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Chapter I
History of Arbitration in China

I INTRODUCTION

1. It is often said that arbitration commenced its journey in China in the early 1900s. In 1912, the then Chinese government promulgated the *Constitution for Business Arbitration Office*, followed by the *Working Rules for Business Arbitration Office* in 1913, which made provisions for the parties to a business dispute to submit their dispute to the Business Arbitration Office for settlement. The rules, however, also provided that an arbitral award would not become legally binding without the consent of the disputing parties. In circumstances where the consent of the disputing parties could not be obtained, a disputing party was at liberty to file civil proceedings in court. This development may have formed the basis for the positive attitude shown today towards the consensus-building mediation and conciliation services available within the Chinese arbitral framework.

2. In 1930, the Chinese government promulgated the *Law for Settling Disputes between Labor and Management*, setting forth the conciliation and arbitration procedures for disputes between employers and employees. In 1949, the Tianjin municipal government promulgated the *Tianjin Municipality Interim Rules of Organization for Mediation and Arbitration Commission*, which set forth the formation, authority and working principles for the mediation and arbitration of disputes. Following the founding of the People's Republic of China (PRC) in 1949, China gradually established both domestic and foreign-related systems of arbitration that included labour arbitration, economic contract arbitration, and real property arbitration.

II DOMESTIC ARBITRATION

A PRE-ARBITRATION LAW

3. China's modern-day domestic arbitration system has its origins in the early 1950s. During that period, the PRC government actively promoted arbitration and conciliation as the preferred means for resolving domestic economic disputes. Subsequently, beginning in the early 1960s, various regulations were put into effect that provided for the mandatory arbitration of economic contract disputes by economic commissions at various levels, thereby effectively denying party autonomy.[1] As a result of these regulations, China developed a domestic administrative arbitration system substantially different from its system of foreign-related arbitration. Terminated during the chaos of the Cultural Revolution (1966–1976), the domestic arbitration system was revived in the 1970s in a manner that saw the restoration of many of the key elements of the pre-Cultural Revolution domestic arbitration system.

4. Prior to the enactment of the *Arbitration Law* in 1995, China's domestic arbitration system consisted of various arbitration institutions. These bodies treated disputes arising from economic contracts, labour matters, patents, consumer transactions, technology transfer contracts, urban property rights and other matters. The jurisdiction of domestic arbitration bodies was restricted to disputes arising exclusively between Chinese legal and natural persons. Foreign invested enterprises (FIEs), such as equity joint ventures, cooperative joint ventures and wholly foreign-owned enterprises (WFOE), which are established partially or wholly by foreign capital, were deemed to constitute Chinese legal persons under Chinese law, and accordingly, disputes between such entities and other domestic legal and natural persons generally fell within the exclusive ambit of the domestic arbitration system, rather than the foreign-related arbitration regime.

5. The *Economic Contract Law of the PRC* (*Economic Contract Law*)[2] provided the main statutory underpinning for the pre-1995 domestic arbitration regime, establishing the basic legal framework for contractual relationships between domestic PRC entities within China's socialist system. The *Economic Contract Law* stipulated that parties to a dispute arising from economic contracts should engage in consultation with a view to resolving the dispute. It further provided

1. *Working Rules for the State-Owned Industrial Enterprises (Draft)*, adopted by the State Council in Sep. 1961; *The Opinions of the State Economic Commission Concerning the Arbitration of Disputes Arising from Defaulting on Loan Payments Among the State-Owned Industrial Enterprises by the Economic Commissions at Various Levels (Draft)*, adopted by the State Economic Commission on 30 Aug. 1962; *The Notice concerning the Strict Implementation of Basic Construction Procedure and the Strict Implementation of Economic Contract*, adopted by the State Council on 10 Dec. 1962.
2. Promulgated by the Standing Committee of the NPC on 13 Dec. 1981, and effective from 1 Jul. 1982, and revoked and replaced by the *Contract Law of the People's Republic of China* which became effective from 1 Oct. 1999.

that where the parties failed to reach a resolution of their dispute via consultation, a disputing party could apply to the competent contract administrative authorities for conciliation or arbitration, or alternatively could file a suit directly before the People's Court. If, following arbitration, a party refused to accept an arbitral award, that party would be entitled to challenge such award before a People's Court within fifteen days of its receipt.

6. In August 1983, the State Council promulgated the *Regulations on Economic Contract Arbitration of the PRC*, which stipulated that economic contract arbitration should be handled by dedicated economic contract arbitration commissions established by and within the State Administration of Industry and Commerce (SAIC) at both the State and various local levels. In December of the same year, the SAIC issued the *Organizational Rules of Economic Contract Arbitration Commissions (for Trial Implementation)*,[3] which provided that economic contract arbitration undertaken by economic contract arbitration commissions must be based on the *Regulations on Economic Contract Arbitration of the PRC*.

7. Following the economic contract arbitration model, similar regulations were introduced that ultimately led to the establishment of a plethora of dedicated arbitration commissions, each affiliated to a government authority at various levels, and each specializing in the arbitration of disputes arising in a particular field, such as economic and commercial contracts, technology contracts, labour matters, intellectual property, real estate, consumer protection, and so on.[4] Prior to the promulgation of the *Arbitration Law*, more than thirty such arbitration commissions existed in China. Other important rules and regulations issued during the 1980s and early 1990s included the following:

- Regulations Regarding Fees for the Arbitration and Verification of Economic Contracts and their Scope of Application; effective 18 January 1984.
- Rules for the Handling of Cases by Economic Contract Arbitration Commissions, promulgated by the State Administration for Industry and Commerce, effective 20 August 1985.
- Provisional Regulations for the Resolution of Labor Disputes in State Enterprises; effective 15 August 1987.
- Provisional Regulations Regarding the Administration of Technology Contract Arbitration Institutions; effective 21 January 1991.

3. Promulgated by the SAIC on and effective from 27 Dec. 1983, revoked by the *Ordinance of the State Administration for Industry and Commerce of the People 's Republic of China* (Regulatory Documents *Clean-up Results)* of 3 Oct. 1998.
4. Ying Chang, *The Science of Law of Arbitration* (in Chinese: *Zhongcai Faxue*) (Beijing: Publishing House of China University of Politics and Law, 2001); *The Complete Works on Arbitration Law of the People's Republic of China* (in Chinese: *Zhonghua Renmin Gongheguo Zhongcaifa Quanshu*), Civil Law Office of Commission of Legislative Affairs of the Standing Committee of the NPC and Secretariat of CIETAC (Beijing: Publishing House of Law, 1995).

– Rules of Arbitration for Technology Contract Arbitration Institutions (for Trial Implementation); effective 1 November 1991.

8. Similar rules and regulations were promulgated to handle, *inter alia*, disputes related to patent rights, consumer protection and residential property contracts. The main features of China's domestic arbitration system prior to the promulgation of the *Arbitration Law* may be summarized as follows:

1 Lack of Independence

9. The then existing regulations permitted the establishment of administratively subordinated domestic arbitration commissions, i.e., affiliated to governmental administrative authorities, with members primarily drawn from those bodies. This hierarchical system ensured that arbitration commissions established at lower levels of the Administration for Industry and Commerce (AIC) were subject to those established at higher levels.

2 Lack of Party Autonomy

10. Domestic arbitration commissions accepted arbitration applications based on administrative law and regulations rather than on the parties' voluntary arbitration agreement. Moreover, domestic arbitration adopted jurisdiction by forum level and territorial jurisdiction, thereby denying the parties the autonomy to select the arbitration commission of their own choice.

3 Arbitral Awards without Binding Force

11. Prior to the *Arbitration Law*, domestic arbitral awards did not have a binding effect on the parties concerned. If a party was dissatisfied with an arbitral award, it could initiate civil proceedings with the People's Court. The implementation of the *Arbitration Law* heralded fundamental changes to this aspect of the domestic arbitration system in China.

B Post-Arbitration Law

12. The *Arbitration Law* became effective on 1 September 1995.[5]

5. In 1994, the General Office of the State Council promulgated a series of regulations to supplement and complement the *Arbitration Law* and to generally promote the establishment and registration of domestic arbitration commissions. These regulations included the following, viz.:

(i) *Model Provisional Rules for Arbitration Commissions*; issued 28 Jul. 1995.
(ii) *Model Articles of Association of Arbitration Commissions*; issued 28 Jul. 1995.

To bring domestic arbitration in line with international practice, the *Arbitration Law* adopted many of the internationally recognized principles of arbitration, such as party autonomy, the independence of arbitration commissions and the binding force of the arbitral award. Following the introduction of the *Arbitration Law*, seven cities, i.e., Beijing, Shanghai, Tianjin, Guangzhou, Xi'An, Hohot and Shenzhen, were designated as pilot cities for the establishment of domestic arbitration commissions. Since then, around 215 domestic arbitration commissions have been reorganized or established throughout China.[6] The majority of arbitration commissions were established through the consolidation of then existing arbitration institutions, with the only exception being labour dispute arbitration commissions and agricultural dispute arbitration commissions.[7]

13. The main features of China's domestic arbitration system following the promulgation of the *Arbitration Law* may be summarized as follows:

1 Free-Establishment of Arbitration Commissions

14. In particular, the *Arbitration Law*:

(i) permits the establishment of arbitration commissions in municipalities, provinces and autonomous regions, and where necessary, in cities with districts;
(ii) prohibits the establishment of administratively subordinated arbitration commissions;
(iii) has provisions on the registration of an arbitration commission with the judicial administrative department of the relevant province, autonomous region or municipality, as the case may be;
(iv) most significantly, requires the reorganization of all arbitration institutions then existing in district cities and all cities in which municipal, provincial or autonomous regional governments are located (Article 79).

Article 79 also provides that any arbitration institution established prior to the *Arbitration Law*'s effective date and that subsequently fails to conform to the reorganization requirements set forth in the *Arbitration Law* within one year thereof, will be automatically dissolved. As such, the then existing arbitration institutions established within the SAIC, the State Construction Commission, the State Science and Technology Commission and other administrative organs of local government were automatically dissolved by operation of law on 1

(iii) *Provisional Measures for the Registration of Arbitration Commissions*; effective 1 Sep. 1995.
(iv) *Measures for Charging Fees by Arbitration Commissions*; effective 1 Sep. 1995.

6. Li Yong, "Continue to Implement the Arbitration Law and to Further Improve the Arbitration Legal System", *Arbitration and Law*, Beijing, (2000): Vol. 5. Shen Sibao & Shen Jian, "Features and Self-innovation of China Commercial Arbitration System", *Legal Science Monthly* 12, Shanghai, (2010): 31–34.
7. Ying Chang, *The Science of Law of Arbitration* (in Chinese: *Zhongcai Faxue*), *supra* n. 4.

September 1996. The law also provides for the separate formulation of a system of arbitration for the resolution of labour disputes[8] and disputes arising from farm contract work undertaken within collective agricultural organizations.[9] In addition, the new law embraces the fundamental and internationally established principle of providing for the presence of experts and specialists on all panels of arbitrators of the arbitration commissions. In particular, the law provides that the chairman, vice-chairman and members[10] of an arbitration commission must be persons specialized in the fields of trade, economics and law, and must possess actual working experience in these fields. Moreover, at least two-thirds of all individuals establishing an arbitration commission must be specialists in the foregoing disciplines.[11]

15. There are no legal restrictions as to the numbers of arbitration commissions which may be established in any given city. Private initiatives for setting up such arbitration commissions are theoretically permissible, although no single private institution has been approved to date.

2 Full Independence of Arbitration Commissions

16. The *Arbitration Law* has been a catalyst in relieving domestic arbitration commissions from government interference and local protectionism, thus furthering the independence of arbitration in China. In particular, Article 8 of the *Arbitration Law* provides that arbitration shall be conducted independently in accordance with the law and shall not be subject to interference by any administrative organs, social organizations or individuals, while Article 14 stipulates that arbitration commissions shall be independent from administrative authorities. Moreover, subordinated relationships between arbitration commissions and administrative authorities, or between different arbitration commissions, are prohibited.

8. *Labor Law of People's Republic of China*, promulgated by the Standing Committee of the National People's Congress on 5 Jul. 1994, and effective from 1 Jan. 1995, revised by the *Decision of the Standing Committee of the National People's Congress on the Amendment of Some Laws* which was promulgated on and effective from 27 Aug. 2009. *Labor Contract Law of People's Republic of China*, promulgated by Standing Committee of the National People's Congress on 29 Jun. 2007, and effective from 1 Jan. 2008. *Law on Labor Dispute Mediation and Arbitration of the People's Republic of China*, promulgated by Standing Committee of the National People's Congress on 29 Dec. 2007, and effective from 1 May 2008.
9. *Interpretation of the Supreme People's Court on some issues concerning the trial of cases involving disputes over agricultural contracts*, promulgated by Supreme People's Court on 28 Jun. 1999, and effective from 8 Jul. 1999, revoked by the *Decision of the Supreme People's Court on Abolishing Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007* which was promulgated on 18 Dec. 2008 and effective from 24 Dec. 2008. *Law of the People's Republic of China on the Mediation and Arbitration of Rural Land Contract Disputes*, promulgated by the Standing Committee of the National People's Congress on 27 Jun. 2009, and effective from 1 Jan. 2010.
10. An arbitration commission must have from two to eleven members.
11. Art. 12 of the *Arbitration Law*.

17. Such independence provided in the *Arbitration Law* is constantly challenged by local protectionism, by the involvement of former and retired government officials who take on functions in local arbitration commissions, and by the financial dependence of local arbitration commissions on governmental subsidies granted by the local governments.[12]

3 Expanded Scope of Arbitral Subject Matter

18. Prior to the *Arbitration Law*, the arbitration of disputes was effectively confined to labour-related disputes and disputes arising from economic contracts. The *Arbitration Law* expanded the scope of arbitral subject matters by permitting the arbitration of contractual disputes and other disputes over rights and interests in property.[13] Also, the prohibition for natural persons to initiate arbitration proceedings (save for labour-related disputes) was removed by the *Arbitration Law*, which eventually allowed the arbitration of disputes between citizens, legal persons and other organizations.

4 Finality of the Arbitral Award

19. Under the *Regulations on the Arbitration of Economic Contracts*, the award of an arbitral tribunal was not automatically binding. Article 33 of the *Regulations* provided that following the rendering of an arbitral award, the subject parties had fifteen days to challenge the arbitral award by filing a lawsuit with the People's Court. If, after fifteen days, neither party had filed such a lawsuit, then the arbitral award would be binding. The *Arbitration Law*, however, incorporates the principle of *the finality of the arbitral award*. It expressly provides that where, following the rendering of an arbitral award in a dispute, a person files suit with a People's Court or an arbitration commission in respect of the same dispute, then the People's Court or arbitration commission, as the case may be, must refuse to accept the case. There exists one general exception to the foregoing rule – where the court revokes an arbitral award, either party may thereafter initiate a lawsuit before the People's Court in respect of the same dispute, or alternatively, if the parties reach a new arbitration agreement, either party may thereafter apply for arbitration of the same dispute.

12. Various articles were published by Hongsong Wang, Secretary General of the Beijing Arbitration Commission, criticizing attempts by governmental bodies to control, both financially and administratively, arbitration commissions. *cf.* Hongsong Wang, "Fostering Public Trustworthiness", in *Collected Works of Hongsong Wang*, (Law Press of China 2010), 3-122.
13. Art. 3 of the *Arbitration Law* provides that the courts retain exclusive jurisdiction over marital, adoption, guardianship, support and succession disputes, and administrative disputes.

I LEGAL BASIS FOR THE ENFORCEMENT OF ARBITRAL AWARDS

A LEGAL BASIS FOR THE ENFORCEMENT OF DOMESTIC ARBITRAL AWARDS

449. Prior to the introduction of the *Arbitration Law*, most domestic arbitral institutions fell under the remit of administrative organs and did not exercise jurisdiction based on the agreement of the disputing parties. Awards rendered by domestic arbitration commissions were not final. A party against whom an award was made could effectively block enforcement proceedings by filing a lawsuit with the People's Court within a specified time period from the date of the award. At that time, the main provisions governing the enforcement of awards were Article 35 of the *Arbitration Ordinance for Economic Contracts of the People's Republic of China*,[1] and Article 195 of the *Trial Civil Procedure Law*.

450. The introduction, in September 1995, of the *Arbitration Law* provided the legislative basis for the establishment of *the system of a single and final award*, which prohibits a party that objects to a domestic arbitral award from subsequently instituting civil proceedings in respect of the same dispute, thereby ensuring that the enforcement mechanism assumes greater importance. However, the losing party, bearing the burden of proof, still enjoys the right to challenge an arbitral award and may apply to the People's Court for an order setting aside the award or an order denying enforcement.

451. In determining applications for the challenge of domestic arbitral awards, the People's Court is empowered to review both procedural and substantive matters. Specifically, Article 58 of the *Arbitration Law* provides that a party may apply to the Intermediate People's Court in the place where the arbitration commission is located for the setting aside of a domestic arbitral award. The applicant will be required to produce evidence proving that the arbitral award was rendered in one or more of the following circumstances:

- where there is no arbitration agreement between the parties;
- where the matters determined in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- where the formation of the arbitral tribunal or the arbitration procedures was not in conformity with statutory procedures;
- where the evidence on which the arbitral award is based was forged;

1. Adopted by the State Council and effective from 23 Aug. 1983. Art. 35 provides that the parties to economic contracts shall automatically perform the written conciliation statement and binding arbitral awards, which have been served during the specified time limit therein. If one of the parties fails to do so, the other party may apply to the competent court for enforcement. This law was replaced by the *Arbitration Law of the People's Republic of China* which was adopted by the Standing Committee of the NPC in 31 Aug. 1994 and effective from 1 Sep. 1995

- where the other party has withheld evidence sufficient to affect the impartiality of the arbitration;
- where while arbitrating the case, the arbitrator has committed embezzlement, accepted bribes, resorted to deception for personal gain or rendered an award that perverts the law; or
- where the award proves to be contrary to the social and public interest.

B LEGAL BASIS FOR THE ENFORCEMENT OF FOREIGN-RELATED ARBITRAL AWARDS

452. Prior to the introduction of the *Arbitration Law*, foreign-related awards merely referred to awards rendered by the two foreign-related arbitration institutions, CIETAC and CMAC. The legal basis for the enforcement of foreign-related awards in China dates back to the *Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (CCPIT)*, adopted on 6 May 1954. Article 11 of the Decision provided as follows:

> The award of the Arbitration Commission shall be executed by the parties themselves within the time fixed by the award. In case an award is not executed after the expiration of the fixed time, a People's Court of the People's Republic of China shall, upon the request of one of the parties, enforce it in accordance with the law.

453. The position remained unaltered until the *Trial Civil Procedure Law* took effect. On the issue of enforcement of arbitral awards rendered by foreign-related arbitration commissions, Article 195 of the *Trial Civil Procedure Law* provided as follows:

> When one of the parties concerned fails to comply with an award made by a foreign-related arbitration institution of the People's Republic of China, the other party may request that the award be executed in accordance with the provisions of this article by the Intermediate People's Court at the place where the arbitration institution is located or where the property is located.

454. This provision is noteworthy in several respects. First, the provision only dealt with the recognition and enforcement of awards rendered by a foreign-related arbitration institution within China, i.e., the CIETAC or the CMAC. As a result, the provision did not apply to those awards rendered by arbitration organizations located outside China or to awards rendered by ad hoc arbitration tribunals conducted within China. Second, the provision contained no indication as to the grounds upon which the court may refuse enforcement; consequently, the power of the court was limited to the issuance of an order for execution. Third, the court had no legal basis upon which to refuse recognition and enforcement of a foreign-related award. Fourth, to enforce an award, the successful party had to

apply to the court at the place where the arbitration institution was located or where the property was located. In practice, this provision effectively resulted in all applications for enforcement being submitted to the Intermediate People's Court in Beijing, where CIETAC and CMAC both maintain their headquarters.

455. In 1991, the *Civil Procedure Law* substantially amended the *Trial Civil Procedure Law*.[2] The new law contains new provisions treating the enforcement of foreign-related awards in China.

456. Article 257 of the *Civil Procedure Law* provides that if a party fails to perform the arbitral award of a foreign-related arbitration commission, the other party may apply for enforcement to the Intermediate People's Court of the place where the domicile of the person against whom an application is made is located or where the property is located. Although this provision still refers to foreign-related arbitration commissions, it is to be read – in the light of the recent practice development – as applying to all awards rendered in a foreign-related dispute by any of the arbitration commissions located in China.

457. Article 258 of the *Civil Procedure Law* provides that if the person against whom the application is made presents evidence which proves that the arbitral award made by a PRC arbitration commission in respect of a foreign-related dispute involves any of the following circumstances, the People's Court shall, after examination and verification by a collegiate bench formed by the People's Court, rule to deny enforcement of the award, where:

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

458. Article 259 of the *Civil Procedure Law* provides that if a People's Court rules to deny enforcement of an arbitral award, a party may, in accordance with the written arbitration agreement between the two parties, reapply to the arbitration organ for arbitration, or institute an action in a People's Court. If compared with Article 9 of the *Arbitration Law*, it appears that the parties actually need to conclude a new arbitration agreement, otherwise they may only take the case to the courts.

2. Adopted by the NPC on 9 Apr. 1991 and further amended on 28 Oct. 2007 by the Standing Committee of the NPC.

459. The *Arbitration Law* follows the *Civil Procedure Law* in respect to the enforcement of foreign-related arbitral awards and invokes the foregoing circumstances as grounds for denying enforcement. However, the *Arbitration Law* additionally establishes a mechanism for the setting aside of foreign-related awards, a mechanism that did not exist previously. Indeed, this mechanism can, and often does, serve to hinder or delay the enforcement of awards. Under Article 64 of the *Arbitration Law*, an application to set aside an arbitral award suspends all enforcement proceedings initiated in relation to the award.[3]

460. Articles 313, 314 and 315 of the *Civil Procedure Law Opinions* further clarified some issues relating to the enforcement of the foreign-related awards.

461. The primary amendments contained in the *Civil Procedure Law* which pertain to the enforcement of foreign-related arbitral awards are the following:

- The competent courts that have jurisdiction over applications for enforcement have been changed. Under the *Civil Procedure Law*, exclusive jurisdiction over the application for the enforcement of a foreign-related award shall be exercised by the court located at the place where the party against whom enforcement is sought is either legally domiciled or has its property located. Accordingly, the court at the place where the arbitration institution is located no longer enjoys automatic jurisdiction over enforcement.
- Refusal of enforcement. Specific grounds for refusal of enforcement were introduced separately for foreign-related arbitral awards and domestic awards.[4]
- A People's Court may, on its own motion, refuse the enforcement of an award if it determines that enforcement would be contrary to the *social and public interest of China*.

462. Article I(1) of the *New York Convention* provides that the convention shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. However, when ratifying the convention, China elected to foreclose this possibility. Therefore, awards rendered in China are not eligible for enforcement inside China pursuant to the *New York Convention*. According to the *Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Convention Implementation Notice),[5] China confirmed its adoption of the *reciprocity reservation* of the *New York Convention*,

3. See also Art. 25, *SPC Judicial Interpretations* 2006.
4. See Art. 63 of the *Arbitration Law* and 215 of the *Civil Procedure Law* as concerns domestic awards, and Art. 71 of the *Arbitration Law* and 258 of the *Civil Procedure Law* as concerns foreign-related awards. See also Jingzhou Tao, "One Award Two Obstacles: Double Trouble When Enforcing Awards in China", in *Asian International Arbitration Journal* 4, no.1 (2008): 83–103.
5. Issued by the Supreme People's Court on 10 Apr. 1987.

thereby confirming the *New York Convention* shall only apply to *arbitral awards made in the territory of other Contracting States*.

463. Although the Convention is not applicable to the enforcement of foreign-related arbitral awards in China, the *Civil Procedure Law* addresses the enforcement of such awards in a manner that mirrors the provisions of the *New York Convention*.

C LEGAL BASIS FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARD

1 Legislation Prior to China's Accession to the New York Convention

464. Prior to 1982, Chinese law contained no provisions with respect to the recognition and enforcement of foreign arbitral awards rendered in foreign countries. Such awards were considered to be *self-executing* and relied entirely upon voluntary compliance and informal sanctions for enforcement.[6] Between 1978 and 1983, the Chinese government concluded bilateral agreements on the mutual protection of overseas investments with numerous countries, all of which, surprisingly, failed to address the issue of recognition and enforcement in China of foreign arbitral awards.

465. The *Trial Civil Procedure Law*, which became effective in 1982 and was later replaced by the current *Civil Procedure Law*, represented a step towards the recognition and enforcement of foreign arbitral awards in China. Article 204 of the *Trial Civil Procedure Law* affirmed that a foreign arbitral award can be recognized and enforced via the mechanism of judicial assistance according to the relevant bilateral agreement and on the principle of reciprocity.[7] In addition, certain formalities had also to be complied with. First, the arbitral award had to be deemed to be a final award in the jurisdiction where it was rendered. Second, direct application by the parties was not accepted; but, the application had to be submitted by a foreign court on behalf of the party seeking recognition and

6. Cheng, Dejun, Moser, Michael, and Wang, Shengchang, *International Arbitration in the People's Republic of China, Commentary, Cases & Materials*, 2nd edn (Asia: Butterworths, 2000), 123.

7. Art. 204 *Trial Civil Procedure Law* provides that:
When a People's Court of the People's Republic of China is entrusted by a foreign court with the execution of a judgment or an arbitral award that has already been confirmed, the People's Court shall examine it in accordance with the international treaties concluded, or conventions joined by the People's Republic of China, or according to the principle of reciprocity. If the court deems that the judgment or award does not violate the fundamental principles of the law of the People's Republic of China or the country's national or social interests, the court shall, by a ruling, recognize the validity of the judgment or award and shall execute it according to the procedures specified by this law; otherwise, the People's Court shall return the judgment or award to the foreign court.

enforcement. Third, the People's Court could refuse recognition and enforcement of an international arbitral award on the basis that the award was in violation of the basic principles of Chinese law or against China's national and social interests. Notwithstanding these restrictions, the *Trial Civil Procedure Law*, at a minimum, confirmed that a foreign arbitral award could be enforced in China on the basis of a reciprocal agreement, thus paving the way for China to accede to the *New York Convention*.

466. The treaties referred to in the foregoing Article 204 include the bilateral agreements on judicial assistance, some of which also treated the issue of recognition and enforcement of arbitral awards.

2 Accession to the New York Convention

467. On 2 December 1986, the Standing Committee of the NPC adopted a decision providing for China's accession to the *New York Convention*. China made two reservations: the reciprocity reservation and the commercial reservation.

468. The *New York Convention* became effective in China on 22 April 1987. The Convention Implementation Notice was intended to safeguard the smooth implementation of the *New York Convention*, and form the basis for the recognition and enforcement of foreign arbitral awards in China. Where a country is not a contracting party to the *New York Convention* but has entered into a bilateral treaty or protocol with China, the issue of recognition and enforcement in China of a foreign arbitral award rendered within such State shall be dealt with in accordance with the provisions set forth (if any) in the applicable treaty or protocol.

469. Accession to the *New York Convention* has played a significant role in influencing China to reconsider its national legislation regarding the recognition and enforcement of arbitral awards. When amending the *Trial Civil Procedure Law* and drafting the *Arbitration Law*, the legislature sought to bring Chinese law closer to the *New York Convention*. For example, following adoption of the *New York Convention*, the obstacles to the enforcement of foreign arbitral awards contained in the *Trial Civil Procedure Law* were repealed and replaced with the new provisions set forth in the *Civil Procedure Law*.

II THE ENFORCEMENT OF ARBITRAL AWARDS IN CHINA

470. Article 62 of the *Arbitration Law* establishes the basic principle for both domestic and foreign-related arbitration. It provides that:

> The parties shall perform the arbitral award. If a party fails to perform the arbitral award, the other party may apply to the People's Court for

enforcement in accordance with the relevant provisions of the Civil Procedure Law. The People's Court that accepts such an application shall enforce the award.

471. Furthermore, Articles 257 and 267 of the *Civil Procedure Law* provide that in the case of foreign awards or foreign-related awards, the application should be submitted to the Intermediate People's Courts.

> Article 257: In a case in which an award has been made by an arbitral commission of the People's Republic of China handling cases involving a foreign element, the parties may not bring an action in a people's court. If one party fails to comply with the arbitral award, the other party may apply for its enforcement to the intermediate people's court of the place where the party against whom the application for enforcement is made has his domicile or where his property is located.
>
> Article 267: If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the Intermediate People's Court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.

472. The provisions of the foregoing articles reflect the legislation and prevailing practices of most other countries. First, the parties are generally obliged to perform the binding arbitral award. Second, the parties enjoy the right to seek enforcement by the People's Court – the courts enforce arbitral awards on the basis of an application submitted by a party rather than ex officio. Finally, the parties must apply to the competent court for the enforcement. The procedures and measures for the enforcement of an award mirror those that apply to the enforcement of civil judgments.

A Time Limit for Initiation and Determination of Enforcement Proceedings

473. Article 215 of the *Civil Procedure Law* sets forth a unified time limit for the initiation of enforcement proceedings, regardless of the nature of the award for which enforcement is sought. Whereas the former version of the Civil Procedure Law provided for two different time limits for natural persons and legal persons, the new Civil Procedure Law provides for a unified time limit of two years. The time runs from the final date upon which, pursuant to the award, the losing party is obliged to comply with its terms. A question arises, though, when the award does not contain any time limit for the losing party to execute its obligations under the award. In such a case, Article 215(3) provides that the time limit shall be calculated from the day when the legal document takes effect. However, a "reasonable period" should be granted and duly taken into account for the calculation of the time limit for filing an application of enforcement. Furthermore, the arbitration institutions and the arbitrators in ad hoc arbitration proceedings sometimes withhold the award until the parties have paid all outstanding arbitration fees. The time limit should then start to run from the date when the parties have received an original copy of the arbitral award.[8]

474. For the enforcement of a foreign award, the translation and authentication by the local Chinese consulate or Embassy may take time. The Chinese courts are not flexible in extending the time limit.[9] However, in the light of the new time limit of two years, the time spent gathering the necessary documents and obtaining the necessary notarizations and authentications should no longer be a burden.

475. Force majeure and other legitimate reasons may interrupt the computation of the time limit, provided that the party must request the People's Court within ten days after the obstacle is removed, to grant an extension. The court can decide whether or not to grant such extension.[10] The travel restriction imposed by an international organization, such as the World Health Organization, or even by a national government concerning its citizens, may be considered a "legitimate reason".[11]

476. According to the *Regulations of the Supreme People's Court for Certain Issues Concerning Enforcement by the People's Court* (*Enforcement Regulations*),[12] in making an application for enforcement, the applicant must present the following documents to the court:

- The enforcement application: This must specify the grounds upon which the application is based, the subject matter of enforcement, and such details as are known to the applicant regarding the property and assets status of the party against whom enforcement is sought. Notably, if a foreign party applies for enforcement, the application must be submitted in Chinese, unless otherwise stipulated in the judicial assistance treaty or

8. See Reply of the Supreme People's Court regarding the Request of Guangdong High People's Court for the Recognition and Enforcement of an English Award by the Applicant Bunge S.A. of Switzerland, dated 9 May 2007, in *Guide on Foreign-Related Commercial and Maritime Trial*, No.2 (2007), (People's Court Press 2008 Beijing), 31–42.
9. See Reply of the Supreme People's Court regarding the Request of Beijing High People's Court for the Recognition and Enforcement of the American Arbitration Association Award by Peter Sheuer, dated 22 Jan. 2007, in *Guide on Foreign-Related Commercial and Maritime Trial*, No.1 (2007) (People's Court Press, 2007 Beijing), 87–93.
10. Art. 76 of the *Civil Procedure Law*.
11. See Reply of the Supreme People's Court of 22 Jan. 2007, n. 9.
12. Promulgated by the Supreme People's Court on 8 Jul. 1998; Fa Shi (1998) No.15, revised by the *Decision of the Supreme People's Court on Adjusting the Sequential Number of the Articles of the Civil Procedure Law of the People's Republic of China Cited in Judicial Interpretations and Other Documents*, adopted on 8 Dec. 2008 at the 1457th Session of the Judicial Committee of the Supreme People's Court, and effective from 31 Dec. 2008.