade With China?", 4 (1995) 12 *Journal of International Arbitration*, pp. 51-64.

<sup>110</sup> Gu Weixia, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (Hong Kong: Sweet & Maxwell, 2012), pp. 142-147.

<sup>111</sup> Wang Wenying, Director of the CIETAC Research Institute, *Arbitral Power in the People's Republic of China: Reality and Reform* (Thesis for the degree of SJD at the University of Hong Kong, 2004), pp. 235-7.

that because China is far from being a mature arbitration community, parties may not be able to make “rational” decisions regarding appointment on the one hand and arbitrators may not conscientiously observe professional ethics on the other hand.<sup>112</sup> But the Chinese traditional respect for harmony has called the resilience of personal relations and networks (*guanxi*) within the operation of the close-panel arbitral tribunal. As parties are obliged to choose arbitrators within the panel list, personal relations within the tribunal could be delicate when most of the panel arbitrators are drawn from internal staff of the administering arbitration commission or government officials who share acquaintance with each other in the same local community.<sup>113</sup> The staff and official arbitrators, afraid of breaking personal ties, tend to accommodate among the tribunal for reaching “amicable” majority opinion.<sup>114</sup> Hence, the closed panel system and its associated problems have seriously restricted parties’ autonomy and dented their confidence in the impartiality of Chinese arbitration.

As noted, many critics have pointed out that in order for CIETAC to operate as a truly international body, the disputing parties should have more freedom in choosing their arbitrators. Therefore, in the 1994, 1998, 2000, 2005, and 2012 amendments to its Rules, CIETAC responded to the growing concerns of the closed panel system by increasing the number of available arbitrators from 89 to almost 1000.<sup>115</sup> In addition to that, the 2005 Rules set forth the new mechanism for appointing arbitrators. For the first time, CIETAC permits parties to appoint arbitrators off the panel list. Although a non-panelist will still need to meet the same criteria as those applicable to admission to the CIETAC panel,<sup>116</sup> this largely opens up the scope of choices, as CIETAC’s panel predominately consists of Chinese nationals, with a majority coming

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<sup>112</sup> *Ibid.*, at 236.

<sup>113</sup> *Supra* note 114.

<sup>114</sup> *Ibid.*

<sup>115</sup> See the updated *Panel of Arbitrators of the CIETAC*, effective from 1 May 2012, available at the CIETAC website, <http://cn.cietac.org/Arbitration/ArbitrationSearch.asp>.

<sup>116</sup> In a recent conference (*Managing Business Disputes in China*, March 26, 2007, at the Harvard Club, New York), the current CIETAC Secretary-General, Yu Jianlong, replied that the criteria under which the off-listed arbitrators will get approved will be analogous to those qualifications required of the CIETAC panel arbitrators.

from its staff and those with government background. The loosening of the CIETAC panel will increase dramatically the pool of experts available to serve on a CIETAC tribunal and hence has significant practical impacts on increasing the parties' procedural autonomy. However, such off-the-list appointment does not enjoy complete freedom, as it is conditional upon the confirmation by CIETAC's chairman.<sup>117</sup> Unfortunately, neither the 2005 Rules nor the 2012 Rules have laid down any implementation details. The silence as to under what circumstances the approval could be obtained has shared a similar vagueness to that happened in the commission's delegation of jurisdictional power concerned by previous discussions.

On the appointment of presiding arbitrator, CIETAC has now enabled parties to submit a list of candidates for matches, which purports to increase the chances of the "meeting of minds". Under the 2005 Rules, each party was able to submit up to three names.<sup>118</sup> However, the appointment procedure stipulated that if there was no single common name on the parties' lists, then all the candidates named might be excluded from appointment as the presiding arbitrator.<sup>119</sup> This stipulation made the approach to appointment less attractive. The practice has now been improved. Under the 2012 Rules, first, the potential persons that parties are entitled to nominate will be increased to five; and secondly, the parties' nominees will not automatically be eliminated as future candidates if no common candidate can be found.<sup>120</sup> This new approach will give the parties better control over the choice of presiding arbitrator. The 2012 Rules provide further clearer guidelines on the criteria that CIETAC chairman should take into account in finding the common candidate and appointment of the presiding arbitrator. These criteria include factors such as the applicable law, the place and language of arbitration, and importantly, nationalities of the parties.<sup>121</sup> The 2012 Rules do not, however, require that the presiding or sole arbitrator be of a different nationality to the parties. Nonetheless, the new provision is

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<sup>117</sup> Article 21(2) of the CIETAC Rules 2005.

<sup>118</sup> Article 22(3) of the 2005 CIETAC Rules.

<sup>119</sup> Article 22(4) of the 2005 CIETAC Rules.

<sup>120</sup> Article 25(3) of the 2012 CIETAC Rules.

<sup>121</sup> *Ibid.*



expected to bring a greater variety to the pool of presiding arbitrators, which has until now been largely dominated by Chinese arbitrators.

### E. Interim Measures

On interim measures, AL falls significantly short in meeting practical needs. Main defects are as follows. First, the arbitral tribunal has no authority to entertain a party's motion for evidence or property preservations. The power is either wholly in the hands of the people's court or shared by the court and arbitration commission.<sup>122</sup> Secondly, AL is silent as to whether the preservation may be ordered before the arbitration takes place. Although it is very likely urgency could arise before the arbitral hearing, there has been a uniform practice among the judiciary and arbitration commissions denying pre-arbitration measures.<sup>123</sup> Thirdly, there is a further legal gap as to the grounds under which the interim measures can be ordered and upon the order, whether parties will have a chance to present their case. Pursuant to Articles 28 (property preservation) and 46 (evidence preservation) of the AL, the "urgency of the measures sought" needs to be considered.<sup>124</sup> In practice, however, people's courts either construe the "urgency" very discretionarily or they just want to make sure that the party applying the measures has supplied a sufficient security from which the opponent whom the measure is sought can be compensated once the measure is found wrong.<sup>125</sup>

The 2012 CIETAC Rules reflect this regime and largely liberalize on the first point. Notably, the Rules now include express provisions that empower the arbitral tribunal to issue interim measures, either in the form of a procedural order or an interlocutory award.<sup>126</sup> The issuance is conditional upon a party's application, and must be necessary or proper

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<sup>122</sup> Articles 28 and 46 of the AL.

<sup>123</sup> Lijun Cao, "Interim Measures of Protection in the Context of Arbitration in China", [2005] *International Arbitration Law Review*, 104.

<sup>124</sup> *Supra* note 126.

<sup>125</sup> Cao, "Interim Measures of Protection in the Context of Arbitration in China" [2005], pp. 105-106.

<sup>126</sup> Article 20(2) of the 2012 CIETAC Rules.

in accordance with the law that applies—typically the law of the seat.<sup>127</sup> According to Yu Jianlong, Secretary-General and Vice-Chairman of CIETAC, the new move will be useful where parties have agreed to arbitrate *outside* China,<sup>128</sup> although it remains to be seen if such orders can be enforced (whether as awards or otherwise) in China. This implies that CIETAC tribunals based in Mainland China (and subject to the AL) may still not have the power to issue interim measures.

For the second and third points, the most recent CIETAC amendment fails to provide an answer, nor have there been any judicial clarifications from the SPC. In this regard, the UNCITRAL Working Group has lately suggested some very liberal amendments concerning interim measures in 2006.<sup>129</sup> Among its various suggestions, the revised ML Article 17(1) has confirmed the ordering of interim measures a default authority for arbitral tribunals unless there is evidence that the parties did not intend to bestow that power; in addition, parties can seek at any time prior to the issuance of the final award of the dispute.<sup>130</sup> As to grounds to order the interim measures, the tribunal should consider “irreparable harm” and “likelihood of success of the claim”.<sup>131</sup> There are other new developments such as the burden of proof on the party seeking interim measures of protection and its duty of disclosing any material change of circumstances on the basis of which the measure was requested or granted.<sup>132</sup> China is suggested to keep up with the world trend and to pick up its regulations and practices.

## F. Evidence and Proceedings

Being a civil law jurisdiction, arbitration proceedings in China tend to follow the civil law model. Hence, there is no discovery as such in

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<sup>127</sup> *Ibid.*

<sup>128</sup> Speech by Yu Jianlong, “The New CIETAC Arbitration Rules”, delivered at Hong Kong International Arbitration Center, March 23<sup>rd</sup>, 2012, Hong Kong.

<sup>129</sup> The ML was revised in 2006, passed by the Forty-fourth session of the UNCITRAL Working Group (New York, 23-27 January 2006). See UNCITRAL document A/CN.9/WG.II/WP.141, available at <http://daccessdds.un.org/doc/UNDOC/LTD/V05/907/58/PDF/V0590758.pdf?OpenElement>.

<sup>130</sup> Article 17(1) of the 2006 ML.

<sup>131</sup> Article 17(2) of the 2006 ML.

<sup>132</sup> Article 17(6)-(7), *ibid.*

Chinese arbitrations although it is generally believed that a party is entitled to request the other to produce documents to support the latter's claim or defense. If the documents are not produced, there might be adverse influences drawn by the tribunal.<sup>133</sup> Detailed rules on evidence such as cross-examination of witnesses by parties' lawyers are not usually featured in China, although AL does allow a party to ask the other party questions in the presence of the tribunal.<sup>134</sup> Following the hearing, parties are usually given further opportunities to make their submissions to deal with points or queries raised by the other side or the tribunal during the hearing.

For examination of evidence, previously, CIETAC relied more on documentary evidence and even accept hearsay factual evidence from the parties' lawyers unless this is challenged by the other party.<sup>135</sup> The practice has however been reformed under the 2012 Rules. The new rules now refer to "evidence" as documentary or otherwise, for example, oral or real (physical) evidence.<sup>136</sup> Moreover, there is an amendment regarding "examination of evidence". It was provided in the 2005 version of the CIETAC Rules that, for a case examined by way of an oral hearing, the evidence must be produced during the hearing for cross-examination by the parties.<sup>137</sup> According to the current version (2012 Rules), however, examination of evidence is no longer obligatory.<sup>138</sup> For additional evidence submitted after the hearing, both parties may agree to examine it by means of writing without any oral hearing to be held.<sup>139</sup>

Another feature of the arbitral proceeding in China concerns the investigation conducted by the tribunal itself. According to AL, a Chinese tribunal may, if it considers necessary, undertake its own investigations and collect evidence.<sup>140</sup> CIETAC has taken its own investigation seriously and since 1998, evidence collected by CIETAC

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<sup>133</sup> This is under the influence of Article 9 of the Evidence Rules of the International Bar Association (IBA).

<sup>134</sup> Articles 45 and 47 of the AL.

<sup>135</sup> Fung and Wang, *Arbitration in China: A Practical Guide* (2003), para 4-23.

<sup>136</sup> Article 40 of the 2012 CIETAC Rules.

<sup>137</sup> Article 39(2) of the 2005 CIETAC Rules.

<sup>138</sup> Article 40(1) of the 2012 CIETAC Rules.

<sup>139</sup> Article 40(2) of the 2012 CIETAC Rules.

<sup>140</sup> Article 43 of the AL.

should be notified to and commented by both parties.<sup>141</sup> Sometimes such power can be effective in resolving important issues in arbitration. For example, in disputes involving joint ventures, CIETAC tribunals may be requested by the party which is not in control of the management of the joint venture to carry out an audit (through tribunal-appointed auditors) of the books and accounts of the joint venture, where the requesting party's efforts to perform the same audit has been obstructed by the other party.

Given the rise in recent years of multi-party and multi-contract disputes, in 2012, CIETAC introduced a new proceeding for "consolidation of arbitrations". Joint ventures with Mainland Chinese partners often involve a suite of contracts and parties will often be left frustrated when having to run parallel arbitrations. Under the new Rules, CIETAC may consolidate two or more arbitrations into one, either on request of one party and with the agreement of all other parties, or if CIETAC considers it necessary to consolidate and all parties consent.<sup>142</sup> It is also provided that in deciding whether to consolidate the arbitrations, CIETAC may take into account any relevant factors in respect of the different arbitrations, including whether all the claims are made under the same arbitration agreement, whether the different arbitrations are between the same parties, or whether one or more arbitrators have been nominated or appointed in different arbitrations.<sup>143</sup> Although a welcome reform, the effect of the consolidation provisions may be limited, since consent of all the parties are required. A recalcitrant party may then easily refuse to provide such consent as delaying tactics.

One potentially controversial development in the 2012 CIETAC Rules regarding arbitral proceedings concerns Article 4(3), which provides that, "where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on ... the application of other arbitration rules", CIETAC "shall perform the relevant administrative duties".<sup>144</sup> It appears on the wording of the provision that CIETAC will also

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<sup>141</sup> Articles 26 and 28 of the 1998 CIETAC Rules, which have been subsequently confirmed at Articles 37(3) and 38(3) of the 2005 CIETAC Rules, as well as Article 41 of the 2012 CIETAC Rules.

<sup>142</sup> Article 17(1) of the 2012 CIETAC Rules.

<sup>143</sup> Article 17(2) of the 2012 CIETAC Rules.

<sup>144</sup> Article 4(3) of the 2012 CIETAC Rules.

administer proceedings commenced under the rules of other arbitral institutions, or even *ad hoc* arbitration rules such as the UNICTRAL Rules. This, however, may potentially bring CIETAC into conflict with, for example, ICC, which has recently amended its rules to make clear that only the ICC Court is authorized to administer ICC arbitration proceedings.<sup>145</sup> It is best practice, in any event, to avoid arbitration clauses which seek to allow one arbitral institution to administer proceedings brought under the rules of another institution. This may not only lead to uncertainty in the conduct of the proceedings, but can also expose the award to challenge.<sup>146</sup>

Foreign representation is also allowed in arbitration practice in China, which has been explicitly provided by the 2012 CIETAC Rules.<sup>147</sup> In such a case, power of attorney shall be forwarded to the secretariat of the commission for record purposes. Compared with civil litigation in Chinese courts, the involvement of foreign lawyers is also deemed as one of the selling points why arbitration is more favored by foreign businesses.

### G. Seat (Place) and Language of Arbitration

AL does not set out in detail issues concerning the seat and language of arbitration. Since 2005, CIETAC Rules have provided that upon the parties' agreement in writing, parties may agree on the place of arbitration.<sup>148</sup> To keep up with the international practice that differentiates the seat of arbitration and place of hearing, in the updated 2012 Rules, the seat of arbitration (Article 7) and place of oral hearing (Article 34) have been separately provided and parties are allowed to agree on different places at their will. Under the Rules, where parties have not agreed on the seat of arbitration, it is deemed to be the city where CIETAC (or any of its sub-commissions such as Shanghai or Shenzhen) is located, namely a

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<sup>145</sup> Article 1(2) of the 2012 ICC Rules.

<sup>146</sup> As evidenced by the case of *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, where the enforcement of the award was denied because the Singapore International Arbitration Center (SIAC) purported to administer a dispute brought under the ICC Rules.

<sup>147</sup> For example, Article 20 of the 2012 CIETAC Rules.

<sup>148</sup> Article 31 of the 2005 CIETAC Rules.

place inside Mainland China.<sup>149</sup> The 2012 Rules now also allow CIETAC, in the absence of party agreement on the seat of arbitration or where the agreement is ambiguous, to decide that the seat to be a city other than the location of CIETAC (or any of its sub-commissions), which could be a city outside Mainland China, for example Hong Kong.<sup>150</sup> It is worth noting, however, that arbitration outside of Mainland China is only permitted for “foreign-related” disputes and the criteria for being “foreign-related” have been outlined in previous discussions. Anyway, this is a significant change, at least on paper, given that the seat determines both the law governing the arbitral proceeding and the courts which will retain supervisory jurisdiction over the arbitration. It remains to be seen, however, how often CIETAC will exercise its new discretion in favor of a seat outside of Mainland China.

With the upcoming opening of the Hong Kong office of CIETAC, this might bring it practically possible for CIETAC to administer arbitral proceedings in Hong Kong.<sup>151</sup> The opening by CIETAC of a branch in Hong Kong will further help clarify the enforceability of CIETAC awards where the parties have chosen Hong Kong as their seat of arbitration. Previously, it was not clear how Chinese courts would treat awards rendered by CIETAC in Hong Kong, given that CIETAC is a Chinese domestically incorporated institution. Now there should be less controversy that awards made by CIETAC seated in Hong Kong would be subject to enforcement through the cross-border mutual enforcement arrangement between Mainland China and Hong Kong, as will be looked into in the next part of analysis on enforcement.<sup>152</sup>

For the language of arbitration, under the 2005 Rules, in the absence of party agreement on the language, the arbitration must be conducted in Chinese.<sup>153</sup> The 2012 Rules now allow CIETAC to determine that the language of arbitration could be any other language... having regard to

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<sup>149</sup> Article 7(2) of the 2012 CIETAC Rules.

<sup>150</sup> *Ibid.*

<sup>151</sup> See Justin D'Agostino, “Key Changes to the CIETAC Arbitration Rules”, available at Kluwer Law International, <http://kluwer.practicesource.com/blog/2012/key-changes-to-the-cietac-arbitration-rules/>.

<sup>152</sup> See discussions *infra* on “Special Enforcement Arrangements with Hong Kong, Macau and Taiwan”.

<sup>153</sup> Article 67(1) of the 2005 CIETAC Rules.

the circumstances of the case.<sup>154</sup> This is a welcome development, particularly for disputes where all of the relevant documents (including the underlying contract) may have been written in a language other than Chinese. As with the other changes to the Rules, however, only time will tell how often this discretion is invoked in practice.

#### **IV. ENFORCEMENT OF ARBITRAL AWARDS IN CHINA**

There are four types of arbitral awards seeking enforcement in China: (1) Chinese domestic awards, (2) foreign-related awards rendered in Mainland China, (3) foreign arbitral awards rendered outside China, and (4) awards rendered in Hong Kong, Macau and Taiwan. Each type is treated differently on recognition and enforcement mechanism as regards both procedure and grounds. As aforementioned, since the 1996 State Council Notice, there is no longer jurisdictional bifurcation on the two types of Chinese arbitration commissions and dual-track jurisdiction has largely been blurred. Hence, awards rendered in China are no longer categorized on the domestic or foreign-related basis of the arbitration body that renders them but rather, the domestic and international nature of the case itself, with three limbs of tests in determining “foreign element” as demonstrated in earlier discussions.

##### **A. Domestic Awards**

Article 58 of the AL specifies the proper application to cancel a domestic award. Where a party can provide evidence proving that the arbitration award involves one of the following circumstances, he/she may apply to the intermediate people’s court in the place where the arbitration commission is located to set aside a domestic award:

- (a) there is no arbitration agreement;
- (b) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- (c) the evidence on which the award is based was forged;

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<sup>154</sup> Article 71(1) of the 2012 CIETAC Rules.

- (d) the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or
- (e) the arbitrators committed embezzlement, accepted bribes, practiced graft or made an award that perverted the law.

Of the grounds for setting aside a domestic award in China, grounds (a), (b) and (c) are common and involve procedural defects, while grounds (d) and (e) relate to those substantive issues and have been contrary to international arbitration practice. In addition, the second paragraph of Art 58 provides that the court could rule *ex officio* to set aside a domestic award if the award is contrary to the social and public interest.<sup>155</sup>

*Hongshi* is a case where the people's court was faced with a challenge to set aside the award on both procedural and substantive grounds. For procedural defects, the applicant submitted that the conduct of the arbitration proceeding was in breach of the Arbitration Rules of the Beijing Arbitration Commission and the arbitral award should be set aside accordingly. In the substantive challenge, the applicant alleged both "forged evidence" and "concealment of evidence".<sup>156</sup>

## B. Foreign-related Awards

The grounds on which a Chinese court may deny the enforcement of a foreign-related arbitral award are much narrower than those of the domestic award. Articles 70 and 71 provide the major legal source for handling foreign-related arbitral enforcement in China. The applicant challenging enforcement shall present to the intermediate court proof that a foreign-related award is in violation of the following grounds:

- (a) no arbitration clause in the contract nor written arbitration agreement concluded after the occurrence of the dispute by the parties;

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<sup>155</sup> Articles 58, para. 2

<sup>156</sup> *Hongshi Foundation Development Company of Beijing v. Wantong New World Commercial Center Company Ltd.*, available at the Beijing Arbitration Commission's website at [www.bjac.org.cn](http://www.bjac.org.cn).



- (b) the failure of the respondent to receive the notice of appointment of arbitrators or of commencement of arbitral proceedings or the inability of the respondent to present his/her case for reasons not due to his own fault;
- (c) the formation of the tribunal or the arbitration procedure was not in consistency with the arbitration rules;
- (d) the matters decided in the award being out of scope of the arbitration agreement or beyond the authority of the arbitration institution.<sup>157</sup>

Chinese people's courts may also deny recognition and enforcement of a foreign-related award if it believes that enforcement would be detrimental to the Chinese "social and public interest".<sup>158</sup> The argument of "social and public interest" has been a major concern in reviewing international awards when they are translated into China and will be dwelled into in the forthcoming section concerning foreign awards.

A comparison between enforcement of domestic and foreign-related awards would show that grounds for foreign-related awards are only limited to procedural irregularities. Apart from the unequal treatment in review grounds, as earlier mentioned, the SPC has also established a different procedure, the "pre-reporting system", catering to the enforcement of foreign-related and foreign arbitral awards. The "pre-reporting" system requires that only after the SPC has confirmed the findings may the intermediate people's court rule to refuse recognition or enforcement of foreign-related and foreign arbitral agreements and awards. Hence, higher level courts would not interfere with positive enforcement rulings made by the lower levels, but a *negative* ruling must be subject to "pyramidal scrutiny" by the higher level and even the central level judiciary. Since there is no appellate procedure for rulings on arbitral enforcement, the importance of the "pre-reporting" is to prevent local influences over arbitration and to improve the international enforcement where the SPC can control the final result of review.<sup>159</sup> By

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<sup>157</sup> Articles 70 and 71 of the AL, making reference to Articles 258 and 260 of the Civil Procedure Law.

<sup>158</sup> *Ibid.*

<sup>159</sup> CIETAC (ed), *Symposium Essays on Economic and Trade Arbitration between the Taiwan Straits* (China Law Press, 2001), 39.

strictly following the SPC stipulations, a refusal or delay in handling enforcement matters of foreign-related or foreign arbitration awards would be deemed as exceptional rather than usual. The scheme, however, is not free from defects. Among the criticisms, it is only applicable to the international regime. The quality of judicial review over domestic awards is not subject to the same examination.

The fact that the standards and procedures for enforcing domestic awards are stricter than foreign-related awards suggests that the domestic regime is more difficult to enforce. Specifically, in an empirical study conducted by Professor Randall Peerenboom in 2001, among the sixty-three domestic awards handled by one court in a large city in Jiangsu Province, two were refused and thirty-five listed as pending.<sup>160</sup> Hence, the domestic regime needs careful judicial handling as well, at least no less than its foreign-related counterpart. The different treatment by AL and SPC raises serious concerns as regards the dual-track system. Over the past decade, many have argued for the abolition of substantive review over domestic arbitration, which has impeached upon the sanctity of arbitration as an independent commercial dispute resolution method. Unfortunately, the most recent SPC Interpretation in 2006 fails to deal with the issue. In this respect, the “pre-reporting” system only aggravates the unbalanced treatment in the judicial review over the two tracks. It is expected that for future amendment to AL, grounds for reviewing domestic awards should be narrowed only to procedural aspects.

Practitioners must also be mindful of the time limit for enforcement actions in China. The former version of the Civil Procedure Law in 1991 provided for two different time limits for different applicants, i.e. for natural persons (individuals, one year) and legal persons (entities, half a year). The new Civil Procedure Law (amended in 2007) provides for a unified time limit of two years, regardless of the nature of the award (domestic or foreign-related) and regardless of the types of the applicant (individuals or entities).<sup>161</sup> The time runs from the final date upon which, pursuant to the award, the losing party is obliged to comply with its

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<sup>160</sup> Randall Peerenboom, “Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC”, 49 (2001) *American Journal of Comparative Law*, 249.

<sup>161</sup> Article 215(1) of the 2007 Civil Procedure Law.

terms. If the award does not contain any time limit, the time limit should be calculated from the day when the award takes effect or ought to take effect.<sup>162</sup>

### C. Foreign Awards

The enforcement of foreign arbitral awards is largely concerned with the application of New York Convention in China to which it became a member since 1986. As aforementioned, China's accession to the New York Convention included two reservations, the "reciprocity reservation" and the "commercial reservation". Notably the significance of the "reciprocity reservation" is diminishing over time as the member states of the New York Convention continue to grow.<sup>163</sup> As for the "commercial reservation", the Chinese practice is that arbitration of foreign investment claims cannot be enforced under the New York Convention but instead, they have to be submitted and resolved through bilateral investment treaties (BITs)<sup>164</sup> or Washington Convention.

Article V is the key part of the Convention for the purpose of enforcement, since it sets out exclusive conditions under which foreign awards can be denied recognition and enforcement. The Article V grounds reinforce the essential principle of modern arbitrations that there shall be no appeal as to matters of fact or law. Hence, grounds (a) – (e) under Article V.1 relate to either incapacity of arbitral parties or procedural deficiency as to how the arbitration has been conducted. There is no review on the merits, nor any basis that the party can challenge tribunal's erring in law.<sup>165</sup> Article V.2 further sets out the ground where the enforcement authority, in the context of China, the

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<sup>162</sup> Article 215(2)-(3) of the 2007 Civil Procedure Law.

<sup>163</sup> As of 2012, the member states to the New York Convention have reached 146, which cover all major jurisdictions in the world. An updated list of member states is available at the UNCITRAL website, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited 11 May 2012).

<sup>164</sup> China has entered into a number of BITs, by which China and a foreign government agree to certain enforcement mechanism on arbitration relating to foreign investment dispute in China. These foreign countries include, for example, Australia, France, Japan, Singapore, UK, etc.

<sup>165</sup> Article V.1 of the New York Convention.

people's court, can take initiative to refuse enforcement. There are two sub-grounds:

- (a) the subject matter of the dispute is not arbitrable under the law of enforcement country;
- (b) the recognition and enforcement of the award would be contrary to the public policy of the enforcement country.<sup>166</sup>

The ground more often as a concern in China is “public policy”, which seems to give rise to the most debate.

In Mainland China, “public policy” carries a delicate and controversial definition, which refers to the concept of “social and public interest”. The basic principle of “social and public interest” was first established by the *General Principles of Civil Law*, which provided that “where the law of a foreign country or of international practice is to be applied in China, this must not be contrary to the public interest of China”.<sup>167</sup> “Social and public interest” in the arbitration regime has remained a common criticism which outsiders lay against China in that Chinese courts sometimes try to review the merits of the award under the pretext of local social and public interest. The *Henan Dongfeng Garment* case shows how a Chinese court applies the notion of “social and public interest” where the court in this case equated the interests of a state-owned enterprise to “social and public interest”.<sup>168</sup> In this respect, the application of “social and public interest” ground may sometimes involve local protectionism concerns and the practice has been criticized by commentators both at home and abroad to be ambiguous and uncertain.

The SPC has realized the serious problem. Over the past decade, it has been working very hard towards stamping out local protectionism in general and making China a pro-enforcement jurisdiction in arbitration in

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<sup>166</sup> Article V.2 of the New York Convention.

<sup>167</sup> Article 150 of the General Principle of Civil Law.

<sup>168</sup> *Henan Garment Import and Export (Group) Company v. Kaifeng Dongfeng Garment Factory*, unreported, compiled in Song Hang, “The Enforcement of Foreign-related Awards in China – Issues in Practice”, 2 (1999) *China Private International Law and Comparative Law Journal*, 370.

particular.<sup>169</sup> By introducing the “pre-reporting system” which applies equally to foreign-related awards rendered in China and completely foreign awards seeking enforcement in China, judiciaries at the central and local levels have to deal with the international awards in a very prudent and cautious manner. As such, “public policy” has actually not been invoked by the Chinese courts to vacate any single foreign arbitral award, at least in the time period from 2000 to 2007.<sup>170</sup> As to the author’s knowledge, the *Jinan Yongning Pharmaceutical* case in 2008 is perhaps the most recent attempt by the SPC to illustrate on the concept of “social and public interest”.<sup>171</sup>

A Chinese pharmaceutical company, Yongning, reached into a joint venture (JV) contract with three non-Chinese investing parties. The JV contract provided that any dispute arising out of the contract would be arbitrated by ICC in Paris. Subsequently, a leasing dispute arose between Yongning and the JV entity. A Chinese court in Shandong province, accepting jurisdiction over the dispute, ruled in favor of Yongning and imposed property preservation upon the JV. As a result of the preservation measures, the operation of the JV was suspended and finally the JV went bankrupt. In July 2005, the three non-Chinese investing

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<sup>169</sup> See Gu Weixia, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (2012), pp. 162-168, 188-190.

<sup>170</sup> Speech by Wan E’xiang, Deputy Chief Justice of the SPC, at the international symposium “50th Anniversary of the New York Convention”, organized by the SPC in collaboration with Renmin University Law School (6 June 2008, Beijing), available at <http://www.rucil.com.cn/article/default.asp?id=798>. Justice Wan stated that, from 2000 to 2007, a total of twelve foreign arbitral awards were not recognized and denied enforcement by the SPC. Of these twelve awards: four were refused because the statute of limitations for application for enforcement had expired; five were refused because the concerned parties had not reached an arbitral agreement or the arbitration clause had been invalid; one was refused because the concerned party against which the arbitral award was enforced did not have any enforceable assets within China; and the remaining award was refused because the concerned party against which the arbitral award was enforced had not received the notice for appointment of arbitrators and arbitration procedure.

<sup>171</sup> *Hemofarm DD, et al. v. Jinan Yongning Pharmaceutical Co. Ltd.*, compiled in Zhao Xiuwen, “Refusing Recognition and Enforcement of Foreign Arbitral Awards on the Ground of Public Policy from the Case of Yongning Corporation”, 4(2009) *Jurist (Renmin University Law Review)*, pp. 101-103.

parties commenced ICC arbitration in Paris against Yongning for breaching the JV contract and making the JV bankrupt. The ICC tribunal found in favor of the non-Chinese parties and ruled that the interim measures ordered by the Chinese court to be improper. In September 2007, the non-Chinese parties lodged an action at the Jinan Intermediate People's Court where Yongning was domiciled, seeking recognition and enforcement of the ICC award. The Court, however, held that the arbitration clause in the JV contract only bound disputes between the contracting parties (investors), and could not extend to cover the leasing dispute between Yongning (investor) and the JV (investee). Hence, the ICC arbitration award purported to resolve a dispute that should be subject to the jurisdiction of the Chinese courts. Moreover, a foreign tribunal cannot rule on the properness of the interim measures taken by the Chinese court. As a result, the Jinan Intermediate Court ruled that the enforcement would violate China's judicial sovereignty and with it, the Chinese public policy. The non-enforcement decision by the Jinan Court had been reported all the way to the SPC, which affirmed the award to be denied enforcement on being against China's "social and public interest".<sup>172</sup>

These days, local protectionism may be less of a concern than it used to be in the enforcement studies in China, particularly with respect to foreign and foreign-related arbitral awards where "pre-reporting" system have been working well. But other problems may remain. Institutional weaknesses within the Chinese courts and property ownership problems inherent in the ongoing transition to a market economy have both contributed to the somewhat difficulties in arbitral enforcement in China. In particular, there is a lack of judicial competence by Chinese judges in handling arbitration.

In the early 1980s, approximately two-thirds of Chinese judges did not have a law degree, and one-third were demobilized military

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<sup>172</sup> See "Reply of the Supreme People's Court to Request Regarding Not Recognizing and Enforcing the ICC Arbitral Award", [2008] Min Si Ta Zi No. 11.

personnel.<sup>173</sup> This has changed to a large extent in the early twenty-first century when new judges are required to pass the National Judicial Exam.<sup>174</sup> Existing judges without a law degree will be trained under the central or local judges' colleges.<sup>175</sup> However, education for judges on commercial law practices is still insufficient. They have limited knowledge of modern standards of arbitration, such as the generally practised pro-enforcement approach in reviewing international arbitral awards. Chinese judges sometimes discretionarily applied the doctrine of public policy.<sup>176</sup> On other occasions, they ignored the applicable law rules in determining the effect of the arbitration agreement.<sup>177</sup> The general shortage of judicial expertise in arbitration has also caused some arbitral awards to be unduly set aside or denied enforcement.<sup>178</sup> There are also perceptions that rapid development of arbitration may disadvantage court's caseloads. All these factors could affect the quality of judicial review over arbitration in China.

Regarding the procedure of foreign arbitration enforcement in China, the SPC, following China's accession to the New York Convention in 1986, timely published a notice on its implementation details (the "SPC

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<sup>173</sup> In the reconstruction of the court system that commenced immediately after the Cultural Revolution, demobilized soldiers became judges, since they were considered good candidates owing to their propensity to promote proletarian ideologies. Thus, many of their decisions were based not on law but on communist ideologies. See Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press, 1999), pp. 253-4.

<sup>174</sup> Article 37 of the Judges' Law.

<sup>175</sup> Report by Xiao Yang, President of the SPC, at the 4<sup>th</sup> Session of the 9<sup>th</sup> National People's Congress in Beijing, 10 March 2001.

<sup>176</sup> See, for example, the *Henan Dongfeng Garment* case.

<sup>177</sup> See, for example, the *Singapore* case, compiled in Gu Weixia, *Arbitration in China: The Regulation of Arbitration Agreements and Practical Issues* (2012), 186.

<sup>178</sup> For example, the ground for setting aside the award where an arbitral tribunal exceeds the scope of an arbitration agreement in its award was tested in an arguable manner in *Shanghai Medical Equipment Factory for Tooth v. Hu Zhunren and Another*, which was decided by Beijing 2<sup>nd</sup> Intermediate People's Court in 1996. In the comments by Mo, judges in that case did not understand what "scope of arbitration agreement" refers to. See, John Mo, *Arbitration Law in China* (Hong Kong: Sweet & Maxwell Asia, 2001), para.10.40.

Notice on Convention”).<sup>179</sup> The SPC Notice clarifies that in seeking enforcement of a foreign arbitral award in China, the applicant need to include the award and the arbitration agreement under which it was made and with their officially certified Chinese translations. The application should then be filed at the intermediate people’s court of the domicile of the party against whom such enforcement is to be effected, or alternatively, of the locality of the property against which enforcement is to be levied.<sup>180</sup> The time limit for such enforcement, in line with the 2007 amendment to the Civil Procedure Law, is two years, starting from the last date that the losing party ought to pay.<sup>181</sup>

#### **D. Other Issues Concerning Non-enforcement: Re-arbitration**

AL provides for the “re-arbitration” system in China where the people’s court that has accepted an application for setting aside a domestic arbitration award will also consider whether re-arbitration can be carried out.<sup>182</sup> The re-arbitration system in China is a subsidiary remedy, rather than, as in Hong Kong, an independent recourse. In fact, just like Article 34(4) of the ML, Article 61 of the AL also envisages a procedure which is similar to ‘remission’ known in most common-law jurisdictions and gives arbitrators an opportunity to conclude the arbitral procedures and reconsider their award in spite of the setting-aside procedures. Under the “re-arbitration” system in China, on one hand, it is the court, in a setting-aside procedure, which exercises control over the award through its discretionary power to remit the case back to the tribunal for re-arbitration. On the other hand, remission is a relief ancillary to the setting-aside procedure. Upon a party’s request, the court, where appropriate, may decide to request the tribunal to re-arbitrate the case within a specific time limit. Yet, the tribunal is under no obligation to have such a re-arbitration since the request of the court is not mandatory. If the tribunal refuses to have the case re-arbitrated, the court

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<sup>179</sup> *SPC Notice on Implementation of China’s Accession to the Convention on Recognition and Enforcement of Foreign Arbitral Awards* (the “SPC Notice on Convention”), promulgated by the SPC on 10 April 1987.

<sup>180</sup> Article 3 of the SPC Notice on Convention.

<sup>181</sup> Article 215 of the 2007 Civil Procedure Law.

<sup>182</sup> Article 61 of the AL.



shall resume the setting-aside procedure.<sup>183</sup> In practice, some issues still demand clarification. The utmost question remains the grounds under which cases could be re-arbitrated. Obviously, re-arbitration is a subsidiary remedy that allows the former tribunal of the case to eliminate procedural defects in order to save the award from being set aside by the court. According to AL and the most recent SPC Interpretation in 2006, these grounds may include:

- (a) no notice to a party to take part in the arbitral proceedings or no opportunity for it to present its case;<sup>184</sup>
- (b) non-compliance of the arbitral procedure with the statutory procedure or the rules of arbitration;<sup>185</sup>
- (c) the evidence on which the award is based are forged;<sup>186</sup> or
- (d) the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration.<sup>187</sup>

Prudent observers will be able to tell that the last two grounds on re-arbitration newly added by the 2006 SPC Interpretation are actually identical to those merit-review grounds for setting aside domestic awards prescribed by Article 58 of the AL. The new rules are intended to eliminate the concerns of substantive review in the domestic arbitration regime. Hence, for domestic awards which are challenged on merit grounds, nowadays, people's courts may notify the tribunal to rectify itself by way of re-arbitration. Moreover, once the arbitral tribunal starts to re-arbitrate within the time limit designated by the people's court, the court shall make a ruling to end the setting-aside procedure.<sup>188</sup> The judicial reform is seen as an encouraging development for bringing more certainty to the effect of domestic awards.

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<sup>183</sup> Mo, *Arbitration in China* (2001), para. 10.04

<sup>184</sup> Article 58(I)(3) of AL and Article 260(I)(2)-(3) of Civil Procedure Law.

<sup>185</sup> *Ibid.*

<sup>186</sup> Article 21 of the 2006 SPC Interpretation.

<sup>187</sup> *Ibid.*

<sup>188</sup> Article 22 of the 2006 SPC Interpretation.

### E. Special Enforcement Arrangements with Hong Kong, Macau, and Taiwan

Prior to the July 1997 resumption of Chinese sovereignty over Hong Kong, the reciprocal enforcement of arbitral awards between Hong Kong and China was governed by the New York Convention, due to Hong Kong being a dependent territory of the United Kingdom. Post reversion, however, the New York Convention could no longer be applied among the different parts of the same Chinese sovereign state. This legislative gap was eventually filled in, with the signing of *Arrangement between Hong Kong and the Mainland on Reciprocal Recognition and Enforcement of Arbitral Awards* (the “Hong Kong Arrangement”) between the two sides on 21 June 1999, and taking effect from 1 February 2000.<sup>189</sup> The Hong Kong Arrangement solely relates to enforcement of Hong Kong awards in the Mainland China, and vice versa. Arbitral awards of other New York Convention countries remain enforceable in Hong Kong.

Under the Hong Kong Arrangement, when a party is in default of complying with an arbitral award from one side, enforcement may be applied to the competent court at the other side where the default party is domiciled or its assets are located.<sup>190</sup> The “competent court” refers to intermediate people’s court in the Mainland or High Court in Hong Kong.<sup>191</sup> The applicant cannot simultaneously apply to relevant courts at both jurisdictions unless enforcement of one place is insufficient to cover the award in full.<sup>192</sup> Procedures are then determined in accordance with the procedural law of the place of enforcement. In this regard, the statutory limitation for enforcement actions in Mainland China is two years;<sup>193</sup> whilst that of Hong Kong is six years from the date when the losing party fails to fulfill its obligations under the award.<sup>194</sup> As to the documentation

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<sup>189</sup> This was brought into effect by the modification to the Hong Kong Arbitration Ordinance on 5 January 2000 in Hong Kong and promulgation of a judicial interpretation by the SPC on 24 January 2000 in the Mainland.

<sup>190</sup> Article 1 of the Hong Kong Arrangement.

<sup>191</sup> Article 2(1) of the Hong Kong Arrangement.

<sup>192</sup> Article 2(2)-(3) of the Hong Kong Arrangement.

<sup>193</sup> Article 215(1) of the 2007 Civil Procedure Law.

<sup>194</sup> Section 4 of the Hong Kong Limitation Ordinance (Cap. 347).

requirement, an application for enforcement in Mainland China shall be made by filing a formal application, together with the arbitral award and arbitration agreement, written in Chinese or in a certified true copy of Chinese translations.<sup>195</sup>

Article 7 of the Hong Kong Arrangement includes a number of grounds for refusal of enforcement of awards rendered in either jurisdiction, which are very similar to those listed under the New York Convention and what is discussed above about the Convention is equally applicable under the Hong Kong Arrangement. A matter that has created some debate and speculation concerns the different understanding of “public policy”. In accordance with the last paragraph of Article 7, a Hong Kong award may be refused if it violates the “social and public interest of Mainland China”, whilst reference is made to “public policy” of the Hong Kong Special Administrative Region.<sup>196</sup> As previously illustrated, the concept of “social and public interest” does not have a fixed definition in Mainland China. Conversely, the Hong Kong Court of Final Appeal in the Hebei *Polytek* case in 1999 expressed the view that while “public policy” is a multi-faceted concept, foreign arbitral awards would be given effect to unless to do so would “violate the fundamental notions of morality and justice of Hong Kong”, such as “violating the due process in rendering the award”.<sup>197</sup> The issue on different understanding regarding “public policy” remains and most recently, in a case in late 2010, the controversy has been brought back again to attention. In the *Keeneye* case, an arbitral award rendered through hybrid process of mediation and arbitration (Med-Arb) in the Mainland sought enforcement in Hong Kong. The Court of First Instance found that the award had real risk of bias arising from an arbitrator also acting as mediator and denied enforcement on basis of public policy in Hong Kong.<sup>198</sup> The judgment was however reversed in appeal in late 2011, where applicable procedures of Med-Arb were interpreted to be understood in the context of the rendering jurisdiction, i.e. Mainland

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<sup>195</sup> Article 3 of the Hong Kong Arrangement.

<sup>196</sup> Article 7, last paragraph, of the Hong Kong Arrangement.

<sup>197</sup> *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 1 HKLRD 665 at 689.

<sup>198</sup> *Gao Haiyan v Keeneye Holdings Ltd*, HCCT 41/2010, at paras 3 and 100, per Justice Reyes.

China”.<sup>199</sup> At the time of writing of this book chapter, the *Keeneye* case still arouses many interesting discussions on the interaction of “public policy” between two sides after more than a decade of implementation of the Hong Kong Arrangement.

On basis of the experience of the Hong Kong Arrangement, to remedy the situation in post-handover Macau after December 1999, the *Arrangement between Macau and the Mainland on Reciprocal Recognition and Enforcement of Arbitral Awards* (the “Macau Arrangement”) was established on 30 October 2007 and entered into force on 1 January 2008.<sup>200</sup> In general, most provisions of the Macau Arrangement are similar to those of the Hong Kong Arrangement, although Macau differentiates the competent court of “recognition” (intermediate court) from “enforcement” (basic court) if the domicile of the default party or property is in Macau.<sup>201</sup> Moreover, according to the Arrangement, if one party applies to a court at one side for enforcement while the other party applies to the other side for setting aside the award, the court shall suspend the enforcement procedure on the ground that the party subject to enforcement applies for suspension and provides a sufficient security. The court shall then terminate or resume the enforcement procedure after receiving the ruling of the court at the other side which reviews the challenge to the award.<sup>202</sup>

For Taiwanese awards seeking enforcement in Mainland China, there is no reciprocal arrangement until after 26 May 1998, where the SPC published its *Provision on the People’s Courts’ Recognition of Civil Judgments Made by Courts in Taiwan Region* (the “Taiwan Provision”).<sup>203</sup> The Taiwan Provision is mainly concerned with enforcement of civil judgments, but Article 19 provides that the Provision is equally applicable to the receiving of Taiwanese arbitral awards.<sup>204</sup> Hence, a party to an award rendered by a Taiwanese

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<sup>199</sup> *Gao Haiyan v Keeneye Holdings Ltd*, CACV 79/2011, at paras 102, per Tang VP.

<sup>200</sup> The Macau Arrangement took effect in the Mainland by SPC’s promulgation on 12 December 2007.

<sup>201</sup> Article 2 of the Macau Arrangement.

<sup>202</sup> Article 9 of the Macau Arrangement.

<sup>203</sup> The Taiwan Provisions took effect in the Mainland by SPC’s approval on 15 January 1998 and with effect from 26 May 1998.

<sup>204</sup> Article 19 of the Taiwan Provision.

arbitration institution can apply for recognition and enforcement of that award in the competent court (intermediate court of domicile or property) in Mainland China.<sup>205</sup> Perhaps the only difference between the Taiwan Provision and the other two inter-regional judicial assistance arrangements in Greater China (Hong Kong and Macau) is its eligibility requirements. The Taiwan Provision requires that as a pre-condition, the domicile of the parties to the judgment/award or the location of the debtor's property must be situated outside Taiwan and within Mainland China.<sup>206</sup> To further implement the 1998 Provision, the SPC published a Supplementary Provision relating to cross-strait enforcement issues in March 2009 (the "Taiwan Supplementary Provision").<sup>207</sup> In tandem with the development of the Civil Procedure Law, the Supplementary Provision expressly provides that the timeline for enforcement application should be two years after the effect of the judgment/award has been confirmed,<sup>208</sup> and Mainland intermediate courts receiving the enforcement application should render a ruling within six months.<sup>209</sup>

## V. CONCLUSION

Every jurisdiction has a story to tell in arbitration studies, particularly because the field is changing rapidly and so closely connected with economic development. Among the major trading nations, the arbitration arrangements established by China stand out as the most distinctive—in theory, law, institutions, and above all, practice. In this book chapter, large volumes of arbitral regulations applicable to China have been referenced, ranging from international and regional agreements to its domestic legislation, administrative guidelines, judicial interpretations, institutional rules and arbitral awards. Moreover, their most recent developments have been featured, such as the SPC

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<sup>205</sup> Article 3 of the Taiwan Provision.

<sup>206</sup> Article 2 of the Taiwan Provision.

<sup>207</sup> *SPC Supplementary Provision on the People's Courts' Recognition of Civil Judgments Made by Courts in Taiwan Region* (the "SPC Supplementary Provision"), took effect in the Mainland by SPC's approval on 30 March 2009 and with effect from 14 May 2009.

<sup>208</sup> Article 9 of the Taiwan Supplementary Provision.

<sup>209</sup> Article 10 of the Taiwan Supplementary Provision.

Interpretation promulgated in 2006, the Civil Procedure Law amended in 2007, and most recently, the reform of the Rules of China's flagship arbitration institution, CIETAC, in 2012. To contextualize these developments, the author has attempted to analyze the rules and practices in the light of wider social and economic reality of China.

In recent years, there has been ongoing study and review of the legal regime for arbitration in China. As an apparent obstacle to the Chinese arbitration system and its development, the current AL published in 1994 has been proved unable to cope with practical needs. Revisions are therefore required to remedy regulatory defects. The Chinese legislature should take advantage of the best experiences of international arbitration norms, including the ML and ICC Rules, in its legislative reform. At the same time, Chinese legislatures also need to pay attention to the consistency with other types of arbitral regulations, whose uncertain and even conflicting interactions have been at least partly blamed for distorting Chinese arbitral practices. In this regard, the revised *Arbitration Law* should confirm the initiatives of the most recent SPC Interpretation on arbitration in 2006 so as to prevent any future inconsistencies. Another point worth noting is that, the concept of "foreign-related arbitration commission"<sup>210</sup> should be discarded, which has caused practical confusion concerning arbitral jurisdiction. Indeed, all arbitration commissions in China are now able to receive both domestic and foreign-related disputes as a result of the State Council Notice in 1996 and subsequent revision to the CIETAC Rules in 1998. Bifurcations should only be maintained to the extent of different treatment of judicial review over arbitral awards resulting from the two types of disputes; and grounds for reviewing domestic awards should be narrowed only to procedural aspects.

Another aspect of reform that is of importance to China is its institutional reform of the arbitration commissions. China has a distinctive institution-only arbitration system where the role of the commission and its secretariat has been over-emphasized. This has overshadowed the role and autonomy of the party-appointed tribunals, which are the core of modern arbitration system ensuring party autonomy

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<sup>210</sup> Articles 66 to 73 of the AL, under Chapter VII, "Special Provisions for Arbitration Involving Foreign Elements".

in the market. In future, pioneered by the CIETAC Rules change in 2012, it is reasonably expected that more tribunals will be empowered to rule on the arbitral jurisdiction and interim measures. Additionally, parties will be enjoying more procedural autonomy, including the freedom to choose outside panel members to be arbitrators, to have different persons serving mediation and arbitration, as well as the right to apply rules of other institutions or choose another place as arbitral seat.

It is encouragingly noted that the SPC has been working very hard to make China a pro-enforcement jurisdiction. Over more than a decade, the pre-reporting system has proved to be helpful, although it is challenged on arguments of procedural transparency and judicial resources. Local courts and judges are thus expected to take a more pro-arbitration approach and to pick up their knowledge and experience in handling arbitration cases (including the proper understanding of “public policy” when reviewing arbitral awards).

To conclude the chapter, the formation of a modern and liberal arbitration environment is still critical to China’s trade and investment interests. Given China’s rapidly expanding economic prominence and ever closer cooperation with the world’s enterprises, both at home and abroad, the number of international disagreements involving Chinese entities is expected to continue to grow. Many cannot be resolved through “friendly consultation” or informal mediation. The assistance of some type of formal dispute resolution is often necessary to decide matters. In view of the lack of competence of Chinese courts and the reluctance of Chinese firms to put their fate in the hands of foreign courts, arbitration is still the best choice. Chinese government should therefore take the development of a favorable international arbitration environment in China a serious commitment and make it a continuous endeavor.

