The International Arbitration Review

Editor

James H Carter

Law Business Research

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The International Arbitration Review

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytic review of what has occurred in each of the important arbitration jurisdictions over the past 18 months, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Sullivan & Cromwell LLP
New York
June 2010

Chapter 5

CHINA

Brenda Horrigan, Felix Hess and Siew Lin Mok[*]

I INTRODUCTION

In recent years, there has been a fast and steady increase in the number of arbitration proceedings seated in China. According to Chinese statistics, more than 60,000 arbitration cases per year are filed with over 200 local arbitration commissions established in mainland China. By far the most important arbitration institution within the mainland is the China International Economic and Trade Arbitration Commission ('CIETAC'). The total value in dispute of proceedings filed with CIETAC in 2008 was some 20.9 billion renminbi. A total of 1482 arbitration cases (923 domestic and 559 foreign-related) were filed with CIETAC in 2009, making CIETAC the most active arbitral institution worldwide by number of published cases. Currently, the majority of foreign-related disputes seated in mainland China are submitted to CIETAC, with the Beijing Arbitration Commission ('BAC') being the second choice. The BAC has been actively promoting itself recently as an attractive venue for cases directly or indirectly involving foreign capital.

i Legal framework

The legal framework for arbitration seated in China is set out in the PRC Arbitration Law ('the Arbitration Law') supplemented, in some respects, by the PRC Civil Procedure Law as well as the arbitration rules published by CIETAC and other arbitration institutions. In recent years the legal environment has been gradually improving as some important

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questions were clarified and improved by People's Court interpretations and circulars[1] as well as the revision of the PRC Civil Procedure Law that took effect in April 2008.

ii Domestic and foreign-related disputes

Chinese arbitration law draws an important distinction between domestic disputes and foreign-related disputes (i.e. disputes with a 'foreign element'). This distinction can affect:

- the choice of the arbitration institution, which in case of a domestic dispute must be an institution registered in China;[2]
- the seat of the arbitration, which in case of a domestic dispute must be in China;[3]
- the amount of fees payable in CIETAC proceedings, as fee schedules are different for domestic and foreign-related arbitration; and
- most importantly, the grounds on which awards can be set aside or enforcement can be denied, which are much broader for domestic arbitrations than for arbitrations with a foreign element.

A dispute will have a 'foreign element' if (1) at least one party is foreign, (2) the subject matter of the contract is located in a foreign country, or (3) the act creating, modifying or extinguishing rights and obligations under the contract occurs in a foreign country. With respect to the first criteria it is important to note that a foreign invested enterprise registered in mainland China is always a domestic entity, even if 100 per cent owned by a non-Chinese investor. Conversely, Hong Kong is treated as 'foreign' for these purposes, so participation of a Hong Kong-based company would give a transaction the 'foreign element' necessary to allow the seat of arbitration to be outside of the mainland.

iii Designated arbitration institution

When drafting an arbitration clause it is important to keep in mind that Chinese law requires that there be 'certainty in the designated institution' for administration of the arbitration.[4] This has been interpreted to mean that 'one-sided' arbitration agreements that one might encounter in other jurisdictions – such as where one party is given the right to choose between arbitration and litigation, or between two different arbitration institutions, at the time the dispute arises – are invalid in China. Additionally, if the parties to a domestic dispute only agree on the applicable arbitration rules but fail to specify the arbitration institution, the agreement will only be valid if the selected arbitration rules clearly provide for the selection of the relevant arbitration institution.[5] *Ad hoc*

1 Most importantly, the Interpretations of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, effective as of 8 September 2006.

2 See Article 128 of the PRC Contract Law.

3 *Ibid.*

4 See Article 16 of the PRC Arbitration Law.

5 See *Interpretations of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China*, effective as of 8 September 2006.

arbitration (i.e.. administrative proceedings that are not administered by an established arbitration organisation) is not permitted under Chinese law for arbitrations conducted on the mainland. Therefore, only parties to a dispute with a foreign element who choose to seat their proceedings outside of the mainland can agree on *ad hoc* arbitration.

iv Selection of arbitrators

The CIETAC and BAC rules both limit the choice of arbitrators. In CIETAC proceedings, arbitrators must be chosen from the panel of arbitrators provided by CIETAC,[6] which currently lists some 1000 names of which approximately 270 are non-Chinese. Appointments beyond the panel are only permitted upon agreement of all parties and confirmation by the chairman of CIETAC.[7] In BAC proceedings, appointments in domestic cases must be strictly made from the panel,[8] while appointment in foreign-related cases can be made from outside the panel.[9]

In practice, CIETAC's low fee scale for arbitrators imposes some limitations on the selection of arbitrators, although some *ad hoc* fee-setting is tolerated with CIETAC's approval. The BAC, on the other hand, allows non-Chinese arbitrators to charge whatever the market will bear, which in theory increases the pool of arbitral talent from which to choose.

v Fees and award on costs

Case-handling fees and registration fees charged by CIETAC and the BAC for small amounts in dispute are generally lower than fees charged by most other international institutions. On the other hand, fees charged in cases with high amounts in dispute can exceed the fees charged by the ICC, the SIAC and other international institutions.

With respect to counsel fees and costs, a prevailing party can recover 'reasonable' amounts incurred. It is common for arbitral tribunals to make their own assessments of the reasonableness of fee amounts claimed, which can be much lower than international standards. In such cases it is common for only part of the costs, fees and expenses to be awarded to the prevailing party.

vi Language

Both the CIETAC and the BAC Arbitration Rules provide for Chinese to be the default language of the arbitration, although both sets of rules permit the parties to agree otherwise. In arbitrations involving parties with a foreign interest it is therefore advisable to choose English as the language of the arbitration to enlarge the pool of available experienced arbitrators and to ensure that all parties can fully participate in the proceedings.

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6 See Article 21(1) of the CIETAC Arbitration Rules.

7 See Article 21(2) of the CIETAC Arbitration Rules.

8 See Article 17 of the BAC Arbitration Rules.

9 See Article 55 of the BAC Arbitration Rules.

vii ArbMed and MedArb

Both the PRC Civil Procedure Law and the CIETAC Arbitration Rules, enshrine conciliation as a (voluntary) part of the arbitration process.[10] If the conciliation procedures fail to result in a settlement, the arbitral tribunal will proceed with the arbitration and render an award. There is widespread discussion on the question of whether arbitrators who participated in conciliation negotiations will be able to completely ignore the confidential information disclosed and proceed with the arbitration as if the settlement negotiations had not happened.

viii Enforcement and annulment of Chinese arbitral awards

Under PRC arbitration and civil procedure law, arbitral awards are final and binding. If a party fails to fulfil its obligations pursuant to the orders in the award, the other party can petition the competent People's Court to enforce the arbitral award.

An award rendered in a domestic arbitration seated in mainland China may be reviewed and refused enforcement by a Chinese court on both substantive and procedural grounds. Of particular concern, courts have the right to overturn an award upon a finding of a clear error in the application of law by the arbitral tribunal, and/or lack of evidence to ascertain the facts.[11] These grounds provide considerable latitude for *de novo* court review of, and interference in, the decisions of the arbitral tribunal.

On the other hand, awards rendered in arbitral proceedings seated in mainland China concerning disputes with a 'foreign element' can only be denied enforcement or set aside due to severe breach of procedural rules similar to grounds under the New York Convention (see *infra*), such as the absence of an effective arbitration agreement or failure to notify a respondent of the proceedings.[12]

ix Recognition and enforcement of foreign arbitral awards

China is member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), and the refusal to recognise and to enforce in China a foreign arbitral award rendered outside of mainland China may therefore only be based on the grounds set forth in the Convention that centre on severe infringement of procedural rules.[13] China has also entered into arrangements for mutual recognition and enforcement of arbitral awards with Hong Kong and Macao that provide for similar grounds for rejection as the New York Convention.[14]

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10 See Article 51 of the PRC Civil Procedure Law and Article 40 of the CIETAC Arbitration Rules.

11 See Article 213 of the PRC Civil Procedure Law.

12 See Article 70 PRC of the Arbitration Law and Article 259 of the PRC Civil Procedure Law.

13 See Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

14 See Memorandum of Understanding on the Mutual Enforcement of Awards signed by Supreme People's Court and the Hong Kong government on 21 June 1999 and the Arrangement between the mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards, dated 12 December 2007.

x Pre-reporting system

In an attempt to deter the improper annulment or non-enforcement of foreign-related awards and avoid biased or protectionist decisions at the subordinate level courts, the Supreme People's Court ('SPC') adopted a pre-reporting system in 1995 for non-enforcement of foreign-related awards (and also foreign awards and Hong Kong awards). In 1998, the Supreme Court also adopted the same system for annulment of foreign-related awards. These decisions must be reported to the superior court, which, if it wishes to uphold the decision, must in turn report to the SPC, which will then take the final decision.

xi Efficiency of actual enforcement

There are, however, widespread concerns about the efficiency of the actual enforcement proceedings handled by Chinese courts. There have been reports of delays, inactivity, local protectionism and governmental intervention and hiding and concealing of assets as obstacles to successful enforcement. China has recognised these problems and is taking steps to address these issues. We comment on some of these steps in the sections below.

II THE YEAR IN REVIEW

Developments affecting international arbitration

i General trend

Recent court rules suggest that arbitration will play an increasingly important role as an indispensable alternative dispute resolution mechanism in China.

On 24 July 2009, the SPC issued the Opinions on the Establishment and Improvement of a Dispute Resolution Mechanism that Incorporates both Litigation and Non-Litigation Approaches ('Opinions'). According to these Opinions, the SPC expressed its intention to improve the development of non-litigation dispute resolution mechanisms, especially arbitration.

The Opinions request the local courts to carefully implement the PRC Arbitration Law and the relevant judicial interpretations, to respect the nature of arbitration procedures and allow arbitration to fully develop as a form of dispute resolution. In particular, the Opinions request the local courts to expeditiously handle applications for evidence preservation and attachment of property required in an arbitration proceeding.

It is also worth noting that the Opinions allow arbitration commissions to mediate disputes that do not even have pre-signed arbitration agreements. In this situation, the parties concerned may file the case with a specific mediation organisation set up under the arbitration commission for mediation. After the mediation, the mediation agreement reached by the parties has binding effect.

ii Online arbitration rules of CIETAC

Over the past decade, internet and virtual cyberspace has been fast growing in China, creating both new types of commercial disputes (e.g., e-commerce disputes) as well as providing the possibility of solving disputes in a more expeditious way than traditional approaches.

In line with this modern trend, CIETAC recently published an online dispute resolution mechanism by promulgating the Online Arbitration Rules, effective as of 1 May 2009 ('the Rules'). This is a further important step after CIETAC led the way in China in the area of resolving e-commerce disputes mainly relating to domain names in the past. Before it published the Rules, the Domain Name Dispute Resolution Centre under CIETAC had already accepted and concluded more than 1,000 arbitration cases online, thus giving CIETAC considerable experience in conducting online arbitration procedures.

As compared to CIETAC's previous online arbitration practice, the major breakthrough of the Rules is the extension of the application of CIETAC's online arbitration procedure to the resolution of all kinds of commercial disputes. While the parties in dispute may submit a normal commercial case to CIETAC for arbitration under the online arbitration procedures, it is also clear that the Rules are in tailored for e-commerce disputes and other internet-related disputes.

The major 'online' characteristic of the Rules are as follows:

a the whole process of the online arbitration may be conducted via electronic technology and the internet (e.g., filing of arbitration request and defence briefs, hearing of cases, publication of arbitration awards, etc);

b files that are generated or saved by electronic, optical or magnetic means may be used as evidence (e.g., the Rules provide that e-signatures have the same legal effect as handwritten signatures and seals); and

c furthermore, the Rules feature a combination of online and off-line procedures in any arbitration cases governed by it, with the online communication as the primary choice and traditional communication as a backup.

The online arbitration procedures under the Rules enable a reliable and expeditious resolution of various disputes, in particular international e-commerce disputes where the parties are usually separated by long distances and complete traces of communication can be preserved online.

The most significant advantage of the online procedures is time saved. Under the typical arbitration rules (non-online resolution), the award for a foreign-related dispute exceeding 1 million renminbi must be rendered within six months, but according to the Rules, the award in an online case for the same type of dispute must be rendered within four months. In addition, the Rules provide for a 'summary procedure' applicable to disputes of a value between 100,000 and 1 million renminbi (or any other threshold as agreed by the parties concerned), under which an award must be rendered within two months; and a 'expedited procedure' applicable to disputes concerning less than 100,000 renminbi (or any other threshold as agreed by the parties concerned), under which an award must be rendered within only 15 days.

The enforcement procedures can also be implemented via the internet. For instance, the cash in the banks or online banks of the party concerned may be transferred via the internet, and to enforce the arbitration award the court may issue online instructions to banks for compulsory transfer.

iii Financial independence of arbitration institutions in China

Another significant event in 2009 is that at the end of the year, CIETAC finally obtained approval from the State Council to implement a system of self-financing, which is a decisive step towards its financial independence.

It is generally acknowledged that an arbitration institute must be fully independent to ensure its impartiality. Although the PRC Arbitration Law attempts to establish an independent arbitration system, in reality this has long been questionable in China, especially in terms of financial independence.

After the promulgation of the PRC Arbitration Law, the central government showed its determination and efforts to move towards the goal of 'self-financing' of all arbitration institutions in China, as has been manifest in a 1999 regulation and China's WTO commitments regarding arbitration fees.

In May 2003, however, a circular issued by a few central departments stipulated that the income and disbursement of arbitration institutions must be treated as that of administrative entities, which means all the income they receive is considered to be a state asset and must be submitted to the government, which later decides on the distribution according to the reported expenditures (known as a 'two-way financial system'). This circular has in fact overthrown the previous regulation and the relevant WTO commitments.

The two-way financial system established by the 2003 circular is undoubtedly detrimental to the financial independence of arbitration institutions and has cast doubts on the impartiality of local arbitration in China due to its quasi-governmental nature. Over the years, experts and critics have spared no efforts to advocate repeatedly that in terms of arbitration institutions, this system must be rectified. Nevertheless, up until now, most of the local arbitration institutions still implement the two-way financial system, partly due to the fact that some do not have sufficient income and require financial support from the government.

Overall, the approval for CIETAC to be financially independent, along with a few other exceptions, one being Beijing Arbitration Commission (which has been financially independent since August 1999), is a promising sign of greater independence of arbitration institutions in China.

Arbitration developments in local courts

China has been generally perceived by corporate counsels as one of the more hostile jurisdictions towards enforcement of foreign arbitration awards, although much of the support given for this perception is anecdotal.[15]

However, there have been encouraging developments in the past few years. The SPC and its local counterparts have chosen to take a broader approach when reviewing the validity of arbitration clauses and Chinese courts seem to be trying to increasingly recognise and enforce foreign arbitration awards. While there are no official documents explicitly supporting this assertion, a few recent cases and SPC circulars point in this direction.

15 *International Arbitration: Corporate attitudes and practices 2008*, by PricewaterhouseCoopers

i Positive attitude toward arbitration clauses/enforcement

As noted above, the PRC Arbitration Law requires a clear reference to an arbitration institution, not merely that institution rules for an arbitration clause to be valid. This requirement has in the past prevented foreign arbitration awards from being enforced in China, on grounds that the institution was not adequately specified.[16] In responding to this, the SPC clarified in a judicial interpretation on PRC Arbitration Law issued in 2006 that where an arbitration clause refers only to arbitration rules but not to a particular institution, such arbitration clause should be deemed as valid as long as the arbitration rules cited can be used to identify the institution.

More recently, in 2008[17] and 2009,[18] the SPC has further clarified that an *ad hoc* arbitration award issued in Hong Kong can be enforced in mainland China pursuant to the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region. This is a further sign of goodwill showing the support of Chinese courts towards international arbitration, since previously Chinese courts would not recognise and enforce international *ad hoc* arbitral awards, on the basis that an *ad hoc* arbitration clause fails to identify an institution for the arbitration, as required by the PRC Arbitration Law.

In the same 2009 circular, the SPC also singled out the Arbitration Court of International Chamber of Commerce ('the ICC'), confirming that foreign arbitral awards issued in Hong Kong, in particular those under the ICC Rules, should be recognised and enforced in China as awards issued in Hong Kong. This is particularly encouraging as it overturns a previous SPC decision that an ICC Hong Kong award should be treated as one issued in France (because ICC as an organisation is registered in France) instead of Hong Kong.[19] This brings the Chinese courts' treatment of such awards more in line with the international arbitration practice.

However, ambiguity remains concerning arbitral awards issued by foreign institutions within China, with one recent ICC award rendered in mainland China being upheld as a foreign award under the New York Convention. Many commentators have criticised the reasoning in the court's decision, although applauding its outcome, and as a practical matter practitioners continue to advise parties to avoid arbitration clauses providing for arbitration in mainland China under the rules of foreign institutions.

16 'Arbitration: ICC Rules, Shanghai shall apply' was insufficient to identify the arbitration institution chosen by the parties and therefore should be held as invalid.

17 Internal meeting minutes of a judicial meeting circulated by the SPC to the Chinese court system concerning arbitration awards renders by the arbitration institutions of Hong Kong SAR and Macao SAR and arbitral awards made by ad hoc tribunals in Hong Kong SAR and Macao SAR.

18 See SPC of the PRC Circular on Issues Relevant to the Enforcement of Hong Kong Arbitration Awards in Mainland China; Fa (2009) No. 415; issued on 30 December 2009.

19 *Hong Kong Weimao v. Shanxi Tianli* 2004.

ii Use of public policy reservation

Although the public policy exception to enforcement is generally not widely used in China to deny enforcement of international arbitration awards, a recent SPC decision in *Hemofarm v. Yongning* in 2008 to deny enforcement of an ICC arbitral award on the ground of the public policy reservation is of note.

In the *Hemofarm v. Yongning* case, Hemofarm, a Serbian company, formed a joint venture ('the JV') with Yongning, a Chinese company. Following a dispute between the parties, Yongning filed a lawsuit against the JV (rather than Hemofarm) in the local Chinese court, claiming unpaid rents and return of the premises previously let by it to the JV. In the same connection, Yongning also applied for attachment orders over the assets and bank account of the JV. The JV disputed the jurisdiction of the local court by citing the arbitration clause in the JV contract between Hemofarm and Yongning, but this objection was dismissed by the local court on grounds that the JV was not party to the contract between Yongning and Hemofarm.

In parallel, Hemofarm filed a request for arbitration against Yongning with the ICC in Paris, claiming, *inter alia*, damages arising out of Yongning's filing of the lawsuit against the JV in China. Prior to completion of the case, the JV went into bankruptcy. In the ICC award, the tribunal determined that although Yongning had the right to make a claim against the JV in a local Chinese court, its application for attachment orders over the JV's assets unnecessarily caused the JV to become incapable of continuing business operations, resulting in its bankruptcy and causing loss. The arbitral tribunal found Yongning's request for attachment orders to thus constitute 'violation of the joint venture contract', and awarded Hemofarm $7.8 million.

When Hemofarm tried to enforce the ICC award in mainland China, its application for enforcement was denied by the local Chinese courts. The SPC issued a concurring opinion in its final review of the refusal to enforce, holding that the joint venture contract was not applicable to disputes between Yongning and the JV, and that therefore the arbitral tribunal did not have jurisdiction to determine the appropriateness of that dispute. The SPC also found that the arbitral tribunal lacked authority to comment on the legitimacy of the application by Yongning for attachment orders during the course of the local litigation proceedings in China, and had essentially 're-adjudicated' matters that the Chinese court has already properly settled with jurisdiction. The SPC therefore upheld the decision to refuse enforcement on grounds that the tribunal's award constituted 'a violation of China's judicial sovereignty and the jurisdiction of its judiciary'.

Although the *Hemofarm v. Yongning* case is influential, it deals with the very specific fact pattern where an international arbitration tribunal recognised its lack of jurisdiction over a dispute being heard by the Chinese courts, yet went on to sanction certain actions by one of the parties within the course of those Chinese court proceedings (which actions had already been allowed by the Chinese courts). It is thus unlikely that the case will prove to be an obstacle to the enforcement of foreign arbitration awards more generally.

Investor–state disputes

One of the most significant developments for investment treaty arbitration with respect to China in 2009 is the Decision on Jurisdiction and Competence in the case of *Tza Yap*

Shum v. the Republic of Peru released on 19 June 2009, which involved interpretation of the investment treaty between China and Peru.

In that case, despite wording in the treaty limiting arbitration to disputes 'involving the amount of compensation for expropriation', the arbitral tribunal held that it had jurisdiction to determine questions of liability, namely, whether the claimant had suffered an expropriation by the Peruvian government, and not solely the amount of compensation due.

The claimant in the case, filed with ICSID on 29 September 2006 under the China-Peru BIT, was Mr Tza Yap Shum, a Chinese national resident in Hong Kong. Mr. Tza had owned 90 per cent of a Peruvian food products company (TSG Peru SAC, or 'TSG') which exported and distributed fish flour. In the suit, Mr Tza claimed that in December 2004, the Peruvian Tax Administration's allegation that TSG owed a tax debt of 12 million Peruvian new sols and the Peruvian tax authority's freezing of the company's bank account a month later (while the company's legal challenge to the charge was still pending) paralysed the company and resulted in an expropriation for which the company had not been compensated.

The arbitral tribunal reached two particularly significant conclusions with respect to jurisdiction in the case. First, Mr Tza had argued that where a bilateral investment treaty ('BIT') does not expressly provide for arbitration of claims of fair and equitable treatment, that limitation could be overcome by operation of the BIT's most-favoured nation ('MFN') clause, which requires the host state to extend investor treatment no less favorable than that extended to investors from third-party states. Mr Tza in this connection pointed to other BITs (e.g., the Peru–Columbia BIT) that allowed for claims apart from expropriation to be submitted for arbitration, and argued that Peru should extend to claimant the right to arbitrate such claims.

The tribunal rejected this argument on the grounds that the dispute resolution clause contained in the Chinese–Peru BIT specifically excluded arbitration of other claims except with the separate agreement of the parties. The tribunal held that the specificity of the clause precluded the more general application of the MFN clause.

However, the tribunal also had to decide the scope of the BIT's dispute resolution provision which allowed for arbitration of claims 'involving the amount of compensation for expropriation'. Peru's argument was that the tribunal could only act when the expropriation had been determined through other means (e.g., by the Peruvian courts) and the tribunal could only decide on the amount of compensation due to the investor. Peru argued that the BIT language did not give the tribunal the latitude to determine if the tax authorities' actions constituted an expropriation of Mr Tza's investment *per se*.

The tribunal rejected Peru's interpretation, and instead sided with Mr Tza's argument that a literal and formalistic reading of the BIT was inappropriate and that the tribunal did have jurisdiction to examine more than simply the amount of compensation due. The tribunal based its determination on a number of factors, including the text of the treaty, as well as the negotiating history and the object and purpose of the treaty. Specifically, the tribunal concluded that that in order to give meaning to all the elements of the article on expropriation, it must be interpreted that the words 'involving the amount of compensation for expropriation' includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was

actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due if any.

Further, the tribunal noted that the BIT's dispute settlement provision contained a 'fork-in-the road' clause that required an investor to make a final and binding choice between submitting claims to domestic courts or arbitration. The tribunal reasoned that to force an investor to first submit to domestic courts to decide on whether an expropriation had taken place would trigger the 'fork-in-the road' clause, effectively precluding recourse to arbitration. The tribunal held that this result would not accord with the object and purpose of the BIT.

This broader reading of the dispute resolution provision gives support for individuals and companies with investments in China, and likewise, Chinese investors in the reciprocal countries, to rely on directly enforceable protections under a wide range of older BITs which were previously thought to be very limited in scope.

Apart from the case of Tza Yap Shum, two notable trends in recent BITs entered into by China (e.g., Netherlands–China BIT, Germany–China BIT, New Zealand–China Free Trade Agreement) should be highlighted. The first such trend is that newer Chinese treaties incorporate much broader arbitration provisions covering 'any dispute concerning investments'. The second trend is that recent BITs also allow either contracting party to submit the dispute to an *ad hoc* tribunal. These developments point in the direction of arbitration being a more viable form of dispute resolution for future investor–state disputes involving China or Chinese investors.

III OUTLOOK AND CONCLUSIONS

As a consequence of the growing Chinese economy and closer economic ties with the global economy, the number and value of China-related arbitration cases are increasing rapidly. Ever more cases are administered by arbitration institutions within China. In addition, on a larger scale, Hong Kong and Singapore have become major arbitration centers for international commercial arbitration. The opening of the first overseas ICC branch in Hong Kong on 19 November 2008, and of the new Maxwell Chambers on 22 January 2010 in Singapore, are clear signs of this trend. There are also more and more internationally renowned arbitrators and counsel relocating to the region, moves that are largely driven by an increase in China-related arbitration.

The increasing importance of China and China-related disputes for international commercial arbitration can also be seen from many other indicators such as the fact that IBA Rules on the Taking of Evidence have now been translated into Chinese, an important commentary on the Swedish Arbitration Act and the SCC Rules is available in Chinese language, and a dedicated Chinese-European Arbitration Centre opened in Hamburg in September 2008.

As a consequence of the development and increasing internationalisation of China-related arbitration, on 7 December 2009 CIETAC started to collect comments from arbitration professionals for a planned revision of the CIETAC Arbitration Rules. CIETAC intends to revise the provisions in the current rules that are not user friendly and difficult to implement in practice, to supplement the provisions that are incomplete and to include provisions reflecting recent developments in international arbitration

practice, e.g. concerning combination and suspension of arbitral proceedings and overall to provide more efficient and higher quality service. The official deadline for submission of comments ended on 30 January 2010. So far there has been one round of discussions with more to follow. An official time line for release of the revisions has not been established to date.

Despite the positive developments there are still widespread concerns regarding effective enforcement of arbitral awards in China. Some commentators have speculated that the settlement of the *Danone v. Wahaha* case, one of the largest China-related business disputes in recent history, was at least partly be motivated by fears that an arbitral award against Wahaha could not be successfully enforced in China. That speculation was denied by other sources.[20]

China is taking a number of positive actions to facilitate enforcement, with the pre-reporting system that has been discussed in the first part of this article being the most notable one. Another important step was the introduction of a public database on enforcement matters on 30 March 2009.[21] The database lists all parties subject to enforcement actions by Chinese courts from cases after 1 January 2007 and has about 6 million records providing the name of the debtor, ID card number or organisation code, name of the relevant court, case number, executed objects and current status of the case. There are also rules in place that restrict debtors that fail to perform a court judgment or arbitral award and that are subject to enforcement actions from leaving the country, and in extreme cases permit the public security bureau to take the debtor or its directors or officers into custody.[22]

While many aspects of arbitration in China are still less than perfect, practitioners are seeing dynamic developments in China and in the region that are likely over time to bring arbitration in China much closer to international standards in connection with arbitral proceedings and enforcement.

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20 See 'Wahaha and Danone settle before award given', in *Global Arbitration Review*, 11 November 2009.

21 http://zhixing.court.gov.cn.

22 See 'Several Provisions Regarding Tracking and Controlling Parties against Whom Enforcement Action is Taken and Their Vehicles', jointly issued by the High Court of Guangdong Province and the Guangdong Provincial Public Security Bureau on 13 September 2009.

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