

Arbitration Law and Practice in China

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JINGZHOU TAO



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Jingzhou Tao
June 2012
Beijing, China

About the Author

Mr Tao is recognized as an expert in international arbitration and corporate law. He has advised on China-related matters since 1985 and has maintained an active practice in China for over twenty years. During this time, the author has advised numerous clients on international legal matters, particularly on the legal, financial, tax and commercial aspects of trade and investment and related disputes. He has represented several dozens of Fortune 500 companies and many major European, Japanese and American companies in hundreds of transactions in China, on such matters as the establishment of equity joint ventures, contractual joint ventures and wholly foreign-owned enterprises, in addition to business and tax planning, mergers and acquisitions, strategic alliances, and intellectual property protection. Mr Tao has also acted as counsel, chief arbitrator or party-nominated arbitrator in substantial numbers of international arbitration proceedings involving letters of credit, construction projects, management contracts, joint ventures, technology transfers, trademark licensing agreements, agency agreements, merger and acquisitions and the international sale of goods. The author also counsels numerous Chinese companies for their merger & acquisition and arbitration activities in foreign countries.

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Preface

Ultimately, it is a fundamental principle of economic development that a first class economy may only be achieved with the parallel development of a competent, impartial and efficient legal system capable of protecting the rights of investors and other risk-takers encouraged to invest in the economy. In particular, it is imperative that investors are confident in the ability of the courts to interpret and to apply the rule of law, free from external influence. Unfortunately, this has not always been the experience in China after the Communist Party's takeover of the country. Disregard for the rule of law reached its nadir during the 1960s, when officialdom actively and deliberately engaged in a program to discredit the very 'concept of law' itself, whilst actively promoting Mao Zedong Thought. It was only in the late 1970s that the Chinese leadership – particularly Deng Xiaoping – adopted the strategy of *opening up and reform*, a policy that required the fundamental reform and modernization of the legal code and practices. In that regard, it is not insignificant that one of the first new laws to be promulgated was the *Sino-Foreign Equity Joint Venture Law of the People's Republic of China* (*Sino-Foreign Equity Joint Venture Law*),¹ designed to afford foreign investors the degree of certainty they required for undertaking commercial operations in China. The years after 1978 witnessed a virtual *coming of age* in terms of China's legal development. China's rapid economic growth and expansion was only matched by unprecedented and equally rapid legal reform that saw the conveyor-belt-like promulgation of a plethora of statutes and regulations treating multifarious subject matters, all designed to afford confidence to foreign investors in the ability of the Chinese legal code and system to protect their investments and contractual rights.

However, the industrious production and promulgation of laws and regulations, in the hundreds, has proved unable to excise some of the more fundamental

1. Adopted by the 2nd Session of the 5th Standing Committee of the NPC on 8 Jul. 1979, revised by the 4th Session of the Standing Committee of the 9th NPC on 15 Mar. 2001, and effective from 15 Mar. 2001.

malignancies evident in the Chinese legal system – e.g., the dearth of jurisprudence; an inexperienced and/or generally ill-trained judiciary; a lack of established and uniform procedural rules, or at least deficiencies in their universal application; and rampant local protectionism. Indeed, in China, judges used to be appointed to the bench without formal legal training of any description. This, combined with the limited, but effective, supervisory powers by provincial government over the local judiciary, has called into question the efficacy, impartiality and independence of the judicial system, and has contributed substantially to the fears and apprehensions of foreign investors. In particular, in disputes between Chinese and foreign companies, the judiciary has often been accused of succumbing to political and social pressures exerted by provincial bureaucrats anxious to secure a verdict in favor of the local party to the dispute. Although China is making great efforts to improve the quality of its judiciary, a number of problems must be overcome before a truly independent judiciary can be established nationwide. Indeed, it was in this environment that the central government became acutely aware of the need to take the dual steps of overhauling and modernizing both the judicial system and the system of arbitration in China. For arbitration, such modernization manifested itself in the *Arbitration Law of the People's Republic of China* of 1994 (*Arbitration Law*).²

In a truly global world, the international business community should be able to feel confident that commercial arbitration can be conducted both competently and independently irrespective of the identity of the arbitration institution or of the place of arbitration. However, undeniably, the overwhelming majority of international arbitration takes place before eminent European and North American arbitration centres, most notably the International Court of Arbitration of the International Chamber of Commerce (ICC International Court of Arbitration), the London Court of International Arbitration (LCIA), the International Arbitral Centre of the Austrian Federal Economic Chamber,³ the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association – centres with long and well-established traditions of arbitration. In that climate, it is certainly difficult for parties from less-developed countries to secure the agreement of foreign investors to seek arbitration at venues beyond the shores of Europe and North America, as foreign investors are somewhat apprehensive about the arbitration laws prevailing in less-developed countries. However, these concerns have to a large extent been allayed through the adoption of the *UNCITRAL Model Law on International Commercial Arbitration* (*UNCITRAL Model Law*)⁴ by many less-developed and developing countries.⁵ Whilst this has

2. Adopted at the 9th Session of the Standing Committee of the 8th NPC, promulgated by Order No. 31 of the President of the People's Republic of China on 31 Aug. 1994 and effective from 1 Sep. 1995. See Appendix A.

3. Also known as the Vienna International Arbitral Centre (VIAC).

4. Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 Jun. 1985, and as amended on 7 Jul. 2006.

5. Up to Mar. 2012, legislation based on the *UNCITRAL Model Law* has been enacted in more than sixty countries and territories worldwide, including Australia, Canada, Germany, Hong Kong SAR and Macao SAR. For an updated and detailed list of all signatory countries to the *UNCITRAL Model Law*, cf.

not been the case in China, it is noteworthy that the *UNCITRAL Model Law* has been adopted by Hong Kong SAR and Singapore, two Asian economic hubs that rank amongst the top ten countries or territories through which foreign investment into China is channeled. It therefore comes as no surprise that many investors in China and Asia generally strive to secure agreement to the arbitration for their commercial disputes in either Hong Kong or Singapore. Indeed, the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) are undoubtedly the two fiercest competitors faced by Chinese arbitration institutions and in particular by the China International Economic and Trade Arbitration Commission (CIETAC) in Asia.

Finally, the inability, in many instances, to enforce foreign court judgments in China, and vice versa, continues to cause difficulties for the business community. Whilst China has agreed to treaties for international judicial assistance, including the issue of recognition and enforcement of judgments by foreign courts with certain States,⁶ China has no such treaties with some of the major industrialized economies, such as Japan, the UK, and the USA.⁷ However, these major industrialized nations and China are amongst the 133 states and territories that have acceded to the *1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the *New York Convention*), that provides a mechanism for the recognition and enforcement of foreign arbitral awards. China's accession to the *New York Convention* in 1986 and its enactment of an arbitration law in 1994 have been the keys to the acceptance of arbitration as the preferred method for the resolution of international commercial disputes with a Chinese party or parties. This book, while briefly tracing the early development of arbitration in China, seeks to provide an analysis of the development of arbitration in China since the introduction of the *Arbitration Law*, while including all current legislative trends. It will focus on those aspects of the applicable law, its interpretation and implementation that have combined to produce a unique system of arbitration, often and accurately referred to as *Arbitration with Chinese Characteristics*.

Jingzhou Tao

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

6. Examples of countries with which China has concluded treaties include France, Poland, Mongolia, Romania, Russia, Byelorussia, Cuba, and Spain. Moreover, Mainland China has recently concluded two arrangements providing for the recognition and enforcement of court judgments rendered by courts in Macao and Hong Kong (see: para. 242).
7. China has participated in the negotiations which led to the *2005 Hague Convention on Choice of Court Agreements*, which provides for the recognition and enforcement of court judgments rendered by a court of a Contracting State designated in an exclusive choice of court agreement. It is, however, still unknown whether China will sign and ratify it.

List of Abbreviations

AAA	American Arbitration Association
ABIC	Administrative Bureau for Industry and Commerce
ADNDRC	Asian Domain Names Dispute Resolution Centre
AIC	Administration for Industry and Commerce
ARI	Arbitration Research Institute of the China Chamber of International Commerce
BAC	Beijing Arbitration Commission
BIT	Bilateral Investment Treaty
CAA	China Arbitration Association
CCOIC	China Chamber of International Commerce
CCPIT	China Council for the Promotion of International Trade
CIETAC	China International Economic and Trade Arbitration Commission
CIAC	China International Arbitration Club
CMAC	China Maritime Arbitration Commission
CNNIC	China Internet Network Information Centre
DRSP	Dispute Resolution Service Provider
EDI	Electronic Data Interchange
FETAC	Foreign Economic and Trade Arbitration Commission
FIE	Foreign Invested Enterprise
FTAC	Foreign Trade Arbitration Commission
HKIAC	Hong Kong International Arbitration Centre
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes

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

Table of Contents

Acknowledgements	xiii
About the Author	xv
Preface	xvii
List of Abbreviations	xxi
Chapter I	
History of Arbitration in China	1
I Introduction	1
II Domestic Arbitration	2
A Pre-Arbitration Law	2
1 Lack of Independence	4
2 Lack of Party Autonomy	4
3 Arbitral Awards without Binding Force	4
B Post-Arbitration Law	4
1 Free-Establishment of Arbitration Commissions	5
2 Full Independence of Arbitration Commissions	6
3 Expanded Scope of Arbitral Subject Matter	7
4 Finality of the Arbitral Award	7
5 Establishing Jurisdiction via the Arbitration Agreement	8
III Foreign-related Arbitration	8
A Development of Foreign-Related Arbitration	8
B Arbitration and Chinese Legislative Developments since 1978	12
C China's Accession to International Conventions	14

	D	Bilateral Investment Treaties	15
	E	The Support of the Supreme People's Court	18
IV		CIETAC and CMAC: the International Arbitration Institutions of the PRC	22
	A	Historical Development of CIETAC and CMAC	22
	B	Jurisdictional Development of the CIETAC	24
	1	FTAC Arbitration Rules (1956)	24
	2	CIETAC Arbitration Rules (1988)	25
	3	CIETAC Rules (1994)	25
	4	CIETAC Rules (1995)	29
	5	CIETAC Rules (1998)	29
	6	CIETAC Rules (2000)	31
	7	CIETAC Rules (2005)	31
	8	CIETAC Rules (2012) ⁸³	33
	9	CIETAC Financial Arbitration Rules (2003/2005)	36
	a	<i>Scope of Application</i>	37
	b	<i>Time Limits</i>	37
	c	<i>Panel of Financial Arbitrators</i>	37
	d	<i>Increased Flexibility</i>	38
	e	<i>Nondiscriminatory Cost Schedule</i>	38
	C	CIETAC: Foreign-Related Caseload 1990–2010	39
V		The CAA	41
	1	Necessity of Establishment	42
	2	Legal Status and Character	42
	3	Duties and Functions	43
VI		Relationship Between Arbitration and the Courts	44

Chapter II

		Arbitration Agreement	47
I		Introduction	47
II		Form of the Arbitration Agreement	48
	A	Written Form Requirement of the Arbitration Agreement	48
	B	Types of Arbitration Agreements	49
	1	Arbitration Clause or Independent Arbitration Agreement	49
	2	Submission Agreement	49
	3	Incorporation by Reference	50
III		Substantive Requirements of the Arbitration Agreement	51
	A	Capacity Requirement	51
	1	General Capacity Requirement of the Parties	51
	2	Corporations	52
	a	<i>Group Companies</i>	52
	b	<i>Mergers and Acquisitions</i>	54
	c	<i>Contract Assignment</i>	56
	3	Capacity in the Context of Agency	58

	a	<i>Invalid Arbitration Agreement signed by an Agent</i>	58
	b	<i>Different Types of Agency and the Binding Effect of an Arbitration Agreement on the Principal</i>	60
B		Substantive Requirements Provided Directly by the Law	64
	1	Expression of the Parties' Intention to Arbitrate	64
	a	<i>True Expression</i>	65
	b	<i>Clear Expression</i>	65
C		Arbitrable Disputes	66
	1	Non-arbitrable Disputes as Specified by Law	66
	a	<i>Administrative Disputes</i>	66
	b	<i>Disputes concerning Personal Rights</i>	69
	c	<i>Labour Disputes/Agricultural Projects</i>	69
	2	Scope of Arbitrable Disputes	70
D		Determining the Arbitration Commission Selected by the Parties	71
	1	Selecting Two Arbitration Commissions	72
	2	Arbitration Institution Incorrectly Recorded	73
	a	<i>Incorrect Name</i>	73
	b	<i>Outdated Name</i>	73
	3	Selection of the Place of Arbitration	74
E		Ad hoc Arbitration	76
IV		Determining Validity	78
	A	Validity Considered on Two Separate Occasions	79
	B	The Prior-Reporting System	80
	C	Supreme People's Court and the Issue of Determining Invalidity	80
	D	Criteria for Setting Aside an Award	81
V		The Severability Doctrine	82
	A	The Application of the Severability Doctrine in China	82
	B	Effect of an Invalid Contract on an Arbitration Agreement	85
VI		Termination and Waiver of Arbitration Agreement	86
VII		Recommended Arbitration Clauses	87
	A	CIETAC and BAC Recommended Arbitration Clauses	87
	B	Ancillary Provisions to Arbitration Agreement	88
	1	Place of Arbitration	89
	2	Language of Arbitration	90
	3	Arbitration Rules	91
	4	Nationality of Arbitrators	92
	5	Applicable Law Requirements	92
	6	Appointment of Arbitrators	93

Chapter III

Court and Arbitral Jurisdiction

I	Differences Between Court and Arbitral Jurisdiction	95
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II	Challenging Jurisdiction Prior to the Commencement of the Arbitration Procedure	96
III	Challenging Jurisdiction During the Arbitration Procedure	97
IV	Jurisdiction of CIETAC	99
V	Jurisdiction of CMAC	103
VI	Jurisdiction of Domestic Arbitration Commissions	104

Chapter IV

	Applicable Law	107
I	Introduction	107
II	The Law Governing the Arbitration: The Lex Arbitri	108
	A Lex Arbitri	108
	B The Role of the Place Where the Award Is Rendered	109
III	The Law Applicable to the Substance	111
	A Limited Party Autonomy	111
	B Conflict of Law Rules and the Applicable Law Thereunder	112
	C The Law Ex Aequo et Bono	114

Chapter V

	Arbitration Procedure	117
I	Domestic Arbitration, Foreign-related Arbitration and Foreign Arbitration	117
II	Domestic Arbitration Procedure	118
	A Arbitrators and the Arbitral Tribunal	118
	1 Appointment to the Panels of Arbitrators in Domestic Arbitration	118
	2 Formation of the Arbitral Tribunal	120
	B The Place of Arbitration	121
	C Cost Schedules	122
	D Preservation Measures	126
	1 Preservation of Evidence	126
	2 Property Preservation Measures and Advanced Execution	127
	3 No Further Preservation Measures	128
III	Foreign-Related Arbitration Procedure	129
	A Arbitrators and the Arbitral Tribunal	129
	1 Appointment to the CIETAC Panel of Arbitrators	129
	2 Notification to the Parties	132
	3 Tribunal Formation	133
	4 Choice of Arbitral Rules and Party Autonomy	136
	B The Place of Arbitration	137
	C Language of the Arbitration	137
	D Cost Schedules: CIETAC, CMAC and BAC	138
	1 CIETAC Fee Schedule for Foreign-related Arbitration Cases	138

	2	CMAC Handling Fees Schedule	140
	3	BAC Fees Schedule for Foreign-related Arbitration Cases	141
	4	Comparison of Fee Schedules of CIETAC and BAC with ICC and HKIAC	141
	E	Preservation Measures	142
IV		General Principles of Procedure for Arbitration in China	142
	A	Application and Acceptance	142
	1	Prerequisites in Applying for Arbitration in China	142
	2	Application for Arbitration and Acceptance	143
	B	Challenging Arbitrators and the withdrawal of Arbitrators	144
	C	Arbitral Hearing	147
	D	Evidence	148
	1	The Collection and Presentation of Evidence	148
	2	Cross-Examination	149
	3	Examination and Identification of Evidence	151
	E	The Combination of Conciliation and Arbitration	153
	1	Introduction	153
	2	Court Conciliation	154
	3	Institutional Conciliation	155
	4	Conciliation within the Arbitration Process	157
	F	Rendering the Arbitral Award	162
	1	Time Limit and Content of Arbitral Award	162
	2	Correction and Supplement to the Arbitral Award	165
	G	Summary Proceedings	166
	H	Statutory Limitation Periods	166
	I	Confidentiality of the Arbitration Hearing	167

Chapter VI

		Enforcement of Arbitral Awards in China	169
I		Legal Basis for the Enforcement of Arbitral Awards	170
	A	Legal Basis for the Enforcement of Domestic Arbitral Awards	170
	B	Legal Basis for the Enforcement of Foreign-Related Arbitral Awards	171
	C	Legal Basis for the Enforcement of Foreign Arbitral Award	174
	1	Legislation Prior to China's Accession to the New York Convention	174
	2	Accession to the New York Convention	175
II		THE ENFORCEMENT OF ARBITRAL AWARDS IN CHINA	175
	A	Time Limit for Initiation and Determination of Enforcement Proceedings	176
	B	Challenging an Arbitral Award	178