CHINESE LAW

■

The New Arbitration Law

Introduction

Following an extensive drafting process, the PRC promulgated its first Arbitration Law on 31 August 1994 which became effective as of 1 September 1995.[1] The new Arbitration Law consists of eighty articles and attempts to incorporate internationally accepted arbitration principles and practices in one coherent framework covering both domestic and international arbitral proceedings. There are major differences between the institutional rules and procedures governing domestic and international arbitrations in the PRC and the domestic system has fallen far behind the international system in modernising its governing rules and procedures. The two main international arbitral institutions in the PRC, the China International Economic and Trade Arbitration Commission ('CIETAC') and the China Maritime Arbitration Commission ('CMAC'), are autonomous and independent bodies with large caseloads and well-developed arbitration rules. By contrast, the domestic arbitration bodies are mainly administrative organs of the PRC government, with commissions set up to govern different groups of people in different kinds of arbitration activities (eg the economic contract arbitration commission, the labour dispute arbitration commission, and the technological contract arbitration commission).[2]

The main focus of the new Arbitration Law (the 'AL') is substantial revision of the domestic arbitration system with a shift away from a centralised arbitration system to one which gives power to the municipal governments and capital cities of the provinces and administrative regions to re-organise independent arbitral commissions.[3] The legislation also contains limited provisions covering 'foreign-related' or international arbitrations.[4] Another important and concurrent development is the progressive liberalisation of CIETAC Arbitration Rules, with major revision in June 1994.[5] In order to align themselves with the new Arbitration Law, CIETAC's Arbitration Rules were

1 Art 80, Arbitration Law.

2 For a more detailed discussion of the differences between the domestic and international arbitration systems in the PRC, see B Beaumont, D Choi, and John Luk, *Commentary on the Chinese Arbitration Act* (London: Simmonds and Hill Publishing Ltd, 1995).

3 'Arbitration Mechanism to be Updated in China' (1995) 23(1) International Business Lawyer 16.

4 Chapter 7 (Arts 65–73) deals solely with foreign-related arbitrations.

5 The CIETAC Arbitration Rules were substantially revised in 1994 to address criticisms that the 1989 CIETAC Rules were inadequate because they did not deal with many fundamental issues confronting arbitrators and failed to incorporate accepted principles of international arbitration. The 1994 Rules provide more concrete guidelines on the form and conduct of CIETAC arbitrations, jurisdiction of CIETAC, conduct of arbitrators, conciliation within arbitration, arbitration awards, and summary arbitration procedures.

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further revised effective as of 1 October 1995.[6] The AL and the revised CIETAC Arbitration Rules are an attempt to update Chinese arbitration law and practice (both domestic and international) in keeping with international standards. This article will review the important provisions of the AL and comment on potential problems arising from its application and interpretation.

The Arbitration Law: an overview

The new legislation consists of eight chapters, each dealing with separate topics:

Chapter One:	General Provisions
Chapter Two:	Arbitration Commissions and the China Arbitration Association
Chapter Three:	Arbitration Agreements
Chapter Four:	Arbitration Proceedings
Chapter Five:	Applications to Set Aside Arbitral Awards
Chapter Six:	Enforcement of Arbitral Awards
Chapter Seven:	Special Provisions Concerning Foreign-Related Arbitrations
Chapter Eight:	Miscellaneous Provisions

Some of the more important reforms are:

- expression of the underlying legislative policy (Art 1);
- re-organisation of independent and autonomous domestic arbitration commissions (and foreign-related arbitration commissions) which are not subordinate to one another (Arts 10 and 14);
- requiring arbitration be carried out independently according to law and without interference by any administrative organ, social organisation, or individual (Art 8);
- limited recognition of the party autonomy principle by requiring that there be a written arbitration agreement voluntarily entered into by the parties describing the matters to be arbitrated and selecting the arbitration commission to arbitrate the dispute (Arts 4 and 16);
- endorsement of the separability of the arbitration clause (Art 19);
- grounds for challenging arbitrators on the basis that they have a material interest in the case or a relationship with one of the parties to the dispute, or that they have met privately with one of the parties or have accepted an invitation or gift (Arts 34–5);

[6] These changes deal mainly with the jurisdiction of CIETAC, property preservative measures, appointment of arbitrators, preparation and execution of arbitral awards, and summary arbitration procedures.

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- establishing the finality of the arbitration award and preventing a party from applying to re-arbitrate or litigate a dispute for which an arbitration award has already been rendered (Art 9);
- grounds for the setting aside of arbitral awards (Art 58); and
- limited provisions governing foreign-related arbitrations (Arts 65–73).

Legislative intention

Unlike most other arbitration laws, Art 1 states the policy of the Arbitration Law: to 'guarantee the timely and impartial arbitration of the economic disputes, to protect the lawful rights and interests of the parties concerned and to ensure the healthy development of the socialist market economy.' Although Art 1 restricts the scope of arbitration to disputes arising out of 'economic' transactions, the term 'economic' is not defined in the new law but may be broadly interpreted to cover disputes arising from or out of economic, trade, or business activities.[7] The phrase 'to ensure the healthy development of the socialist market economy' is also not defined in the AL, or in other PRC legal instruments, and it remains to be seen how this will affect the scope of arbitration.[8]

Establishment of arbitration commissions and arbitration association

In an effort to reduce the interference of local government and local protectionism in the PRC arbitration system, the AL re-organises all existing arbitration bodies. Rather than the previous system of arbitration institutions established by administrative levels or regions (with different jurisdictions according to their hierarchical level and territorial limitations),[9] Arts 10–15 contemplate the establishment of arbitration commissions at the provincial level. Power is given to the municipal governments in Beijing, Shanghai, Tianjin, and capital cities of the provinces and autonomous regions to consult local chambers of commerce and re-organise independent arbitral institutions which will be registered with local judicial administrative departments. Commissions may be established where there is a need, although the AL is silent as to how or by whom that need is to be established.[10]

7 See Beaumont et al (note 2 above), p 7. This would presumably include all disputes subject to arbitration under the Economic Contract Law 1981 and the Foreign-related Economic Contract Law, as well as tort and environmental control matters.

8 Given the recent emergence of a 'socialist market economy' as a goal of the PRC, it is difficult at this stage to define the essential features of this notion with any certainty. It first emerged in the 14th National Congress of the Chinese Communist Party in 1992 and was later entrenched by a constitutional amendment in 1993 by the National People's Congress.

9 This system had many disadvantages: see N Kaplan, J Spruce, and M Moser, *Hong Kong and China Arbitration: Cases and Materials* (Hong Kong: Butterworths, 1994), ch 14 and Jin Pengnian, 'On Framework of Arbitration Legislation in China,' *1993–94 CIETAC Yearbook*.

10 At present there are arbitration commissions established at Beijing, Shanghai, Tianjin, Xian, Shenzen, Guangzhou, and Inner Mongolia.

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An important feature of Art 10 is that domestic arbitration commissions are no longer subject to jurisdiction by level.[11] Furthermore, Art 14 makes it clear that the arbitration commissions are independent from the administrative organs and are neither subject to nor affiliated with each other. At present, CIETAC and CMAC operate as independent and autonomous foreign arbitral bodies but the challenge will be to create such independent domestic arbitration commissions.[12]

Art 11 requires that each arbitration commission:[13]

- have its own name, domicile and articles of association;
- possess the necessary assets;
- have the personnel to form a commission; and
- have appointed arbitrators.

While the first requirement may not pose a problem, new arbitration commissions may have difficulty obtaining the 'necessary assets' without financial support from the government, which may impair its independence and impartiality.[14] Furthermore, the final requirement for the commissions to have appointed arbitrators assumes the availability of trained and qualified arbitrators.[15]

China Arbitration Commission

Article 15 introduces a new national arbitration organisation, the China Arbitration Association ('CAA'), and provides that all arbitration commissions are members of the CAA. The CAA will operate as a non-governmental body independent of any administrative control and will supervise all the PRC arbitration commissions and arbitrators.[16] The CAA is intended to act as self-regulatory authority and must formulate rules in accordance with the AL and the Civil Procedure Law ('CPL'). Presumably, these arbitration rules will be those of existing and future arbitration commissions. It is not clear from the new law whether the CAA will be involved in the education and training of existing

[11] See also Art 6 which states that arbitration shall not be subject to jurisdiction by levels or regions. The true independence of arbitral commissions is dependent upon obtaining of a source of financing independent of the government. See Beaumont et al (note 2 above), pp 28–9.

[12] In view of Art 14, the existing structure of CIETAC and CMAC may have to be changed since the head office of CIETAC is in Beijing and two sub-commissions are located in Shanghai and Shenzen and are subordinate to the head office. See ibid, pp 32–3.

[13] In the absence of any contrary provision in Chapter 7, it appears that both domestic and foreign-related arbitration commissions must comply with these provisions.

[14] Query what is meant by 'necessary assets' since this is not defined in the AL. See Beaumont et al (note 2 above), p 29.

[15] Ibid, pp 29–30. It may be that the arbitrators already on the CIETAC list of arbitrators will provide the core of arbitrators for the new arbitration commissions.

[16] Under Art 15 the CAA is charged with supervising any breaches of discipline committed by PRC arbitration commissions and arbitrators. However, Art 15 is silent on the nature of breaches contemplated, the sanctions available, and whether any judicial review or challenge to the exercise of this disciplinary power is permitted.

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and prospective arbitrators. However, in view of the CAA's central supervisory role and the legislative intention to unify and upgrade the system of PRC arbitration, the CAA may be the best body to organise this training and education (and to set appropriate standards).[17]

The establishment of the CAA along with the re-organisation of domestic arbitration commissions will hopefully result in more dynamic domestic arbitration commissions operating under new CAA-approved arbitration rules. This is important to foreign investors since CIETAC's jurisdiction may not extend to disputes between foreign investment enterprises and domestic companies. Under the 1994 CIETAC Arbitration Rules, a dispute between a Sino-foreign joint venture or wholly foreign-owned enterprise (regarded under Chinese law as Chinese legal persons) may not fall within CIETAC's jurisdiction. As a result, if foreign investors in such disputes have opted for arbitration, they will have to resort to arbitration before domestic economic contract arbitration commissions.[18]

Independence of arbitrations

Article 8 establishes arbitral independence by requiring that the arbitrations be conducted independently according to law without the interference of any administrative institutions, social organisations, and individuals.[19] It remains to be seen whether this freedom from influence by administrative agencies will in fact occur.[20] At present, however, the commissions will be funded by the government and can only hope to gain financial independence at some future date.

Arbitration agreements

Arbitrability

Article 2 deals with arbitrability of disputes by PRC arbitration commissions and provides that any contract disputes or other disputes concerning property, rights, or interests 'between civil subjects with equal status,' be they citizens, legal persons, or organisations, are arbitrable. Article 3 exempts the following from arbitration: (a) marital, adoption, guardianship, support, and succession disputes;[21] and (b) administrative disputes that by law are required to be

17 See Beaumont et al (note 2 above), p 33.

18 If there is no arbitration agreement, the parties may have to resort to the People's Courts to resolve their dispute. See A Crawford, 'China's New Arbitration Law — Business as Usual for CIETAC,' *1994 International Arbitration Report*, p 3.

19 Article 53 of the CIETAC Arbitration Rules also reflects this by providing that: 'The arbitration tribunal shall independently and impartially make its arbitral award ...'

20 See Beaumont et al (note 2 above), p 23.

21 Family disputes are excluded from arbitration in the PRC owing to the importance of conciliation in resolving such disputes. If such conciliation fails, there is a final recourse to the People's Court.

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handled by administrative authorities.[22] Under Art 3 disputes involving departments of the PRC government appear to be excluded from arbitration. However, this article may be narrowly construed: if the administrative legislation does not provide for a specific form of dispute resolution, then administrative disputes should be capable of settlement by arbitration.[23] The concept of non-arbitrability is re-inforced by Art 17 which provides that any arbitration agreement concerning non-arbitrable matters is null and void.

Consensual nature of arbitration

The consensual nature of arbitration is stressed in Art 4 which provides that, if arbitration is adopted as a means of resolving disputes, an agreement must be reached by the voluntary consent of both disputing parties. Article 17 further provides that an arbitration agreement reached by coercion of one of the parties is null and void. If no agreement is reached and one of the disputing parties applies for arbitration, the arbitration commission must decline to accept its application.

The party autonomy principle is further stressed in Art 6 which requires the arbitration commission to be selected by agreement between the parties and provides that 'Arbitration shall not be subject to jurisdiction by levels or regions.' However, while the parties are allowed choice in selecting the governing arbitration commission and the arbitrators to resolve the dispute, they are restricted to choosing the arbitrators from the commission's panel of arbitrators.

Form of the arbitration agreement

Article 16 provides that an arbitration agreement shall include arbitration clauses incorporated in a contract or an agreement of submission to arbitrate concluded in writing before or after disputes arise. This covers both an agreement to submit an existing dispute to arbitration and an arbitration clause in a contract relating to future disputes. While Art 16 provides for a written arbitration, it does not expressly state that the agreement cannot be oral. Nor is there any clear definition of what amounts to a 'written agreement' within the article — does this include an exchange of letters, telexes, telegrams, cables, or telefaxes?[24]

A new development in Art 16 is the requirement that an arbitration agreement must include the following:

[22] Such disputes are normally submitted to administrative tribunals of the People's Courts under the 1989 PRC Administrative Procedure Act.

[23] See Beaumont et al (note 2 above), p 12.

[24] Professor Tang, Vice-chairman of CIETAC, is of opinion that these probably would constitute a written arbitration agreement. See ibid, p 35. See also Kaplan et al (note 9 above), p 311.

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- an indication of the parties' intention to apply for arbitration;
- the matter to be referred to arbitration; and
- the selection of an arbitration commission.

However, Art 16 is silent on what happens if the parties fail to provide which commission is to resolve the dispute.[25] Is it intended that overriding authority be granted to the CAA? At present there is no provision in the new law which would allow the CAA to act on such an issue.[26]

The resolution of this issue may be partially dealt with by Art 18 which provides that, if the arbitration agreements do not specify the matters for arbitration or the selected arbitration commission, the parties may offer supplementary agreements. However, if the parties cannot reach a supplementary agreement clarifying matters, the arbitration agreement is deemed void. This suggests that any uncertainty in the arbitration agreement will be construed against the parties' intention to arbitrate.[27] However, any such problems may be prevented by the CAA and the domestic arbitration commissions providing draft model arbitration clauses to be incorporated within contracts.[28]

Stay of litigation

Article 5 makes it clear that a dispute which is the subject of an arbitration agreement cannot be litigated in the People's Court. If a valid arbitration agreement exists and one of the parties commences an action, the People's Court must decline to accept the action (and is bound to grant a stay) except where it is convinced the agreement is invalid (see Arts 3 and 17).

Separability of the arbitration clause

In keeping with the trend in international arbitration law,[29] Art 19 of the AL endorses the separability principle and provides that an arbitration clause in a contract shall exist independently from the contract even if the contract is deemed to be invalid or revoked. This is a progressive clause since it gives the arbitral tribunal jurisdiction to decide whether or not the contract is valid. The clause also provides that: 'The arbitration tribunal has the right to confirm the effect of a contract.' However, this does not appear to give the tribunal the right to modify or rectify the contract.

25 Article 6 is also silent on this issue.

26 By contrast, Art 4 of the CIETAC Arbitration Rules clearly provides that 'The arbitration commission has the power to decide on the existence and validity of the arbitration agreement and the jurisdiction over an arbitration case.'

27 See Beaumont et al (note 2 above), p 37.

28 Ibid, p 38. In the interim period before the establishment of the PRC domestic arbitration commissions, it has been suggested that arbitration agreements should include a clause such as 'the Arbitration Commission shall be that which exists in the place or that in the event of such commissions not being so constituted an alternative commission shall be so nominated by the CAA.'

29 See *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1992] 1 LL Rep 81, [1993] 3 WLR 42 and K Lynch, 'Separability Principle Prevails' (1993) 2:9 Asian Law Journal 10.

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Invalidity of an arbitration agreement

Art 17 of the Arbitration Law deals with the validity of arbitration agreements or clauses and states that an arbitration agreement shall be void:

- where the matters to be arbitrated fall outside the scope of arbitration as specified by law (see Art 3);
- where the arbitration agreement was concluded by persons with no or limited civil action capacity; or
- where the arbitration agreement is concluded by coercive action of one party.

Of concern to foreign investors is the second basis for rendering agreements void — limited capacity to conclude contracts. Under Chinese law, only those Chinese companies which obtain government approval have the necessary capacity to conclude foreign-related commercial contracts and such companies must operate within their registered areas of business. If they lack the necessary capacity or operate in unauthorised businesss activities, the contracts they conclude are deemed void under Chinese law. In addition, under Art 17 of the AL the arbitration clause in the main contract would also be void, despite the adoption of the separability principle in Art 19 and in the 1994 CIETAC Arbitration Rules. In such cases, CIETAC would lack authority to deal with the issues regarding the validity of the main contract and the People's Courts would have sole jurisdiction over these issues.[30]

Jurisdiction

Under Art 20 the PRC arbitration commissions, as well as the People's Court, have the power to make a decision on disputes concerning the validity of an arbitration agreement and jurisdiction over a specific case. If either party objects to the validity of the agreement, it may apply either to the PRC arbitration commission or the People's Court for a ruling. However, if one party challenges the decision with the arbitration commission and the other with the court, it is the People's Court that has the right to make a decision.

Note that the language of Art 20 appears to conflict with Art 19 which gives the arbitration tribunal power to decide the validity of the contract.[31] It is difficult to see how Art 20 operates. Art 20 may apply when one party wants the tribunal to determine the validity of the contract and the other wishes to apply directly to the arbitration commission for a ruling. However, this will

[30] See D Lewis, 'New Arbitration Law Brings Order to Dispute Settlement,' Asia Law, November 1994, pp 19, 20.

[31] Note that Art 16 of the UNCITRAL Model Law provides that the arbitration tribunal may rule on its own jurisdiction including objections concerning the existence or validity of the arbitration agreement.

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result in the arbitration commission being given jurisdiction (on appeal from a decision of the arbitral tribunal) which may then be taken away by a party directly applying to the People's Court.[32] It would also violate Art 9 which prevents the People's Court from accepting an application concerning a dispute for which an arbitration award has already been rendered.[33]

Presumably, it is intended to operate only after the tribunal has rendered a decision on the validity of the contract. If the challenge to the agreement's validity is rejected by the tribunal whose decision is subsequently upheld by the arbitration commission, then there may be further appeal to the People's Court.

Arbitration proceedings

Challenge to arbitrators

The new law substantially improves the grounds for withdrawal of arbitrators and party challenges to arbitrators. Articles 34–5 give either party the right to challenge any member of the arbitral tribunal if they have any reason to do so, before the first hearing (or before the last hearing if the cause for challenge is only known to the challenging party after the first hearing). However, it is the chairman of the arbitration commission, rather than the arbitral tribunal, who makes a decision on the challenge. Article 34 requires an arbitrator to withdraw (or the parties may request the arbitrator's withdrawal) if the arbitrator:

- is a party involved in the case or is a relative of the parties or their agent;
- has a personal interest in the case;
- has other relationships with the parties or their agents which may affect the arbitration; or
- has met the parties or their agents in private or has accepted gifts or banquets (dinners) from them.[34]

These provisions should be useful is dealing with cases of ex parte contracts, banquets, and gift-giving for arbitrators and the impact of 'guanxi' on the Chinese arbitration system. This is further strengthened by Art 38 which provides that an arbitrator involved in such conduct must 'assume the legal responsibilities according to the law' and should be dismissed by the arbitration commission (with their name removed from the arbitration commission's panel of arbitrators). This innovative provision appears to cover legal (including criminal) and financial liability.[35] If a challenge is sustained, the parties may

32 See Beaumont et al (note 2 above), pp 40–1.
33 Ibid.
34 See similar (although not as extensive) provisions in Arts 29–31 of the CIETAC Arbitration Rules. Note that in April 1993 CIETAC issued a set of guidelines entitled 'Ethical Rules for Arbitrators of CIETAC' which sets forth standards of impartiality and conduct for arbitrators, as well as guidelines for avoidance of conflicts of interest.
35 See Beaumont et al (note 2 above), p 41.

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appoint a new arbitrator and apply to renew the arbitration proceedings (Art 37).

Finality of the arbitration award

Article 9 of the new law has adopted the principle that once an arbitration award has been rendered it is final. If one party applies to re-arbitrate the same dispute or bring an action in the People's Court after the arbitral award has been made, the arbitration commission or the People's Court must not accept the case. The present system allows a party to appeal an arbitral award to the next higher arbitral authority or to commence an action in the People's Court for the same dispute and thus requires substantial reform to conform with the AL.

Article 9 further provides that where an award is set aside or where enforcement is refused by the People's Court, a party may apply to submit the dispute to arbitration under a new arbitration agreement or may litigate the action in the People's Court. Article 9 gives surprisingly broad discretion to both the arbitration commission and the People's Court to consider or accept such an application but is silent on how this discretion is to be exercised.

Some commentators suggest that Art 9 should be amended to require the arbitration commission or the People's Court to refuse to accept any re-application save in exceptional circumstances:

- where the arbitral tribunal was not impartial;
- where the award was based on evidence which was not properly produced; or
- where fresh evidence has come to light which could not be reasonably known at the time the award was made.[36]

Article 58 (discussed below) sets out the criteria upon which awards may be set aside by the People's Court — these criteria may be what was intended to be considered under Art 9. However, no reference to Art 58 is made in Art 9. It is possible that an application to set aside an arbitral award (under Art 58) will have different criteria applied to it than a decision made by a commission or the People's Court on an application to re-hear the matter. Such potential inconsistency requires legislative reform.[37]

[36] Ibid, pp 59–60.
[37] Ibid, pp 24–5.

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Enforcement of arbitral awards

Performance of the arbitral award

Under Art 62 the parties must automatically execute domestic arbitration awards within the time limit specified. If the award is not performed, the other party may apply to the People's Court for enforcement in accordance with the provisions of the CPL. However, what if no limit is specified in the award? Presumably performance of the award would have to be within a reasonable time. Note that Art 63 provides that if no time limit is specified in the arbitration award, the parties must carry out the award immediately.[38]

Refusal of enforcement

Chapter 6 deals with recognition and enforcement of domestic arbitral awards but adds little to the existing PRC law. Article 63 merely provides that the People's Court may refuse to enforce a domestic award if it is proved that an award involves any of the circumstances set out in Art 217 of the CPL:

- the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ;
- the composition of the arbitral tribunal or the arbitration procedure did not conform to statutory procedure;
- the main evidence for ascertaining the facts was insufficient;
- the law was applied incorrectly; or
- one or several arbitrators committed embezzlement, accepted bribes, practised favouritism, or made an award that perverted the law.

These criteria are similar to those for setting aside a domestic arbitral award under the provisions of Art 58 (discussed below). Whether these provisions will be given the same interpretation by the People's Court remains to be seen.

Applications to set aside award

The Arbitration Law contains new provisions governing the setting aside of domestic arbitration awards.[39] Under Art 58[40] a party may request the People's Court to set aside a domestic arbitration award within six months of its receipt, if it can prove that:

[38] Ibid, p 25.
[39] Foreign-related arbitral awards may also be set aside but only on the somewhat different grounds set out in Art 70, discussed below.
[40] Article 58 is modeled after Art 34 of the UNCITRAL Model Law.

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- there is no arbitration agreement;
- the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- the formation of the arbitration tribunal or the arbitration procedure was not in conformity with statutory procedure;
- the evidence on which the award is based was forged (it appears the Intermediate Court has discretion to decide on the relevance and weight attached to fabricated evidence);
- the other party has withheld evidence sufficient to affect the impartiality of the arbitration (this innovative provision places an onus a party not to conceal evidence which may be against itself); or
- while arbitrating the case, the arbitrators committed embezzlement, accepted bribes, practised graft, or made an award that perverted the law.[41]

Also of interest is the final paragraph in Art 58 which states that an arbitral award may be set aside where it is contrary to 'public and social interest'. This appears broader than the 'public policy' test set out in Part V of the New York Convention, although it is difficult to determine what the concept of 'public and social interest' within the PRC will mean.[42] It is also difficult to predict how the Intermediate People's Court will exercise such broad discretionary power. However, in view of the narrow interpretation of the 'public policy' doctrine by most national courts, this provision may be used sparingly — only when the state's most basic notions of morality and justice are violated.[43]

Foreign-related arbitration

Meaning of 'foreign-related' arbitrations

Articles 65–73 of Chapter 7 deal with foreign-related arbitrations and apply to 'arbitrations of disputes arising from economic, trading, transportation and maritime activities involving a foreign element.' Although the term 'foreign-related' appears to refer to the character of the dispute as involving foreign

[41] Article 59 states that an application to set aside an award must be made within six months of receipt of the award before the Intermediate People's Court *at the place where the arbitration commission is situated*. This strict venue rule differs from that applying to enforcing domestic arbitral awards; presumably this is to prevent unjustified vacating of arbitral awards by the People's Courts. See Lewis (note 30 above), p 21.

[42] See Beaumont et al (note 2 above), p 77. Part V of the New York Convention provides that the recognition and enforcement of arbitral awards may be refused if the competent authority in the country where the enforcement is sought finds that it would be contrary to the public policy of that country.

[43] Otherwise, the 'public and social interest' test in Art 58 may become a powerful tool to set aside domestic arbitral awards. Note that a similar provision exists in Art 260 of the CPL: the People's Court may deny execution of a foreign-related award if the execution of that award would be against the 'public interest.' See Beaumont et al (note 2 above), p 82 and H J Uschinski, 'The Procedures for Enforcement of Arbitral Awards and Foreign Judgments in the PRC' in *Proceedings of the 1995 IFCAI Conference*, p 16.

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elements, it is not defined in the new law. However, the Supreme People's Court has defined 'foreign-related' in civil cases as follows:

> Civil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or organisations, or in which the legal fact of establishment, modification or termination of the civil legal relationship between the parties legally occurred in a foreign country, or in which the object of the action is located in a foreign country, shall be civil cases involving foreign parties.[44]

Some commentators suggest that this definition should apply to 'foreign-related' as used in Art 65, resulting in arbitration being 'foreign-related' when: (a) one or both of the parties to the dispute is a foreigner, a stateless person, or a foreign legal person; (b) the subject matter of the dispute is located outside the PRC; or (c) the material facts affecting the rights of the parties occur outside the PRC.[45] This definition would cover those arbitrations currently under the jurisdiction of CIETAC and CMAC.

Organisation of foreign-related arbitration commissions

Article 66 contemplates the establishment of foreign-related arbitration commissions by the China Council of International Commerce (the 'CCOIC'). Article 67 gives these commissions authority to appoint foreign arbitrators and endorses the establishment and work of CIETAC and CMAC and their practice of appointing experienced foreign arbitrators to their panel of arbitrators. Interestingly, the role of the CCOIC under the new law appears more restricted than that of the CAA: the CCOIC can establish a new commission, appoint staff to operate the commissions, and establish rules. However, there is no express power granted to the CCOIC to deal with breaches of discipline of its members. Presumably such matters will be handled by the CAA, which will be the sole disciplinary body of all of its members, both domestic and foreign-related.[46]

Enforcement and setting aside of the arbitral award

The provisions of the AL do not change the way in which foreign-related arbitration awards are enforced in the PRC. Article 71 permits a party to oppose enforcement of foreign-related awards under Art 260 of the CPL, which allows applications to the Intermediate People's Court if:

[44] See Beaumont et al (note 2 above), p 88. See the Opinion of the Supreme People's Court on the Application of the Civil Procedure Law — Several Questions, issued 14 July 1992, as reported in China Law & Practice, 14 January 1993.
[45] See Beaumont et al (note 2 above), pp 88–9.
[46] Ibid, p 89.

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- the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement;
- the person against whom the application is made was not requested to appoint an arbitrator or to take part in the arbitration proceedings or the person was unable to state his opinion due to reasons for which he is not responsible;
- the composition of the arbitral tribunal or the arbitration procedure was not in conformity with the arbitration rules; or
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ.

Although the grounds for setting aside domestic arbitral awards are expressly stated in Art 58, Art 70 simply refers to the setting aside of foreign arbitral awards on the basis of Art 260 of the CPL (set out above). This difference is presumably to ensure that the setting aside of PRC foreign-related arbitration awards accords with prevailing international practice.[47]

However, the separate treatment of domestic and foreign-related arbitration awards has important consequences for foreign investors, particularly in view of the availability of judidical review. For domestic arbitration awards, a People's Court may deny execution of the award on the basis that the law was incorrectly applied (see Art 217, CPL). However, for foreign-related arbitral awards (CIETAC awards) there cannot be judicial review of errors of law made by the arbitral tribunal (see Art 260, CPL). This is in accordance with internationally accepted arbitral practice and with the spirit and intent of the UNCITRAL Model Law.

Article 72 provides for enforcement of foreign-related arbitral awards outside the PRC and gives a right to the winning party to apply for enforcement against the losing party where the losing party or his property is not within the PRC. The winning party applies directly to the relevant foreign court for recognition and enforcement, subject to whether there is a treaty of mutual recognition between the PRC and the country in which the enforcement is sought (eg the 1958 New York Convention).

The AL provides little guidance on the issue of how arbitral awards rendered in Hong Kong after the PRC assumes sovereignty in July 1997 will be treated. Hong Kong is presently a party to the 1958 New York Convention by virtue of the United Kingdom's ratification. As a result, arbitral awards rendered in Hong Kong are enforceable under the New York Convention in the PRC. However, after 1 July 1997 Hong Kong will be a party to the New York Convention by virtue of the PRC's ratification. Arbitral awards rendered in Hong Kong after that date will be considered domestic awards and thus unenforceable under the New York Convention. Discussions are underway

[47] See Lewis (note 30 above), p 21.

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between the UK and the Chinese authorities to establish a regulatory framework for the post-1997 enforcement of Hong Kong arbitral awards in the PRC.[48]

Potential problems with the AL

The enactment of the Arbitration Law is a radical change to the domestic arbitration system in the PRC but has little effect on the international arbitration system. One commentator has suggested that it will be 'business as usual' for CIETAC (and CMAC) as they still maintain a virtual monopoly over international commercial arbitration involving foreigners.[49] Apart from the points raised earlier, there are a number of concerns about the application and interpretation of the AL.

Establishment of arbitration commissions

A major concern is whether there are sufficient resources in the PRC for effective implementation of the new legislation. The AL contemplates the establishment of arbitration commissions at the provincial level with sufficiently qualified arbitrators. Does the PRC have the necessary institutional support, personnel, and regulatory framework to effectively enact the new law? Has the requisite infra-structure been established and, if not, how long will the transition period take — months or years?

Chapter 7 empowers the CCOIC to establish foreign-related arbitration commissions and appears to mean that CIETAC and CMAC should therefore continue in their present form past 1 September 1995. However, it is unclear whether the government intends that any commissions other than CIETAC or CMAC are to be established. A further concern is the limit of the CAA's supervisory jurisdiction over domestic and foreign-related arbitration commissions. Will it provide for the necessary training and education of qualified arbitrators and to what extent will it supervise, monitor, and sanction the activities of the arbitration commissions and their members?

Limited recognition of the principle of party autonomy

The AL and the revised CIETAC Arbitration Rules were both influenced by the UNCITRAL Model Law but give only limited recognition to the principle of party autonomy. The AL stresses the voluntary nature of arbitration agreements and allows parties to choose the governing arbitration commission, but restricts the choice from amongst the commission's panel of arbitrators.

[48] For discussion of the recognition and enforcement of domestic and foreign-related arbitration awards, see Kaplan et al (note 9 above), pp 332–4 and 343–4 and M Moser, 'China and the Enforcement of Arbitral Awards' 61(1&2) Arbitration International.

[49] See Crawford (note 18 above), p 2.

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Furthermore, the AL (and the CIETAC Arbitration Rules) still vest a sizeable amount of discretionary authority in the domestic and foreign-related arbitration commissions, rather than in the arbitral tribunal chosen by the parties themselves. The AL (and CIETAC Arbitration Rules) need further reform to give the arbitration tribunal greater control over the arbitration proceedings.[50]

Whereas the Model Law is designed to provide a framework for the administration of all kinds of ad hoc and institutional arbitration, the AL is concerned solely with arbitration under domestic and foreign-related arbitral commissions to which it refers. It makes no provision for ad hoc arbitration.[51] As China continues its drive towards a socialist market economy, CIETAC continues to have a monopoly over international arbitration in China. However, at some point CIETAC will have to surrender its monopoly to give effect to the principles of a market economy where the parties have free choice. This must occur in order to effectively implement the party autonomy principle and to enhance CIETAC's reputation as an international arbitration institution.

However, there appears to be quite firm resistance to this.[52] Of interest is the fact that the PRC is now a member of the International Chamber of Commerce. If the PRC does not release CIETAC's monopoly over international arbitrations and allow international arbitrations to be held in the PRC under ICC Rules, a curious position will result: the PRC will be a member of the ICC but will refuse to allow ICC arbitrations to be held within its country.

Overlap with the Civil Procedure Law

The attempt to provide a single unified source of arbitration law in the PRC is commendable. However, there is still some overlap with the provisions of the CPL on some important areas, such as enforcement and setting aside of arbitral awards. Under the AL, the CPL and its interpretation by the Supreme People's Court will remain in force. For effective and efficient administration of arbitration in the PRC, the AL should be reformed so that it is truly the sole source of arbitration law.

Interpretation of the Arbitration Law

In addition, CIETAC must implement its newly liberalised Arbitration Rules and apply the AL in a manner consistent with international arbitration practice. The AL remains untested and it must be read in conjunction with the

[50] See Zhang Yulin, 'Towards the UNCITRAL Model Law: A Chinese Perspective' (1994) 11(1) Journal of International Arbitration 87, 89.

[51] However, ad hoc arbitration awards rendered in foreign countries may be recognised and enforced in China in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of which China is a contracting state.

[52] It has been suggested that the provisions of the Arbitration Law are a compromise between two different groups in the PRC: those supporting the adoption of the principles of the UNCITRAL Model Law, and those favouring only modest reform of the well-established domestic arbitration system. See Beaumont et al (note 2 above).

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CIETAC's new Rules, as well as the rules of the national CAA which are to be established under the new law. There are some ambiguous provisions in the AL requiring clarification and judicial examination by the People's Court. One potential problem may be the unpredictable and inconsistent court interpretation of the AL and the new CIETAC Rules. This problem may be best dealt with by establishing a centralised arbitration court in Beijing to oversee all procedural matters in arbitration proceedings, particularly interlocutory and enforcement related matters.[53] This may ensure greater consistency in the interpretation and application of the AL and CIETAC Arbitration Rules.

Conclusion

The Arbitration Law is the first major comprehensive arbitration legislation enacted in the PRC and has dramatically reformed the system of domestic arbitration in the PRC, particularly by the establishment of the CAA and independent and autonomous domestic arbitration commissions. Its effect on the system of international arbitration in the PRC is much less dramatic. However, an effort has been made to harmonise the domestic arbitration system with the international arbitration system. The AL has modernised many outdated rules and practices and enacted provisions which adopt the principle of the finality of arbitral awards and give limited recognition to the principle of party autonomy.

However, more changes are required to bring the arbitration system in the PRC in conformity with international arbitration law and practice. The main areas for reform include:

- allowing the parties complete freedom to choose arbitrators and removing the restrictive panel system for selection of arbitrators (currently all arbitrators must come from panels established by the domestic arbitration commissions and CIETAC and CMAC);
- vesting greater discretion and decision-making power and control over the arbitration proceedings in arbitration tribunals rather than in the domestic arbitration commissions and CIETAC and CMAC; and
- removing the monopoly of CIETAC and CMAC by allowing ad hoc international arbitrations to be held in the PRC, under whatever arbitration rules chosen by the parties.

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[53] See suggestion by Beaumont et al (note 2 above), pp 2–3.

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