



Arbitration

in 50 jurisdictions worldwide

2010

Contributing editors: Gerhard Wegen and Stephan Wilske



Published by
Global Arbitration Review
in association with:

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Arbitration 2010

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Arbitration 2010

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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2010

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ISSN 1750-9947

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Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

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China

Brenda Horrigan, Felix Hess and Jeff Xu

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Laws and Institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The People's Republic of China ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 22 January 1987. It only applies to recognition and enforcement of awards made in the territory of another contracting state and to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

2 Bilateral treaties

Do bilateral treaties relating to arbitration exist with other countries?

Mainland China has bilateral agreements on reciprocal recognition and enforcement of arbitration awards with Hong Kong (2001) and Macau (2007).

In addition, the PRC is currently party to 122 bilateral treaties (92 ratified and effective) on the reciprocal promotion and protection of investments (BIT), including Belgium and Luxembourg (2005, not yet in effect), France (1984), Germany (2003), Netherlands (2001), Russia (2006, not yet in effect), Singapore (1985), Spain (2008), Switzerland (1986) and the United Kingdom (1986) and many developing countries in Africa, Asia, the CIS and the Middle East.

The protections offered by the majority of these BITs are limited by the fact that such BITs only refer to arbitration 'disputes related to the amount of compensation in the event of expropriation', and refer the threshold question of determination of whether an expropriation has occurred to domestic courts. A few of the newer Chinese BITs (such as the BITs concluded by the PRC with Germany, the Netherlands and the Czech Republic) are more favourable in that they provide that any 'investment-related' dispute (as defined in the bilateral treaty) can be referred to arbitration, usually before ICSID or ad hoc under the UNCITRAL rules.

The list of bilateral treaties to which the PRC is party can be consulted at www.unctadxi.org/templates/docsearch_779.aspx.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic sources of law relating to domestic and foreign arbitral proceedings and recognition and enforcement of awards within the PRC are:

- the Arbitration Law of China, 1 September 1994;

- the Supreme Court Interpretation of the Arbitration Law, 8 September 2006; and
- the Civil Procedure Law, 28 October 2007.

Chinese Arbitration Law distinguishes between 'domestic' and 'foreign' related disputes. Pursuant to two interpretations issued by the Supreme Court of China in 1988 and 1992, a 'foreign' element will exist where the dispute meets one of the following criteria:

- the contract is one to which one of the parties is 'foreign'. A company legally registered in China is never considered 'foreign', regardless of whether it is a joint venture or a company owned exclusively by non-Chinese shareholders. Accordingly, a dispute between two companies registered in China will be considered as a 'domestic' dispute, not as a dispute involving a 'foreign element';
- the object of the contract is pursued or located entirely or primarily outside China. The question of location of the object of the contract is one that will be assessed by the Chinese courts, which will determine whether the relationship between the parties to the contract should be reclassified if the main object of the contract is linked to the Chinese territory; or
- the contract relates to the 'occurrence, modification or expiry of civil rights or obligations outside China'. The meaning or concrete scope of this third criterion is not clear. Nonetheless, the mere fact that a contract is signed or terminated abroad does mean per se that a 'foreign element' is involved.

If there is a doubt as to whether the criteria are met, it is advisable to proceed on the assumption that the transaction is 'domestic' and that selection of a seat of arbitration in China is necessary.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

PRC arbitration law is not based on the UNCITRAL Model Law. Unlike the UNCITRAL Model Law, the Chinese arbitration law does not endeavour to recognise the parties' contractual freedom to solve their disputes, but rather aims to protect the 'legitimate rights and interests of the parties and to safeguard the development of the socialist market economy'.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Chinese law imposes a number of mandatory requirements in relation to arbitration procedures. As regards the arbitration agreement, there must be a written arbitration agreement between the parties and the parties must specify the name of an arbitral institution. Consequently,

ad hoc arbitration is not allowed under Chinese law (see question 9). As regards the arbitrators, they must satisfy certain requirements (see question 15).

6 Substantive law

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 Arbitration Law itself does not provide any guidance as to which substantive law shall be applied to the merits of the dispute.

If a transaction involves a foreign element and is not in one of the categories for which mandatory rules on application of Chinese law apply, the parties are free to agree on the law applicable to the transaction (and the dispute). This principle is specifically recognised by the PRC Contract Law, and also under the Beijing Arbitration Commission (BAC) rules.

Mandatory Chinese law requires, however, that certain categories of transactions (and, correspondingly, disputes arising in connection therewith) must be subject to Chinese law. First, all domestic transactions must be governed by Chinese law. Second, even where a transaction involves a foreign element, it must be governed by Chinese law if it involves a joint venture contract (whether for an equity joint venture or contractual joint venture), a contract for the exploitation and exploration of natural resources in China, purchase by a foreign party of equity in or subscription to the capital increase of a domestic enterprise, or a foreign party management contract in a sino-foreign JV.

In the absence of an agreed choice of law, the arbitral tribunal will apply the rules on conflict of laws provided by Chinese law. These rules leave considerable room for interpretation and in the absence of specific guidance the merits of the dispute would be decided according to the law with which the respective subject matter has the closest connection. Irrespective of the applicable law, the arbitral tribunal is to decide the case in accordance with the terms of the valid agreement and take into account relevant international trade usage.

7 Arbitral institutions

What are the most prominent arbitral institutions in your country?

The two arbitral institutions in China that have particular international experience are the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC). The Shanghai Arbitration Commission (SAC) is also attempting to make inroads in this market, but to date has less involvement than CIETAC and BAC.

CIETAC is one of the earliest established arbitral institutions and also arguably the most influential.

CIETAC

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www.cietac.org

The arbitration rules of CIETAC can be read at www.cietac.org.

Arbitrators' fees are calculated based on the amount of the claim. According to the 2005 fee schedule, a dispute before CIETAC involving a claim of 50 million renminbi would result in a total fee of approximately 620,000 renminbi (including registration fees of 10,000 renminbi) for a typical three-arbitrator panel.

BAC has been actively promoting itself as an attractive venue for cases directly or indirectly involving foreign capital.

BAC

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www.bjac.org.cn/en/index.asp

The arbitration rules of BAC can be read at www.bjac.org.cn/en/arbitration/index.html.

BAC charges case acceptance fees and handling fees that are calculated based on the amount of the claim. According to the 2004 fee schedule, a dispute of 50 million renminbi would result in a total fee of 287,550 renminbi for a typical three-arbitrator panel. A fee calculator is available online at www.bjac.org.cn/en/arbitration/fees.htm.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The following civil disputes may not be arbitrated pursuant to the Arbitration Law:

- marital, adoption, guardianship, fosterage and succession disputes; and
- administrative disputes that must be handled by administrative authorities according to the law. Specific procedures and arbitration commissions exist for employment disputes.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing. Additionally, the arbitration agreement must clearly designate the arbitration institution to which the dispute is to be submitted; ad hoc arbitration is not permitted under Chinese law. It remains unclear whether the parties can designate a foreign arbitral institution for this purpose for a dispute seated in China, but the prevailing view is that it is safer to designate an institution with a physical presence within China. Failure to designate an institution will result in invalidation of the arbitration agreement unless the parties can reach a supplementary agreement or unless selection of an arbitral institution can be inferred from the circumstances. For example, if the name of the arbitral institution is incorrect but the institution can still be identified, that choice will usually be given effect. Similarly, if the arbitration agreement stipulates that the parties will submit their dispute to arbitration in a locality without mentioning which institution, an institution may be inferred if there is only one (or sometimes two) institution in that place, whereas that inference may not be possible if there are several institutions in that locality.

Arbitration clauses that provide for a choice between litigation or arbitration (whether by one party, or by both), or for a choice between institutions depending upon which party initiates the arbitration, are not generally considered valid in China.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements exist independently of the underlying contract, and the alteration, rescission, termination or invalidity of that underlying contract does not affect the effectiveness of the arbitration agreement. An arbitration agreement may be terminated by joint decision of the parties, and if a party loses its legal capacity, the arbitration agreement will no longer be enforceable.

11 Third parties

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under Chinese law, parties must agree to an arbitration agreement or an arbitration clause in their agreement for it to be effective, and thus as a general rule only those parties that have expressly consented to arbitration will be bound by it. There are a limited number of exceptions to this, namely for circumstances explicitly addressed in the Chinese arbitration law and in the Interpretation of the Supreme Court referred to in question 3.

- Where two or more legal entities merge, the merged entity will be bound by the arbitration agreements entered into by any of its predecessors. The same principle applies in the case of a spin-off;
- if claims or debts are transferred or assigned in whole or in part, the arbitration agreement related thereto will be binding on the transferee or assignee unless otherwise provided by the parties or unless, at the time of acquiring the claims, debts, or both, the transferee expressly objects to or is unaware of the existence of a separate arbitration agreement;
- if an individual has concluded an arbitration agreement and dies after its conclusion, the arbitration agreement will bind the beneficiary who succeeds to his rights and obligations in the arbitrable matters; and
- if a legal entity changes its legal form or name, the newly created or named entity will be bound by the arbitration agreements entered into by the former entity.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration such as joinder or third-party notice?

Chinese law is silent on third-party participation in arbitration such as joinder or third-party notice. Generally only the parties to the respective arbitration agreement will be parties of the arbitration; for example, in an arbitration between seller and end-user, the seller may only bring the manufacturer into the arbitration if the parties have concluded a tripartite contract with an arbitration clause. If the relationship between seller and manufacturer on the one hand and seller and manufacturer on the other are based on two separate contracts, the dispute must be tried in two separate arbitrations with potentially different outcomes. Third-party rights are to some extent protected during the enforcement stage of an arbitral award when a third party may petition to the court enforcing the arbitration award to suspend the enforcement if the enforcement of the arbitration award infringes his legitimate rights.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not known under Chinese law. For the same reasons as described under question 11, a party that has not explicitly entered into an arbitration agreement is unlikely to be bound by it.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no specific requirements for a valid multiparty arbitration agreement. Parties should follow the procedure stated in the applicable arbitration rules.

The CIETAC rules provide specifically that where there are two or more claimants or respondents in an arbitration case, the claimant side or the respondent side shall jointly appoint or jointly entrust the chairman of CIETAC to appoint one arbitrator from CIETAC's panel of arbitrators. In the event of failure to do so within 15 days from the date of receipt of the notice of arbitration, the arbitrator shall be appointed by the chairman of CIETAC. The presiding arbitrator would then be appointed following the procedure described in question 16. The BAC rules contain similar provisions.

Constitution of arbitral tribunal**15 Appointment of arbitrators – restrictions**

Are there any restrictions as to who may act as an arbitrator?

An arbitrator must:

- have been engaged in arbitration work or working as a lawyer or served as a judge for up to eight years;
- have been engaged in legal research or education and held a senior position and title; or
- possess legal knowledge, have engaged in professional work such as economic relations and trade, etc, and hold a senior post and title or meet equivalent professional standards.

Under the CIETAC rules, parties may choose arbitrators from one of the panels of arbitrators chosen by CIETAC based on these criteria or outside the panel, provided the arbitrator chosen by the parties fulfils any of the conditions mentioned above and subject to the confirmation of its appointment by the chairman of CIETAC. The BAC rules provide that arbitrators for domestic arbitrations must be chosen from the panel of arbitrators maintained by BAC, but permit the parties to go outside the BAC panel for arbitrations with a 'foreign element'.

16 Appointment of arbitrators – default mechanism

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The default mechanism for appointment of arbitrators is similar under the CIETAC or BAC rules:

Within 15 days from the date of receipt of the notice of arbitration, the claimant and the respondent are each to appoint one arbitrator or entrust the chairman of CIETAC or BAC to make such appointment. Failing such, the arbitrator will be appointed by the chairman of CIETAC or BAC.

Within 15 days from the receipt of the notice of arbitration, the presiding arbitrator is to be jointly appointed by the parties or appointed by the chairman of CIETAC or BAC upon the parties' joint authorisation.

The parties may each recommend one to three arbitrators as candidates for the post of presiding arbitrator and are to submit the list of recommended candidates to the arbitration institution within the time specified above. Where there is only one common candidate in the lists, such candidate will be the presiding arbitrator jointly appointed by the parties. Where there is more than one common candidate in the lists, the chairman of CIETAC or BAC will choose a presiding arbitrator from among the common candidates, based on the specific nature and circumstances of the case, who will act as the presiding arbitrator jointly appointed by the parties. Where there is no common candidate in the lists, the presiding arbitrator is to be appointed by the chairman of CIETAC or BAC from outside of the lists of recommended candidates.

If the parties fail to jointly appoint the presiding arbitrator according to the above provisions, the presiding arbitrator is to be appointed by the chairman of CIETAC or BAC.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced?

Under the BAC rules, parties may challenge an arbitrator in any of the following circumstances:

- the arbitrator is a party to the arbitration, or a close relative of any party or any party's authorised representatives;
- the arbitrator has personal interests in the dispute;
- the arbitrator has any other relationships with any party or its authorised representatives that may affect the arbitrator's impartiality; or
- the arbitrator met with any party or its authorised representatives in private, or accepted from any party or its authorised representatives offers of entertainment or gift.

The CIETAC rules are more general in the sense that they simply refer to circumstances that raise a doubt as to the impartiality or independence of an arbitrator without providing a list of examples.

Under both sets of rules, an arbitrator is to be replaced if the arbitrator becomes unable to conduct the arbitration as a result of death or illness, withdraws from the arbitration due to personal reasons, is ordered to withdraw from the arbitration by the chairman or is requested by both parties to withdraw from the arbitration. An arbitrator may also be replaced on the institution's initiative if the institution decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling his or her functions as an arbitrator, or is not fulfilling necessary functions in accordance with the rules.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators?

An arbitrator cannot be a party to the dispute submitted to arbitration nor a close relative of a party or agent to such dispute. More generally, an arbitrator must not entertain a relationship with any party or agent in such dispute that may have an impact on the impartiality of the arbitration. Similarly, an arbitrator cannot privately meet a party or its agent nor accept an invitation or gift from such party or agent.

An arbitrator who has 'demanded or accepted bribes, practised graft or made an award that perverted the law' or privately met a party or its agent in the case submitted to arbitration or accepted an invitation or gift from such party or agent shall assume legal liability according to law and the arbitration commission shall remove his or her name from the list of arbitrators.

Notwithstanding clear indications in both the CIETAC and BAC rules concerning arbitrator impartiality and a similar requirement in the Arbitration Law, in practice it is not uncommon in arbitrations seated in China to notice more familiarity between arbitrators and the parties appointing them than one would find in some other jurisdictions.

Jurisdiction**19 Court proceedings despite arbitration agreement**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

In the event that court proceedings are initiated despite an existing arbitration agreement, parties to the dispute may file a jurisdictional objection to the court hearing the case.

For civil law suits filed to Chinese courts, a jurisdictional objection based on the existence of an arbitration agreement can be filed before the first hearing of the case. Usually, the first hearing is scheduled sometime between a few days to a few weeks after the court acceptance of the case.

Failure to file a jurisdictional objection within this period

will result in deemed acceptance of the court's jurisdiction by the parties.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Where arbitral proceedings have been initiated, any jurisdictional objection may be filed with either the competent Chinese court or with the administering arbitral institution. If duplicate objections are filed by different parties, the one filed with the court would prevail. A challenge filed with CIETAC will be finally decided by the chairman of CIETAC (who may or may not give reasons for the decision). A challenge filed with BAC will be finally settled by the chairman of BAC.

The CIETAC rules require a challenge to be made in writing within 15 days from the date of receipt by the challenging party of the notice of formation of the arbitral tribunal. The BAC rules simply require that a jurisdictional challenge be raised before the first hearing in the case.

The CIETAC rules additionally provide that an arbitrator who has been challenged is to continue to fulfil his or her functions as arbitrator until a decision on the challenge has been made by the chairman of CIETAC.

Arbitral proceedings**21 Place and language of arbitration**

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under both the CIETAC and BAC arbitration rules, the place of arbitration shall be in Beijing, China and the language of arbitration proceedings shall be Chinese unless the parties have agreed otherwise. If a CIETAC sub-commission is specifically identified in the arbitration agreement, then the place of arbitration will be in the locality of that sub-commission.

22 Commencement of arbitration

How are arbitral proceedings initiated?

Under both sets of rules, the claimant must submit a request for arbitration in writing signed by or affixed with the seal of the claimant or its authorised representatives, which shall include, *inter alia*: the names and addresses of the claimant and the respondent, including the postal code, telephone, telex, fax and telegraph numbers, e-mail addresses or any other means of electronic telecommunications; a reference to the arbitration agreement that is invoked; the claims and the facts and grounds on which the claims are based; the facts and grounds on which the claim is based (and attaching relevant evidence supporting the facts on which the claimant's claim is based); and under the BAC rules, proof of the claimant's identity.

In advance of submission of the request, the claimant should also make payment of the arbitration fee to CIETAC or BAC in accordance with their respective arbitration fee schedule.

23 Hearing

Is a hearing required and what rules apply?

Both the BAC and CIETAC rules require that a hearing be held to examine the case. A hearing can be waived under both the CIETAC and BAC rules with the agreement of the parties and the tribunal. The arbitral tribunal must notify the parties of the date of the first hearing at least 10 (BAC) or 20 (CIETAC) days in advance of the oral hearing date. CIETAC also accommodates hearing by video

conference, provided the parties agree to opt for the ‘online arbitration procedure’.

24 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Both sets of rules specify that each party has the burden of proving the facts relied upon to support its case, and both sets of rules give the arbitral tribunal the power to require the parties to produce their evidence within a specified time period. Under both sets of rules, the arbitral tribunal may, at its own initiative, undertake investigations or collect evidence as it considers necessary, consult or appoint experts and appraisers, and require the parties to deliver or produce to the expert or appraiser any materials, documents or the like in the context of the appraisal or expertise.

Pursuant to the BAC rules, a reproduction, photograph, duplicate copy and abridged version of a document or thing shall be deemed identical to the original document or thing unless the other party challenges its authenticity. A similar approach is taken within CIETAC, although not specifically elaborated in the CIETAC rules. This flexibility is important, since civil procedure rules within the PRC impose many more constraints on the parties in domestic court proceedings (including with respect to production of original copies, certified and notarised copies, and the like).

25 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The arbitral tribunal will most likely request assistance from local courts in matters such as preservation of evidence and properties, enforcement of arbitration award, and similar issues.

Under the CIETAC or BAC rules, when any party applies for the preservation of property, the arbitral institution is to forward the party’s application for a ruling to the competent court at the place where the domicile of the party against whom the preservation of property is sought is located or where the property of such party is located (see question 27).

When a party applies for the protection of evidence, the arbitral institution shall forward the party’s application for a ruling to the competent court at the place where the evidence is located.

Finally, the courts may also intervene in the case of a dispute over jurisdiction of the arbitral tribunal (see question 20).

26 Confidentiality

Is confidentiality ensured?

Arbitration hearings are to be conducted in private, unless both parties agree otherwise. Under CIETAC rules, hearings are to be held in camera. Arbitrations involving state secrets shall be conducted in private in any event. Where an arbitration is conducted in private, the parties, their authorised representatives, witnesses, arbitrators, experts consulted by the arbitral tribunal, appraisers appointed by the arbitral tribunal and staff of the arbitration commission are required to not disclose to third parties any matter concerning the arbitration, whether substantive or procedural.

Interim measures

27 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Interim measures in China are exclusively ordered by the Chinese People’s Courts.

Preservation is carried out by the courts by sealing up, seizing or freezing the property. The People’s Court may order the applicant to provide security as a condition of accepting the application. In urgent cases the ruling has to be rendered within 48 hours and implemented immediately.

Application for property preservation is possible even before filing of the arbitration request, if the lawful rights and interests of an interested party would be irreparably harmed if it did not immediately apply for preservation of property. The ruling has to be rendered within 48 hours, the applicant has to provide security and must file the arbitration request within 15 days after the People’s Court has adopted the preservation measures (30 days in cases involving foreign parties). If such conditions are not met, the court will lift the property preservation measures.

If the person who is subject to the property preservation measures provides security, the court will lift the preservation measures. If it turns out that an application was made wrongfully, the applicant shall compensate the other party for damages caused by the preservation measures.

The parties can also apply for preservation of evidence if there is a risk that the evidence may be destroyed, lost or subsequently inaccessible. If the arbitration commission receives such an application, it is to submit that application to the competent People’s Court for resolution.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Interim measures are exclusively ordered by the Chinese People’s Courts (see question 27).

Awards

29 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences if an arbitrator refuses to take part in a vote or sign the award?

If the seat of arbitration is in China, arbitral awards are made by a majority of the arbitrators. A unanimous vote is not required. Arbitrators with dissenting opinions may or may not sign the award.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Under CIETAC rules, the arbitration award shall be issued in accordance with the majority opinion, and the dissenting opinion shall be docketed into the file and may be attached to the award, but shall not form a part of the award. The BAC rules also contain similar provisions. The dissenting opinions do not affect the enforceability of the arbitration award, but only serve as reference.

31 Form and content requirements

What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

CIETAC and BAC rules provide that the arbitral tribunal shall render the award within six and four months respectively after the tribunal is formed.

32 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The award becomes effective and legally binding on the day it is made. If there are typographical errors in the award or the written award omits certain matters covered by the oral award, the parties can apply for correction within 30 days after receipt of the award. A party can apply for cessation of the award within six months after receipt of the award.

33 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Besides the final award, the arbitral tribunal of proceedings with their seat in the PRC may grant an interim award ascertaining part or all of the facts of the case. According to the CIETAC rules and BAC rules, the arbitral tribunal can also make interim or partial awards on any disputed issue if necessary or upon request of one of the parties. Furthermore, the arbitral tribunal can recognise settlement agreements between the parties. This can be done either in the form of an arbitral award reflecting the contents of the settlement or in the form of a written mediation statement. The written mediation statement must specify the arbitration claim and the contents of the settlement agreement between the parties.

A dispute over the effectiveness of the arbitration agreement would be submitted to and decided by the People's Courts.

34 Termination of proceedings

By what other means than an award can proceedings be terminated?

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

35 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The costs of the arbitration are, in principle, to be borne by the losing party. If the parties are only partially successful, the costs are allocated according to the proportion of each party's responsibilities. There is no legal guidance concerning the expense categories to be reimbursed. Administrative fees (including fees engaged for obtaining interim measures), arbitrators' fees and expenses, cost for expert witnesses, legal fees and similar expenses are generally compensated up to a reasonable amount.

36 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded for principal claims. The interest rate depends on the law applicable to the claim raised in the arbitral proceedings (*lex causae*).

The decision of whether or not to grant interest on expenses is within the discretion of the arbitral tribunal, which is to apply a standard of reasonableness.

Proceedings subsequent to issuance of award**37 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Within 30 days from the receipt of the award, a party may apply for correction of clerical, typographical and calculation errors, as well as omission of decisions that have been included in the reasoning. If

entire claims have been omitted in the award, the parties can apply for a supplementary award. The arbitral tribunal can also correct errors on its own initiative within a reasonable time after the award was made.

The CIETAC rules further prescribe that such corrections or supplementary awards shall be made within 30 days from the request of the party.

38 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Within six months after receiving the arbitration award a party can apply to the Intermediate People's Court at the place where the arbitration commission is located to set an arbitration award aside if:

- there was no arbitration agreement;
- matters decided in the award fall beyond the scope of an arbitration agreement or the authority of an arbitration commission;
- the formation of the arbitral tribunal was in violation of statutory procedures;
- evidence on the basis of which the award was made was forged;
- the other party withheld evidence that would have been sufficient to affect the rendering of an impartial arbitration award;
- in the course of the arbitration, the arbitrators demanded or accepted bribes, practised graft or made an award that perverted the law; or
- the award is contrary to the public interest.

39 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There is one level of appeal. At the court of first instance domestic proceedings (proceedings without a foreign party) shall generally be completed within six months. The appellate court is to conclude the case within three months. However, these time limits do not apply if the dispute involves a foreign element.

40 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The practice and the attitude of Chinese courts towards enforcing an award varies from location to location. Whereas in many larger cities the People's Courts will generally look favourably upon enforcement of arbitral awards, in some smaller cities and localities enforcement actions can sometimes be delayed due to local protectionism.

In addition, the procedures and requirements, including standards of review, applied by the local courts to enforcement actions will differ, depending upon whether the arbitration award is domestic or foreign.

- For domestic awards, the People's Courts have the right to deny enforcement not only due to procedural reasons, but also based on the merits of the case, for example if the 'main evidence for ascertaining the facts was insufficient or the law was applied incorrectly', which gives rise to uncertainty as to the effectiveness of the award. This adds to the discretion of the People's Courts and can constitute a considerable risk factor for parties attempting to enforce domestic arbitral awards.
- Regarding foreign awards, since China is a member state to the New York Convention, arbitral awards made in one of the other 142 member states of the New York Convention are to be recognised and enforced in China. People's Courts may only refuse recognition and enforcement if:

- there was no arbitration agreement or the arbitration agreement was invalid;
- the party against whom the award is enforced had not sufficient chance to defend itself in the arbitral proceedings;
- matters decided in the award fall beyond the scope of an arbitration agreement or the authority of an arbitration commission;
- the formation of the arbitral tribunal was in violation of statutory procedures or the parties' agreement;
- the award has not become binding or has been set aside by a competent authority in the country where the award was made;
- the matter decided in the award is not capable of settlement by arbitration under the laws of China; or
- the recognition and enforcement of the award would be contrary to public policy of China.

41 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Generally Chinese courts will not enforce awards that have been set aside by competent courts in the country where the award was made, although there is no legal prohibition against doing so.

42 Cost of enforcement

What costs are incurred in enforcing awards?

The application fee payable to the People's Court for enforcing an arbitral award is 0.5 per cent of the enforceable amount if the enforceable amount is between 10,000 and 500,000 renminbi, and 0.1 per cent if the amount exceeds 500,000 renminbi. The detailed fee schedule is as follows:

Amount of claim	Amount of fee
10,000 RMB or less	50 RMB
10,001 RMB to 500,000 RMB	50 plus 1.5% of the amount above 10,000
500,001 RMB to 5 million RMB	7400 RMB plus 1% of the amount above 500,000 RMB
5,000,001 RMB to 10 million RMB	52,400 RMB plus 0.5% of the amount above 5 million RMB
10,000,001 RMB or more	77,400 RMB plus 0.1% of the amount above 10 million RMB

The legal fees for such enforcement would depend on the rates agreed with the legal counsel, and success fees are permissible.

Update and trends

Along with the dramatic increase in the number of China-related arbitrations being initiated in recent years has come a growing desire and drive within the major Chinese domestic arbitration institutions, as well as at the level of the Supreme People's Court, to bring Chinese arbitration and enforcement practices closer to international standards.

In addition, the procedural framework is steadily being improved as controversial issues are being clarified by Supreme People's Court's interpretations. Also the CIETAC Rules on Financial Dispute Arbitration in 2005 and the new CIETAC Online Arbitration Rules promulgated in 2009 show an ongoing effort to improve the regulatory framework.

Other

43 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In court proceedings before the Chinese People's Courts, if one of the parties challenges the authenticity of documentary evidence, documents produced in countries outside of China have to be presented in notarised and legalised form. This adds significantly to costs and efforts related to court proceedings of foreign parties in China. There are no such requirements in arbitration; however, some Chinese arbitrators may nevertheless be inclined to apply such requirements to arbitral proceedings.

There are no specific provisions or procedures for request for production of documents by one party from the opposing party in either domestic court proceedings or domestic arbitrations, and such requests to date remain rare in the arbitration context. Written witness statements are frequently seen, but are not as prevalent as in some other jurisdictions; additionally, there is generally less opportunity for examination of witnesses than one might find elsewhere.

44 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

As mentioned in this chapter, PRC legal and administrative systems present a large number of unique factors, and any individual or entity doing business in this jurisdiction should be particularly cautious, and seek advice from legal professionals with relevant experience.



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