



Arbitration Guide
IBA Arbitration Committee

CHINA

February 2012

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I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

The use of arbitration is already fairly prevalent in the People's Republic of China (PRC) and is increasing in popularity. Although the PRC court system continues to improve, foreign companies dealing with China-related matters often prefer to use arbitration due to their lack of familiarity with the PRC courts and the easier cross-border enforceability of arbitral awards as compared to court judgments. PRC courts also tend to support the development of arbitration, in part to alleviate the heavy caseload they face.

The cross-border enforceability of arbitral awards is one of the main advantages of arbitration. While foreign court judgments are very difficult to enforce in the PRC due to a lack of mutual enforceability treaties with other countries, enforcement of foreign arbitral awards is much easier because China is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the 'New York Convention'. Enforcement of arbitral awards made in Hong Kong and Macau is also possible in Mainland China under mutual enforcement arrangements similar to the New York Convention. Other advantages of arbitration over the courts include the privacy of the proceedings and the greater ability of arbitral tribunals to make use of professional expertise.

As for disadvantages of arbitration in China, local arbitration institutions often lack experience in dealing with complex legal issues and are commonly perceived to be biased in favour of local PRC parties. Arbitrations in China often proceed more quickly than those overseas, which might be considered either an advantage or a disadvantage.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

The PRC Arbitration Law, promulgated in 1994, requires that all arbitrations in the PRC be administered by a PRC arbitration institution. *Ad hoc* arbitrations (including UNCITRAL arbitrations) are prohibited within China, although arbitral awards obtained through foreign *ad hoc* arbitration proceedings are recognised and enforceable. China makes a distinction between foreign, foreign-related (arbitration in China with a foreign element) and domestic (arbitration in China without a foreign element) arbitrations, and the latter two types of arbitration must be institutional.

The China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission have long been the two dominant foreign-related arbitration institutions in China. Since the promulgation of the Arbitration Law, however, there has been a remarkable growth in the number of domestic arbitration institutions, which by the end of 2010 totalled 180. Further, a 1996 State Council Notice expressly allowed domestic arbitration institutions to accept foreign-related cases, meaning that the long-existing monopoly of CIETAC over foreign-related cases has been broken.

CIETAC remains the most dominant arbitration institution in China, although several local arbitration institutions such as the Beijing Arbitration Commission have grown rapidly in recent years.

(iii) What types of disputes are typically arbitrated?

A wide range of disputes can be arbitrated. The exceptions include matters relating to marriage, adoption, custody of children and inheritance. Under the Arbitration Law, administrative disputes that must be handled by administrative authorities also may not be arbitrated. Further, the arbitration of labour disputes is subject to a different regulatory regime.

(iv) How long do arbitral proceedings usually last in your country?

This varies, but arbitration proceedings tend to be shorter in China than in many other countries. A total duration from commencement to issuance of the arbitral award of around a year is typical, although this very much depends on various factors such as the efficiency of the arbitrators, the complexity of the issues and the cooperation of the parties. The current CIETAC Arbitration Rules (effective 1 May 2005, the 2005 CIETAC Rules) require the tribunal to render an arbitral award within six months as from the date on which the arbitral tribunal is formed, although in reality this time limit is often extended upon approval of the Chairman of CIETAC. The new CIETAC Rules, which are expected to come into force on or about 1 May 2012 (the 2012 Amended Rules), do not change the time limit for rendering the award.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

Foreign nationals may act as arbitrators in arbitrations in China. There are almost 300 foreign arbitrators from some 30 countries and regions registered on the CIETAC Panel of Arbitrators. To act as arbitrator on a CIETAC arbitration, the appointee must be on the CIETAC Panel unless the parties specifically agree in their arbitration agreement to dispense with this requirement.

As for foreign nationals acting as legal counsel in arbitrations, the PRC Ministry of Justice regulations provide that foreign law firms may only advise on matters that do not concern PRC law, such as the law of their own country or the law of international treaties. In practice, this means that unless the arbitration only involves foreign law issues, foreign law firms will generally work together with PRC co-counsel.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Arbitration Law governs commercial arbitration proceedings conducted in China and applies to both domestic and foreign-related arbitrations, although there are differences in the specific provisions that apply to each type of arbitration. The Arbitration Law is not based on the UNCITRAL Model Law because the UNCITRAL Model Law is focused on *ad hoc* arbitration and the Arbitration Law is heavily institutional. Although there have been calls to amend the existing Arbitration Law to bring it more in line with international practice, such an amendment has not yet been put on the legislative agenda.

- (ii) **If there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

PRC arbitration law makes a distinction in terms of arbitral awards. As mentioned above, there are three main types of arbitral awards: foreign, foreign-related and domestic.

According to a judicial interpretation of the PRC Civil Procedure Law (CPL) issued by the PRC Supreme People's Court (SPC), a contract will be deemed to be foreign-related if any of the following circumstances exists:

- one or both parties to the contract are foreign nationals, stateless persons, or foreign legal persons; or
- the subject matter of the contract is located in a foreign country; or
- the legal act which gives rise to, modifies, or extinguishes the rights and obligations under the contract takes place in a foreign country.

Under current PRC law and judicial practice, only foreign-related contracts may be governed by foreign law or arbitrated outside of the PRC.

The regimes that apply to foreign, foreign-related and domestic arbitrations are in many ways similar, but there is a chapter in the Arbitration Law that especially addresses the procedural matters applicable to foreign-related arbitrations. For example, time limits for domestic arbitrations tend to be shorter and the hearing transcript has to be confirmed by the parties to domestic arbitrations. There are also different regimes that apply when it comes to the enforcement of arbitral awards. For domestic awards, there is a wider scope for review on the merits when the enforcement of the arbitral award is challenged.

- (iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

China acceded to the New York Convention on 22 January 1987, with the reservation that it would only apply the convention to an award made in the territory of another contracting state and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law. China has ratified the Washington Convention, which entered into force for China on 6 February 1993.

- (iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

The PRC Contract Law provides guidance on the substantive law that should apply to the merits of the dispute. For domestic contracts, this must be PRC law. For foreign-related contracts, the parties may decide the substantive law to apply to a dispute, failing which, the applicable substantive law will, according to Article 126 of the PRC Contract Law, be the law of the country with the closest connection to the contract. However, there are certain circumstances where PRC law must apply even for foreign-related cases, for example joint venture agreements and agreements to transfer equity in a PRC company.

III. Arbitration Agreements

- (i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

Article 16 of the Arbitration Law specifies that an arbitration agreement must contain an expression of an intention to arbitrate, the matters to be covered by the arbitration and the arbitration institution chosen.

Under PRC law, an arbitration agreement must also be in written form. The 2006 Interpretation on Several Issues in relation to the Application of the Arbitration Law (SPC Interpretation) specifies that contracts, correspondence and electronic forms (such as telegraph, telex, facsimile, electronic data exchange and electronic mail) qualify as written forms.

Although there are recommended arbitration provisions provided by institutions such as CIETAC, these are not compulsory. Individual law firms sometimes recommend arbitrations clauses that contain additional provisions such as provisions regarding the language of arbitration, the nationality of the presiding arbitrator and an agreement to choose arbitrators outside of the CIETAC Panel.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

Generally speaking, PRC courts are becoming more supportive of arbitration and are unlikely to accept a case if there is a valid arbitration agreement. Further, according to the SPC's 1995 Notice on the Handling of Issues Regarding Foreign Related Arbitration and Foreign Arbitration, in foreign-related cases, any decision by the Intermediate People's Court regarding invalidity of an arbitration agreement shall be subject to review by the Higher People's Court. If the Higher People's Court agrees with the Intermediate People's Court that there is no valid arbitration agreement, such decision must be reported to the SPC for approval before the Intermediate People's Court will be in a position to accept the case.

An agreement for arbitration will be considered invalid under Article 17 of the Arbitration Law if the matters agreed for arbitration exceed the scope of arbitration provided by law, the agreement was concluded by persons who lacked capacity under the civil law, or the agreement was concluded by means of coercion.

If the arbitration agreement fails to specify or to specify clearly the matters covered by the arbitration or the chosen arbitration institution, the parties can enter into a supplementary agreement to remedy this, failing which the arbitration agreement will be considered invalid.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be

commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

It is not uncommon to see arbitration clauses that require some sort of attempt at negotiation or amicable settlement before arbitration proceedings can be commenced. The Arbitration Law does not specifically provide for the consequences if one party fails to comply with the negotiation procedure before commencing arbitration proceedings.

However, following the decision in the Pepsi arbitration case, in which the Chengdu Intermediate People's Court (as confirmed by the SPC) refused to recognise and enforce an international arbitration award based on the failure to comply with pre-arbitral consultation requirements, CIETAC has started to apply a strict approach in enforcing pre-arbitration negotiation requirements. Upon submission of the application to commence arbitration, CIETAC will now generally ask the claimant to provide evidence showing that the parties have attempted to settle the dispute by way of negotiation for the requisite time period. Failing that, CIETAC will ask the claimant to at least provide a declaration stating that it has attempted to settle the dispute by negotiation with the respondent. Failure to produce evidence or a suitable declaration could lead to CIETAC declaring that it lacks jurisdiction to conduct the arbitration. Indeed, respondents are increasingly challenging CIETAC's jurisdiction solely on the grounds that the negotiation period had not been observed. If, however, the agreement between the parties was to negotiate, but with no time period specified, CIETAC is usually more flexible and will generally not require any evidence to show the parties' attempt at negotiation.

(iv) What are the requirements for a valid multi-party arbitration agreement?

Under Article 4 of the Arbitration Law, the arbitration agreement must be entered by all parties based on their free will. Therefore, if one of the parties to the contract was not involved in the conclusion of the arbitration agreement, the arbitration agreement could be deemed invalid. Under the Arbitration Law and the 2005 CIETAC Rules, non-signatory parties cannot join arbitration proceedings by way of joinder or intervention. Under the 2012 Amended Rules, CIETAC will allow for consolidation of arbitration proceedings upon the parties' consent.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

The SPC Interpretation does not specifically address this situation. However, the Arbitration Law provides that in order for an arbitration agreement to be valid,

there must be an intention to arbitrate and, in the case of an arbitration agreement giving one of the parties a unilateral right to arbitrate, such an intention is very likely to be found lacking by the PRC courts.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Generally no, except in certain situations such as agency, assignment of rights or mergers. If an agent signs a contract containing an arbitration agreement on behalf of the principal, the principal will be bound even if it did not sign the contract. If there is a dispute over the existence of the agency relationship, CIETAC will first make a ruling on this, but the arbitral tribunal can later reverse this ruling. As for an assignment of rights, arguably this also includes the right to arbitrate. In merger situations, the company taking over the other company will also inherit its contractual rights and obligations, including the right to arbitrate.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Certain matters such as marriage, adoption and custody issues cannot be arbitrated. A party objecting to the effectiveness of an arbitration agreement may request that the arbitration institution or People's Court make a decision on this, with the People's Court making the decision if both entities have requested it to do so. However, if a party would like the court to make the decision, it must make its objection to the tribunal's jurisdiction before the first hearing. Further, if the arbitral tribunal has already made a decision as to arbitrability, the People's Court will follow this decision and not accept the case (Article 13 of the SPC Interpretation).

The lack of arbitrability tends to be a matter of jurisdiction rather than admissibility.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Article 5 of the Arbitration Law specifies that a People's Court shall not accept a claim brought at court by a party where there is an arbitration agreement unless the arbitration agreement is invalid.

If a party brings a claim at a People's Court without informing the court that there is a valid arbitration agreement, the court shall reject the case if the other party submits the arbitration agreement to the court before the first hearing. However, if the other party fails to object to the acceptance of the case by the court before the first hearing, that party shall be regarded as having forfeited the agreement for arbitration and the court will, according to Article 26 of the Arbitration Law and Article 13 of the SPC Interpretation, continue with its hearing.

- (iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Pursuant to Article 20 of the Arbitration Law, the jurisdiction of the tribunal will be determined by the arbitration institution or the People's Court. If both the arbitration institution and the People's Court have been requested to rule on the effectiveness of an arbitration agreement, the People's Court will make the decision. However, CIETAC does allow for the possibility of CIETAC delegating the power to determine the jurisdiction of the tribunal to the arbitrators themselves. Under the 2012 Amended Rules, the tribunal will have clearer powers to decide on its own jurisdiction, either during the arbitration proceedings or in the final award.

V. Selection of Arbitrators

- (i) How are arbitrators selected? Do courts play a role?**

Where the tribunal is composed of three arbitrators, each party shall choose an arbitrator or entrust the appointment of the arbitrator to the chairman of the arbitration institution. The third presiding arbitrator shall be jointly appointed by the parties or the chairman of the arbitration institution. Where the tribunal consists of only one arbitrator, the arbitrator shall either be jointly appointed by the parties or by the chairman of the arbitration institution. Courts do not play any role in the arbitrator selection process.

Under the 2012 Amended Rules, each party will be given the opportunity to recommend up to 5 arbitrators as presiding arbitrator, as compared to 3 arbitrators under the 2005 CIETAC Rules. In multi-party arbitrations, unless the parties on

the claimant's side or the respondent's side agree jointly on the choice of the arbitrator, all three arbitrators shall be appointed by the Chairman of CIETAC.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

There are detailed requirements in the relevant rules and regulations of Chinese arbitration institutions regarding the disclosure of conflicts. For example, the CIETAC Code of Ethics for Arbitrators states that arbitrators shall make disclosures where the arbitrator or the organisation in which the arbitrator works is connected with the case, where an arbitrator works in the same organisation as another arbitrator on the tribunal or where the arbitrator has a financial interest in the case. If such disclosures are not made and a party later challenges the arbitrator, the chairman of the arbitration institution may ask the arbitrator to withdraw if the conflict is serious enough.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

The Arbitration Law requires that those acting as arbitrators have at least eight years of experience either in arbitration work, as a lawyer, as a judge or as a senior academic.

Under Article 34 of the Arbitration Law, an arbitrator may not serve as an arbitrator and may be forced to withdraw on the request of a party where:

- the arbitrator is a party involved in the case or a blood relative of the parties concerned or their legal counsel;
- the arbitrator has personal interests in the case;
- the arbitrator has relationships with the parties or their legal counsel such that the fairness of the decision in the case may be affected; or
- the arbitrator meets with the parties or their legal counsel in private or has accepted gifts or attended banquets hosted by the parties or their legal counsel.

The CIETAC Code of Ethics sets out various principles about the importance of arbitrators maintaining independence, impartiality and fairness and provides guidance on the situations where arbitrators should not accept appointment, situations where they should make disclosures or apply for withdrawal and situations where the arbitration institution will have the right to replace the arbitrator.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

The IBA Guidelines on Conflicts of Interest in International Arbitration do not apply in China. However, the general principles related to impartiality, independence and disclosure of conflicts contained in the IBA Guidelines are reflected in the ethical codes of the various local arbitration institutions, albeit in a less detailed fashion. For example, the CIETAC Code of Ethics contains separate provisions addressing situations where arbitrators should not accept appointment and situations where they should apply for withdrawal or make disclosures, which to some extent resemble the Red List and the Orange List of the IBA Guidelines.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

The Arbitration Law only specifically provides for two types of interim measures, property preservation and evidence preservation measures. Neither type can be granted by arbitral tribunals. Instead, CIETAC must pass requests for these types of relief on to the relevant PRC courts.

However, PRC law does not prevent tribunals from issuing other forms of preliminary relief, for example preliminary injunctions, nor does it restrict the form of the tribunal's decision in respect of such relief. In practice, it is rare for tribunals to issue any interim relief. The 2012 Amended Rules are expected to improve the current situation by expressly stating that the arbitral tribunal may order preliminary measures in the form of procedural orders or interim awards. It should be noted that interim measures issued by arbitrators are not enforceable in the PRC courts. Thus, the changes in the 2012 Amended Rules will be more immediately relevant where CIETAC administers arbitration proceedings outside of mainland China, for example in Hong Kong.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?**

Courts will grant provisional relief in support of arbitrations where the arbitration institution has transferred the application to the relevant court and the court deems

the relief necessary. For example, the courts will grant preservation of property orders where they consider that the actions of one party will make the enforcement of the arbitral award difficult or impossible. Courts will grant preservation of evidence orders where they consider that the relevant evidence is likely to be destroyed or become difficult to retrieve. These measures are decided entirely at the discretion of the courts. They can be granted immediately after the application for arbitration has been filed and the effectiveness of these measures is not affected by the constitution of the arbitral tribunal.

- (iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

The power to grant provisional relief lies with the courts. The arbitration institution may pass the application for provisional relief on to the courts but the courts have sole discretion as to whether to grant such measures.

VII. Disclosure/Discovery

- (i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

There is no established procedure for disclosure or discovery in PRC arbitrations. This conforms to the basic principle in Chinese civil proceedings, as reflected in Article 64 of the CPL, that a party shall be responsible for adducing evidence in support of its claims. However, a party is entitled to request that the other party provide specific documents or types of documents to support its claim. Such requests are becoming increasingly common, particularly in foreign-related arbitrations. If the other party does not comply with a request for disclosure, the arbitral tribunal may draw adverse inferences.

- (ii) What, if any, limits are there on the permissible scope of disclosure or discovery?**

As there is no formal disclosure process, there are also very few detailed rules regarding the scope of disclosure or discovery. To provide detailed guidelines for discovery procedures, the parties are recommended to refer to the IBA Rules of Evidence in their arbitration agreement, which, in principle, should be acceptable to CIETAC. The arbitral tribunal also has the power to carry out its own investigation of the evidence, but in practice this rarely happens unless a party can effectively demonstrate that it is practically difficult for the party to obtain such evidence by itself.

(iii) Are there special rules for handling electronically stored information?

We are not aware of any special rules for handling electronically stored information. However, evidence in the form of electronically stored information is not uncommon. In practice, the party that presents such evidence must show, either by notarisation or otherwise, the authenticity of the sources where the information is stored electronically in order to demonstrate that the information has not been changed or edited.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Article 40 of the Arbitration Law states that the tribunal shall not hear a case in open session, except with the agreement of the parties (unless the case involves state secrets, in which case the case cannot be held in open session regardless of any agreement by the parties to the contrary).

The 2005 CIETAC Rules and 2012 Amended Rules have similar provisions. Arguably this might not cover confidentiality of the proceedings or documents exchanged. If confidentiality is likely to be an important issue for the parties, they should address this in the arbitration agreement.

As for breaches of confidentiality, theoretically damages and injunctive relief are available. As in other jurisdictions, however, in practice it can be difficult to assess damages and enforce penalties.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions in the Arbitration Law addressing the arbitral tribunal's power to protect trade secrets and confidential information. In practice, all evidence used in arbitration proceedings shall be subject to cross-examination, regardless of whether that evidence involves a state secret, trade secret or a matter of personal privacy. Thus, any document used in arbitration proceedings should be given to the opposing party. If one party wishes to avoid disclosure of certain information to the opposing party, it can choose to have such information properly deleted from the relevant document or make the opposing party sign a confidentiality agreement.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

Although lawyers in China owe confidentiality obligations towards their clients, under PRC law there is no separate concept of legal professional privilege which protects from the authorities and courts confidential communications between lawyers, including in-house counsel, and clients. This means that the confidentiality obligation of lawyers does not override the Chinese courts' or other authorities' power to compel disclosure of information. However, privilege is seldom a problematic issue in China due to the lack of general disclosure requirements in civil proceedings. Further, Chinese courts rarely exercise their power to ask for disclosure of information by lawyers or law firms, except in politically sensitive cases.

IX. Evidence and Hearings

- (i) **Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

No, although CIETAC and the tribunal will probably accept the Parties' wishes if the IBA Rules are specifically referred to in the arbitration agreement. However, it is unlikely that a CIETAC tribunal would adopt such rules on its own initiative. There have recently been some discussions at CIETAC as to whether to adopt its own evidence rules to govern arbitration proceedings.

- (ii) **Are there any limits to arbitral tribunals' discretion to govern the hearings?**

A CIETAC arbitral tribunal has the discretion to decide how the hearing should be conducted, including, for example, whether to adopt an adversarial or an inquisitorial approach. Unless otherwise agreed by the parties, a tribunal also has the discretion to issue procedural directions and lists of questions, hold pre-hearing meetings and preliminary hearings and produce terms of reference.

- (iii) **How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

Arbitration in China tends to rely more heavily on written than oral evidence. As such, oral direct examination and cross-examination are much less common than in other jurisdictions. Nevertheless, CIETAC has seen an increasing trend towards the use of witness testimony, as Chinese lawyers become more familiar with advocacy skills.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

The parties may decide who they call as a factual witness and how many witnesses they will call. It is not compulsory for witnesses to appear at the hearing, although if a witness does not appear, this may have some impact on the weight given to his or her written witness statement. There are no formal statutes requiring the taking of oaths or affirmations, although in practice it is common for witnesses to include declarations that they have given their witness statements truthfully and to the best of their knowledge.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

There are no specific limitations on the witnesses that may be called. The benefit of calling a witness who is specially connected with a party (eg, legal representative) is that he may have more firsthand knowledge of the facts than an unrelated witness. However, the tribunal may also choose to give less weight to the testimony of that witness because of his connection with one of the parties.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

There are no formal requirements regarding the independence and/or impartiality of expert witnesses. However, in practice, the expert generally will confirm that he has no conflict of interest in acting for the party that appointed him, and that he understands his duties, including the duty to act independently and impartially. The parties are free to decide whether they wish to present experts. The arbitral tribunal will then decide the admissibility and weight of such expert evidence.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

Both the tribunal and the parties have the right to appoint experts. Even if none of the parties has appointed an expert, the tribunal sometimes appoints an expert if it considers it necessary. Although there are no statistics on this, the evidence provided by the tribunal-appointed expert might be given more weight than the evidence provided by a party-appointed expert. There are no formal requirements regarding experts, but as a matter of practice experts should have expertise in their

field, should act impartially and should not have a conflict of interest in acting in the case. Expert reports must be provided to the parties for comments.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

'Hot-tubbing' is not common in PRC arbitration because the PRC arbitration process tends to focus on written statements rather than oral examination of experts. Questions may be posed by the parties or the tribunal to the expert, but it is uncommon to see experts debating with each other during the hearing process.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

Chinese arbitration institutions maintain well-staffed secretariats and will assign a secretary to the arbitral tribunal to assist them with procedural matters. In some cases, arbitrators bring their own assistant to the hearing, provided that the parties consent to such an arrangement.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Under Article 54 of the Arbitration Law, an award shall set out the arbitration claim, the facts in dispute, the tribunal's decision and grounds for that decision, the apportionment of arbitration costs and the date of the award. Also, an award shall be signed by the arbitrators and affixed with the seal of the arbitration institution. Arbitrators with dissenting opinions may choose not to sign the award. CIETAC has similar formal requirements. PRC law does not expressly limit the types of permissible relief.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

If a party has made a claim for damages, including interest, the tribunal can award interest if it finds in favour of that party. There are no express regulations regarding the award of compound interest, but the authors are not aware of any such awards in Chinese arbitrations to date.

Chinese law technically allows punitive damages to be awarded in certain limited circumstances, for example fraudulent conduct. In practice, however, punitive

damages are unlikely to be granted and the tribunal only awards compensation for actual loss suffered.

(iii) Are interim or partial awards enforceable?

An interim award is not final and so is not enforceable by the court. A partial award may be enforceable.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Yes, arbitrators are allowed to issue dissenting opinions, although the arbitration award shall be made in accordance with the opinion of the majority of the arbitrators. The dissenting opinion will be entered in the records and under CIETAC rules, it may be attached to, but not included as part of, the award. In practice, dissenting opinions are rarely attached to the award or made available to the parties.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted under the Arbitration Law. After the request for arbitration has been filed, the parties may settle the dispute by themselves, and the tribunal may assist in this process. The tribunal may also render an award in accordance with the settlement agreement of the parties. Alternatively, following settlement, the party may terminate the arbitration proceedings by withdrawing the request for arbitration. The arbitration proceedings will also be deemed terminated if the claimant is absent from the hearing or fails to attend or complete the hearing without justification.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Arbitrators can correct typographical or calculation errors in the award and can also supplement the award in relation to matters which were arbitrated but were omitted from the award. If the party wants the tribunal to make corrections or supplements, it must request this within 30 days after receipt of the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The parties may agree to the allocation of arbitration costs between them, but usually the unsuccessful party bears the costs. Where the tribunal only decides in favor of some, but not all, of a party's claims, the tribunal may allocate the costs between the parties in proportion to their respective liabilities.

(ii) What are the elements of costs that are typically awarded?

Costs typically awarded include (i) arbitration fees and other expenses payable to the arbitration institution by the parties and (ii) fees, charges and expenses incurred by the parties for engaging legal counsel and other professional advisers. There is no cap on the amount of costs that can be allocated by the tribunal, but the fees awarded typically reflect the nature and complexity of the case.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Arbitrators' costs and expenses are included in the arbitration fees collected by the arbitration institution. There is a formula for calculating the fees according to the amount in dispute. A foreign arbitrator may collect his or her own fees (including travel expenses) from the party that appoints the arbitrator. Generally, the arbitrator's fees are fairly limited and not based on an hourly rate.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Arbitration fees are usually borne by the losing party, although if a party only succeeds in some of its claims or counterclaims, the tribunal can allocate the costs in accordance with the liabilities apportioned between the parties or otherwise as it sees fit.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Courts do not have the power to review the tribunal's decisions and this includes the decision on costs.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

A losing party seeking to set aside an award can apply to the Intermediate People's Court of the place where the arbitration institution resides. The rules applicable for setting aside domestic awards and foreign-related awards are different in that the court's review of domestic awards will not be restricted to procedural matters as it is with foreign-related awards.

Article 58 of the Arbitration Law sets out the following grounds for the cancellation of a domestic arbitral award:

1. there is no agreement for arbitration;
2. the matters ruled on are outside of the scope of the agreement for arbitration or the scope of authority of an arbitration institution;
3. the composition of the arbitration tribunal or the arbitration proceedings violates the legal proceedings;
4. the evidence on which the ruling was based is forged;
5. matters that have an impact on the impartiality of the ruling have been found to have been concealed by the opposite party; and
6. arbitrators have accepted bribes, resorted to deception for personal gain or perverted the law in the ruling.

Further, if a court establishes that an arbitral award goes against the public interest, it shall set aside the award.

In relation to setting aside a foreign-related award, the same grounds that are applicable for refusing recognition and enforcement of such awards will apply. These grounds, as set out in Article 258 of the CPL, are:

1. there is neither an arbitration clause in the contract nor a written arbitration agreement concluded after the occurrence of a dispute;
2. the party against whom the arbitration is filed was unable to appoint the arbitrator of its choice, did not receive notice of arbitral proceedings or was unable to present opinions due to reasons for which he/she was not responsible;
3. the formation of the arbitration tribunal or the arbitration procedure is not consistent with the arbitration rules; or

4. the matters dealt with in the award fall outside the scope of arbitration agreement or are not within the jurisdiction of the arbitration institution.

The grounds for setting aside a foreign-related award are much narrower than those for setting aside a domestic award, as the court does not have explicit power to set aside a foreign-related award on the grounds of malpractice by the arbitrators, forged evidence or concealment of evidence. Although a violation of public policy is not expressly included in the grounds for setting aside a foreign-related award, in practice it is often used by applicants as the basis for challenging the award.

Article 59 of the Arbitration Law requires any application to set aside an arbitral award to be made within six months after receipt of the award. Article 60 further provides that the People's Court shall render its decision either to set aside the award or reject the application within two months after receiving the application. However, in practice, the duration of challenge proceedings can be much longer, especially in foreign-related cases. The SPC's 1998 Notice of Issues Concerning Setting-aside Foreign-related Arbitral Awards by the People's Court made it clear that the ruling of the Intermediate People's Court to set aside a foreign-related arbitral award or send the case back to the tribunal for re-trial is subject to review and approval by the Higher People's Court. If the Higher People's Court agrees with the Intermediate People's Court, it must report its findings to the SPC for final approval. While the reporting mechanism helps to minimise the chances of successfully challenging foreign-related arbitral awards, the unavoidable side-effect is that the challenge proceedings (and enforcement of the award itself) can suffer from further delay.

Article 25 of the SPC Interpretation makes it clear that a pending application to set aside will suspend the enforcement proceedings. It is not possible to obtain leave to enforce in such circumstances.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

There are no express rules under PRC law about waiving the right to challenge an arbitral award, but it is generally understood that the right to sue cannot be waived by consent. However, we are not aware of any cases in which waiver to challenge an arbitral award has been tested before the PRC courts.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

No, an arbitral award cannot be appealed in China.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes. According to Article 61 of Arbitration Law, the court has the discretion to pause the setting aside procedure and remand the award to the tribunal for the rectification of procedural defects. The law does not specify the circumstances in which the award could be remanded to the tribunal. In practice, ‘remand’ is applicable where the defect in the award is readily capable of being rectified by the tribunal.

If the award is remanded to the tribunal, the same tribunal will generally conduct a hearing to re-examine the case.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

The process for enforcement of arbitral awards in the PRC depends on the type of the arbitral award sought to be enforced, that is, whether it is a foreign award, foreign-related award or domestic award.

Firstly, pursuant to Article 267 of the CPL and a 1987 Notice of the SPC, a Chinese court may deny recognition and enforcement of foreign arbitral awards if one or more of the grounds set out in Article V of the New York Convention are met.

Secondly, the grounds for refusing enforcement of foreign-related awards are set out in Article 258 of the CPL, and are very similar to those for refusing enforcement of a foreign award under the New York Convention. One slight difference is that the CPL uses the term ‘social and public interest’ as compared to ‘public policy’ under the New York Convention. The slightly broader wording of the CPL is unlikely to have any real practical impact on any consideration to refuse enforcement based on violation of ‘public policy’.

The grounds for refusing enforcement of a domestic award are set out in Article 213 of the CPL, which allows the court to revisit the merits of the award, including evidence and application of law. In particular, in addition to relying on procedural defects, the court is entitled to refuse enforcement because the main evidence was insufficient; the law was applied incorrectly; or one or several

arbitrators committed embezzlement, accepted bribes, practised graft or made an award that perverted the law.

Refusing enforcement of an award on the ground that it would be against public policy rarely occurs. To our knowledge, there have only been two reported cases where Chinese courts have refused enforcement on this ground.

As to the competent court which handles enforcement cases, according to Article 29 of the SPC Interpretation, where a party has applied for the enforcement of an arbitration award, the Intermediate People's Court of the place where the person against whom the judgment is being executed is domiciled or of the place where the property against which enforcement is to be carried out is located shall have jurisdiction.

To apply for recognition and enforcement, the applicant must provide the award, a copy of the contract containing the arbitration clause, a written application for recognition and enforcement and the applicant's incorporation documents and power of attorney. Any foreign language originals must be translated into Chinese, notarised and legalised by agencies recognised by the Chinese courts.

Any application to oppose enforcement based on the grounds set out above will not officially stay the enforcement. However, the court will first decide on such opposition before taking any enforcement action.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Exequatur, or the concept of a court authorising enforcement of an arbitral award made abroad, is primarily carried out in the PRC through the New York Convention. The PRC People's Courts recognise and enforce foreign awards in accordance with the New York Convention subject to the PRC's reservations to that convention.

(iii) Are conservatory measures available pending enforcement of the award?

The CPL, various SPC enforcement notices and other relevant regulations provide for a variety of measures to preserve assets pending enforcement of the award. For example, courts have the power to grant property preservation and evidence preservation measures to aid arbitration proceedings. At the enforcement stage, courts have the further power to freeze bank accounts or attach property of the party subject to enforcement. The PRC courts also have the power to request information regarding property or make their own investigations in that regard.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There are no complete or reliable statistics regarding enforcement in China. There is therefore no uniform view amongst commentators about the true enforcement situation. For example, a survey carried out by PricewaterhouseCoopers suggested that enforcement of arbitral awards in the PRC courts was far from consistent, but reports from CIETAC and the PRC courts paint a somewhat rosier picture.

In our own experience, awards involving large amounts of compensation or specific performance tend to be more difficult to enforce.

If an arbitral award has already been set aside in the place of arbitration, the award will not be enforced in China because China has fully adopted Article V of the New York Convention, including Article VI(e).

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement procedures should be completed by the enforcement court within six months from the date of acceptance of the application for enforcement, subject to any extensions granted by the chief justice of the relevant court. The CPL stipulates that if a People's Court fails to carry out execution within the prescribed six months, the applicant for execution may apply to the People's Court at the next level for execution. The People's Court at the next level may order the original People's Court to carry out execution within a specified period of time, may carry out the execution itself or may order another People's Court to carry out the execution. However, this application process is not often used successfully in practice because it is relatively easy for a court to show that it has taken at least some enforcement action and thus avoid official compulsion to take further action.

As with the setting aside of foreign-related awards, any decision to refuse enforcement of foreign-related awards or to refuse recognition and enforcement of foreign awards is subject to the internal reporting system that leads to the SPC making the ultimate decision on whether the award should be enforced. By introducing several layers of checks and balances, the reporting system is designed to minimise problems of lack of impartiality and local bias.

Taking all these factors into account, it is difficult to predict the exact time that will be needed to successfully enforce an award.

Under PRC law, an application for enforcement of the award must be made within two years from the last day for compliance under the award or, if the award is silent on that point, from the effective date of the award.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

PRC law has traditionally entailed absolute immunity for a state and its property. In the recent Hong Kong case of *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, a 3:2 majority of the Court of Final Appeal held that state immunity covered not only sovereign acts but also the state's commercial activities, which has been confirmed by the Standing Committee of the PRC National People's Congress' interpretation. In other words, absolute state immunity now applies in Hong Kong. This means that, as in the rest of China, there is no exception for a foreign state's commercial activities.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

China is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2005, which is widely acknowledged to be a treaty that endorses a restrictive approach to state immunity. Under the CJISTP, signatory states will be subject to essentially the same jurisdictional rules as private entities with respect to commercial transactions. However, the CJISTP has not yet come into force and China has not yet ratified it. China's first specific law concerning state immunity, the 2005 Law on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks grants, on a reciprocal basis, special protection to the property of foreign central banks in the PRC, including the Hong Kong and Macau Special Administrative Regions.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Yes, China is a party to the Washington Convention, which entered into force for China on 6 February 1993. China is an observer to, but not a member of, the Energy Charter Treaty.

(ii) Has your country entered into bilateral investment treaties with other countries?

Yes, China has entered into approximately 130 bilateral investment treaties (BITs) with other countries, of which approximately 100 have already come into force. The UNCTAD website contains a search engine of the bilateral investment treaties entered into by countries (<http://www.unctad.org/templates/Page.asp?intItemID=2344&lang=1>)

The PRC Ministry of Commerce's Department of Treaty and Law's website also shows a list of BITs China has entered into (<http://fs.mofcom.gov.cn/column/2010.shtml>), with a further link at the bottom of the webpage showing BITs that have not yet come into effect or which are now defunct.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The reference materials most frequently used by practitioners include arbitration guides, journals and textbooks, as well as educational seminars held by arbitration institutions. In particular, *Arbitration In China: A Practical Guide*, published by Sweet & Maxwell Asia in 2004, is a comprehensive reference covering essential aspects of Chinese arbitration, although some of its discussions and examples are now a little out of date. Tao Jingzhou's *Arbitration Law and Practice in China* also provides useful guidance on arbitration in China.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

CIETAC regularly holds arbitration seminars jointly with other major international organisations, for example, the ICC, HKIAC, SIAC and the ICDR. There are also seminars and speaker events held by other organisations such as bar associations, chambers of commerce and law firms.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes. There is also an increasing trend of financial institutions shifting from litigation to arbitration, especially for derivatives transactions.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

In Chinese arbitrations, mediation and settlement are often encouraged. For example, arbitrators in CIETAC arbitration proceedings often attempt to mediate the dispute for the parties at some time during the arbitration proceedings. The 2012 Amended Rules have formally endorsed the possibility that the parties appoint non-arbitrators to conciliate the case. However, despite the existence of the Mediation Center of the China Council for the Promotion of International Trade/ China Chamber of International Commerce since the 1980s, mediation has not yet developed as a fully-fledged alternative to arbitration.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

2011 saw the first example of a claim being brought against the PRC government under a bilateral investment treaty. The claimant was a Malaysian investor. According to media reports, the parties are currently engaged in settlement discussions.

The 2012 Amended Rules are likely to come into effect on or about 1 May 2012, replacing the 2005 CIETAC Rules. In the above sections, we have tried to incorporate the most relevant changes expected in the 2012 Amended Rules, based on the latest draft available to us.