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Chapter 17

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China

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your country?

Under the PRC Arbitration Law, an arbitration agreement must be in writing and may be concluded before or after the dispute arises. The following particulars are required:

a) an expression of intention to apply for arbitration;
b) matters that should be referred to arbitration; and
c) a designated arbitration commission.

Pursuant to Article 17 of the PRC Arbitration Law, an arbitration agreement shall be void if:

a) the agreed matters for arbitration exceed the scope of arbitral matters as specified by law;
b) a party to the arbitration agreement lacks sufficient capacity for civil acts; or
c) a party coerced the other party into concluding the arbitration agreement.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Language

Parties can specify the language in which the arbitration is to be conducted. If the arbitration is to be handled by the China International Economic and Trade Arbitration Commission ("CIETAC"), Article 85 of the CIETAC Arbitration Rules provides that "the Chinese language is the official language of the Arbitration Commission but if the parties have agreed to use another language, their agreement shall prevail."

Governing Law

Article 145 of the PRC General Principles of Civil Law ("Civil Law") provides that, "[u]nless otherwise stipulated by law, the parties to a contract involving foreign elements may choose the law applicable to handling of disputes arising from the contract. If the parties to [any such contract] have not made a choice, the law of the country of closest connection to the contract shall be applied" (see also Article 126 of the PRC Contract Law). By legislation, some matters fall within the exclusive ambit of Chinese law (for example, Sino-foreign joint venture contracts). In the absence of any express choice of law by the parties to a foreign-related arbitration, the tribunal will apply such law as it determines appropriate. However, for purely domestic arbitration that does not involve a foreign-related contract, Chinese law will apply.

Location

There are numerous local arbitration commissions in the main cities throughout China. Where the parties have decided to refer their dispute to one of the local arbitration commissions, they should check the correct name of such commission. For example, although local arbitration commissions exist in Guangzhou and Shenzhen, there is no "Guangdong Arbitration Commission."

Where the parties wish to have the arbitration referred to CIETAC, it is important to note that CIETAC has its head office in Beijing and sub-commissions in Shanghai and Shenzhen. Parties should specify to which of the three offices they would like to submit their dispute. If the parties fail to reach an agreement in this regard, according to Article 12 of the CIETAC Arbitration Rules, the claimant may opt to have the arbitration conducted in any of the three CIETAC locations. In practice, the office that receives the claim generally will initiate the case, and the case will remain with that office unless an objection is received, in which case CIETAC will decide on the matter.

The parties are free to agree on where the hearing of the arbitration should take place. For example, it is possible for the parties to agree that the hearing of an arbitration submitted to the CIETAC Shanghai Sub-Commission in Shanghai should take place in, say, Wuhan. In the absence of any such agreement, Article 35 of the CIETAC Arbitration Rules provides that the hearing of the arbitration shall take place at the place where the Commission or Sub-Commission to which the case is referred is located, unless the Secretary-General of the Commission or of that Sub-Commission decides otherwise. The major local arbitration commissions also adopt a similar rule (see, for example, Article 36 of the Rules of Arbitration of the Beijing Arbitration Commission and Article 50 of the Rules of Arbitration of the Shenzhen Arbitration Commission).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Article 5 of the PRC Arbitration Law provides that, where there is a valid arbitration agreement, the case must be submitted to arbitration and the courts should not hear the matter (see also Article 111(2) of the Law of Civil Procedure of the PRC). However, pursuant to

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Article 26, if one party initiates court proceedings without informing the court of the existence of the arbitration agreement and the other party does not raise any objection prior to the first hearing, the other party will be deemed to have waived its rights under the arbitration agreement and the court will not examine the existence of the arbitration agreement on its own initiative and shall continue to try the case.

Generally speaking, Chinese courts (especially those in the major cities) have been very willing to enforce arbitration agreements. In recent years, the People's Supreme Court has issued many judicial interpretations and replies in individual cases demonstrating a pro-arbitration posture.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

Enforcement of arbitration agreements is dealt with under the PRC Arbitration Law and the Law of Civil Procedure of the PRC ("Civil Procedure Law").

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the law differ?

The PRC Arbitration Law governs both domestic and international arbitrations. However, the additional provisions of Chapter 7 (Articles 65 to 73) of the PRC Arbitration Law apply only to international or foreign-related arbitrations. Apart from the establishment, rules and composition of foreign-related arbitration commissions and the appointment of foreign arbitrators, the principal differences between the provisions governing domestic and foreign-related arbitration are as follows:

a) Preservation of evidence – applications in respect of foreign-related arbitrations are made to the Intermediate People's Court where the evidence is located, instead of the local level People's Court.
b) Setting aside and refusal of enforcement of awards – the grounds for setting aside/refusal to enforce foreign-related arbitral awards are more restricted (see *post*, paragraph 10.2).

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The drafting of the PRC Arbitration Law was influenced by the UNCITRAL Model Law. However, the PRC Arbitration Law is different from the UNCITRAL Model Law in many important respects, including:

1. Application - While the UNCITRAL Model Law applies to international commercial arbitrations only (Article 1), the PRC Arbitration Law applies to both international and domestic arbitrations (Articles 1 and 65).
2. Form of Arbitration - The PRC Arbitration Law appears to permit only institutional arbitrations, and not ad hoc arbitrations (Articles 10-15), at least for arbitrations sited in China.
3. Jurisdictional Challenge - The UNCITRAL Model Law permits the arbitral tribunal to rule on its own jurisdiction, including on any objections to the existence or validity of the arbitration agreement (Article 16). Under the PRC Arbitration Law, the arbitration commission may rule on the validity of the arbitration agreement unless either party requests a court ruling instead, in which case the power to rule on jurisdiction is vested in the court (Article 20). The general practice of Chinese courts is that, once an arbitration commission has rendered a decision on its jurisdiction, then the courts shall not accept nor rule on objections to jurisdiction.
4. Number of Arbitrators - Under the UNCITRAL Model Law, parties have a choice of the number of arbitrators, failing which three arbitrators shall be appointed (Article 10). Under the PRC Arbitration Law, the number of arbitrators is either one or three, failing agreement on which the arbitration commission chairman shall decide (Articles 30 and 32).
5. Default Appointment of Arbitrators - The UNCITRAL Model Law vests the default power to appoint arbitrators in the court or other specified authority (Article 11). Such power is vested in the arbitration commission chairman under the PRC Arbitration Law (Article 32).
6. Minimum Qualifications of Arbitrators - Under the PRC Arbitration Law, a person can only be appointed as an arbitrator if he can satisfy the specified minimum requirements in terms of qualifications, experience and knowledge (Article 13). There are no such minimum requirements under the UNCITRAL Model Law.
7. Interim Measures of Protection - The UNCITRAL Model Law permits parties to apply directly to the court for interim measures of protection (Article 9). Under the PRC Arbitration Law, a claimant should send the application for interim measures of protection via the arbitration commission, which then shall submit such application to the court (Articles 28, 46 and 68).
8. Court's Assistance in Taking Evidence – The UNCITRAL Model Law provides that the arbitration tribunal or a party with the approval of the tribunal may request the court to assist in taking evidence (Article 27). There is no similar provision in the PRC Arbitration Law, except for evidence preservation orders.
9. Decision Making – Under the UNCITRAL Model Law, parties may agree that the decision of the tribunal must be unanimous or by the majority of the arbitrators. Under the PRC Arbitration Law, decision must be made in accordance with the opinion of the majority of the arbitrators. If there is no majority opinion, the presiding arbitrator shall decide (Article 53).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Non-arbitral Disputes

Under the PRC Arbitration Law, certain types of disputes are non-arbitral:

- marital, adoption, guardianship, support and succession disputes; and
- administrative disputes that are required by law to be handled by administrative authorities (Article 3 of the PRC Arbitration Law).

Under Article 2 of the CIETAC Arbitration Rules, CIETAC does not accept cases over the following types of disputes:

- Marital, adoption, guardianship, support and succession disputes.
- Administrative disputes that laws require to be handled by administrative authorities.
- Labour disputes and disputes within agricultural collective economic organizations over contracted management in agriculture.

Disputes subject to arbitration

Article 2 of the PRC Arbitration Law provides that "Contractual and other disputes concerning property rights and obligations between citizens, legal persons and other organizations of equal status may be subject to arbitration."

Article 2 of the CIETAC Arbitration Rules provides that the Arbitration Commission will resolve "disputes arising from economic and trade transactions of a contractual and non contractual nature," including:

- international or foreign-related disputes;
- disputes related to the Hong Kong SAR or the Macao SAR or the Taiwan region;
- disputes between foreign investment enterprises or between a foreign investment enterprise and a Chinese legal person, natural person and/or economic organization;
- disputes arising from project financing invitations to tender and bidding submissions, project construction or other activities conducted by a Chinese legal person, natural person and/or other economic organization which utilize capital, technology or services from foreign countries, international organizations or from the Hong Kong SAR, the Macao SAR and the Taiwan region;
- disputes that may be taken cognisance of by the Arbitration Commission in accordance with special provisions of, or upon special authorization from, the laws or administrative regulations of the People's Republic of China; and
- any other domestic disputes that the parties have agreed to submit to the Arbitration Commission for arbitration.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Article 20 of the PRC Arbitration Law provides that, where there is a dispute over the validity of an arbitration agreement, such dispute may be ruled upon by the arbitration commission or the court. However, if either party wishes to have the matter resolved by the court, then the court shall rule on it. Article 4 of the CIETAC Arbitration Rules has similar effect.

Although both the PRC Arbitration Law and the CIETAC Arbitration Rules stipulate that the arbitration commission (rather than the tribunal) has the power to rule on the validity of the arbitration agreement (if the parties agree that the commission may do so), when considering such issues CIETAC may consider the views of the tribunal, especially if an investigation into the relevant facts or law is required.

3.3 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

As to the circumstances in which a court can address the issue of validity of an arbitration agreement, see paragraph 3.2 above.

As mentioned above, arbitrators in China have to satisfy certain minimum requirements as to qualifications and experience and generally have to be on the panel of arbitrators of the respective arbitration commissions. Challenges based on partiality of arbitrators in the circumstances set out in paragraph 4.4 below are made to the arbitration commission. For domestic arbitration cases, the court may decide to set aside or not to enforce an award based on lack of impartiality of the tribunal (see *post*, paragraph 10.2).

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

Pursuant to Article 16 of the PRC Arbitration Law, a valid arbitration agreement must include a designated arbitration commission. Under Article 10, such arbitration commissions must be established by government authorities. Therefore, it is implied that only institutional arbitrations through authorized Chinese arbitration commissions are recognized in China.

As mentioned, CIETAC and all the local arbitration commissions currently require arbitrators to be selected from their respective panels of arbitrators.

Both the PRC Arbitration Law and the CIETAC Arbitration Rules are silent as to whether parties are entitled to agree on the nationalities or other attributes of arbitrators to be appointed. CIETAC officials have suggested that, in line with principles of party autonomy, parties to CIETAC arbitrations are free to agree on the nationalities of arbitrators, and in its practice for many years CIETAC has respected such agreement of the parties. By analogy, the parties should also be free, for example, to stipulate that the arbitrators ought to have a certain specialized knowledge or experience.

Both the PRC Arbitration Law and the CIETAC Rules lay down provisions concerning how arbitrators are to be selected. In normal cases not involving summary procedures (CIETAC and other arbitration commissions have special rules concerning cases subject to summary procedure based on, for example, the size of the claims), where there is one claimant and one respondent and no agreement for a sole arbitrator, each party shall appoint an arbitrator and the presiding arbitrator shall be appointed by agreement of the parties or by the chairman of the arbitration commission. Where the parties fail to decide upon the composition of the tribunal or fail to choose an arbitrator within the prescribed time limit, the chairman of the arbitration commission shall also make that choice.

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4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

As indicated above, generally speaking, the chairman of the arbitration commission shall make a decision where the parties fail to decide upon the composition of the arbitral tribunal or fail to choose an arbitrator within the prescribed time limit.

It is unclear whether the parties are entitled to add to or vary the selection procedure for arbitrators laid down in the PRC Arbitration law and the CIETAC Rules. It is submitted that the parties are free to do so provided they do not contradict the said rules. According to this theory, parties would be free, for example, to stipulate that a designated outside party should decide the identity of the presiding arbitrator and such decision shall be deemed to be the decision of the parties. However, it would appear that the parties would not be entitled to contradict the rules by, for example, ousting the default power of appointment vested in the chairman of the arbitration commission.

4.3 Can a court intervene in the selection of arbitrators? If so, how?

There are no provisions in the PRC Arbitration Law or in any other legislation in China allowing a court to intervene in the selection of arbitrators. A court may, however, refuse to enforce an arbitration award where the arbitral tribunal was not properly constituted (see *post*, paragraph 10.2).

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Article 34 of the Arbitration Law provides that an arbitrator must withdraw from the tribunal if

- the arbitrator is a party in the case or a close relative of a party in the case or its agent;
- the arbitrator has a personal interest in the case;
- the arbitrator has some other relationship with a party or its agent that may affect their ability to act fairly; or
- the arbitrator has privately met with a party or its agent, or has accepted gifts or an invitation to entertainment from the party or agent.

Article 28 of the CIETAC Rules provides that any appointed arbitrator having a personal interest in the case must disclose such interest to the arbitration commission and request to be withdrawn from their office.

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in your country? If so, do those laws or rules apply to all arbitral proceeding sited in your country?

In general, interim measures can be divided into two categories: interim property protection measures and interim evidence protection measures. The power to grant such protection measures is vested in the courts (see Articles 28, 46 and 68 of the PRC Arbitration Law).

The interim measures designed to protect property available under the Civil Procedure Law are attachment, sequestration, freezing, sealing up and provision of security. Under Article 28 of the Arbitration Law (which applies to both domestic and foreign-related arbitrations), a party may apply to the arbitration commission for interim property protection measures, following which, the arbitration commission shall, according to the relevant provisions of the Civil Code, submit the application to court (see also Article 23 of the CIETAC Arbitration Rules).

Article 46 of the Arbitration Law governs preservation of evidence in domestic arbitrations, while Article 68 governs preservation of evidence in foreign-related arbitrations. In domestic arbitrations, the application should be submitted via the arbitration commission to the local-level court where the evidence is located. In foreign-related arbitration cases, the application should be submitted via the arbitration commission to the Intermediate People's Court where the evidence is located.

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

The Arbitration Law sets out some procedural steps that the parties must follow when commencing arbitration proceedings.

Before any person can apply to initiate arbitration, there must be a valid arbitration agreement and a specific arbitration claim (Article 21 of the PRC Arbitration Law). Such application must be within the authority of the chosen arbitration commission.

A claimant must submit the written arbitration agreement and a written application for arbitration to the appropriate arbitration commission (Article 22 of the PRC Arbitration Law). The claimant must also provide sufficient copies of the written arbitration agreement and the application as stipulated by the rules of the relevant arbitration commission.

The written application for arbitration shall contain the following particulars (Article 23 of the PRC Arbitration Law):

- the party's name, sex, age, occupation, work unit and address, and in the case of a legal person, its name and domicile and the names and positions of its legal representatives or principal leading members;
- the claim and the facts and reasons on which the claim is based; and
- evidence and source of evidence and names and address of witnesses.

Pursuant to Article 24 of the PRC Arbitration Law, if the arbitration commission accepts an application for arbitration, it is obliged to notify the claimant of its decision within five days from the date of receipt of the application. If the arbitration commission considers that the application does not comply with the requirements and should be rejected, it shall inform the claimant of its decision and state the reason for rejection in writing within five days from the day of receipt. However, in practice, this provision is not rigidly followed by the arbitration commissions.

The arbitration commissions normally give parties the opportunity to amend and/or supplement their applications if some formal requirements are not met. For example, both the CIETAC Rules and the Arbitration Rules of the Beijing Arbitration Commission allow such amendment and/or supplementation, while not mentioning the five-day limit for rejections.

If the arbitration commission accepts the application,

it shall, within the time limit prescribed in its arbitration rules, deliver copies of its arbitration rules and its list of arbitrators to the claimant and to the respondent together with a copy of the application.

The respondent shall submit a written defense to the arbitration commission within the time limit specified in the arbitration rules of the arbitration commission (Article 25 of the PRC Arbitration Law). Upon receipt of the respondent's defense, the arbitration commission shall serve a copy of this on the claimant within the time limit specified in the rules of arbitration.

Article 27 provides that the claimant may amend its arbitration claim, and the respondent may acknowledge or refute the claim and shall have the right to raise a counterclaim.

5.3 Are there any rules that govern the conduct of an arbitration hearing?

Like the arbitration codes in most countries, the PRC Arbitration Law does not set out detailed rules governing the conduct of an arbitration hearing.

However, the arbitration commissions will have more detailed rules in this regard. For example, the CIETAC Arbitration Rules contain, among others, the following provisions governing the conduct of an arbitration hearing:

Article 32: The arbitration tribunal will hold oral hearing(s). Hearings may be dispensed with if the arbitration tribunal considers these unnecessary and the parties consent thereto. For cases subject to summary procedure, the tribunal may decide not to hold a hearing (see Article 67).

Article 39: The arbitration tribunal may consult an expert or appoint an appraiser for clarification of the specific issues relating to a case.

Article 40: The report of the expert or appraiser shall be copied to the parties for comments and if the arbitration tribunal considers it necessary and appropriate, the expert or appraiser shall attend the hearing to explain their report at the request of the parties.

Article 42: If one party fails to attend the hearing, the arbitration tribunal may make an award in default.

Article 43: The arbitration tribunal may make a record in writing and/or by tape-recording during the hearing. It may also make a minute summarising the main points raised in the hearing signed by the parties and/or their agents.

5.4 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

In general, the courts do not have jurisdiction to interfere with arbitration proceedings, but the courts may refuse to enforce an arbitral award in certain circumstances where there is procedural irregularity (see *post*, paragraph 10.2).

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Only the court has power to grant interim relief (see *ante*, paragraph 5.1).

The power to make interim or preliminary arbitral awards is expressly provided for in Article 55 of the PRC Arbitration Law. This provision provides that "[i]n arbitration proceedings, if a part of the facts involved has already become clear, the arbitration tribunal may first make an award in respect of such part of the facts."

Both partial and interlocutory awards are allowed under the CIETAC Arbitration Rules. Article 57 of the Rules provides that "an interlocutory or partial award may be made on any issue of the case at any time in the course of arbitration before the final award is made if considered necessary by the arbitration tribunal, or if the parties make such proposal and it is accepted by the arbitration tribunal."

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

As mentioned above, the court may grant interim measures of protection of property and interim measures of protection of evidence.

Such interim measures will only be granted if the following conditions are met:

- The applicant is a party to the arbitration.
- For interim protection of property - "if it may become impossible or difficult to implement the award due to an act of the other party or other causes" (Article 28 of the PRC Arbitration Law).
- For interim protection of evidence – "… where the evidence may be lost or difficult to obtain at a later time" (Article 46 of the PRC Arbitration Law).
- The property proposed to be subject to the interim measures must be owned by a party to the arbitration.
- The value of the property proposed to be subject to the interim measures must not exceed the amount of claim.

As mentioned in paragraph 5.1, applications for the above interim measures should be made to the arbitration commission. In practice, however, applications sometimes are made directly to court without adversely affecting the jurisdiction of the arbitral tribunal.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Usually the court will require the applicant to provide security. Generally speaking, if an applicant fails to provide security, the court will reject the application.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

The main relevant provisions are set out in Articles 43 to 45 of the PRC Arbitration Law, which are applicable to both domestic and foreign-related arbitrations. Chinese law does not impose formal complex rules of evidence.

Article 43 requires the parties to "provide evidence in support of their own arguments." However, the arbitral tribunal may, if it considers it necessary, undertake investigations and collect evidence. Such investigations may include appointment of experts/auditors, site visits and inspection. This is similar to the court's power under

Article 64 of the Civil Code. Further, under Article 44 of the PRC Arbitration Law, an arbitral tribunal may, if it considers it necessary, submit a specialized issue for appraisal by an appraisal department as agreed by the parties or as designated by the arbitral tribunal. Parties may, with the permission of the arbitral tribunal, request the appraiser to attend the hearing and to answer questions.

Article 45 provides that "[e]vidence shall be provided during the hearings and may be examined by the parties."

More detailed rules of evidence are contained in the rules of the arbitration commissions. For example, Articles 39 and 40 of the CIETAC Arbitration Rules govern expert evidence (see *ante*, paragraph 5.3).

Chinese arbitral tribunals tend to attach more weight to written evidence.

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

There is no provision in the Arbitration Law or CIETAC Rules dealing with issue of disclosure/discovery. The concept of disclosure/discovery is foreign to the Chinese legal system.

In practice, the arbitration tribunal may, either by its own motion or at the request of a party, require the other party to produce evidence in support of its claim. Under Article 39 of the CIETAC Arbitration Rules, where the tribunal wishes to consult an expert or appoint an appraiser, the arbitration tribunal may "order the parties to submit to the expert or appraiser any relevant materials, documents, or properties and goods for check-up, inspection and/or appraisal…"

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

There is no provision in the PRC Arbitration Law or any other legislation allowing the court to intervene in matters of disclosure or discovery. However, the court may set aside an award in a domestic arbitration award if a party "has withheld evidence sufficient to affect the impartiality of the arbitration" or if the arbitration award is based on forged evidence (see Article 58 of the PRC Arbitration Law).

7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

As mentioned above, generally speaking, disclosure/discovery is not featured in arbitrations in China; although a party may request the other party to produce evidence in support of the latter's claim or defense (see *ante*, paragraph 7.2).

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

If the arbitral tribunal considers that it needs to consult an expert or appoint an appraiser, the expert or appraiser may be required to attend the hearing and may be questioned or be required to explain his report (Article 44 of the PRC Arbitration Law and Article 40 of the CIETAC Arbitration Rule).

There are no other formal rules concerning the production of a witness and/or oral testimony, except that, in practice, arbitrators in China will often not insist on formal oral witness testimony and cross-examination of witnesses is uncommon.

Under the PRC Law Concerning Lawyers, a lawyer is not permitted to submit false evidence, conceal facts or coerce or induce by corrupt means, another person to do so or to obstruct the other party in exercising its lawful right to obtain evidence.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

Under the PRC Arbitration Law, an arbitral award must comply with the following requirements:

- The Award shall be made in accordance with the opinion of the majority of the arbitrators. Where the arbitral tribunal cannot reach a majority opinion, the award shall be made in accordance with the opinion of the presiding arbitrator (Article 53 of the PRC Arbitration Law).
- The arbitration tribunal must state in the arbitral award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs, the date and the place at which the award is made. The facts of the dispute and the reasons may be omitted if parties so desire (Article 54 of the PRC Arbitration Law).
- The award must be signed by the arbitrators. Arbitrators who dissent may choose whether to sign the award or not (Article 54 of the PRC Arbitration Law).
- The arbitral award should be sealed by the relevant arbitration commission (Article 54 of the PRC Arbitration Law).

Under the CIETAC Arbitration Rules, an arbitral award must further comply with the following requirements:

- An arbitral award shall be made within 9 months from the date of formation of the tribunal. This time limit may however be extended by the Secretary-General at the request of the arbitration tribunal for justifiable reasons (Article 52 of the PRC Arbitration Law).
- Where the arbitration proceedings are conducted under summary procedure, the award must be made within 30 days of the oral hearing (or the second oral hearing if there are two) or within 90 days from the date of the formation of the arbitral tribunal if the arbitration proceedings are conducted based on written submissions only (Article 73 of the PRC Arbitration Law).
- The tribunal must submit its draft award to the Commission for scrutiny on procedural issues before it can sign the award (Article 56 of the PRC Arbitration Law).

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

The PRC Arbitration Law does not contain any provision allowing a party to appeal against an award. Apart from

resisting enforcement, if a party is not satisfied with an award, it may apply to set aside the award pursuant to Article 58 of the PRC Arbitration Law.

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? What is the relevant national legislation?

China is a signatory state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The Convention came into force in China on 22 April 1987. The accession was subject to both "commerciality" and "reciprocity" reservations.

China has given effect to the Convention by way of the following instruments:

1. Decision of the Standing Committee of the National People's Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1986).
2. Supreme People's Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987).

10.2 What is the approach of the national courts in your country towards the enforcement of arbitration awards in practice?

Enforcement of arbitral awards is governed by the PRC Arbitration Law, the Civil Procedure Law, the Civil Code as well as relevant Notices issued by the Supreme People's Court.

Parties are expected to comply with arbitral awards. However, if a party fails to comply with an award, the other party may apply to the court for enforcement, subject to any application by the losing party for setting aside the award.

Under the PRC Arbitration Law, an application to set aside an arbitral award must be made within six months after receipt of the award (Article 59 of the PRC Arbitration Law). An application to set aside an arbitral award will stay the performance of the award and any enforcement proceedings (see Article 64 of the PRC Arbitration Law). This six-month time limit to file an application to set aside an award applies to both domestic and foreign-related arbitration awards. However, the grounds for setting aside a domestic award and a foreign-related award are different.

Under Article 58, the grounds for setting aside domestic awards are:

- there is no arbitration agreement;
- matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration commission;
- the formation of the arbitration tribunal or the arbitration procedure did not conform to statutory procedure;
- evidence on which the award is based was forged;
- the other party withheld evidence sufficient to affect the fairness of the award;
- during the course of the proceedings, one or more of the arbitrators demanded and/or accepted bribes, practiced graft or made an award that perverted the law; or
- the award would be against the public interest.

Under Article 70 of the PRC Arbitration Law and Article 260 of the Civil Procedure Law, the grounds for setting aside foreign-related arbitral awards are:

- the parties have neither included an arbitration clause in their contract nor subsequently concluded a written arbitration agreement;
- the party against whom the application is made was not notified to appoint an arbitrator or to take part in the arbitration proceedings or the said party was unable to present his case due to reasons for which he is not responsible;
- the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration;
- the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution; or
- the award would be against the public interest.

Pursuant to Article 61 of the PRC Arbitration Law, upon receipt of an application to set aside an award, the court may (if it considers it necessary) notify the arbitral tribunal to re-arbitrate the dispute. In that case, the setting aside proceedings shall be stayed. If the arbitration tribunal refuses to re-arbitrate the case, the court shall then proceed with the application to set aside the award.

The attitude of the court to enforcement of foreign-related arbitral awards is embodied in a notice issued by the Supreme Court on 28 August 1995 (see Notice of the Supreme People's Court on Relevant Issues in dealing with Foreign-related awards and Foreign Awards (Fa Fa [1995] No. 18) issued on 28 August 1995). Pursuant to such notice, if the first instance court (the relevant Intermediate People's Court) decides not to enforce a foreign-related award, it must refer that decision to the court above it, and finally to the Supreme People's Court for approval. A decision to set aside a foreign-related arbitral award must be reported to and approved by the Supreme People's Court (see Notice of the Supreme People's Court on Relevant Issues in the Setting Aside of Foreign-related Arbitral Awards by People's Courts (Fa [1998] No. 40) issued on 23 April 1998). Without the consent from the Supreme Court, no lower court is entitled not to enforce a foreign-related award.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

Article 40 of the PRC Arbitration Law specifies that arbitration shall be conducted *in camera* unless the parties agree otherwise.

Article 37 of the CIETAC Arbitration Rules provides that, in closed session arbitration hearings, all the participants in the arbitration, including the parties and their agents, the arbitrators, clerks, interpreters, experts and appraisers, shall not disclose to outsiders the substantive and procedural matters of the case.

In the CIETAC *Code of Ethics for Arbitrators*, it is provided that arbitrators shall strictly maintain the confidentiality of arbitration proceedings. They may not divulge to

outsiders any circumstances regarding the substance and procedure of a case, including the case details, hearing proceedings, and the outcome of deliberations (Article 13 of the CIETAC Code of Ethics for Arbitrators).

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

There appears to be no express prohibition in this regard. Given that confidentiality is an important characteristic of arbitration, it is arguable that information obtained in arbitral proceedings should not be referred to and/or relied on in subsequent proceedings especially if these involve different parties.

Under the CIETAC Arbitration Rules, conciliation may be conducted by the arbitral tribunal in the course of the arbitration. In this case, Article 50 of the Rules provides that, should conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in subsequent arbitration proceedings, judicial proceedings or any other proceedings.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

See paragraph 11.1.

12 Damages/interests/costs

12.1 Are there limits on the types of damages that are available in arbitration (E.g., punitive damages) ?

Generally speaking, under Chinese law, damages are meant to compensate actual or anticipated loss. Liquidated damages will be awarded if they are reasonable. Punitive damages generally are not available under Chinese law.

12.2 What, if any, interest is available?

There are no express rules in this regard. In practice, an arbitration tribunal would grant interest as part of compensation for loss suffered if it considers this appropriate.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

In practice, the rule "costs follow the event" — i.e. the losing party will pay costs (including arbitration fees) of the successful party — is generally followed, although the tribunal retains discretion to apportion fees and costs depending on conduct of the parties and the outcome of the arbitration.

For CIETAC arbitrations, Article 59 of the CIETAC Rules provides that compensation for expenses reasonably incurred by the winning party in dealing with the case should not exceed 10% of the total amount awarded to the winning party.

While legal costs and expenses must be specifically included in the claim, the arbitration tribunal has the discretion to order that the arbitration fee be borne fully or partly by either party (see Article 54 of the Arbitration Law and Article 58 of the CIETAC Arbitration Rules).

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Generally speaking, arbitral awards are not subject to PRC tax.

13 General

13.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain disputes commonly being referred to arbitration?

Increase in use of arbitration

In 1985, CIETAC handled 37 arbitration cases. In 2003, the number of cases handled was 709, roughly equal to the caseloads in 2001 and 2002. Some of the local arbitration commissions have also seen huge increases in the number of cases handled. The Beijing Arbitration Commission, for example, handled 666 cases in 2001 (see J Tan "A Look at CIETAC: Is it Fair and Efficient" China Law & Practice, April 2003).

Types of dispute

International commercial arbitration is common in China. A large proportion of commercial contracts (especially sale of goods contracts and investment contracts signed between Chinese and foreign parties) have arbitration clauses. Investment protection agreements signed by China and foreign governments also provide for arbitration for resolving disputes. Arbitration is also being increasingly used as a means for dispute resolution in the construction, shipping, insurance and securities industries.

13.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

Generally speaking, the Chinese government and judiciary have adopted a supportive attitude to arbitration.

While there have been sporadic criticisms about the fairness of CIETAC arbitrations *vis a vis* foreign parties in particular, the views advanced by many of the critics are not supported by a survey of American companies in Beijing by the American Chamber of Commerce in Beijing (available at www.AmCham-China.org.cn) as well as the statistics given by Mr. Wang Sheng Chang on the outcome of arbitral awards rendered by CIETAC arbitral tribunals in the headquarters in Beijing (see *ante*, paragraph 4.1). According to such statistics, in 2001, half of the concluded cases (i.e. excluding cases settled by mediation, withdrawn and pending) were won by Chinese parties and half by foreign parties. In 2002, around 61% of the concluded cases were won by foreign parties, and 39% by Chinese parties.

There have also been criticisms concerning enforcement of arbitral awards in China, but as mentioned, the Supreme People's Court has reserved exclusively to itself the power to set aside or refuse to enforce a foreign-related arbitral award. Further, many critics in this regard have failed to distinguish between refusal of enforcement and other difficulties in enforcement. In China, as well as in any other country in the world, by far the most common reasons for failure to obtain any payment

following a judgment or arbitral award are that the losing party lacks the means to pay, has no or reachable assets within the relevant jurisdiction, or the winning party does not know where the assets of the losing party are located.

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