

# CONTENTS

<i>Preface</i> .....	v
<i>About the Authors</i> .....	vii
<i>Table of Abbreviations</i> .....	xxxi
<i>Table of Key Provisions</i> .....	xxxiii
<i>Table of PRC Legislation</i> .....	xxxv
<i>Table of Judicial Interpretation, Opinions and Regulations from the SPC</i> .....	xli
<i>Table of Replies from the SPC</i> .....	xlvi
<i>Table of Cases</i> .....	xlix
<i>Table of Institutional Rules</i> .....	liii
<b>Chapter 1 Introduction to Chinese Arbitration Law</b> .....	1
<i>By Peter Yuen, Damien McDonald, Arthur X Dong</i>	
Introduction .....	1
Chinese Arbitration Law Examined Against Different Contexts .....	1
Chinese arbitration in a practical context .....	1
Chinese arbitration in an international context .....	2
Chinese arbitration in a comparative context .....	2
Chinese arbitration in a state control context .....	3
Chinese arbitration in a cultural context .....	3
An Introduction to the Legal Framework for Arbitration .....	4
The framework .....	4
Key features of the framework .....	4
Foreign-Related and Domestic Arbitrations .....	5
The importance of the concept .....	5
Restrictions on the choice of governing law .....	5
The test .....	5
The Arbitration Agreement and Challenges to the Validity of Clauses in China .....	6
The Chinese Arbitration Commission .....	7
Scope of role .....	7
Local arbitration commissions .....	7
The 'reformist' Chinese arbitration commission .....	7
Structure of this Text .....	8
Scope .....	8
History and framework of Chinese arbitration .....	8

The arbitration agreement .....	8
Commencement and establishment of the tribunal .....	8
Conduct of the proceeding .....	8
China-related investment arbitration .....	9
<b>Chapter 2 History of Arbitration in China</b> .....	11
<i>By Damien McDonald</i>	
Introduction.....	11
China's unique path to arbitration .....	11
Scope of this chapter .....	11
Development and change .....	12
The History of Commercial Arbitration in China.....	12
Legal frameworks.....	13
The State.....	13
Economic development and changes in policy .....	14
Before the Late Qing Reforms—Merchant Guilds.....	14
Self-regulation.....	15
Internal justice.....	15
Arbitration and trade .....	15
Late-Qing Dynasty: 1860–1911.....	16
The first arbitration commissions.....	17
Government and frameworks .....	17
Republican Period: 1912–1949.....	18
The chambers of commerce .....	18
Other reforms .....	19
The PRC: 1949–1978.....	19
Overview .....	19
Doctrinal context.....	20
Internal dispute recognition.....	21
Domestic arbitration—State as arbitrator.....	22
Foreign trade and the FTAC.....	22
Other developments.....	26
The PRC: 1978–1995.....	26
Arbitration reforms.....	28
Foreign-related arbitration.....	29
Economic Contract Law arbitration—an outline framework for domestic arbitration.....	30

Technology Contract Law arbitration .....	32
The legacy of the early domestic arbitration system.....	33
Drafting of the Arbitration Law and influences .....	33
The Model Law .....	35
Not the old system .....	35
Independence of arbitration and arbitration commissions.....	36
Party autonomy.....	36
The arbitration agreement.....	37
Chinese arbitrators and the panel system .....	37
Finality of the award.....	37
Conclusion on the drafting of the law .....	38
The PRC: 1995–2010.....	38
The SPC as supervisor.....	39
Chinese arbitration commissions .....	40
CIETAC .....	42
The end of the monopoly.....	42
Domestic disputes.....	43
Rule changes.....	43
BAC—the alternative model.....	43
Recent History and Conclusion .....	44
The 2013 revisions to the Civil Procedure Law .....	44
CIETAC split.....	45
Rule changes .....	45
Concluding remarks .....	46
<b>Chapter 3 The Chinese Legal Framework</b> .....	55
<i>By Peter Yuen, Damien McDonald</i>	
Introduction.....	55
Overview .....	55
A civil law system and dual track system for arbitration.....	55
Primary laws.....	55
China arbitration commissions.....	56
The Chinese Legal System.....	56
The Chinese system of law.....	56
The Chinese legislature .....	57
The People's Courts .....	58
The hierarchy of law .....	60

The SPC and its role in interpreting PRC law.....	60
Overview .....	60
Classes of interpretation .....	61
Interpretations .....	61
Provisions .....	61
Replies .....	61
Decisions .....	62
Higher People's Courts .....	62
Case law .....	62
Arbitration rules .....	64
The Arbitration Law .....	64
Introduction .....	64
Territorial scope of the Arbitration Law .....	64
Major provisions of the Arbitration Law .....	65
The Civil Procedure Law .....	68
Overview .....	68
Interim remedies .....	69
Prior to and after the initiation of arbitration .....	69
After the initiation of arbitration .....	69
Abuse of process .....	70
Prevention of bringing litigation where an arbitration agreement exists .....	70
Enforcement of arbitral awards .....	70
The Contract Law .....	71
The Law on Applicable Law .....	72
The SPC Interpretations, Opinions and Replies .....	73
Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (1987) .....	73
Arrangements as to reciprocal recognition and enforcement of awards between the Mainland and HKSAR and Macau SAR .....	74
Notice on certain issues relating to foreign-related and foreign arbitrations and setting aside foreign-related awards .....	74
Interpretation on certain issues regarding application of the Arbitration Law .....	74
Interpretation of the Law on Foreign-Related Civil Relations .....	75
Notice of the Supreme People's Court on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters (2013) .....	76
Interpretation on the application of the Civil Procedure Law .....	76

Reply to the Shanghai Higher People's Court on request for instructions concerning judicial review of awards made by CIETAC and its former sub-commissions .....	77
The Relevant International Treaties .....	77
New York Convention .....	77
ICSID Convention and investment law .....	78
The Foreign-related Arbitration Regime .....	78
Structuring .....	81
The Domestic Arbitration Regime .....	81
Domestic arbitration may only be administered by Chinese arbitration commissions .....	81
Domestic contracts must be governed by Chinese law .....	83
Domestic arbitration awards are subject to wider review than foreign-related awards by Chinese courts .....	83
The Prior Reporting System .....	84
The Role of Chinese Arbitration Commissions .....	85
Foreign Arbitration Institutions in China .....	87
No application to domestic disputes with domestic parties .....	87
The debate on Article 16 .....	88
The law on foreign institutions—a structural analysis .....	88
Overview .....	88
The structure of the Arbitration Law .....	89
Articles 10, 16 and 18 of the Arbitration Law .....	89
The enforcement regime .....	90
A fourth category of arbitration? .....	90
Reconciling the positions .....	91
The Cases on Foreign Institutional Arbitration Clauses .....	91
The Züblin case .....	91
The Duferco case .....	92
The Longlide case .....	92
Foreign Institutions—Practical Difficulties and Enforcement .....	95
Enforcement—nationality of the award .....	95
The traditional approach: seat of arbitration institution .....	96
Non-domestic under the New York Convention? .....	96
Foreign award .....	97
Setting aside and resisting the enforcement of domestic awards .....	97
Foreign Law and Arbitration Clauses—A Variation on a Theme .....	98
Ad hoc Arbitration .....	98

The Applicable Laws .....	99
Overview .....	99
The law governing the arbitration agreement .....	100
The law governing the arbitration proceedings: <i>lex arbitri</i> .....	100
The possibility of applying foreign law as the <i>lex arbitri</i> .....	101
Limits on party autonomy and mandatory laws .....	101
Law governing the substance of the dispute .....	101
Mandatory application of Chinese law .....	102
Conflict rules in the absence of express choice of substantive law .....	103
<i>Ex aequo et bono/amiabile compositeur</i> .....	105
The Role of the Chinese Courts in Arbitrations .....	105
Restrictions on Foreign Lawyers in Chinese Arbitration .....	106
Anticipated Reform of the Arbitration Law .....	107
The NPC legislative agenda .....	107
Development via the arbitration commissions .....	108
Shanghai FTZ .....	108
<b>Chapter 4 The Arbitration Agreement</b> .....	109
<i>By Peter Yuen</i>	
Introduction .....	109
The Legal Framework for Arbitration Agreements .....	110
Who determines the validity and existence of an arbitration agreement? .....	110
Requirement to state an arbitration commission (Article 16) .....	111
Applicable / governing law of the arbitration agreement .....	111
Types of Arbitration Agreements .....	112
The formal requirements of an arbitration agreement under the Arbitration Law .....	113
Requirements .....	113
Must be in writing .....	113
Must contain an expression of intention to apply for arbitration .....	114
Must contain the matters to be referred to arbitration .....	115
Must designate a (Chinese) arbitration commission .....	115
Other key elements of the arbitration agreement .....	116
Seat or place of arbitration .....	116
Arbitration commissions and arbitration rules .....	118
Language of arbitration .....	118
'Off panel' appointment .....	119

Appointment of the chairperson of the tribunal .....	120
Governing law of the arbitration agreement .....	121
Other procedural adjustments .....	122
Defective Clauses .....	123
Interpretation of arbitration agreements .....	123
Name of arbitration commission is incorrect, but can be ascertained by inference .....	124
Designation of a particular locality (failure to designate the arbitration commission) .....	124
Arbitration agreement provides for more than one arbitration institution .....	125
Designation of applicable arbitration rules only .....	126
Exclusion of <i>ad hoc</i> arbitration .....	127
Foreign arbitration institutions/ICC .....	128
Expert determination .....	129
Split clauses/hybrid clauses .....	129
Other carve-out clauses .....	130
The CIETAC Split and Clauses .....	130
Escalation Clauses .....	132
The Parties to the Arbitration Agreement Must Have the Capacity to Perform Civil Acts .....	132
The Parties to the Arbitration Agreement Were Not Coerced into Concluding the Arbitration Agreement .....	133
Arbitrability .....	134
Arbitrable disputes .....	134
Tort disputes .....	134
Intellectual property disputes .....	135
Securities disputes .....	136
Agricultural land disputes .....	137
Employment disputes .....	137
Non-arbitrable disputes .....	138
Disputes over personal rights .....	138
Corporate governance disputes .....	138
Anti-trust disputes .....	139
Disputes involving allegations of bribery and corruption .....	140
Insolvency .....	141
Administrative disputes .....	141
Agricultural contractors' contract disputes .....	142

Non-signatories .....	142
Group of companies doctrine in China .....	142
Corporate reorganisations .....	143
Assignment .....	143
Agents .....	144
Principal is disclosed .....	144
Undisclosed principal .....	145
Severability .....	146
Termination and Waiver of the Arbitration Agreement .....	147
Termination of arbitration agreement where the award is set aside or not enforced .....	147
Termination of arbitration agreement where a party fails to object to the court's jurisdiction .....	147
Multi-Party and Multi-Contract Arbitration Agreements in the PRC .....	148
Consolidation .....	149
Joinder .....	150
Other solutions .....	150
<b>Chapter 5 Commencing the Arbitration,     Limitation Periods and Interim Measures</b> .....	151
<i>By Arthur X Dong</i>	
Introduction .....	151
How is the Statute of Limitations for Claims in Arbitration in China Determined? .....	152
Overview .....	152
Limitation periods under Chinese law .....	153
Calculation of the limitation periods .....	154
Renewal of limitation periods .....	155
'Brings a lawsuit' .....	155
'Makes a claim' .....	155
'Agrees to perform' .....	156
Extension .....	156
Suspension of the statute of limitations on grounds of force majeure and waiver .....	157
Particular contract situations .....	157
Instalment contracts .....	157
Contracts of guarantee .....	158
Joint debtors .....	158
Burden of proof .....	158

Stay of Court Proceedings .....	159
Commencement of the Arbitration .....	159
Commencement formalities .....	159
Commencement of arbitration .....	160
Notice of case acceptance .....	161
Service of Documents .....	161
Broad criteria for determining successful service .....	161
Service of documents and exchange of documents exchanges by the arbitration commission .....	163
Parties have the responsibility for providing service information .....	164
Consequences of service of process .....	164
Types of Interim Measures and Basic Procedures .....	166
Applying for Interim Measures .....	170
Prior to initiating the arbitration proceedings .....	170
Concurrently with commencement of arbitration or during the arbitration proceedings .....	170
Where to Submit the Application .....	171
Pre-arbitration applications for interim measures submitted directly to the court .....	171
Application for interim relief made simultaneously with the filing of arbitration proceedings submitted to the arbitration institution .....	171
Which court level has jurisdiction to hear applications for interim relief .....	173
Foreign-related cases .....	173
Wholly domestic cases .....	174
Emergency Arbitrator and the Power of Arbitration Tribunal to Order Interim Measures .....	174
Emergency arbitration application .....	174
Emergency arbitrator and tribunal interim orders enforced outside mainland China .....	175
Emergency arbitrator and tribunal interim orders inside mainland China .....	176
Threshold Standards .....	177
Threshold standards for pre-arbitration application .....	177
Threshold standards when an application is made concurrently with commencing the arbitration .....	178
Timing for the court to take action .....	178
Security Requirements for Interim Measures .....	179
Property and behaviour preservation pre-arbitration .....	179
Property and behaviour preservation concurrent with the arbitration filing .....	179

Evidence preservation .....	180
The Mechanics of Property Attachment and Deadlines for Property to be Attached .....	181
Remedies for Respondent Affected by Interim Measures Order .....	182
Counter security measures as a release .....	182
Application for review .....	183
Wrongfully made interim measures .....	183
<b>Chapter 6 The Tribunal</b> .....	185
<i>By Sabine XIAO Fang</i>	
Introduction .....	185
Pre-appointment Issues and Qualifications .....	185
Availability and conflict checks .....	185
Pre-appointment interview .....	186
Chinese panel system and qualifications .....	186
The Chinese qualifications in context .....	187
Restrictions on party autonomy .....	188
The distinctions between domestic and foreign-related arbitrations .....	189
Difficulties appointing off panel in specialised cases .....	189
The makeup of Chinese panels .....	190
Education and training .....	190
Appointments off panel .....	191
The appointment of foreign arbitrators .....	192
Foreign arbitrators and decision-making .....	193
Formation of the Tribunal .....	194
The number of arbitrators, appointment of the presiding arbitrator and party nomination of arbitrators .....	194
Involvement of the arbitration commission in respect of certain appointments .....	194
CIETAC practice of appointing its staff members as Chairman .....	196
Disclosure and Challenging the Appointment of Arbitrators .....	196
Disclosure .....	196
Challenging appointment of arbitrators .....	197
Party's waiver of right to challenge .....	200
Prevalence of challenges .....	200
No judicial review .....	201
IBA Guidelines on Conflicts of Interest in International Arbitration (2014) .....	201

Dismissal/Demise/Non-participation/Retirement of Arbitrators .....	201
Dismissal .....	201
Demise .....	202
The Arbitrator's Duties .....	203
Duties imposed by the parties .....	203
Codes of conduct .....	204
Duties imposed by the law .....	205
Immunity .....	205
Powers of the Tribunal .....	207
Powers conferred by the parties through the arbitration agreement and selection of the arbitral rules .....	207
Powers conferred by legislation .....	208
Fees of the Tribunal .....	209
<b>Chapter 7 Jurisdictional Challenges</b> .....	211
<i>By Melody Wang</i>	
Introduction .....	211
Procedure for Challenge .....	213
Challenges before an arbitral commission .....	213
Overview .....	213
Timing of challenge .....	214
Basic procedure .....	215
Time limit for decision .....	215
Challenging a jurisdictional decision .....	215
Effect of challenge on the conduct of the arbitration .....	216
Challenges before the PRC courts .....	216
Timing of challenge .....	216
Basic procedure .....	216
Challenging a jurisdictional decision .....	217
Severability of an Arbitration Clause .....	218
Grounds for Challenge .....	219
Total challenges .....	219
Defective clauses .....	219
Arbitrability .....	220
Standing .....	222
Partial challenges .....	223
Scope of dispute .....	223

<b>Chapter 8 The Arbitration Commission in China</b> .....	225
<i>By KANG Ming</i>	
Introduction.....	225
The Chinese Model of the Arbitration Institution.....	226
China Arbitration Association.....	226
Overview .....	226
The preparatory work for the establishment of the CAA.....	226
Quasi-CAA organisations' practices .....	227
Problems and the future.....	228
The distinction between foreign-related and domestic arbitration commissions under Article 66 of the Arbitration Law.....	229
What makes the Chinese model unique? .....	229
The legacy of administrative / government based arbitration .....	229
Regulatory requirements under the Arbitration Law.....	230
Greater level of involvement in the administration of the arbitration.....	230
Timing in general and specific timing in terms of delivering the award .....	232
Challenges to arbitrators.....	232
Consolidation.....	233
Approach to arbitration costs (administrative and arbitrator fees).....	233
Arbitration / mediation .....	234
The Relationship Between the Arbitration Commissions and the Government .....	234
Legislative efforts.....	235
Administrative impact.....	235
The Relationship between PRC Arbitration Commissions and Courts .....	236
Parties applying for interim relief .....	236
Parties challenging the validity of an arbitration clause .....	236
Setting aside and challenging the enforcement of an arbitral award.....	237
Foreign Administered Arbitration / No Ad Hoc Arbitration in the PRC.....	237
PRC Administered Arbitrations Overseas, their Recent Efforts and Upcoming Reforms.....	237
Emergency arbitrators .....	238
Joinder .....	238
Consolidation .....	239
Arbitration Costs.....	239
Case acceptance fee (registration fee) and administrative fee .....	239
The calculation of arbitrators' fees.....	239

Special arrangements for the payment of additional fees for off-panel / foreign arbitrators .....	240
Deposits.....	240
China International Economic and Trade Arbitration Commission (CIETAC) .....	240
Introduction .....	240
The recent CIETAC split .....	241
A brief history.....	241
The implications for the choice of arbitration commission, the arbitration procedure and the recognition / enforcement of the award .....	244
When the dust settles—the latest reply of the Supreme People's Court .....	244
Basic features of the CIETAC Rules (2015) .....	246
Structural changes—the establishment of the CIETAC Arbitration Court.....	246
Consolidation, multiple contracts and joinder of additional parties.....	246
Emergency arbitrator procedures.....	247
Hong Kong provisions / CIETAC Hong Kong Arbitration Centre .....	247
A wider application of summary procedures.....	247
Brief outline of other specialist rules .....	248
CIETAC Financial Disputes Arbitration Rules .....	248
CIETAC Online Arbitration Rules .....	249
CIETAC Domain Name Dispute Resolution Centre .....	250
Construction Dispute Review Rules.....	251
Distinct features of CIETAC .....	252
The institutional structure and the composition of committee members.....	252
Scope of services .....	252
Arbitration rules and arbitration fees.....	252
The quality and influence of the cases administered .....	253
Arbitration fees.....	253
Beijing Arbitration Commission (2015) .....	255
Shanghai Arbitration Commission.....	257
Shanghai International Economic and Trade Arbitrator Commission.....	257
Pilot Free Trade Zone Court of Arbitration .....	259
Shenzhen Court of International Arbitration .....	260
China Maritime Arbitration Commission .....	260

<b>Chapter 9 The Arbitration Proceeding</b> .....	263
<i>By Dr CHEN Fuyong</i>	
Introduction.....	263
China and international procedure .....	263
Sources of law .....	263
The importance of Chinese institutions' rules.....	264
Different procedures for different arbitrations .....	264
The Chinese Arbitration Procedure .....	265
Party autonomy .....	265
Equal treatment of the parties.....	266
Good faith .....	267
Preliminary Issues .....	268
Service.....	268
Interim measures .....	268
Seat / venue .....	269
Joinder / consolidation .....	270
Language .....	271
Applicable law.....	271
Default.....	272
Dispute on the existence of foreign elements .....	272
Pleadings.....	273
Pleadings in general .....	273
Request for arbitration.....	273
Statement of defence .....	275
Counterclaim .....	276
Amendments.....	276
Determining the Procedure .....	277
Documentary Evidence.....	279
Production of evidence.....	279
Documents referred to in pleadings .....	279
Specific document production.....	279
Presentation .....	280
Collection of evidence.....	280
Examination of Evidence .....	281
Hard copy documents.....	281
Documents from outside China.....	281
Electronic evidence .....	281

Presentation of evidence.....	282
Late evidence.....	282
Assessment of evidence .....	282
Privilege and Confidentiality .....	283
Legal professional privilege and 'without prejudice' privilege .....	283
Confidentiality .....	283
Factual Witnesses .....	284
Expert Evidence.....	284
Expert witnesses .....	284
Appraisers.....	285
Cross-Examination .....	286
Law and Lawyers.....	287
Translation Issues .....	287
Hearings .....	288
Bundles.....	289
Pre-hearing or second conference .....	289
The timing and notification of the hearing .....	289
Length of hearing .....	290
Minutes and transcripts .....	291
Post-hearing .....	291
Costs .....	292
Defaulting Parties / Withdrawal of Claims.....	293

## **Chapter 10 Arbitration-Mediation**.....

*By Dr Lin Yifei*

Introduction.....	295
Basic Principles of Arb-Med in the PRC .....	297
Overview .....	297
Principle of consent.....	298
The principle of ascertaining the facts .....	298
The consensus principle .....	298
No contravention of the law .....	298
Efficiency principle .....	299
No conflict between arbitration and mediation .....	299
The Procedure of Arb-Med in the PRC .....	300
Timing .....	300
Process.....	300





Nationality.....	365
Chinese awards (domestic awards and foreign-related awards).....	367
Awards from Greater China (Hong Kong, Macau and Taiwan).....	368
Foreign awards (convention state awards and non-convention state awards).....	368
Introduction to the Setting Aside of Awards in China.....	368
Legal framework.....	368
Time limits and jurisdiction.....	369
Formalities and process of the application.....	369
Consequences of setting aside an award.....	370
Introduction to the Enforcement of Arbitral Awards in China.....	371
Legal framework.....	371
Legal framework for enforcement of Chinese awards.....	371
Legal framework for enforcement of foreign awards.....	372
Legal framework for enforcement of Greater China awards.....	375
Time limits and jurisdiction.....	376
Time limits.....	376
Territorial jurisdiction.....	377
Jurisdiction by level.....	377
Formalities and process of application.....	377
Consequences of enforcement and non-enforcement.....	380
Grounds to Challenge an Award.....	381
Grounds for both setting aside and/or non-enforcement across all sorts of awards.....	381
Lack of a valid arbitration agreement.....	381
Lack of civil capacity of a party.....	382
Lack of due process.....	382
Excess of the arbitration scope.....	382
Irregularity in the arbitration procedure.....	383
Lack of binding character of the award.....	383
Lack of arbitrability.....	384
Conflict with public policy.....	385
Grounds specific to domestic awards.....	386
Overview.....	386
Forged evidence.....	386
Withholding of evidence.....	386
Misconduct of an arbitrator.....	387
Grounds specific to Taiwan awards.....	387

Case discussion on specific grounds.....	387
Lack of civil capacity of a party.....	388
Lack of valid arbitration agreement.....	389
Lack of due process.....	392
Exceeding the scope of arbitration.....	393
Procedural irregularity.....	397
Lack of arbitrability.....	400
Public policy.....	402
Appendix.....	407
Index.....	471