Arbitration Law and Practice in China

THIRD EDITION

JINGZHOU TAO

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Jingzhou Tao
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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.

Prior to October 2005, the author was the Managing Partner of Coudert Brothers' China practice. Mr Tao also worked with a major French firm in Paris from 1985 to 1991. He was admitted to practice law in China and Paris in 1989 and 1992, respectively. Mr Tao currently is the Managing Partner of Dechert LLP responsible for the Asia practice. His contact email is jingzhou.tao@dechert.com.

The author has been a Member of the ICC International Court of Arbitration from 1999 to the present and sit on the board of London Court of International Arbitration. He is listed as an arbitrator at the Court of Arbitration for Sport, the Hong Kong International Arbitration Centre, the China International Economic and Trade Arbitration Committee (CIETAC), Beijing Arbitration Commission, and more. He is also a Member of the Advisory Committee of CIETAC, co-chair of China International Arbitration Club and Chair of the Commission on

International Commercial Arbitration of ICC China, as well as an Adjunct Professor at Peking University Law School and of East-China University of Political Science and Law. He is a Chartered Arbitrator.

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*.

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<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

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