KIDRC	Korean Internet Address Dispute Resolution Committee
LCIA	London Court of International Arbitration
MAC	Maritime Arbitration Commission
MII	Ministry of Information Industry
MOFCOM	Ministry of Commerce
NPC	National People's Congress
SAIC	State Administration of Industry and Commerce
SCC	Stockholm Chamber of Commerce
SAR	Special Administrative Region
SIAC	Singapore International Arbitration Centre
SOE	State Owned Enterprise
UN	United Nations
UDNDRP	Uniform Domain Name Dispute Resolution Policy Rules
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre
Washington Convention	Convention on the Settlement of Investment Disputes
WFOE	Wholly Foreign Owned Enterprise
WIPO	World Intellectual Property Organization

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, co-operative 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 that where the parties failed to reach a resolution of their dispute via consultation, a

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. 30, 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.

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 30 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.
- Rules of Arbitration for Technology Contract Arbitration Institutions (for Trial Implementation); effective 1 November 1991.

3. Promulgated by the SAIC on and effective from 23 Dec. 1983.
4. Chang YING, *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).

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] To bring domestic arbitration in line with international practice, the *Arbitration Law*

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

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 185 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; and
   (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 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

6. Li Yong, 'Continue to Implement the Arbitration Law and to Further Improve the Arbitration Legal System', *Arbitration and Law*, Beijing, (2000): Vol.5.
7. Ying Chang, *The Science of Law of Arbitration* (in Chinese: *Zhongcai Faxue*), *supra* n. 4.
8. *Labor Law of People's Republic of China*, promulgated by Standing Committee of the National People's Congress on 5 Jul. 1994, and effective from 1 Jan. 1995. *Labor Contract Law of*

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.

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.

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.

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

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.
10. An arbitration commission must have from two to eleven members.
11. Art. 12 of the *Arbitration Law*.

Arbitration Law expanded the scope of arbitral subject matter by permitting the arbitration of contractual disputes and other disputes over rights and interests in property.[12] 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 in which to reject the arbitral award and file 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.

5 Establishing Jurisdiction via the Arbitration Agreement

20. Prior to the *Arbitration Law* the jurisdiction of arbitration commissions was based entirely upon Articles 9 and 10 of the *Regulations on the Arbitration of Economic Contracts*, which established jurisdiction only over those disputes falling within the remit of the scope of an arbitrable subject matter detailed in the *Regulations*. In later years new laws such as the *Economic Contract Law*, the *Technology Contract Law*, the *Copyright Law* and the *Civil Procedure Law* all provided for the arbitration of disputes on the basis of an arbitration agreement reached by the disputing parties. For disputes arising beyond the remit of these new laws, the general principle for the establishment of jurisdiction contained in the regulations still applied. This somewhat unusual situation was finally rectified with the introduction of the *Arbitration Law* which firmly establishes the arbitration agreement as the sole and exclusive basis for founding the jurisdiction of an arbitral tribunal.

12. Art. 3 of the *Arbitration Law* provides that the courts retain exclusive jurisdiction over marital, adoption, guardianship, support and succession disputes, and administrative disputes.

The law as agreed by the parties shall apply to the examination over the validity of the foreign-related arbitration agreement; where the parties concerned have not agreed on the applicable law but have agreed on the place of arbitration, the law of the place of arbitration shall apply; and where neither the applicable laws nor the place of arbitration is agreed or the agreement on the place of arbitration is not clear, the laws of the place where the court is located shall apply.

236. This Article is actually a repetition of the principle stated at Article V(1), lit. a of the *New York Convention*, but it is helpful to have the Supreme People's Court reconfirm this principle, since (i) local courts can sometimes feel uncomfortable when applying the *New York Convention* and (ii) some situations may not fall within the scope of application of the *New York Convention*.

6 Appointment of Arbitrators

237. In China, generally three arbitrators are appointed to form an arbitral tribunal.[76] However, under the summary procedure, one arbitrator will be appointed. The parties may also agree upon the methods of appointing arbitrators, generally either via appointment by the parties, or alternatively, by authorizing the arbitration commission to effect the appointments. The issue of applicable law is treated in detail in Chapter IV.A.2 and B.1 and 2 herein.

76. Art. 21(2) of the *CIETAC Rules (2005)* provides that unless otherwise agreed by the parties or provided by the *CIETAC Rules*, the arbitral tribunal shall be composed of three arbitrators.

Chapter III
Court and Arbitral Jurisdiction

I DIFFERENCES BETWEEN COURT AND ARBITRAL JURISDICTION

238. Whilst Court jurisdiction is based on the constitution and laws arising therefrom, enabling one party to initiate a civil law suit without the consent of the other, the arbitration of disputes and the jurisdiction of the arbitral commission require the consent of the parties. Many arbitration institutions in China have their own arbitration rules, which understandably limits their jurisdiction to a specific scope. Chapter II of the *Civil Procedure Law* treats four levels of jurisdiction: jurisdiction by level (i.e., by hierarchical order), territorial jurisdiction, referral and designated jurisdiction. Any civil lawsuit brought by any physical person, legal person or organization must comply with the aforementioned jurisdictional provisions. However, the selection of arbitral jurisdiction is mainly a matter for the parties to determine. A dispute will generally be eligible for arbitration if it is arbitrable and falls within the competence of the selected arbitration institution. Moreover, not only are the parties to an arbitration permitted to select the arbitration institution and arbitrators, they are additionally permitted to select the arbitration procedure and, to some extent, the governing law, thereby affording the parties a level of autonomy significantly greater than that found in a civil court.

239. Generally, the recognition and enforcement of a foreign-rendered court judgment is mainly based upon the existence of a dedicated mutual agreement between China and the state rendering that judgment, or failing such agreement, on the principle of reciprocity. However, since China's adoption of the *New York Convention*, arbitral awards rendered by an arbitration institution in a contracting

state may be recognized and enforced by the Chinese courts, and vice versa. Article 269 of the *Civil Procedural Law* provides that:

> 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 the 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.

II CHALLENGING JURISDICTION PRIOR TO THE COMMENCEMENT OF THE ARBITRATION PROCEDURE

240. Where one party, notwithstanding the existence of an arbitration agreement, initiates a lawsuit against the other party, the respondent may challenge jurisdiction by submitting the arbitration agreement to the People's Court prior to the first arbitral hearing of the case. For reasons of efficiency, if the respondent fails to effect such challenge, the People's Court will consider the arbitration agreement to have been waived by the party and the court is obliged to proceed with the hearing.

241. Article 5 of the *Arbitration Law* expresses the principle that a valid arbitration agreement excludes the jurisdiction of the court. According to Article 5, only where the arbitration agreement is invalid, i.e., null and void, may a court accept its jurisdiction. However, the exclusion of the court's jurisdiction appears to be more partial than absolute. The problem is that there is no recognition of the *Kompetenz-Kompetenz* of the arbitral tribunal under Chinese law. In practice, Article 5 bestows upon the court the authority to decide on the validity of the arbitration agreement instead of giving such power to the arbitration institution and/or the arbitral tribunal in accordance with the doctrine of *Kompetenz-Kompetenz*. The non-acceptance of the principle of *Kompetenz-Kompetenz* in China is clearly reflected in Article 20 of the *Arbitration Law*, which stipulates that where a party requests a court to decide on the validity of the arbitration agreement and the other party requests the arbitration institution to make the ruling, the court's decision is given precedence. As a consequence thereof, if a dispute, which is subject to arbitration, is brought before the Chinese court, the defendant who wishes to see this dispute resolved by means of arbitration has an obligation to raise an objection prior to the first hearing of the case. If he fails to do so, he will be deemed to have waived his right to refer to arbitration.

242. The court that hears a motion to revoke jurisdiction must render a determination in accordance with Article 26 of the *Arbitration Law*. Unlike arbitration practice in most countries, for example, Article 1458 of the French *Code de Procedure Civile*, China's *Arbitration Law* does not distinguish between a situation where the arbitral tribunal has already been constituted prior to the initiation of a lawsuit, and where it has not. The Chinese court always has priority. Further, the *Arbitration Law* does not appear to permit a party to seek a declaratory judgment from a court in favour of arbitral jurisdiction when an arbitration institution has declared itself incompetent after a prima facie examination of the matter.

III CHALLENGING JURISDICTION DURING THE ARBITRATION PROCEDURE

243. The *Arbitration Law* empowers the arbitration institution to determine the existence and validity of an arbitration agreement and to determine challenges to the jurisdiction of the arbitration institution or the arbitral tribunal over an arbitration case, as long as none of the parties initiates proceedings in the People's Court. If the parties to a dispute separately apply to the arbitration commission and to the People's Court for a determination on the issue of the validity of the arbitration agreement, here again the decision of the court will prevail according to Article 20 of the *Arbitration Law*. However, where an application to the arbitration commission challenging the validity of the arbitration agreement precedes a separate application to the court by another disputing party, then provided that (1) the arbitration commission has accepted the application, and (2) it has already rendered a decision on the jurisdictional issue, the determination of the arbitration institution on the matter shall prevail.[1] However, an application challenging the validity of the arbitration agreement or the jurisdiction of the arbitration institution over the case must be filed prior to the first oral hearing of the case. If the case is to be conducted via submission of documents only, then the respondent must file the challenge with the arbitration commission prior to the submission of the first substantive defense. A failure to submit a challenge within this prescribed time frame is treated as a waiver by the respondent of the right to subsequently raise any such objections.[2] Adopting the global practice, Article 26 of the *Arbitration Law* provides that:

> Where the parties had agreed on an arbitration agreement, but one of the parties initiates an action before a People's Court without stating the existence of the arbitration agreement, the People's Court shall, unless the arbitration agreement is invalid, reject the action if the other party submits to the court the arbitration agreement prior to the first hearing of the case. If the other party fails to object to the hearing by the People's Court prior to the first hearing, the arbitration agreement shall be considered to have been waived by the party and the People's Court shall proceed with the hearing.

1. See Art. 13(2) of the *SPC Judicial Interpretations 2006*.
2. See Art. 27 of the *SPC Judicial Interpretations 2006*.

244. The arbitration rules of both CIETAC (Article 6) and CMAC (Article 6) restate the foregoing legislative provisions.

245. Prior to the introduction of the *CIETAC Rules (2000)* and the *CMAC Rules (2001)*, respondents were often known to have waited until the day of hearing to submit a challenge to the validity of the arbitration agreement or the jurisdiction of the arbitration institution, thereby requiring a postponement of the hearing. Both sets of rules now provide that any objection to an arbitration agreement and/or arbitral jurisdiction shall not interfere with or otherwise affect the hearing of the case according to the arbitration procedures. The same principle remains valid under the *CIETAC Rules (2005)*, which have either introduced new time limits or shortened existing time limits, such as the time limit to file a defence or to select an arbitrator, which enhances the efficiency of the arbitration proceedings.

246. Often, a party will object to jurisdiction on the grounds that the dispute referred to in the arbitration application does not exist in fact. However, as CIETAC generally affords a broad interpretation to the term *dispute*, objections based on such grounds are rarely successful. Indeed, practically any difference between parties regarding whether the subject matter falls within the jurisdiction of the arbitral commission may be deemed a *dispute* between the parties. Thus, once a party has submitted an application for arbitration, it is almost impossible for the respondent to establish the non-existence of a dispute.

247. Disputes often arise in cases where the parties enter into a new contract without waiving or quoting the arbitration provision of the original contract. In China, the courts have generally held that, in such circumstances, the arbitration provision is still applicable. Therefore, where a dispute arises in relation to a supplementary agreement, then, notwithstanding that such agreement may not include a reference to the arbitration agreement contained in the original contract, a court will usually decline jurisdiction over the dispute. In the case of *Mikeda (Qingdao) Sport Article Co. Ltd v. A Walk In The Clouds International Co.*[3] the parties had concluded a manufacturing agreement containing an arbitration clause which referred '*all disputes related to this Agreement*' to arbitration. The parties then signed a Repayment Agreement, which did not contain any arbitration clause, but which was related to payments due under the Manufacturing Agreement. Mikeda initiated arbitration proceedings under the Repayment Agreement, although it contained no arbitration clause. The other party contested the jurisdiction of the arbitral tribunal based on the absence of an arbitration clause in the Repayment Agreement. The Supreme People's Court admitted the jurisdiction of the arbitral tribunal based on the argument that a dispute arising out of the Repayment Agreement, was actually also a dispute related to the Manufacturing Agreement and therefore fell under the scope of application of the arbitration clause contained in the Manufacturing Agreement.

3. *Letter of Reply of the SPC to the Request for Instructions on the Validity of the Arbitration Clause*, dated 7 Mar. 2006 and addressed to the High People's Court of Shandong Province.

IV JURISDICTION OF CIETAC

248. China's arbitration system has traditionally adopted dual regimes for foreign-related and domestic arbitration, with foreign-related arbitration institutions exercising jurisdiction over disputes involving foreign-related elements and domestic arbitration dealing exclusively with disputes arising between Chinese legal persons. However, the trend is clearly towards jurisdictional convergence between foreign-related and domestic arbitration, at least in a legal sense. Moreover, the broad spectrum of commercial matters that has been subject to arbitration in China indicates a de facto acceptance of the interpretation extended to the term *commercial* in the footnote to the *UNCITRAL Model Law*, which provides that:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

249. Although historically confined to taking cognizance of only international or foreign-related disputes,[4] foreign-related arbitration has gradually expanded to cover (i) international or foreign-related disputes; (ii) disputes related to Hong Kong SAR, Macao SAR, or Taiwan; (iii) inter-FIE disputes (i.e., disputes between FIEs and Chinese natural persons, economic organizations, and/or other Chinese legal persons); (iv) disputes relating to the use by Chinese legal persons, physical persons, and/or economic organizations within China, of funds, technology, or services provided by foreign entities or by entities from Hong Kong SAR, Macao SAR, or Taiwan, for the purposes of project financing, tendering, construction work, or other activities; and (v) other disputes which it may take cognizance of in accordance with special provisions of, or upon special authorization from, the laws or administrative regulations of China. In 2000, CIETAC further expanded its jurisdiction over domestic arbitral cases, an expansion that took form under an amended Article 2 of *CIETAC Rules (2000)*. The revision took effect from 1 Oct. 2000. The amendments detailed in the *CIETAC Rules (2000)* brought (i) an expansion of arbitral jurisdiction; (ii) the inclusion of dedicated provisions relating to domestic cases; (iii) provisions providing for the commencement or continuance of arbitral proceedings in cases where jurisdiction is challenged; (iv) an improvement in the provisions for conciliation and arbitration; and (v) a reduction in CIETAC arbitration fees. The *CIETAC Rules* were again revised in 2005, the

4. See *supra* Ch. I, Section III.

revisions taking effect from 1 May 2005. The *CIETAC Rules* were restructured, the jurisdiction of CIETAC was consolidated, more flexibility was given to the parties as concerns the choice of the applicable procedural rules and of the arbitrators, etc., all these measures aiming at enhancing the efficiency of the arbitration proceedings. The foregoing amendments will be treated below.

250. Consolidation of arbitral jurisdiction: In Article 3 of the *CIETAC Rules (2005)*, the six categories of disputes falling within the scope of CIETAC's jurisdiction were consolidated into three categories: (1) international and foreign-related disputes; (2) disputes involving parties from the Hong Kong SAR, the Macao SAR and Taiwan; and (3) domestic disputes.

251. This amendment, although of a formal nature, reaffirms CIETAC's wide jurisdiction in domestic and international and/or foreign-related disputes. Whereas the *CIETAC Rules (2000)* placed CIETAC firmly in direct competition with domestic arbitration institutions with respect to the hearing of domestic cases, the *CIETAC Rules (2005)* now open the door for the handling of purely foreign disputes, putting CIETAC in direct competition with foreign arbitration institutions.[5] CIETAC contended that the amendment to its rules in 2000 was necessitated due to (i) the requirement to prepare itself for the potential competition posed by international arbitration institutions in arbitral services, with respect to both domestic and foreign-related arbitration that would inevitably result following China's accession to the WTO; (ii) the view that there existed no valid reason for denying jurisdiction to CIETAC over domestic cases; (iii) the overall promotion of the arbitration system in China; and (iv) the crucial need to satisfy commercial demand and enable a greater international impact.[6] The same is valid for the *CIETAC Rules 2005*, which once more consolidated CIETAC's extended jurisdiction.

252. Although, the *CIETAC Rules (2000)* broadened CIETAC's jurisdiction to include not only foreign-related or international disputes, but also domestic disputes; from a procedural standpoint, foreign-related/international disputes and domestic disputes were handled differently. This applied, for example, with regard to the panel of arbitrators, schedule of arbitration fees, and the rules governing the enforcement of an arbitral award. This is still true under the new *CIETAC Rules (2005)*, although it harmonized somewhat the relevant provisions, in particular as concerns the formation of the arbitral tribunal.[7]

5. See *supra* Ch. I, s. G.
6. See WANG Shengchang, *Explanation of Certain Issues Relating to the Modification of the CIETAC Rules*, contained in *Arbitration & Law*, Sep. 2000. In this article, Mr. Wang points out that the *Arbitration Law*:

   (i) does not prohibit CIETAC from accepting domestic arbitration cases; and
   (ii) enables the arbitration commission to determine the nature of cases that will be accepted.

7. Art. 61 of the *CIETAC Rules (2005)* states that the formation of the arbitral tribunal (in a purely domestic case) shall be formed in accordance with Arts 21, 22, 23 and 24 of the *CIETAC Rules (2005)*, which apply to foreign-related arbitration. This theoretically means that the possibility to choose an arbitrator outside of the CIETAC panel of arbitrators also applies to domestic arbitration. If this will be the case in practice remains uncertain. See *supra* para. 113 et seq.

253. Special provisions for domestic arbitration: In complementing the expansion of CIETAC's jurisdiction to also include purely domestic disputes, the *CIETAC Rules (2000)* contained a new chapter (Articles 75 to 84) detailing special procedures for purely domestic arbitration. These rules clarified that, whilst CIETAC may exercise jurisdiction over both domestic disputes and foreign-related disputes, different procedures apply to the arbitration of each type of dispute. The differences, however, mainly consisted of different time limits. The *CIETAC Rules (2005)* have not changed the principle, although they have harmonized somewhat the time limits. A comparison of the CIETAC domestic arbitration procedures under the *CIETAC Rules (2005)* and those of 2000 reveals that (i) the time limits have been shortened for both foreign-related and domestic arbitration proceedings, and that (ii) domestic arbitration proceedings are still faster than the CIETAC foreign-related arbitration procedures.

	CIETAC Rules (2000)		*CIETAC Rules (2005)*	
	Foreign-Related Arbitration	*Domestic Arbitration*	*Foreign-Related Arbitration*	*Domestic Arbitration*
Time frame for appointing Arbitrators	Twenty days	Fifteen days	Fifteen days	
Time frame for submitting defence and counterclaim	Forty-five days and sixty days, respectively	Thirty days and forty-five days, respectively	Forty-five days and thirty days respectively	Twenty days
Time frame for rendering an arbitral award	Nine months	Six months	Six months	Four months

254. It was somewhat unclear whether the new *CIETAC Rules (2000)* fully complied with Chapter VII of the *Arbitration Law*, which established the *Special Provisions on Foreign-Related Arbitration*. The special provisions of the *Arbitration Law* employ the term *foreign-related arbitration commission* and provide that *such a commission may be organized and established by the China Chamber of International Commerce*. But since there are no specific provisions in

relevant laws. Of course, as the *applicable law* and the *principles of equity* are occasionally mutually exclusive, a question then arises as to which has priority and is to be applied in determining a dispute. The well-established position in China is that the law as selected by the parties and recorded in their arbitration agreement will be applied without equivocation. However, where the selected law is silent on a particular point, the arbitral tribunal will apply international practice and the principles of equity.

289. Moreover, where Chinese law applies, equitable principles will, of necessity, be followed by operation of law. In that respect, many fundamental Chinese statutes expressly provide for the application of equitable principles. Articles 5 and 6 of the *Contract Law*, for example, provide that the parties shall observe the principle of fairness in defining their respective rights and obligations and shall observe the principles of good faith in exercising their rights and performing their obligations. Indeed, Article 54 thereof states that a party has the right to request a People's Court or an arbitration body, as the case may be, to alter or nullify a contract that was clearly unfair at the time it was concluded. It can therefore be said that by virtue of the principles of equity embodied in numerous fundamental Chinese statutes, arbitrators apply not merely the relevant provisions of Chinese law but also operate to a certain extent as *amiable compositeurs* when they consider that the application of equity is appropriate. In conclusion, whilst in many countries the determination of arbitral disputes may, with the authorization of the parties, be effected purely on a basis of *ex aequo et bono*, it must be effected in Chinese arbitration in accordance with the law, which, through its embodiment of equitable principles, permits arbitrators to act as *amiable compositeurs* without the authorization of the parties. However, the application of such equitable principles will only apply where specific legal provisions are absent and as far as they are compatible with the applicable legal provisions.[9]

9. For a more detailed analysis of the application of the 'ex aequo et bono' principle under Chinese law, see Hu Li, 'Arbitration Ex Aequo et Bono in China', *Arbitration: Journal of the Chartered Institute of Arbitrators* 66, no. 3 (2000): 188-192.

Chapter V
Arbitration Procedure

I DOMESTIC ARBITRATION, FOREIGN-RELATED ARBITRATION AND FOREIGN ARBITRATION

290. As discussed earlier,[1] arbitration in China is categorized into two groups: domestic arbitration and foreign-related or international arbitration. Whilst a broad understanding of the terminology 'international arbitration' might cover arbitration dealt with by arbitration institutions in other countries, this chapter uses the term 'international arbitration' in the sense of 'foreign-related arbitration'. This is also the case in relevant arbitration rules in China.[2] Foreign arbitration, namely those handled by foreign arbitral tribunals, in which the most important issues are recognition and enforcement, will be discussed in the next chapter.

291. Pursuant to Article 304 of the *Civil Procedure Law Opinions*,[3] the term 'foreign-related' may refer to any of the following circumstances:

(1) where either or both parties are of foreign nationality or stateless, or a company or organization is located in a foreign country;
(2) where the legal facts that establish, alter or terminate the civil legal relationship between the parties occurs in a foreign country; or
(3) where the subject matter in dispute is situated in a foreign country.

292. The scope of foreign-related arbitration should be determined in accordance with the above three criteria. Domestic arbitration covers the circumstances which do not contain foreign elements falling within these three categories.

1. See Ch. I, Section A.
2. See the introduction of various versions of CIETAC Rules in Ch. I.
3. *Several Opinions of the Supreme People's Court Concerning the Implementation of the Civil Procedure Law of the People's Republic of China*, see *supra*.

293. Confusion often occurs when a case involves Foreign Invested Enterprises (FIEs).[4] Although FIEs are created by foreign companies in China and therefore may contain a number of 'foreign-related' factors, they are registered in China and thus are Chinese legal persons and are not considered as included in the first category listed above. Therefore arbitration involving FIEs is considered domestic, unless the second or third criteria listed above is simultaneously satisfied.

II DOMESTIC ARBITRATION PROCEDURE

A ARBITRATORS AND THE ARBITRAL TRIBUNAL

1 Appointment to the Panels of Arbitrators in Domestic Arbitration

294. Article 13 of the *Arbitration Law* details the qualifications necessary to be appointed to the panel of arbitrators of any arbitration commission in China, excluding foreign-nationals arbitrators' panels. In addition to the statutory requirement that a candidate must be *righteous* and *upright*, it further provides that a person may not be appointed as an arbitrator unless he can satisfy at least one of the following requirements:

- has at least eight years' experience working in the field of arbitration;
- has at least eight years' experience working as a lawyer;
- has served as a judge for at least eight years;
- has a senior title in the legal research or legal education field; or
- has knowledge of the law and holds a senior title or has acquired an equivalent professional level in fields such as economic relations and trade.

295. Chapter 7 of the *Arbitration Law*, which addresses foreign-related arbitration, contains a dedicated provision treating the appointment of foreign specialists to dedicated *foreign-related* arbitration panels.[5] The foregoing provision does not make reference to the requirements in Article 13 of the *Arbitration Law*, and, in view of the separate treatment of foreign-related arbitration, appointments of foreign-nationals arbitrators are not subject to the Article 13 qualification requirements.

296. Further, the China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC) jointly promulgated the *Stipulations for the Appointment of Arbitrators* on 1 September 1995, and later amended them on 1 September 2000 '(*Appointment Stipulations*') and on 2 March 2005,[6] listing different criteria for Chinese

4. See the *Lido* case in Ch. I, Section IV. B.
5. Art. 67, *Arbitration Law*.
6. Jointly issued by CIETAC & CMAC, on 1 Sep. 1005 and amended on 1 Sep. 2000. See CIETAC's website <www.cietac.org.cn>.

arbitrators, foreign arbitrators and Hong Kong and Macao arbitrators. According to the updated version of the *Appointment Stipulations*, the qualifications for the appointment of Chinese arbitrators are:[7]

- has keen interest in arbitration, has a righteous and upright personality, and can uphold the principle of independence and impartiality in handling cases;
- has been engaged in arbitration work, has worked as a lawyer, or has served as a judge for eight years; or has been engaged in legal research or legal education work and has a senior title; or has acquired the knowledge of law, engaged in the professional work of economy and trade or maritime affairs, and possesses a senior title or has attained an equivalent professional level;
- is willing to observe the arbitration rules of the arbitration commission, the *Ethical Rules for Arbitrators of CIETAC & CMAC* ('*Ethical Rules for Arbitrators*')[8] and other relevant regulations;
- has a good grasp of, and can work in, a foreign language, but for a few well-known individuals these terms can be relaxed appropriately;
- can guarantee the time to handle cases, and does not permanently stay abroad.

297. CIETAC kept a *List of Arbitrators on Domestic Cases* and a *List of Arbitrators on Foreign-related Cases* until May 2008, when CIETAC abolished this distinction.[9] Therefore, in domestic cases, parties have the same options as in foreign-related cases, where parties can choose both Chinese arbitrators and arbitrators from Hong Kong, Macao, Taiwan or other countries and regions.

298. In forming arbitral tribunals, the parties to an intended CIETAC/CMAC arbitration, and the chairman of the arbitration commission were traditionally obliged to select arbitrators from the appropriate panel lists, although occasional exceptions existed based on a specific authorization of CIETAC.

299. However, the new *CIETAC Rules (2005)* provide in Article 21(2) that the parties can agree to appoint arbitrators outside the panel, the appointment being subject to confirmation by CIETAC. This provision, although designed for foreign-related arbitrations, also applies to domestic CIETAC arbitrations based on Article 61 of the *CIETAC Rules (2005)*, which simply refers to Article 21 and following. Indeed, the practice as to the choice of the arbitrator is becoming more and more flexible, although the CIETAC's list of arbitrators still has great influence, especially in domestic arbitration.

7. See information on CIETAC's's website, <http://www.cietac.org.cn>.
8. *Ethical Rules for Arbitrators*; issued by CIETAC and CMAC; adopted in 1991 and subsequently revised in 1993 and 1994.
9. *See supra*, para. 234.

2 Formation of the Arbitral Tribunal

300. Under the *Arbitration Law*, an arbitral tribunal may consist of either three arbitrators or a sole arbitrator. Where it is agreed to have a sole arbitrator, the parties are required to jointly appoint such arbitrator or entrust the appointment to the chairman of the arbitration commission. Similarly, if the parties select a three-member arbitral tribunal, the applicant and respondent must each appoint one arbitrator drawn from the then pertaining panel of arbitrators, whilst the third presiding arbitrator is jointly selected by agreement between the parties. Alternatively, the parties may each entrust the chairman of the arbitration commission to select the arbitrators, and/or the presiding arbitrator. Where the parties fail to determine the composition of the tribunal, or fail to appoint their respective arbitrators within the time frame set forth in the applicable arbitration rules, then the chairman of the arbitration commission is obliged to make the appointments and the arbitral tribunal will in principle be constituted of three arbitrators.

301. The *CIETAC Rules* implement the principle of the *Arbitration Law* with the following specificities: According to Article 22 of the *CIETAC Rules (2005)*, where there are three arbitrators, the Claimant and the Respondent shall each appoint one arbitrator or entrust the Chairman of the CIETAC to make such appointment. Where a party fails to appoint or to entrust the Chairman of the CIETAC to appoint an arbitrator within the specified time period, the arbitrator shall be appointed by the Chairman of the CIETAC. As concerns the presiding arbitrator, he shall be jointly appointed by the parties or appointed by the Chairman of the CIETAC upon the parties' joint authorization. The appointment mechanism is as follows: The parties may each recommend one to three arbitrators as candidates for the presiding arbitrator and shall submit the list of recommended candidates to the CIETAC. Where there is only one common candidate in the lists, such candidate shall be the presiding arbitrator jointly appointed by the parties. Where there are more than one common candidate in the lists, the Chairman of the CIETAC shall choose a presiding arbitrator from among the common candidates based on the specific nature and circumstances of the case, who shall act as the presiding arbitrator jointly appointed by the parties. Where there is no common candidate in the lists, the presiding arbitrator shall be appointed by the Chairman of the CIETAC from outside of the lists of recommended candidates. Where the parties have failed to jointly appoint the presiding arbitrator according to the above provisions, the presiding arbitrator shall be appointed by the Chairman of the CIETAC.

302. The Beijing Arbitration Commission (BAC) Rules provide for a very similar system. According to Article 18, within fifteen days of the receipt of the Notice of Arbitration, the parties shall nominate or entrust the Chairman to appoint their arbitrators from the BAC's Panel of Arbitrators. If the parties fail to nominate the arbitrator in accordance with the aforementioned provisions, the arbitrator shall be appointed by the Chairman. As concerns the presiding arbitrator, the parties may each nominate one to three arbitrators as the candidates for the presiding arbitrator,

or where provided for by the parties, the BAC may also provide a list of five to seven candidates for the presiding arbitrator from which the parties shall select one to three as candidates. Where there is only one common candidate on both parties' lists of nomination or both parties' lists of selection (the 'Candidate'), such candidate shall be the presiding arbitrator jointly nominated by both parties. If there are two or more such candidates, the Chairman shall, taking into consideration the specific circumstances of the case, confirm one of them as the presiding arbitrator, who shall be regarded as being jointly nominated by the parties. If there are no such candidates, the Chairman shall appoint the presiding arbitrator from outside of the lists of nomination and lists of selection. If the parties fail to jointly nominate the presiding arbitrator in accordance with the aforementioned provisions, the presiding arbitrator shall be appointed by the Chairman.

B The Place of Arbitration

303. The parties may specify in their arbitration agreement the intended place of any arbitration proceedings. If they fail to do so, the place of arbitration is presumed to be the place where the selected arbitration commission is located.[10]

304. Although neither the *Arbitration Law* nor the rules of major Chinese arbitration commissions make a distinction between domestic and foreign-related arbitration with regard to the choice of the place of arbitration, in practice, it might be problematic for the parties in a domestic arbitration to choose to arbitrate outside the territory of China. Indeed, according to Article 128 of the *Contract Law*, parties may only choose a place of jurisdiction abroad if their dispute qualifies as 'foreign related'. This is because such a forum selection will trigger the application of the *New York Convention*, which would not be otherwise relevant. If this is permitted, then all domestic arbitral awards could easily be made international and thus escape from the jurisdiction of Chinese law, diminishing the effectiveness of the *Civil Procedure Law* and *Arbitration Law*. Chinese courts would not permit the parties to choose a place of arbitration in a foreign country in domestic arbitration proceedings due to the evasive nature of such a choice. When it comes to the stage of recognition and enforcement, it is very likely the Chinese court would set aside such awards pursuant to Article V(2)(b) of the *New York Convention*, which permits the court of a contracting state to set aside the award based on public policy concerns.

305. Therefore, although there is no explicit regulation in the law, it would be more prudent for the parties in domestic arbitration to choose a place in the territory of China as the place of arbitration.

306. The place of arbitration to be chosen by the parties can have an important impact on the conduct of the arbitration proceedings and the setting-aside of the arbitration award. This is particularly true since most local courts are unfamiliar with

10. See Art. 16, *SPC Judicial Interpretation* (2006).

arbitration and the judicial personnel can be quite invasive towards arbitration. If the arbitration is domestic, there are actually no legal remedies for this kind of problem.

C Cost Schedules

307. In accordance with the *Notice of the General Office of the State Council on Measures Regarding Arbitration Fees of Arbitration Commissions*,[11] domestic arbitration commissions have set their respective fee structures. For example, the *Case Acceptance Fees* and *Case Handling Fees* of the BAC are as follows:[12]

BAC Case Acceptance Fee Schedule

Disputed Amount (CNY)	*Fee Standard*	*Case Acceptance Fee (CNY)*
Less than 1,000		A minimum of 100
1,001-5,000	5%	100 plus 5% of the portion of the disputed amount exceeding 1,000
5,001-100,000	4%	2,550 plus 4% of the portion of the disputed amount exceeding 50,000
100,001-200,000	3%	4,550 plus 3% of the portion of the disputed amount exceeding 100,000
200,001-500,000	2%	7,550 plus 2% of the portion of the disputed amount exceeding 200,000
500,001-1,000,000	0.5%	13,550 plus 0.5% of the portion of the disputed amount exceeding 500,000
1,000,000 or more	0.3%	18,550 plus 0.3% of the portion of the disputed amount exceeding 1,000,000

Where the disputed amount is not specified by the Claimant, the case acceptance fee shall be determined by the office of BAC.

BAC Case Handling Fee Schedule

Disputed Amount (CNY ¥)	*Fee Standard*	*Case Handling Fee (CNY ¥)*
Less than 200,000		A minimum of 5,000
200,001-500,000	2%	5,000 plus 2% of the portion of the disputed amount exceeding 200,000

11. Guobanfa (1995) No. 44.
12. See <www.bjac.org.cn/en/program/price.htm>.

Disputed Amount (CNY ¥)	*Fee Standard*	*Case Handling Fee (CNY ¥)*
500,001-1,000,000	1%	11,000 plus 1% of the portion of the disputed amount exceeding 500,000
1,001,000-5,000,000	0.4%	16,000 plus 0.4% of the portion of the disputed amount exceeding 1,000,000
5,000,001-10,000,000	0.3%	32,000 plus 0.3% of the portion of the disputed amount exceeding 5,000,000
10,000,001-20,000,000	0.25%	47,000 plus 0.25% of the portion of the disputed amount exceeding 10,000,000
20,000,001-40,000,000	0.2%	72,000 plus 0.2% of the portion of the disputed amount exceeding 20,000,000
40,000,001 or more	0.1%	112,000 plus 0.1% of the portion of the disputed amount exceeding 40,000,000

308. Since 26 September 2002, the BAC has implemented a fee refund policy. If an arbitration application is withdrawn prior to the formation of an arbitral tribunal, the commission will refund the entirety of the acceptance fee, and half of the arbitration handling fee. Where an application is withdrawn after the formation of the tribunal but prior to the commencement of the hearing, the commission will refund half of both the acceptance fee and the handling fee, except where the acceptance fee exceeds CNY 10,000, in which case the commission will refund half the handling fee, and either one-third of the acceptance fee or CNY 5,000, whichever is greater. If the application is withdrawn after the arbitral proceedings have commenced, then depending on the individual circumstances, the commission will refund up to one-third of the handling fee. However, no part of the acceptance fee will be refunded.

309. The *Case Acceptance Fees* and *Case Handling Fees* of the Shanghai Arbitration Commission are as follows:[13]

Disputed Amount (RMB)	*Fee Standard*	*Case Acceptance Fee (RMB)*
Less than 1,000		A minimum of 100
1,001-5,000	5%	100 plus 5% of the portion of the disputed amount exceeding 1,000
5,001-100,000	4%	2,550 plus 4% of the portion of the disputed amount exceeding 50,000

13. See <www.accsh.org>.

Chapter VI

Enforcement of Arbitral Awards in China

430. A meaningful arbitral award is conditional upon an effective and reliable enforcement mechanism. In China, as elsewhere, this task lies beyond the remit of the arbitral tribunal. Indeed, the tribunal is invariably disbanded once the arbitral award is rendered except in a few special cases where an additional award or re-arbitration is required. Should one party to the arbitration fail to honour the arbitral award, the other party will have no alternative but to seek recognition and enforcement thereof via a competent court.

431. In China, the manner of enforcement depends upon the type of the award: domestic, foreign-related and foreign. This is an important distinction, as Chinese law pertaining to the enforcement of arbitral awards treats each differently. The recent expansion in the jurisdictional scope of the CIETAC, the CMAC and the domestic arbitration commissions means that all arbitration commissions located in China's major cities may now, in certain circumstances, handle both domestic and foreign-related arbitration cases. This change in policy reflects similar alterations to the standards used to distinguish a domestic arbitral award from a foreign-related one. Distinctions pertaining to the domestic or foreign-related nature of the award now turn on the character of the underlying dispute rather than the nature of the actual arbitration body that administered the arbitration proceedings. Arbitral awards rendered in the Hong Kong SAR, Macao SAR and Taiwan are treated separately and are subject to specific arrangements with Mainland China. The difference in the treatment of these awards and their respective enforcement in China are explored below.

I LEGAL BASIS FOR THE ENFORCEMENT OF ARBITRAL AWARDS

A Legal Basis for the Enforcement of Domestic Arbitral Awards

432. 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*.

433. 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.

434. 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;
- where the other party has withheld evidence sufficient to affect the impartiality of the arbitration;

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.

- 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

435. 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.

436. 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.

437. This provision is noteworthy in several respects. Firstly, 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. Secondly, 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. Thirdly, the court had no legal basis upon which to refuse recognition and enforcement of a foreign-related award. Fourthly, 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.

438. 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.

439. 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.

440. 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 opinions due to reasons for which he 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.

441. 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.

442. 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*

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

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]

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

444. 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*.

445. 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*, thereby confirming the *New York Convention* shall only apply to *arbitral awards made in the territory of other contracting states*.

446. Although the Convention is not applicable to the enforcement of foreign-related arbitral awards in China, the *Civil Procedure Law* addresses the

3. See also Art. 25, *SPC Judicial Interpretations* 2006.
4. See Arts 63 of the *Arbitration Law* and 215 of the *Civil Procedure Law* as concerns domestic awards, and Arts 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.

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*

447. 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.

448. 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. Firstly, the arbitral award had to be deemed to be a final award in the jurisdiction where it was rendered. Secondly, 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 enforcement. Thirdly, 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.

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.'

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*.

449. 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

450. 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.

451. 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.

452. 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

453. 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.