Preface

International arbitration has been an important tool for international trade. In the eighteenth century, the principles of *lex mercatoria* became part of the common law in the United Kingdom. Lord Mansfield was a great advocate of mercantile law and felt that mercantile justice and arbitration went hand in hand. Trade today continues to be as important and as powerful a force as it ever has been and international arbitration is there to serve and promote international trade.

International arbitration is a developing system which has been embraced around the world. Our work together has provided an ideal opportunity to review and discuss the current status of both international and domestic arbitration in China, and to set out some of the details that are not readily available to international practitioners outside China.

By necessity, this textbook can only provide a snapshot of the position. However, it is also a valuable tool for those both in China and abroad who are looking to expand their knowledge of this dispute resolution mechanism and to better appreciate the road that must be travelled in order to ensure consistency, reliability and understanding of the system and its implications by all relevant parties.

We have set out comparisons and distinctions between Chinese arbitral practice and the approach taken in international arbitration so as to enable a constructive and comparative review by readers. We also hope that Chinese practitioners in particular will appreciate the insight into both substantive issues and also the opportunity to gain a better understanding of the terminology commonly used internationally to discuss and debate the founding principles of arbitration.

We must thank, of course, Kluwer (and in particular Eleanor Taylor) for their support of the book, and Huang Xingyu, Wu Fan, Xie Chenxi, Zhang Xin, Markus Esly, Robert Blackett and Ryan Deane as well as Adam Kirby for being an outstanding and supportive team during the production of this manual. Our thanks go, too, to Mr Yu Jianlong from CIETAC, and Madame Wang Hongsong and Dr Chen Fuyong from BAC. We are grateful.

2015

CHAPTER 2

The Arbitration Law, Relevant Judicial Interpretations and International Treaties

2.1 THE ARBITRATION LAW AND AMENDMENTS

2.1.1 Arbitration Laws in the Broad and Narrow Sense

Arbitration laws are enacted by the state to regulate arbitration proceedings, arbitral institutions, arbitral tribunals and the parties to arbitrations themselves. Arbitration laws can be given either a broad or a narrow definition. In a narrow sense, they encompass binding laws that apply to all types of arbitration proceedings enacted by the State's principal legislative body. Looked at more broadly, they may be taken to include other regulations, statutory instruments or norms that have an effect on the conduct of arbitration proceedings in a given jurisdiction.

In the narrow sense, Chinese law governing arbitration proceedings is set out in the Arbitration Law of the People's Republic of China, passed during the ninth session of the Eighth Standing Committee of the National People's Congress on 31 August 1994. Looking beyond that key statute, Chinese arbitration laws could also be said to include: (a) specific laws applying to arbitrations in disputes over rural land[1] and labour issues,[2] (b) relevant provisions in other laws such as the Civil Procedure Law and the Contract Law, (c) relevant provisions in multilateral or bilateral treaties concluded or acceded to by China such as the New York Convention, (d) relevant judicial interpretations, and (e) the charters and rules of arbitration of arbitral institutions.

1. Law of the People's Republic of China on Mediation and Arbitration of Disputes Concerning the Operation of Contracts for Rural Land, enacted in 2009.
2. Law of the People's Republic of China on Mediation and Arbitration in Labor Disputes, enacted in 2007.

We briefly introduced the Arbitration Law in Chapter 1 section 1.1.2. The purpose of the Arbitration Law, as stated in Article 1, is to:

> ... ensure impartial and prompt arbitration of commercial disputes, to protect the legitimate rights and interests of the parties and to safeguard the positive development of the socialist market economy.

In this chapter, we explore the scope, fundamental principles and mechanisms set out in the Arbitration Law further.

2.1.2 The Scope of the Arbitration Law

The Arbitration Law only applies to such matters that fall within its scope. In effect, the scope of the Arbitration Law also delineates what types of disputes are capable of being referred to arbitration under Chinese law. The subject matter of a dispute must be 'arbitrable', and be within the scope of the Arbitration Law. Article 2 of the Arbitration Law states that:

> Contractual disputes and disputes over other rights and interests in property between citizens, legal persons and other organisations that are equal subjects may be arbitrated.

Article 3 expressly excludes certain types of disputes from arbitration:

> The following disputes may not be arbitrated: (a) matrimonial disputes, adoption, guardianship, child support and maintenance, and inheritance; (b) administrative disputes falling within the jurisdiction of administrative organs.

Furthermore, Article 77 provides that:

> Regulations concerning arbitration of labor disputes and disputes over contractual operation of rural land within the agricultural collective economic organisations shall be established separately.[3]

Pursuant to these provisions, the scope of the Arbitration Law is as follows:

2.1.2.1 The Parties

Article 2 of the Arbitration Law permits citizens, legal persons and other organisations, regardless of their nationality or place of incorporation, to submit disputes to Chinese arbitral institutions – always provided that the type of dispute is also within the scope of the Arbitration Law.

The requirement in Article 2 that the dispute must be between '*citizens, legal persons and other organisations that are equal subjects*' is potentially misleading. The intention is not to require there to have been equality of bargaining power between the

3. Specialized laws respectively enacted in 2007 and 2009.

parties to an arbitration agreement, or to exclude from arbitration all disputes between private parties and public bodies.

A dispute between a private party and a public body will still be arbitrable provided that the claim does not depend upon the special status of one party as a public body. In other words, it must be a dispute which could also have arisen between private parties. In such a case, the private party and the public body will be '*equal subjects*'. Hence, a dispute under a procurement or construction contract may be arbitrated, even if the purchaser / employer happens to be a government entity.[4]

For all practical purposes, the '*equal subjects*' requirement in Article 2 and the exclusion of '*administrative disputes*' in Article 3 are probably equivalent.

2.1.2.2 The Subject Matter of the Dispute

Under Article 2 of the Arbitration Law, contractual disputes and disputes over other rights and interests in property are arbitrable. Disputes over rights and interests in property for this purpose go beyond questions of title or a right to make use of the property, and include claims relating to damage to, or the quality of, the relevant property. For instance, the commission of a tortious act that damages property would give rise to a dispute that is capable of being referred to arbitration. Other disputes that are arbitrable under this heading would include patent, copyright or trademark infringements, or claims under consumer protection legislation.[5]

Article 3 of the Arbitration Law expressly excludes certain categories of disputes from arbitration:

(a) Matrimonial disputes, adoption, guardianship, child support and maintenance, and probate or other disputes relating to inheritance. Although these disputes are civil in nature and can concern rights and interests in property, these matters are too closely linked to questions of status and legal responsibility, where the parties are not able to freely alter the relationship in question or dispose of any rights and obligations. For that reason, Chinese

4. In practice government procurement and construction contracts in mainland China rarely provide for disputes to be resolved by way of arbitration (the position differs in Hong Kong, where the government's standard form provides for Hong Kong International Arbitration Centre (HKIAC) arbitration). There are some signs of a more favourable attitude towards the use of arbitration for government procurement contracts in mainland China. For instance, The China Democratic League, one of the eight legally recognised political parties other than the Communist Party of China in the PRC, proposed the use of arbitration as a dispute resolution method under government procurement mechanisms at the Chinese People's Political Consultative Conference meeting in 2010. See http://news.xinhuanet.com/politics/2010-03/08/content_13124596.htm, accessed on 21 March 2014.

5. A consumer injured by a defective product may either base their claim on the Contract Law (claiming breach of warranty), or on the Tort Liability Law and Law on the Protection of Consumer's Rights and Interests. Claims on either basis are arbitrable. Note that Chinese law does not allow a claimant to simultaneously claim on tortious and contractual grounds for the same incident.

law has reserved these disputes to be dealt with only under the jurisdiction of the people's courts.

(b) Administrative disputes falling within the jurisdiction of administrative organs. Unlike civil and commercial disputes, administrative disputes may not be arbitrated under Chinese law. Jurisdiction over administrative matters vests only in the relevant administrative organ (by taking the relevant decision or applying policy) and the people's courts, which have been empowered to review administrative and governmental actions, always within the applicable legislative framework for such reviews. As non-governmental organisations, arbitration commissions are not deemed competent under Chinese law to determine administrative disputes on behalf of the State.

(c) Labour disputes or disputes relating to the contractual operation of rural land within the context of agricultural collectives are governed by specific legislation aimed at only these categories of disputes, which is beyond the scope of this chapter. The Arbitration Law does not apply to any such disputes.

2.1.2.3 The Effective Date

Article 80 of the Arbitration Law provides for it to take effect on 1 September 1995. The Arbitration Law has retrospective effect, in the sense that it applies to arbitration agreements entered into before that date in the same way that it applies to arbitration agreements entered into after that date. The implementation of the law was mainly achieved through reform of the arbitral institutions. Many 'local' arbitral institutions were abolished and others were reorganised, pursuant to Article 79 which provides that:

> *Arbitration institutions established prior to the implementation of this Law in the municipalities directly under the Central Government, in the cities that are the seats of the people's governments of provinces or autonomous regions and in other cities divided into districts shall be reorganized in accordance with this Law. Those of such arbitration institutions that have not been reorganized shall terminate upon the end of one year from the date of the implementation of this Law. Other arbitration institutions established prior to the implementation of this Law that do not comply with the provisions of this Law shall terminate on the date of the implementation of this Law.*

2.1.2.4 Territorial Scope

All arbitration proceedings conducted under the auspices of an arbitral institution established in China, but excluding Hong Kong, Macau and Taiwan, will be subject to the Arbitration Law.

2.1.3 The Fundamental Principles of the Arbitration Law

It is possible to identify a number of fundamental principles that run through all of the provisions of the Arbitration Law, and which apply to the entire arbitral process and all parties involved (be it arbitral institutions, tribunals or arbitration users). These principles can be said to represent the nature or core of the Arbitration Law. We identify three such fundamental principles below: free will (or party autonomy), due process ensuring that there is fair, fact and law-based decision-making and arbitral independence.

2.1.3.1 Free Will (Party Autonomy)

Article 4 of the Arbitration Law provides that:

> The parties' submission to arbitration to resolve their dispute shall be on the basis of both parties' free will and an arbitration agreement reached between them. If a party applies for arbitration in the absence of an arbitration agreement, the arbitration commission shall not accept the case.

Article 6 continues by stating that 'The arbitration commission shall be selected by the parties through agreement'.

Freedom for the parties extends beyond choosing arbitration as a dispute resolution mechanism, and appointing the arbitration commission of their choice. Under the rules of many of the major Chinese arbitration commissions, the parties are also free to exert control over the identity or composition of their arbitral tribunal. They are also free to settle their disputes by agreement without the tribunal making an award, or can choose to have a mediation during the proceedings. The parties are also generally able to elect whether hearings before the tribunal should be in private. The autonomy of the parties is reflected in many aspects of the Arbitration Law, which gives the parties' considerable choice as regards the form that their arbitral proceedings will take. Nonetheless, as discussed further below, there are still areas where the Arbitration Law could do more to respect party autonomy.

2.1.3.2 Reliance on Facts

It is a fundamental principle underlying all judicial practice in China that the facts in any dispute should be duly established by evidence, and that decisions should be made by applying legal principles to those facts. Arbitration, as a quasi-judicial process, is no different. Article 7 of the Arbitration Law provides that, *'In arbitration, disputes shall be resolved on the basis of facts, in compliance with the law and in an equitable and reasonable manner'*. Article 7 codifies the principle of reliance on facts, that tribunals should disregard their subjective views or opinions, and instead decide all disputes referred to them objectively, on the basis of the law and the evidence before them,

having regard to the applicable procedural rules and in a manner that is fair and reasonable.

Non-compliance with this principle could lead to the setting aside of a domestic arbitral award. Article 58 of the Arbitration Law provides that:

> A party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located, if it can produce evidence which proves that the award was made in one of the following circumstances: ... (4) The evidence on which the award is based was forged; (5) The opposing party has withheld evidence which was sufficiently material to affect the fairness of the award.

2.1.3.3 Arbitral Independence

Article 8 of the Arbitration Law sets forth that:

> Arbitration shall be carried out independently according to law and shall be free from interference of administrative organs, social organisations or individuals.

Article 14 states:

> Arbitration commissions shall be independent from administrative organs and there shall be no relationship involving an element of control between arbitration commissions and administrative organs. There shall also be [no such relationship] between arbitration commissions.

As a quasi-judicial institution, each arbitration commission should operate independently from any administrative organs of the state or any other arbitration commissions. Provided that the arbitration commission exercises its power within the legal limits, there should be no interference by any other party in its affairs, subject only to the supervisory jurisdiction of the people's courts.

2.1.4 Basic Mechanisms of the Arbitration Law

By a basic mechanism of the Arbitration Law, we refer to an important procedural rule or a rule of conduct that serves a fundamental function within the arbitral process, and will be in play in any particular arbitration. The following basic mechanisms can be identified throughout the provisions of the Arbitration Law: the exclusive nature of arbitration, a private oral hearing before the tribunal, the withdrawal of arbitrators and the finality of arbitral awards.

2.1.4.1 The Exclusive Nature of Arbitration

In China, arbitration and litigation are mutually exclusive, i.e., the parties may only choose either one as the method by which to resolve their dispute. Article 5 of the Arbitration Law provides that:

> If the parties have concluded an arbitration agreement and one party commences an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void.

Arbitration of course depends on the existence of an arbitration agreement between the parties. It is only through that agreement that the parties can opt out of the jurisdiction of the people's court (or any other court) that would otherwise be competent to decide the matter.

Article 26 further clarifies that:

> If the parties have concluded an arbitration agreement and one party has commenced an action in a people's court without declaring the existence of the arbitration agreement and, after the people's court has accepted the case, the other party submits the arbitration agreement prior to the first hearing, the people's court shall dismiss the case unless the arbitration agreement is null and void. If, prior to the first hearing, the other party has not raised an objection to the people's court's acceptance of the case, he shall be deemed to have waived the arbitration agreement and the people's court shall continue to try the case.

The exclusive nature of arbitration is also evident in that, arbitration agreements that purport to allow the parties to choose either arbitration or litigation are deemed invalid under Chinese law.[6]

2.1.4.2 Private Oral Hearings

Article 39 of the Arbitration Law provides:

> Arbitrations shall be conducted by means of oral hearings. If the parties agree to arbitration without holding oral hearings, the arbitration tribunal may render an arbitration award on the basis of the written application for arbitration, the defence and other written materials.

Article 40 provides:

> Arbitration proceedings shall be private. If the parties agree, an arbitration may be conducted in public unless State secrets are involved.

Confidentiality, the default position under Chinese law, serves to distinguish arbitration from court proceedings, and is often perceived as an advantage of arbitration compared to litigating a dispute in public, allowing commercially sensitive information to be protected. The requirement for oral hearings is intended to provide both parties with a sufficient opportunity to present their case, and respond to the case made against them, before the tribunal. The fact that, by agreement, the parties can dispense both with confidentiality and with oral hearings exemplifies the party autonomy which is characteristic of arbitration.

6. Article 7 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the 'Arbitration Law of the People's Republic of China' provides that, '*Where the parties agree that they may apply for arbitration before an arbitral institution or file a lawsuit before the people's court for a dispute, the arbitration agreement is invalid.*'

2.1.4.3 *Withdrawal of Arbitrators*

In judicial proceedings, judges with conflicts of interests should recuse themselves, so as to avoid bias, or the appearance of bias. Similarly, arbitrators who come within the prescribed circumstances in which a conflict is deemed to arise, or where their impartiality or independence is compromised, should withdraw from the proceedings.

Article 34 of the Arbitration Law provides that:

> In the circumstances set out below, the arbitrator must withdraw from his appointment and the parties shall have a right to challenge the arbitrator:
>
> (a) the arbitrator is a party to the arbitration, or a close relative of any party or any party's representative;
> (b) the arbitrator has a personal interest in the dispute;
> (c) the arbitrator has any other relationships with any party or its representative which may affect the arbitrator's impartiality; or
> (d) the arbitrator met with any party or its representative in private, or accepted from any party or its representative offers of entertainment or gifts.

An arbitrator may withdraw voluntarily, or may be subject to a challenge by a party. Any challenge to an arbitrator should be submitted, orally or in writing, before the first hearing before the tribunal. If a party only becomes aware of the matter, giving rise to the challenge after the first hearing, the challenge may be raised prior to the conclusion of the final hearing. The decision as to whether any arbitrator should withdraw is generally made by the chairman of the arbitration commission. If the chairman of the arbitration commission serves as an arbitrator in the relevant proceedings, then the decision would be made collectively by the arbitration commission. If an arbitrator cannot perform his duties, either because he has withdrawn or for other reasons, a substitute will be appointed in accordance with the Arbitration Law. The mechanism relating to the withdrawal or replacement of arbitrators is considered in more detail in Chapter 15 section 15.2.

2.1.4.4 *Finality of Arbitral Awards*

As soon as an award is rendered by the arbitral tribunal, it takes effect and becomes binding on the parties. No party may commence proceedings before the people's courts in relation to the dispute that was referred to (and decided by) the tribunal, nor may any party apply for further arbitration proceedings before an arbitration commission. Article 9.1 of the Arbitration Law states that:

> If a party applies for arbitration before an arbitration commission or commences any action in a people's court regarding the same dispute in which an arbitration award has been made, the arbitration commission or the people's court shall not accept the case.

Articles 57 and 62, respectively, further state that '*[t]he arbitration award shall be legally effective as of the date on which it is made*'; and that, '*The parties are required to*

perform the arbitration award. If a party fails to perform the arbitration award, the other party may apply to the people's court for an order for enforcement in accordance with the relevant provisions of the Civil Procedure Law. The people's court to which the application has been made shall enforce the award'.

This rule is not, however, without exception. Article 9.2 provides that:

> If an arbitration award is set aside or enforcement of an award is refused by the people's court based on legal grounds, a party may apply for arbitration on the basis of a new arbitration agreement reached between the parties, or commence an action in the people's court, regarding the same dispute.

The effect of this is that where an award has been set aside by the people's court, or where the award is not enforced, the underlying arbitration agreement is no longer binding on the parties. Instead, they must take their dispute to the people's court unless a fresh agreement to arbitrate can be concluded. This can be contrasted with the position in a number of other jurisdictions, where, following the setting aside of any award the arbitration agreement remains valid and is not rendered void. Note, however, that – notwithstanding the default position in Article 9.2 – the Arbitration Law expressly provides that the court may order an arbitral tribunal to re-arbitrate a case when it deems this approach preferable to setting aside the award (and so voiding the arbitration agreement).[7]

2.1.5 Amendments to the Arbitration Law

The increase in the numbers of arbitral institutions, their caseload and the total amounts in dispute in arbitration proceedings in China (as illustrated by the statistics set out in Chapter 1) is in no small part due to the enactment of the Arbitration Law. The statute has been implemented and followed both by tribunals and the people's court, and has contributed greatly to the development of arbitration in China. However, with the social and economic landscape changing and the Chinese legal system (including arbitral practice) continuing to develop, a number of the provisions of the Arbitration Law have proven inadequate.

For instance, the Arbitration Law:

(a) still insufficiently respects party autonomy, as is apparent from its limited scope of application (see Chapter 2 section 2.1.2), the draconian, formalistic requirements for valid arbitration agreements (see Chapter 3) and restrictions on the parties' ability to choose their arbitrators (for instance, limitations in the form of panel arbitrators);

7. See Article 61 of the Arbitration Law, '*If, after accepting an application for setting aside an arbitration award, the people's court considers that the case may be re-arbitrated by the arbitration tribunal, it shall notify the tribunal that it shall re-arbitrate the case within a certain time limit and shall rule to stay the setting-aside procedure. If the arbitration tribunal refuses to re-arbitrate the case, the people's court shall rule to resume the setting-aside procedure.*'

(b) lacks flexibility in procedures which often results in arbitration proceedings being too similar to litigation, as is apparent from provisions relating to evidence (for instance, Article 45 requires that all evidence shall be presented during the hearings and be examined by the parties which, if interpreted literally, would make document-only arbitrations impossible[8]);
(c) does not permit arbitral tribunals to determine the validity of arbitration agreements and jurisdictional issues;
(d) fails to effectively eliminate all links between the government and arbitration commissions (for instance, while the Arbitration Law specifies that arbitration commissions should be independent, Article 10 requires them to be established under the 'coordination' of the local governments); and
(e) provides for a system of judicial review of arbitral awards that is less than clear.[9]

Having accepted that there is a gap to be filled between the Arbitration Law and modern arbitral practice and principles, the Supreme People's Court has issued more than thirty judicial interpretations and provided a large number of replies to lower courts in arbitration-specific queries. The most important guidance issued by the Supreme People's Court is the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the 'Arbitration Law of the People's Republic of China' (the *Interpretation of the Arbitration Law*) issued in 2006. Nonetheless, even though judicial guidance and explanations have provided a patchwork of improvements, they are insufficient to overcome or address the more deeply-rooted issues.

As early as 2006, the annual National Arbitration Conference promised to '*give priority to the development of arbitration, and promote the new venture of arbitration wholeheartedly*'. At this conference, the Office of Legal Affairs of the State Council set out a number of initiatives for amendments to the Arbitration Law, towards a reform of the arbitration regime, stressing that: (a) a progressive yet prudent attitude was needed; (b) the focus should be on resolving matters that acted as bottlenecks in the arbitral process; and (c) international practices and experience could be drawn on, always provided that China's unique requirements and circumstances were taken into account.

Following this conference, amendments to the Arbitration Law have been a standing item on the legislative agenda, with government officials, practitioners and academic commentators engaging in a wide-ranging and spirited debate as to precisely what changes should be implemented. The most concrete proposals for change that have emerged are centred on the following issues.

8. In reality, arbitration institutions interpret this Article 45 as only applicable to cases with oral hearings and make their own rules about the examination of evidence when it comes to document-only arbitrations. See Article 42 of the CIETAC Rules 2015.
9. Ma Zhanjun, *Amendment of the 1994 Arbitration Law and Reasoning, Arbitration Study*, Vol. 8, 62–63, (China Law Press 2006); Song Lianbin, *From Ideal to Provisions – Several Issues Warranting Attention during the Amendment of the Arbitration Law*, Vol. 2 (Beijing Arbitration, 2004).

2.1.5.1 *The Nature of Arbitration Commissions*

The Arbitration Law does not address the nature of arbitration commissions. The Chinese legal community is divided into two schools of thought on this point: one group of commentators and practitioners believes that arbitral commissions should be considered 'public institutions', while others take the view that they are 'social organisations'.[10] Looking at this distinction, it may be said that arbitration commissions currently act much like public institutions, while they should aspire to be true social organisations operating for the public good, but independently of any public or government bodies. Overall, the Chinese legal community takes the view that regardless of how one describes the nature of arbitration commissions in Chinese jurisprudence, arbitral commissions should become more independent of government organs. Defining arbitration commissions as 'social organisations' under an amendment to the Arbitration Law would best serve that aim and accelerate the transition of these institutions.

2.1.5.2 *Institutional versus Ad Hoc Arbitration*

As set out in Chapter 1, Chinese law currently only permits institutional arbitration proceedings before an arbitration commission, rendering arbitration agreements that provide for ad hoc proceedings invalid. That said, the New York Convention, which China has acceded to, expressly recognises both types of arbitration and China did not make any reservation on this matter. In other words, China recognises the validity of ad hoc arbitration held outside of China.

There is no clear consensus among the Chinese legal community as to whether the Arbitration Law should be amended to permit ad hoc proceedings. Some practitioners take the view that China should follow international practice and allow ad hoc arbitration. The proponents of ad hoc arbitration argue that parties and tribunals now have sufficient experience to ensure that the advantages and flexibility of this type of arbitration are being realised. Ad hoc arbitrations have been a feature of international commerce for some time now, and China should not be seen to remain out of step as it is exposed more and more to globalisation and international trade.

Another school of thought, perhaps representing the mainstream view, nonetheless argue that it may be premature to permit ad hoc arbitration. They do agree that ad hoc arbitration has its own advantages and can coexist with institutional arbitration, but note that in practice, the conditions in which ad hoc arbitration would function best

10. Under Chinese law, public institutions or '事业单位' refer to organizations run by state organs or other organizations using state-owned assets for the purpose of social and public interests and conduct activities such as education, science and technology, culture, and public health, etc. Social associations or '社会团体' are defined as non-profit-seeking social organizations voluntarily composed of Chinese citizens that perform activities in accordance with the articles of association for the realization of the common desires of the membership.

do not yet exist in China. Ad hoc arbitration requires a sophisticated credit system to ensure that payments under awards and on account of fees can be made between private parties, routine and robust enforceability of arbitral awards as a matter of course and a mature arbitration community that is able to provide sufficient experienced arbitrators and counsel to meet demand. China has not quite reached the stage where all these preconditions have been met, and may not therefore be ready for permitting ad hoc arbitration at this point in time.

2.1.5.3 Requirements for an Arbitration Agreement to Be Valid

Article 16.2 of the Arbitration Law specifies that:

> An arbitration agreement shall contain the following particulars: (1) an expression of an intention to refer matters to arbitration; (2) the matters that are to be referred to arbitration; and (3) a designated arbitration commission.

Article 18 further stresses that:

> If an arbitration agreement contains no or only unclear provisions concerning the matters to be referred to arbitration or as regards the arbitration commission, the parties may reach a further, supplementary agreement. If no such further agreement can be reached, the arbitration agreement shall be null and void.

These requirements are widely criticised by academic commentators and practitioners alike as inconsistent with the fundamental principle of arbitration, respecting the free will of the parties. In international arbitral practice, both conventions and the arbitration laws of numerous jurisdictions provide that as long as an arbitration agreement contains the expression of an intention by the parties to submit disputes between them to arbitration, that agreement should be upheld. Draconian and prescriptive rules requiring specific provisions on '*matters to be referred to arbitration*' and a '*designated arbitration commission*' may well have impeded the development of arbitration in China.

The judicial branch has shown awareness of these difficulties, and has sought to mitigate the effects of these provisions. Article 2 of the Interpretation of the Arbitration Law provides that:

> If the parties concerned generally agree that the disputes arising from a contract shall be submitted for arbitration, then all disputes arising from the conclusion, validity, modification, assignment, performance, liability for breach, interpretation, or rescission of the contract may be deemed to be arbitrable matters.

Article 3 continues:

> If the name of the arbitration institution agreed upon in an arbitration agreement is not described in an accurate manner, but a specific arbitration institution can be determined, then that specific arbitration institution shall be deemed to have been designated.

Article 4 further provides:

> Where an arbitration agreement only refers to the arbitration rules that are to apply to the dispute in issue, the parties shall be deemed not to have agreed any arbitration institution, unless the parties have reached further agreement or the arbitration institution can be identified by reference to the arbitration rules that the parties have agreed.

These provisions relax the requirements for a valid arbitration agreement. There is widespread agreement among the Chinese arbitration community that the Arbitration Law should be amended to incorporate similar modifications, so that fewer arbitration agreements would be deemed invalid.

2.1.5.4 A Two-Track Regime for Judicial Review of Arbitration Proceedings

The arbitration laws of virtually every jurisdiction and international convention governing arbitral awards recognise as a general principle that there is a need for the State courts to supervise arbitration proceedings and to review arbitral awards. The Chinese Arbitration Law differentiates between judicial review of domestic awards, and of awards with a foreign element, putting in place two distinct frameworks under which the people's courts can exercise powers of review. There are also two different methods of judicial review, as discussed further below. Consequently, the debate concerning the best approach to judicial review of arbitration revolves around two key issues: (a) whether distinct judicial review mechanisms should apply to domestic arbitral awards and awards with foreign elements, and (b) whether the setting aside of awards and a refusal to enforce an award should coexist as separate methods of judicial review.

Pursuant to the Arbitration Law, the Chinese courts may only review procedural matters when it comes to arbitrations with a foreign element, while they are permitted to review both procedural and substantive matters as regards domestic arbitrations. The standard for judicial review of arbitration awards with a foreign element is generally in line with international practice. The main issue here is whether a review of domestic arbitrations should also be limited to procedural matters. Most academic commentators and practitioners are of the opinion that there should be only one standard of review, and it should be that which is currently applied to awards made in arbitral proceedings with a foreign element. They argue against any review of substantive matters decided in arbitral proceedings. The arguments in support of this position include the following:

(a) The nature of arbitration demands that any judicial review respects the autonomy of the parties and the finality of arbitral awards. If the scope of judicial review were extended to include substantive matters, then the authority of any arbitral tribunal would exist in name only. Arbitration would lose one of its major advantages, namely providing a final determination in a more cost efficient manner than litigation could offer.

(b) Based on such statistical information as is available, in recent years less than 1% of arbitral awards rendered by Chinese arbitral institutions have been set aside or were denied enforcement by the people's courts. This could be seen as reflecting the relative reliability and quality of arbitration proceedings before Chinese arbitral institutions: if the more onerous standard of judicial review has not led to many awards being declared invalid, then more expansive scrutiny by the courts may not be needed.

(c) So-called domestic arbitral institutions have long since begun to accept cases with foreign elements, and China International Economic and Trade Arbitration Commission (CIETAC), traditionally the arbitral institution with the most foreign-oriented approach, has also been accepting domestic cases for a considerable period of time. This stresses the importance of a unified standard for the judicial review of both domestic arbitrations, and arbitrations with a foreign element.

The fact that setting aside and refusing enforcement of arbitral awards coexist has also attracted criticism. Before the enactment of Arbitration Law in 1994, a refusal to enforce an arbitral award was the only method of judicial review that existed under the Civil Procedure Law. The Arbitration Law then introduced the setting aside of arbitral awards as a method of judicial review universally applicable to domestic awards and awards with foreign elements. These two methods of review have coexisted ever since.

The grounds (or the standard of review) for setting aside and for denying enforcement of an arbitral award, whether it is domestic or has foreign elements, are largely similar. With that in mind, one may question why there is a need for these two distinct judicial remedies. As a matter of principle, the setting aside of an award is only possible where the people's court is the competent supervisory court. Where the award has been made abroad and China is not the seat of the arbitral proceedings, setting aside the award is not an option. For domestic awards, or awards made in China which have a foreign element, one may ask whether there really is a need for two different routes of, essentially, denying the effectiveness of the award.

Furthermore, since any people's court that has jurisdiction over an application for enforcement of an award may conduct a review of the award in order to decide whether enforcement measures should be ordered, even an award already upheld by the court at the place of the arbitral institution following an application before that court to set aside the award, under the present system an award can be subject to two challenges. Even where an application to set aside the award has already been heard and dismissed, the court in the place where the assets against which enforcement is sought may still refuse enforcement. This leaves ample room for local protectionism. Arbitration practitioners in China tend to view enforcement challenges as being detrimental to the arbitral process. It is suggested that the Arbitration Law should be amended such that a domestic arbitral award is only subject to judicial review before the court at the place of the institution, through an application for setting aside the award.

In conclusion, the amendment of the Arbitration Law is an ongoing project that requires due consideration of both international arbitral practice and the specific circumstances of the Chinese judicial system.

2.2 THE NEW YORK CONVENTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a conference on international commercial arbitration convened by the Economic and Social Council of the United Nations on 10 June 1958 in New York. The treaty has become known as the *New York Convention*. It entered into force on 7 June 1959. As of September 2014, 150 of the 193 United Nations Member States have acceded to the New York Convention.[11] The New York Convention is by far the most important international treaty on the recognition and enforcement of foreign arbitral awards.

2.2.1 Objectives

As stated by the United Nations Commission on International Trade Law (UNCITRAL), the objective of the New York Convention is to ensure that the binding nature of arbitration agreements is respected by the courts of all the contracting parties, and that foreign and non-domestic arbitral awards are effectively enforced. The principle aim of the New York Convention is that:

> foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[12]

2.2.2 The Main Provisions of the New York Convention

By way of a brief overview of the treaty, the sixteen Articles of the New York Convention provide for the following key matters:

(1) The New York Convention applies to both foreign arbitral awards and non-domestic awards. The latter 'appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its

11. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, accessed on 28 October 2014.
12. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html, accessed on 9 September 2013.

CHAPTER 7

Requests for Arbitration, Acceptance of Proceedings and the Defence

7.1 PRE-ARBITRATION PROCEDURES AGREED BY THE PARTIES

The parties may include pre-arbitration procedures in their arbitration agreement. Such agreements usually provide that the parties are to use their efforts to resolve any disputes through discussions and negotiations, or perhaps by mediation, before commencing arbitration proceedings. Such clauses may give rise to jurisdictional issues: can an arbitral institution accept a request for arbitration where the claimant has commenced proceedings without having followed such an agreed procedure?

In its Reply to the Report on the Review of the Application of Runhe Development Limited Company objecting to Enforcement of an Arbitral Award ((2008) Min Si Ta Zi No.1), the Supreme People's Court gave its opinion on this question:

> Although the parties agreed in their arbitration agreement that they would first strive to resolve any dispute through negotiations, no time limit was given for such a procedure. The provision is too general and therefore ambiguous and open to conflicting interpretations as to what performance it requires of the parties. However, the real intention behind this provision can be ascertained by considering the parties' purpose in concluding an arbitration agreement. Of the two conditions that the parties agreed [as conditions precedent to commencing arbitration proceedings], namely that there should be 'amicable negotiations' and a 'failure of negotiations', the former is merely a formality, while the latter can be interpreted as a substantive matter. It requires that the negotiations have in fact failed. Such a failure can be inferred from a party having requested arbitration proceedings. As such, the first condition was insufficiently clearly defined, while the second condition was met. The arbitral tribunal was therefore entitled to accept the case pursuant to the arbitration agreement.

This Reply clarifies the enforceability of pre-arbitration procedures: agreements between the parties requiring them to undertake any kind of alternative dispute

resolution (ADR) procedures will not prevent the parties from commencing arbitration proceedings, if the provision is too general and merely deals with attempts to negotiate or reach a settlement as matter of principle. Where the parties have included such provision in their contract, a request for arbitration will be taken to signal the end of any discussions. The claimant, by filing a request with an arbitral institution, will have rejected any further ADR methods such as negotiations or mediation. Where, however, the pre-arbitral procedure is described in clear and compulsory terms, it will be upheld and will operate as a condition precedent to commencing proceedings.

References to '*amicable negotiations*', considered in the Supreme People's Court's Reply, are commonly found in arbitration clauses that seek to impose pre-arbitral ADR procedures. We have set out a number of examples of such clauses below, and consider their enforceability.

> **Examples**:
> Clause 1: '*Any dispute arising from or in connection with the Contract shall be settled between both parties through amicable negotiations. If no settlement is reached, the dispute shall be submitted to XX Arbitration Commission for arbitration in accordance with its rules in effect at the time of applying for arbitration.*'
>
> Clause 2: '*Any dispute arising from or in connection with the Contract shall be settled between both parties through amicable negotiations. If no settlement is reached within 30 days after the commencement of negotiations, the dispute shall be submitted to XX Arbitration Commission for arbitration by either party.*'
>
> Clause 3: '*Any dispute arising from or in connection with the Contract shall be settled between both parties through amicable negotiations. The dispute shall not be submitted to arbitration institutions in the absence of such negotiations. If no settlement has been reached within 30 days of commencement of negotiations, the dispute shall be submitted to XX Arbitration Commission for arbitration by either party.*'

The first clause expresses the parties' general agreement as regards entering into amicable negotiations, but without providing for any time limit. The second provision does include a thirty-day time limit for the negotiations. The third clause expressly provides that amicable negotiations are a prerequisite to arbitration. In our view, the first clause would not be sufficient to preclude a party from commencing arbitration proceedings at its own initiative, even though reference is made to negotiations.

Lin Yifei, previously an official of the CIETAC South China Sub-Commision (and now head of the South China International Economic and Trade Arbitration Commission's Development and Research Division) once published an article dealing with 'Pre-Arbitral Negotiations' in one of its journals, South China Arbitration. This provides:

> CIETAC's view is that negotiations should be based on party autonomy. If either party is unwilling to participate, negotiations cannot meaningfully proceed. Where a party makes an application for arbitration without engaging in negotiations, this indicates that party's unwillingness to settle the disputes through negotiation, in which case negotiations would have been impossible. Therefore, unless it is expressly provided in the arbitration agreement that negotiations or mediation are required prior to the commencement of any arbitration, any such provision should not be interpreted widely, so as to deprive the other party of its right to commence arbitration. ... Whether or not a time limit is imposed, CIETAC takes negotiations as an optional procedure instead of a prerequisite for arbitration, to be engaged in voluntarily, and which does not affect the right to commence arbitration.[1]

Lin reasons that negotiations can only proceed if both parties are willing to participate, regardless of any provision in the contract purporting to require this. Whether a pre-dispute agreement to negotiate has any value depends on the actual differences which have arisen between the parties. Rather than engage in negotiations which it knows, or strongly suspects, will be fruitless, a party may prefer arbitration as a process which guarantees a binding award. It would be unreasonable to restrict that party's right to arbitrate where there exists an arbitration clause, absent clear and mandatory language requiring negotiation (or some other forms of ADR).

That said, both CIETAC and the BAC strive to avoid any controversy (or jurisdictional arguments) as regards pre-arbitration ADR procedures. To our knowledge, parties are generally advised by these arbitral institutions to apply for arbitration after the expiration of any time limit that may be imposed for negotiations. If a party insists on commencing arbitration before that point, it must sign a 'waiver' to acknowledge that it has been informed of the potential risks of doing so.

Mediation is another common form of ADR that may be provided for in a contractual pre-arbitration procedure. Mediation is a much more specific and certain process than negotiations. A number of arbitral institutions also provide mediation services, such as for example the BAC's Mediation Centre that was established on 1 August 2011. The BAC's Mediation Centre operates independently of the institution's arbitration arm. Pursuant to Article 26 of the BAC's Mediation Rules, any mediator may not also sit as either arbitrator or judge, or act as representative of a party in subsequent arbitration or litigation concerning the matter to be mediated, unless the parties were to agree otherwise.[2] An arbitration before a mediation institution such as that BAC's Mediation Centre will therefore differ from a mediation conducted during arbitration proceedings, where the arbitrators take on the role of the of mediators.

The BAC (through its official website) provides a model mediation clause:

> Any dispute arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall first be referred to BAC Mediation Center in accordance with the BAC Mediation Rule, unless one of the parties objects. If one of the parties objects to Mediation or if the Mediation is terminated, the dispute shall be finally submitted to BAC for arbitration which shall be conducted in accordance with the BAC's arbitration rules in effect at the time of applying for arbitration.

Article 24 of the BAC's Mediation Rules reflects this approach, stating that '*Mediation proceedings shall be terminated if any of the following circumstances arises:*

1. Lin Yifei, *Pre-arbitration Negotiation*, 'CIETAC's South China Arbitration' Vol. 7, 7 August 2009.
2. Article 44(3) of the Civil Procedure Law provides that a judge should recuse himself when his 'other types of relationship' with the parties may affect his impartiality. Having acted as mediator is likely to constitute such a relationship.

1. (One of) [t]he parties declined mediation; …' (meaning that they withdrew from, or declined to continue with, the mediation).

Lin Yifei further commented that:

> ADR procedures exist to expedite dispute resolution. When drafting contracts, parties often agree to conduct negotiations before litigation or arbitration. Many contracts submitted to CIETAC during arbitrations include provisions such as 'Any dispute arising from or in connection with the Contract shall be settled between both parties through amicable negotiations. In case no settlement is reached, the dispute shall be submitted to CIETAC for arbitration…' In such circumstances, parties often rely on pre-arbitral procedures to challenge the arbitral tribunal's jurisdiction, claiming that commencing arbitration without going through negotiation is against the arbitration agreement. In fact, any 'failure of negotiation' should include both a substantive failure to reach settlement and a procedural failure to reach agreement on whether to and how to negotiate. Based on this interpretation, any kind of failure to reach agreement should enable the parties to move to the next available procedure, i.e. to commence arbitration. This is the result of the characteristics of ADR and reflects its major shortcoming: the lack of enforceability. The effectiveness of ADR therefore varies widely: sometimes it can resolve a dispute swiftly, in other cases in may increase actual cost of dispute resolution.

Mr Lin's comments are representative of perhaps the majority opinion in mainland China, where most arbitration practitioners seem to dismiss provisions urging the parties to *'strive to settle the dispute through amicable negotiations'* as nothing more than politeness or good manners, rather than being a prerequisite to commencing arbitration proceedings. When disputes do arise, the parties are generally permitted to go to arbitration regardless of any such provisions.

7.2 REQUESTS FOR ARBITRATION[3]

7.2.1 Documents to Be Submitted

Arbitration proceedings are commenced by a party submitting a request for arbitration to the arbitration institution. The institution will then consider the request. If the institution considers that the formal requirements for commencing proceedings have been satisfied, it will accept the case. The Arbitration Law, as well as the procedural rules of the major arbitral institutions such as CIETAC and the BAC, set out specific requirements in this regard. These are reviewed in turn below.

The Arbitration Law contains the most fundamental rules governing the commencement of proceedings. Article 22 states that:

> Any party referring a matter to arbitration shall submit to an arbitration commission the arbitration agreement and a request for arbitration, together with copies of these documents.

3. The term '*Application for Arbitration*' is used by some institutions to denote the same concept.

Article 23 further provides that:

> A request for arbitration shall clearly state the following: (a) the name, gender, age, occupation, employer and address of the party (in case of a natural person); the name, address, name of legal representative or name and position of the officer acting on behalf a legal person or other organization; (b) the claim that is referred to arbitration and the facts and arguments on which the claim is based; and (c) the supporting evidence and the source of that evidence, and the name and address of the witness(es).

The Arbitration Law does not presently expressly deal with the following issues:

(a) Should the claimant submit the original of the arbitration agreement, or will a photocopy suffice?
(b) What requirements as to form and presentation must a request for arbitration satisfy for it to be effective?
(c) What other information, if any, should be included in a request for arbitration beyond the details of the claimant and the respondent, the claims, the facts, the relevant arguments in support of the claims and the evidence?
(d) Should the request be accompanied by all the supporting evidence that the claimant will be relying on in the proceedings as regards the claims?
(e) How many copies of the request for arbitration is the claimant required to submit?
(f) What documents are required to identify a representative or an officer of a party, or to prove that he or she is duly authorised to act on behalf of the party in question?

The Arbitration Rules of CIETAC and the BAC do address most of these issues, as considered below:

Q: Should the claimant submit the original of the arbitration agreement, or will a photocopy suffice?
A: The original of the arbitration agreement is not required. Photocopies will generally be accepted, provided that they are clear and legible. If any party challenges the authenticity or the arbitration agreement, that might be considered by the tribunal in the further course of the proceedings.
Q: What requirements as to form and presentation must a request for arbitration satisfy for it to be effective?
A: A request for arbitration must be made in writing, and be signed and/or bear the seal of the claimant or its authorised representative.[4] The relevant arbitral institution will only examine whether these formalities are met before accepting the case. The authenticity of the claimant's signature and/or seal will not generally be an issue unless the respondent raises this with the arbitration commission.

4. Section 1 of Article 12, CIETAC Arbitration Rules (2015).

Q: What other information, if any, should be included in a request for arbitration beyond the details of the claimant and the respondent, the claims, the facts, the relevant arguments in support of the claims and the evidence?

A: The claimant should ensure that the request for arbitration makes specific reference to the arbitration agreement pursuant to which the claims are referred to the arbitral commission. CIETAC has published a Model Written Application for Arbitration, which places a description of the arbitration agreement that is relied on immediately after the basic information relating to the parties, which serves to show its importance. In addition, a claimant ought to specifically mention any of the following agreements between the parties:

(a) the proceedings are to be conducted in a language other than Chinese;
(b) the governing law of the contract is not that of mainland China;
(c) the rules of arbitration to be applied are other than those of the institution to which the request is submitted; and
(d) the arbitrators chosen are not on the panel of arbitrators of the institution to which the matter is referred.

If the arbitral institution is informed of any such arrangements varying the default position in proceedings before it, that should assist the institution in dealing with these matters expeditiously:

Q: Should the request be accompanied by all the supporting evidence that the claimant will be relying on in the proceedings as regards the claims?

A: The claimant should not be required to provide all the evidence that will be relied on at the very outset of the proceedings, with the request for arbitration. Both parties will be able to adduce further evidence in the course of the proceedings. Article 12.2 of the CIETAC Rules 2015 states that a party applying for arbitration shall attach '*the relevant documentary and other evidence on which the Claimant's claim is based*'. Similarly, Article 7.1 of the BAC Rules 2015 states that '*A party applying for arbitration shall submit …the evidence or other supporting documents on which the Application for Arbitration is based*'. These provisions leave it to the claimant to ensure that all relevant evidence is provided with the application. It should, of course, be in the claimant's own interest to present the case to the arbitration commission that is supported by all necessary evidence and in an accessible manner so as to assist the tribunal, quite irrespective of what the rules may prescribe.

Q: How many copies of the request for arbitration is the claimant required to submit?

A: The number of copies of the request for arbitration that need to be submitted will vary depending on the number of arbitrators. In case of a tribunal of three arbitrators, five copies should be provided: three for the tribunal, one for the respondent, and one for the institution. If there are several respondents, additional copies should be provided accordingly. Three copies of the application should be submitted if a summary or expedited procedure applies. If the claimant intends to apply for interim measures for the preservation of

evidence or property, two originals of the application for interim measures, and an additional copy of the request for arbitration should also be provided to the arbitral institution.[5]

Q: What documents are required to identify a representative or an officer of a party, or to prove that he or she is duly authorised to act on behalf of the party in question?

A: The original of the representative's power of attorney is to be submitted together with the request for arbitration.[6] The power of attorney should describe the scope of the authority conferred. One question that is frequently asked is whether a power of attorney that has been executed abroad by a foreign party should be notarised and authenticated. In litigation before the Chinese courts, these steps are necessary, otherwise the power of attorney would not be recognised by the court. The rules of arbitration of most arbitral institutions in China are, however, less strict. Powers of attorney that have not been notarised or authenticated would be unlikely to be rejected by the arbitral institution. However, if the opposing party were to object to the instrument, then the claimant might be required to complete the relevant formalities to be able to prove that the power of attorney is effective. This issue is dealt with in further detail in Chapter 14. Finally, we suggest that claimants also provide the case manager of the arbitral institution with an electronic copy of the request and the supporting documents, to assist with the efficient conduct of the proceedings.

7.2.2 CIETAC and Its Sub-commissions or Centres

Besides CIETAC's headquarters in Beijing, the institution has sub-commissions and regional centres in Shenzhen, Shanghai, Tianjin and Chongqing. Led by CIETAC's Beijing headquarter, CIETAC is a centralised institution. Its leadership structure (the Chairman, the Secretariat and the Arbitration Court,[7] etc), all located in Beijing, govern not only CIETAC Beijing, but also the various sub-commissions and regional centres. The other establishments are considered to be branches of CIETAC, who are authorised by CIETAC to accept applications for arbitration, and to administer proceedings, on behalf of CIETAC. The parties are free to agree that any disputes should be submitted to CIETAC, or specifically to one of the sub-commissions or centres. Where the parties have agreed that CIETAC is the competent arbitral institution, the Arbitration Court (in Beijing) will accept the application and will administer the proceedings. If a sub-commission or centre has been chosen, then the arbitration court of that specific

5. See Article 21, CIETAC Rules 2015, Article 15, BAC Arbitration Rules 2015.
6. See Article 22, CIETAC Rules 2015, Article 17, BAC Arbitration Rules 2015.
7. On 26 September 2014, CIETAC established an Arbitration Court to assume part of the functions of the Secretariat. The Arbitration Court will be in charge of day-to-day functions such as case management, researching, and promotion of CIETAC. The Secretariat will be in charge of more general functions such as coordinating the development of arbitration with foreign elements in China. This arrangement is confirmed by CIETAC Arbitration Rules (2015).

branch of CIETAC will be responsible for accepting the application, and administering the further course of the arbitration. If the parties in their contract made reference to a branch or sub-division of CIETAC that does not in fact exist, or if there is any ambiguity in the arbitration agreement as to which particular part of CIETAC the parties had in mind, then the Beijing Arbitration Court will be the competent entity to administer the proceedings. CIETAC itself decides any dispute as to which part or branch of CIETAC is to have jurisdiction.[8]

The Shanghai and South-China Sub-Commissions of CIETAC, however, asserted that they are independent arbitral institutions in their own capacity, rather than being merely branches of CIETAC. This led to an open dispute with CIETAC, with the two sub-commissions ultimately breaking away from CIETAC. On 1 August 2012, CIETAC Beijing announced that it had chosen to terminate its authorisation granted to the Shanghai and South-China Sub-Commissions, based in Shenzen, and that CIETAC would set up new offices in both Shanghai and Shenzen.[9] The two break-away Sub-Commissions responded with a joint statement, noting that as independent arbitral institutions, their jurisdiction over any disputes stemmed from the agreement between the parties, and did not depend on any authorisation by CIETAC in Beijing. Shortly thereafter, the two entities changed their names. Shanghai Sub-Commission became Shanghai International Economic and Trade Arbitration Commission, also known as the Shanghai International Arbitration Center (SHIAC), and the South-China Sub-Commission became the South China International Economic and Trade Arbitration Commission / Shenzhen Court of International Arbitration (hereinafter 'SCIA'). These two institutions also issued their own (respective) arbitration rules and established panels of arbitrators.

The break-up of CIETAC led to practical difficulties for parties who had chosen the relevant branches of CIETAC as their arbitration commission (for instance, by agreeing to '*submit any dispute to arbitration before the Shanghai Sub-Commission of CIETAC*'). Would SHIAC as the self-appointed successor to CIETAC's Shanghai branch have jurisdiction over any arbitration proceedings, or would the matter have to be referred to CIETAC, either in Beijing or in Shanghai, to be arbitrated before CIETAC's own new branch?

This issue has led to conflicting rulings by different courts. For instance, in case decided by the Suzhou Intermediate People's Court ([2013] Su Zhong Shang Zhong Shen Zi No.0004): Solar Inc. of Suzhou, a subsidiary of a Canadian business, and LDK Solar Co., Ltd. of Jiangxi had entered into two contracts including arbitration clauses in identical wording, that '*the parties agree to submit it to the CIETAC (Arbitration Place: Shanghai, China) for arbitration*'. The Suzhou Intermediate People's Court held that, before its independence and separation from CIETAC, CIETAC Shanghai Sub-Commission had jurisdiction over the case. However, after its registration in the Shanghai Bureau of Justice and its subsequent issuing of arbitration rules and change of name, the SHIAC was no longer a part of the CIETAC and therefore was no longer the

8. Article 2.3 and 2.6 of the CIETAC Arbitration Rules 2015.
9. 'Reorganized' Shanghai Sub-Commission and South China Sub-Commission were established on 31 December 2014.

agreed arbitral institution. On that basis, the court refused to enforce the award made by SHIAC.

In another case[10] involving the same LDK Solar Co., Ltd, Risen Energy Co., Ltd. and LDK Solar Co., Ltd. entered into a contract with an arbitration clause providing that '*disputes shall be referred to the Shanghai sub-commission of the China International Economic and Trade Arbitration Commission for arbitration*'. The Ningbo Intermediate People's Court initially refused to enforce the award made by the SHIAC, on grounds similar to those in the Suzhou Case. However, Risen Energy Co., Ltd, the applicant, applied to the Zhejiang High People's Court to supervise enforcement of the award. The Zhejiang High People's Court instructed the Ningbo Court to correct its formal ruling. The Ningbo Court then issued another Ruling on Enforcement, which stated:

> [T]he parties specifically chose Shanghai Sub-Commission in their arbitration agreement and the award was made by an arbitral institution bearing the same name. During enforcement proceedings, the issue of whether these two intuitions are the same in essence can only be judged in a prima facie fashion. Moreover, after Risen Energy's objection to jurisdiction was rejected, it participated in subsequent arbitration proceedings and accepted Shanghai Sub-Commission's jurisdiction through its actions. Therefore Risen Energy's application to refuse enforcement in these proceedings should not be granted.

To ensure consistency in court rulings in cases arising out of the break-up of CIETAC, the Supreme People's Court issued a notice[11] on 4 September 2013 to require all such cases be reported to it before a decision can be made.[12] It should be noted that the ruling in the Suzhou case was made on 7 May 2013 and the two Ningbo rulings were made respectively on 22 May 2013 and 25 July 2013. As all these decisions pre-dated the Supreme People's Court's notice requiring that these cases be reported to it, they do not elucidate the approach that the Supreme People's Court will take on this issue. Arbitration practitioners will need to wait until a reply by the Supreme People's Court to lower courts is issued.

7.3 PAYMENT OF THE COSTS OF THE ARBITRATION

7.3.1 Payment in Advance

Once a case is accepted, the arbitration commission will require the claimant to pay both the tribunal's and the arbitration commission's fees in full, in advance, according to the schedule of costs and fees of the relevant institution. Payment of the costs of the arbitration in full, and in advance, is a distinguishing feature of arbitration in China.

Article 6 of the Notice of Measures for the Charging of Arbitration Fees by the Arbitration Commission provides that, a claimant may apply for deferred payment of the arbitration fee if it '*has difficulties*' in paying the fee in adance. Arbitral institutions tend to have their own rules relating to such applications. For instance, the BAC

10. See Appendix 8-1A and Appendix 8-1B.
11. See Appendix 7-2.
12. See Chapter 20 section 20.4 for more details about the reporting mechanism.

requires a party to file an application in writing setting out the reasons for deferred payment, the amount that needs to be paid at a later date, and the proposed time for payment. The applicant is also expected to submit evidence regarding its financial difficulties, for instance, a relevant attestation issued by a local authority.

In practice, arbitral institutions rarely grant applications for deferred payment of arbitration fees. Deferred payment is especially rare if the claimant is a legal person in financial difficulties, rather than a natural person with a lack of means. That said, where the amounts in dispute are substantial, the claimant may be able to agree a more flexible payment schedule in conjunction with the arbitral institution. If the arbitral institution accepts deferred payment, the claimant will usually be required to pay the deferred part of the costs before the arbitral tribunal is constituted, or before the first hearing but in any event always before the arbitral award is made.

Arbitral institutions in many other jurisdictions permit the claimant to commence proceedings by paying a modest amount, the 'registration' or 'filing' fee, at same time as submitting the claim. By way of example, Article 4.4(b) of the ICC Rules states that the claimant is to:

> ... payment of the filing fee required by Appendix III ('Arbitration Costs and Fees') in force on the date the Request is submitted.

The filing fee, of USD 3,000 at the time of writing, is non-refundable and will be applied towards reducing the 'advance on costs', a payment towards the final costs of the arbitration that the ICC fixes at an early stage of the proceedings, and subsequently monitors until the actual costs of the proceedings are determined in the final award. Article 36 of the ICC Rules further explains how the ICC fixes this provisional payment by the claimant on account of the likely costs of the arbitration:

> 1) After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36.
> 2) As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent.

Article 1 of Appendix III to the ICC Rules further details how the provisional advance is set, using the ICC's published scales of fees which work by reference to the value of the claims before the tribunal:

> 2) The provisional advance fixed by the Secretary General according to Article 36(1) of the Rules shall normally not exceed the amount obtained by adding together the ICC administrative expenses, the minimum of the fees (as set out in the scale hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the claimant shall be credited to its share of the advance on costs fixed by the Court.

The ICC's Secretariat will monitor the fees of the tribunal during the course of the proceedings, and the ICC Rules provide a power to adjust the advance in view of the following (see Article 1, Appendix III):

> 11) As provided in Article 36(5) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.

Similarly, Articles 33.1 and 33.2 of the AAA International Arbitration Rules provide that, '1. When a party files claims, the administrator may request the filing party to deposit appropriate amounts as an advance for the costs referred to in Article 31, paragraphs (a), (b) and (c).'; '2. During the course of the arbitral proceedings, the tribunal may request supplementary deposits from the parties.'

Both the ICC and the ICDR therefore allow partial payments on account of the costs of the arbitrations, and may request the parties to make further payments towards the costs of the tribunal and the administration of the proceedings during the course of the arbitration, depending on the requirements of the particular case. This more flexible approach differs from the common practice of Chinese arbitration commissions.[13]

7.3.2 The Composition of Arbitration Fees

The fees payable to arbitration commissions in China usually include both an acceptance fee and a so-called 'handling fee'.[14] The acceptance fee is intended to cover the remuneration of the arbitrators, together with a contribution towards the general operating costs of the arbitration commissions.[15] The handling fee for a case includes:

(a) travel, accommodation and other reasonable expenses incurred by the arbitrators in connection with the case;
(b) travel and accommodation expenses and payments for loss of working time as regards witnesses, experts, appraisers, or interpreters (if any of such costs are borne by the arbitration commission);
(c) the costs of consulting any third party, and the costs of, appraisers, inspections and interpreters;

13. Jin Zhao, *The Guides for and Interpretation of the CIETAC Arbitration Rules*, 65 (The Law Press, 2006).
14. Article 2 of the *Notice of the Measures for the Charging of Arbitration Fees by the Arbitration Commission.*
15. Article 3 of the *Notice of the Measures for the Charging of Arbitration Fees by the Arbitration Commission.*

(d) reproduction and courier charges or posting charges for files and documents;
(e) any other reasonable expenses that should be borne by the parties.

CIETAC has implemented a distinct schedule of fees for arbitrations with a foreign element and for financial cases (for instance, cases related to banking or securities). As regards any such arbitrations, the claimant is charged a fixed registration fee of RMB 10,000 and one single 'arbitration fee' which is not separated into an acceptance fee and a handling fee. This registration fee is intended to cover the costs of CIETAC reviewing the request for arbitration, initiating the arbitration proceedings, electronic case management and the filing of documents.[16]

The handling fees, according to the Measures for the Charging of Arbitration Fees by the Arbitration Institution, are apparently designed to reimburse the arbitration commissions' out-of-pocket expenses. In practice, however, both acceptance fees and the handling fees are charged according to the amount in dispute. Both will be charged up-front by reference to the amount in dispute, and both will be used by the arbitration commission to cover the usual costs and expenditures of arbitration. If there are any additional costs which are not covered by the acceptance and handling fees, parties will generally have to make further payment to cover these. There is, however, scope for flexibility. For example, in a case to be heard in Beijing, a party who chooses an arbitrator who lives in Shanghai, can expect to have to cover the travel and accommodation costs of that arbitrator on top of the normal acceptance fees and handling fees paid. If, however, a party fails to choose an arbitrator and the arbitration commission appointed an arbitrator from Shanghai, then the commission might well foot the additional travel and accommodation costs.

It is sometimes said that the cost of arbitration proceedings is higher than that of litigation, due to the need to pay arbitrators. That may not be the case, however, if one takes into account the finality of arbitration. Court judgments are subject to appeals, and the fees of the higher people's courts can significantly increase the costs of resolving a dispute through litigation. An arbitral award, on the other hand, is immediately enforceable and should not be subject to any review or challenge, save in very limited circumstances. Nonetheless, for matters where the sums in dispute are relatively small, litigation may be more appropriate. It would not make sense to refer a case where the amount in issue is, say, RMB 1,000 to arbitration before the BAC, which would charge an arbitration fee of RMB 5,100 in accordance with its schedule of fees.

7.3.3 The Amount in Dispute and Arbitration Fees

The amount in dispute is not always apparent, or capable of being easily quantified. It is important both for the parties and for the arbitral commission for there to be a

16. CIETAC Arbitration Fee Schedule, available from: http://www.cietac.org/index.cms, visited on 29 January 2013.

consistent standard for determining the amount which is deemed to be in dispute for the purpose of fixing the arbitration fees.

The BAC has published its own 'Measures for the Determination of the Amount in Dispute for Requests for the Revocation/ Rescission/ Annulment / or Termination of a Contract, or for Specific Performance' (the 'Measures').

According to the Measures, the amount in dispute in the relevant cases is deemed to be:

(a) in a claim seeking the revocation, rescission, nullification, termination or specific performance of a contract, the total consideration provided for in the contract;
(b) in a claim for revocation, rescission, nullification, termination or specific performance of a stock swap contract or a gratis stock transfer contract, the amount of the disputed portion of the registered capital of the relevant company;
(c) in a claim for revocation, rescission, nullification, termination or specific performance of a part-performed contract which provides for performance to take place over time (such as a lease or an agency agreement) the consideration provided for in the contract in the contract for the unfulfilled portion of the contract;
(d) if the claimant submits other claims beyond rescission, nullification, termination or specific performance, such as claims for losses or expenses incurred, or for legal fees, these claims may be added to the amount in dispute in the tribunal's discretion;
(e) where the claim concerns the transfer or obtaining of a certificate of real property ownership, the agreed purchase price of the property in question;[17]
(f) where the claimant seeks an order that the respondent commit, or refrain from, certain actions which do not involve the transfer of any sum of money or property interest, the BAC will charge a further RMB 1,000 in addition to the acceptance fee and the handling fee. If it is possible to determine the monetary value of the action for which an order is sought, then that will be the amount in dispute.

CIETAC has not so far published any rules or guidelines as to determining the amount in dispute in the situations described above. Nonetheless, in practice, the approach taken by CIETAC to such claims does not tend to differ considerably from that set out in the BAC's Measures. One difference, however, is that where the claimant is asking for an order that the respondent either commits or refrains from committing certain acts, CIETAC considers the nature of the act in question (instead of imposing a fixed fee, as the BAC does).

17. Note that in China most new-build apartments are sold prior to being built, and before a certificate of real property ownership is issued. Disputes commonly arise where developers fail to obtain the necessary certificates, for example because they have failed to comply with construction codes.

CHAPTER 17

The Hearing

17.1 TIMING AND PLACE FOR HEARING

In proceedings before arbitral institutions based in mainland China, the secretariat or the arbitration court of the relevant institution will serve each party with a '*Notice of the Formation of the Arbitral Tribunal*' once the tribunal has been constituted. Thereafter, the case manager assigned to the case will ascertain the availability of the arbitrators in order to fix a convenient time for an oral hearing. The availability of the parties and their attorneys will also be taken into consideration, although there is no legal requirement for the case manager to do so. The secretariat or arbitration court will then confirm the timing for the evidentiary hearing with the tribunal, and then inform the parties of this through a '*Notice of the Oral Hearing*'.

The rules of major Chinese arbitral institutions also require that the notice for the first oral hearing be sent to the parties sufficiently in advance, to ensure that the parties have enough time to prepare. For instance, Article 37.1 of the CIETAC Rules 2015, which applies to the general procedure, provides that, '*Where a case is to be examined by way of an oral hearing, the parties shall be notified of the date of the first oral hearing at least twenty (20) days in advance of the oral hearing.*' For summary or expedited procedures and domestic arbitration cases, the notice should be served on the parties fifteen days in advance.[1] As regards the BAC, the advance notice period is ten days under the general procedure and three days in case the summary procedure applies.[2]

A party may request a postponement of the oral hearing, provided there is a good reason for this. Both the CIETAC and the BAC Rules require that any such request be raised at least five days prior to the scheduled hearing. The arbitral tribunal will then decide whether to order a postponement. Where a hearing is postponed, or where a

1. See Art. 61 and Art. 69 of the CIETAC Rules 2015.
2. See Art. 30 and Art. 56 of the BAC Rules 2015.

further hearing is held, the relevant hearing is not subject to the requirements set out in the preceding paragraph.

Hearings are generally held at the offices of the arbitral institutions or, in case of CIETAC, the offices of the relevant sub-commissions and arbitration centres. Parties may agree on a different venue for hearings, provided they are willing to pay the additional costs involved in advance.

17.2 PROCEDURAL MEETING

Chinese arbitral tribunals tend not to convene any procedural meetings prior to the oral hearing. In Chinese arbitral practice, the majority of practitioners (both representatives of the parties and arbitrators) still tend to take the view that such meetings are not necessary, as any procedural issues that require to be addressed can be raised and resolved at the oral hearing. It is also worth noting that Chinese arbitral institutions do not ascribe a great deal of importance to procedural issues, and have tended to underestimate the importance and impact that procedural matters can have. Traditionally, the institutions have not taken the greatest care in respecting the procedural rights of the parties and their representatives.

Chinese arbitral practice stands in marked contrast to the procedure adopted by many international arbitral institutions and tribunals sitting under their auspices. In international arbitrations, tribunals will almost invariably call for a procedural meeting with the parties and their representatives, very soon after the tribunal has been constituted. A procedural meeting, and fixing a timetable for the further course of the arbitration, is considered indispensable in complex, high-value cases where the parties will usually expect an oral hearing. So as to be as useful as possible, the procedural meeting will often be held before the parties embark on the first substantive step in the proceedings, by exchanging their detailed written submissions.

A procedural meeting may serve several purposes. Taking HKIAC practice as an example, first, the tribunal may wish to take the opportunity to confirm that the representatives of the parties have been properly appointed, and are duly authorised to appear on their behalf. Second, the tribunal may wish to consult the parties as to the procedural framework for the arbitration and the timetable that the tribunal intends them to follow in the further course of the proceedings. The tribunal may also take the opportunity to confirm with the parties what powers the tribunal is to have – that is to say that the arbitrators will be able to exercise all the powers conferred on them by the rules of the relevant arbitral institution and the Arbitration Ordinance (which incorporates the Model Law), unless the parties were to agree otherwise.

A tribunal under the auspices of the HKIAC will usually issue a procedural order following the meeting. Amongst other matters, such an order will set out the procedural timetable for the proceedings, dealing with all relevant steps from written submissions, to the production of document and the final hearing to award rendering.

Such procedural meetings are not intended to be an occasion for the parties to make substantive arguments, or present their respective cases, beyond outlining the nature of the disputes so that the tribunal may better understand the issues and tailor

the procedure to the needs of the case before it. A party might, however, raise an objection to the jurisdiction of the arbitral institution during a procedural meeting.[3]

17.3 CONDUCT OF THE HEARING

In China, in practice arbitration hearings are likely to be conducted as follows:

17.3.1 Opening Session

After the presiding arbitrator or the sole arbitrator announces that the hearing is in session, the tribunal will usually confirm whether the parties and/or their attorneys are present. Article 42 of the Arbitration Law provides that:

> If, despite written notice, the claimant fails to appear at an oral hearing without justifiable reasons or withdraws from an oral hearing without the permission of the arbitral tribunal, the claimant may be deemed to have withdrawn its request for arbitration. If, despite written notice, the respondent fails to appear at an oral hearing without justifiable reasons or withdraws from an on oral hearing without the permission of the arbitral tribunal, the arbitral tribunal may render a default award.

Following introductions, the presiding or sole arbitrator may proceed to announce the procedural rights and obligations of the parties and inquire if they wish to raise any challenge to arbitrators or objection to the tribunal's jurisdiction.

17.3.2 Submissions by the Parties

The parties will then be invited to present their respective cases, claims, defences and counterclaims, identifying the facts and legal basis on which they rely.

17.3.3 Presentation of the Evidence and Cross-Examination

All evidence in the proceedings, whether adduced by the parties or gathered by the arbitral tribunal, should ideally be presented at the hearing. The parties are entitled to make submissions as to the evidence relied on by the opposing party. Any witnesses will also be asked to testify, as they generally only provide their evidence orally, and may be cross-examined.

17.3.4 Submissions and Argument

Following the evidentiary phase of the hearing, the parties will have an opportunity to make submissions and argue the case. Argument before the tribunal usually involves

3. Michael J Moser & Teresa Cheng, *A Practical Guide of Arbitration in Hong Kong*, 38 (the Law Press, 2004).

the parties presenting their positions in turn, with the claimant going first, before both parties are then permitted to respond to the opposing party's arguments. At the conclusion of this part of the hearing, it is common for the presiding or sole arbitrator to invite both parties to make a closing statement.

At the conclusion of the hearing, it is customary for the tribunal to inquire whether the parties wish to settle their disputes. The role of the tribunal in seeking to promote settlement is discussed further in Chapter 21.

Chinese arbitration rules grant the arbitral tribunal considerable flexibility in respect of the conduct of hearings. For instance, Article 35 of the CIETAC Rules 2015 provides:

> Article 353 Conduct of Hearing
>
> 1. The arbitral tribunal shall examine the case in any way it deems appropriate unless otherwise agreed by the parties. Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to all parties to make submissions and arguments.
> 2. The arbitral tribunal shall hold oral hearings when examining the case. However, the arbitral tribunal may examine the case on the basis of documents only if the parties so agree and the arbitral tribunal consents or the arbitral tribunal deems that oral hearings are unnecessary and the parties so agree.
> 3. Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.
> 4. The arbitral tribunal may hold deliberations at any place or in any manner that it considers appropriate.
> 5. Unless otherwise agreed by the parties, the arbitral tribunal may, if it considers it necessary, issue procedural orders or question lists, produce terms of reference, or hold pre-hearing conferences, etc.

The procedure for oral hearings outlined above is not mandatory or prescribed and is generally followed by tribunals based on their experience or professional habits. Whether an arbitral tribunal will conduct a hearing in the manner described above will depend on its personal preferences, especially those of the presiding arbitrator.

Record of the Hearing

In practice, major arbitral institutions in China arrange for a written record of the oral hearing to be taken. This is usually the task of the responsible case manager. Parties may also request the arbitral institution to hire a transcriber, provided they are willing to pay for the additional costs. Where the language of the arbitration is not Chinese, CIETAC may also prepare minutes of the hearing, summarising the key issues and arguments, and ask the parties to sign these by way of confirmation.

The parties and/or their attorneys, the witnesses and anyone else present at the hearing are expected to sign the formal record at the conclusion of the hearing. If anyone present at the hearing considers that the record omits or does not properly reflect matters that they presented at the hearing, that person may request that the

tribunal correct the record. If the tribunal decides that any such correction is not appropriate, the objection to the record would nonetheless be recorded.

In practice, it is very rare for a party to refuse to sign the record of the hearing, and even where this were to occur, the arbitration proceedings would not be affected.

Of the major arbitral institutions, both CIETAC and the BAC preclude the parties from taking any copies of the record; the SAC, on the other hand, allows this. If required during any judicial review of arbitration proceedings, the relevant arbitral institution will usually submit the record of the hearing to assist the court's understanding of the case.

17.4 DOCUMENTS-ONLY PROCEEDINGS

In China, most arbitrations involve a hearing before the arbitral tribunal. Oral hearings are favoured by the parties and their representatives as an ideal opportunity of presenting their case and arguments directly to the tribunal. From the tribunal's standpoint, a hearing will enable the arbitrators to ask questions and interact with the parties, thus assisting the tribunal in familiarising themselves with the claims and the evidence.

Article 39 of the Arbitration Law provides that:

> An arbitral tribunal shall hold oral hearings in any case. Where the parties agree to dispense with any oral hearings, the arbitral tribunal may render the award on the basis of the request for arbitration, claims and counterclaims and other documents.

Accordingly, documents-only proceedings require the consent of the parties. Absent the parties' consent, such proceedings will breach the Arbitration Law and any award would be susceptible to being set aside. For an example of an award being set aside on this ground, see the application of Taiwan Huaqing Plastics Co., Ltd. to set aside CIETAC Award [2002] No. 0039.

Based on our experience and dealings with the major arbitral institutions in China, document-only proceedings are very rare, to the extent that many experienced case managers of these institutions have never handled a case on a documents-only basis. The rare exceptions tend to be cases where the parties have reached a settlement agreement prior to any hearing and only requires the arbitral tribunal to confirm their agreement in the form of an arbitral award.

APPENDIX 17-1A

Reply of the Supreme People's Court to a Request for an Instruction concerning Setting Aside CIETAC Award [2002] No.0039

Supreme People's Court (2002) Min Si Ta Zi No.44

To the Beijing High People's Court:

This is to acknowledge receipt of your Request for an Instruction concerning Setting Aside CIETAC Award [2002] No.0039 (Jin Gao Fa [2002] No. 307). Having concluded our deliberations, our reply is as follows:

According to Article 32 of the CIETAC Arbitration Rules, arbitral tribunals shall hold an oral hearing in order to consider the case. However, where both parties consent, the arbitral tribunal may consider the case solely on the basis of the written documents, if it deems it appropriate. With respect to the dispute arising out of the business venture between Taiwan Huaqing Plastics Co., Ltd. and Huarui Plastics Net Weaving Co., Ltd. of Yantai Development Area, the arbitral tribunal decided to consider Huaqing's counterclaim solely on the basis of written documents, without the parties' consent. Such a breach of the CIETAC Arbitration Rules amounted to *"the arbitration procedures not being in conformity with the rules of arbitration"* as provided for under Article 260.1 of the Civil Procedure Law[4], and the award should therefore be set aside.

10 March 2003

APPENDIX 17-1B

Request for an Instruction on Setting Aside CIETAC Award [2002] No. 0039

The High People's Court of Beijing Jing Gao Fa [2002] No. 307

To the Supreme People's Court:

Further to Taiwan Huaqing Plastics Co., Ltd.'s request to set aside CIETAC Award (2002) No. 0039, the Beijing Second Intermediate People's Court accepted the case, intends to set aside the award and has requested our instruction. Following our review, we hereby report the following relevant information to your Court:

I. BASIC FACTS OF THE CASE

On 16 November 1999, Huarui (a company) and Huaqing (a company) concluded a contract referred to as the "Sino-foreign Cooperative Enterprise Contract for Yantai Dazheng Plastic Mesh Ltd." ("**Cooperative Contract**") and adopted Articles of Association for the cooperative enterprise ("**AOA**"). Both parties agreed to invest in and establish a company named Yantai Dazheng Plastic Ltd. The Cooperative Contract and the AOA were approved by the competent government authority on 19 November 1999, and the cooperative enterprise obtained its business license on 26 November 1999. Disputes arose during the performance of the Cooperative Contract. After negotiations failed, on 16 November 1999, Huarui commenced arbitration before CIETAC in accordance with the Cooperative Contract.

4. This should be Art. 260.3 of the Civil Procedure Law 1991, or Art. 274.3 of the Civil Procedure Law 2012.

II. THE ARBITRATION

Huarui's claim in the arbitration was that the Respondent was responsible for the relevant costs and was required to indemnify it in respect of financial losses suffered: including (1) the cost of establishing the cooperative enterprise, in the amount of RMB 238,000; (2) interest as regards that cost, in the amount of RMB 33,700; (3) financial losses, in the amount of RMB 762,500 RMB; (4) interest on a loan (RMB 341,000), in the amount of RMB 51,900; and (5) the arbitration fees in their entirety.

Huaqing's counter-claim included: (1) the cost of establishing the cooperative enterprise, in the amount of RMB 341,000, of which 50% was to be borne by the Claimant, *i.e.*, RMB 170,500; (2) the loss of equipment in the sum of RMB 607,000; and (3) the arbitration fees in their entirety.

On 15 September 2002, CIETAC rendered Award (2002) No. 0039 and ordered that: (1) the Respondent shall pay the Claimant of the sum of RMB 350,000 as regards financial losses; (2) the Claimant's other claims were to be dismissed; (3) the Respondent's counterclaims were to be dismissed; (4) 30% of the arbitration fees relating to the claim was to be borne by the Claimant, and 70% was to be borne by the Respondent; and (5) the arbitration fees relating to the counterclaim were to be borne by the Respondent.

III. THE PARTIES' MAIN GROUNDS

1. The Respondent's main grounds for setting aside the Arbitral Award

(1) The arbitration was not conducted in accordance with the Arbitration Rules. The oral hearing was in its early stages when we raised the counterclaims. In view of the counterclaims, the hearing was adjourned. We did not have an opportunity to fully present our case during the oral hearing. Most of the evidence was not submitted at the hearing, including in particular the Audit Report relied on by the Chinese party, the evaluation report concerning the investment in industrial property and the documents relating to the transfer of ownership of the patents and technology. We did not see the originals of these documents and cannot verify the authenticity of these important items of evidence. Regarding the examination of the evidence, as we did not see the originals of the evidence submitted by the Chinese party, we could not exercise our right to examine the evidence. Although we made certain written submissions on the basis of the copies of these documents as forwarded by the Tribunal, such comments were limited. Further, there were no exchanges in argument between the parties. In view of these deficiencies, the oral hearing of 19 November 2001 was not completed properly and fell far short of fair arbitration proceedings. We have been awaiting a further oral hearing

following 19 November 2001, so that we might present our case in full, but we were never given that opportunity.

(2) Our counterclaims were not considered in any oral hearings. According to Article 32 of the CIETAC Arbitration Rules (2000), the Tribunal shall hold oral hearings when considering the case. The tribunal, having admitted our counterclaims into the arbitration, in breach of the Arbitration Rules proceeded to dismiss these counterclaims without an oral hearing, absent any application by the parties for the case to be considered on the documents alone.

(3) As regards the issue of investments made by Chinese parties who do not hold valid patents, the present dispute concerns whether the patent, based on which the Chinese party claims to have fulfilled its investment obligations, is in fact valid. We have informed the Tribunal in writing on two occasions of the fact that the Patent Re-examination Board of the State Intellectual Property Office is currently examining the validity of this patent. The outcome of this review will have a significant impact on the arbitration. The Tribunal ought to have properly considered our position that the patent is invalid, instead of ignoring it. One month after the Arbitration Award was rendered, on 21 March 2002, the Patent Re-examination Board declared that the Patent was invalid. The Arbitration Award was unfair and ignored the true position, and the Tribunal should reconsider the Award in the light of the findings made in the re-examination of the patent.

2. Huarui's main grounds for upholding the award.

(1) The arbitration procedure was in compliance with the Arbitration Rules: (a) Both parties presented their cases in full, adduced and reviewed the relevant evidence, and made submissions as regards the counterclaims advanced by the Taiwanese party. Huaqing submitted its Defence, the counterclaims and its challenges to the documents submitted by us subsequent to the hearing. (b) Regarding the submission and examination of the evidence, the Arbitration Rules do not require that the evidence be adduced and reviewed at the oral hearing. (c) Not convening a further oral hearing is not in breach of the Arbitration Rules. The Rules only required the Tribunal to hold 'oral hearings', but they do not specify how many hearings shall be held.

(2) As regards the counterclaims not being considered in the course of an oral hearing, the Arbitration Rules only require the Tribunal to hold oral hearings, but they do not specify that any particular issues, including the counterclaims, should be examined in the course of a separate oral hearing. The Tribunal may in its discretion determine whether to consider any particular issues in the course of an oral hearing. The Tribunal had already considered the counterclaims briefly at the outset of the arbitration. Following the oral

hearing, the Taiwanese party made written submissions as regards the counterclaims, which we forwarded to the Tribunal. We replied to the Taiwanese party's counterclaims in writing, and submitted the relevant evidence. The Tribunal has analysed the position of both parties in detail. Dismissing the Taiwanese party's counterclaims without an oral hearing is not in contravention of the Arbitration Rules.

(3) As regards the investment made by the Chinese party holding the patent, the issue of the validity of the patent goes to the merits of the dispute, and the challenge made on this ground should therefore be dismissed in accordance with Article 261.1 of the PRC Civil Procedure Law.

IV. THE OPINION OF THIS COURT:

1. Regarding the grounds relied on by Huaqing for setting aside the Arbitral Award

Having reviewed the matter, we find that CIETAC served the Claimant's Request for Arbitration and the relevant evidence on the Respondent. In the course of the oral hearing, Huarui and Huaqing set out their positions regarding the main issues in this case and responded to the Tribunal's questions. During the consideration of the case, Huaqing did not ask Huarui to present the originals of the evidence relied on, including the audit report. As this is an arbitration with foreign elements, the Arbitration Rules did not require the parties to present the originals of the evidence or to have engage in argument at the oral hearing. Hence, this Court does not support the Respondent's claim that the arbitration was not conducted in accordance with the Arbitration Rules.

2. Regarding Huaqing's argument that its counterclaims were not considered in an oral hearing.

Following our review, we find that Huaqing submitted an Application that a consideration of the Counterclaims be postponed at the oral hearing. The Tribunal accepted Huaqing's application. Following the oral hearing, Huaqing then submitted its counterclaims and evidence within the time limit set by the Tribunal. Upon receipt of the documents forwarded by the Tribunal, Huarui also submitted its reply and the relevant evidence. The Tribunal examined both parties' positions on the basis of documents and rejected Huaqing's counterclaims based on facts and evidence.

According to Article 32 of the Arbitration Rules, "*[t]he arbitral tribunal shall hold oral hearings when examining the case. However, the arbitral tribunal may examine the case on the basis of documents only if the parties so agree and the arbitral tribunal consents or the arbitral tribunal deems that oral hearings are unnecessary and the parties so agree.*" Neither party applied for examination on a documents-only basis. Without obtaining both parities' consent, the

Tribunal decided to examine the counterclaims on a documents-only basis. This is against the Arbitration Rules. According to Article 260(1)(3) of the PRC Civil Procedure Law, an arbitral award with foreign elements shall be set aside when "*the composition of the Tribunal or the procedure of the arbitration is not in accordance with the Arbitration Rules*". Hence, Huaqing's ground for setting aside the Award is valid and shall be upheld by this Court.

3. Regarding Huaqing's argument that Huarui's investment based on a patent is invalid. This issue is indeed a point on the merits of the case, and is beyond the scope of judicial review as stipulated by the Arbitration Law. Hence this ground is not supported by this Court.

Without obtaining the parties consent, to consider the counterclaims on the basis of documents only goes against the Arbitration Rules and the award should thus be set aside pursuant to Article 260.1 of the Arbitration Law. In accordance with Article 70 of the Arbitration Law, this Court agrees with the Intermediate People's Court of Beijing that the CIETAC (2002) No. 0039 Award should be set aside. Please provide your instruction if this opinion is correct.

21 November 2002

CHAPTER 18
Arbitral Award

18.1 TIME LIMIT FOR THE ISSUING ARBITRAL AWARD

The Arbitration Law does not specify the time limit within which the arbitral award should be made. Instead, this matter is addressed by the arbitration rules of the various institutions. For instance, Article 48.1 of the CIETAC Rules 2015, which applies to cases within CIETAC's general procedure provides that, '*The arbitral tribunal shall render an arbitral award within six (6) months from the date on which the arbitral tribunal is formed.*' For cases to which the summary procedure applies, the time limit is three months; whereas it is four months for domestic cases. Under the BAC Rules 2015, the time limits for the general procedure and summary procedure are four months and seventy-five days, respectively.[1]

Despite these provisions, it is still common for arbitration proceedings to continue for much longer. The reasons for this include:

(1) The time period is calculated from the date on which the arbitral tribunal is formed, rather than from the date when the case is accepted.
When a case has been accepted, the arbitration commission will serve the notice of arbitration, the arbitrators will be nominated or appointed, the arbitrators will declare circumstances which may cause justifiable doubts as to their impartiality and independency, and the arbitral institution will forward these declarations to the parties for them to raise any objections. Where any party does challenge an arbitrator, it will inevitably lead to more delay in the formation of the arbitral tribunal. In practice, usually a significant amount of time will have elapsed until the tribunal has been appointed.

(2) An arbitral tribunal may apply to the relevant arbitral institution for an extension of the time period: such requests are, in most cases, approved.

1. See Articles 62.1 and 71.1 of the CIETAC Rules 2015 and Articles 47 and 58 of the BAC Rules 2015.

> Article 48.2 of the CIETAC Rules 2015 states that *'Upon the request of the arbitral tribunal, the President of the Arbitration Court may extend the time period if he/she considers it truly necessary and the reasons for the extension truly justified.'* Article 47 of the BAC Rules 2015 similarly provides that, *'If there are special circumstances justifying an extension, at the request of the presiding arbitrator, the Secretary-General may approve an appropriate extension of the time limit.'*

Since the rules do not specify what might constitute 'justifiable circumstances', arbitral tribunals may request extensions for all manner of reasons, including the emergence of new evidence, difficulties in gathering the evidence within the original time limit, the parties' intention to negotiate a settlement, or simply the complexity of the case. As arbitrators tend to be established academics, practicing lawyers or government officials, their other professional commitments may well be such that they are unable to focus on the case. Even if the real reasons for the delay in issuing any award are unrelated to the arbitration proceedings, the tribunal may nonetheless simply request an extension by referring to the 'complexity of the case'. Faced with such requests, the arbitral institutions often feel they have no choice but to approve them.

18.2 THE MAKING OF ARBITRAL AWARDS

In Chinese arbitration practice, arbitral awards are usually drafted by the presiding arbitrator or sole arbitrator and proofread by the case manager. An arbitral award will address the claims, the facts of the dispute, the reasons on which the award is based, the tribunal's order (the decision or determination of the claims), the allocation of the costs of the arbitration, and the date on which and the place at which the award is made. Where the award is made in accordance with the terms of a settlement agreement between the parties, the facts of the dispute and the reasons on which the award is based may be omitted.

Where the arbitral tribunal consists of three arbitrators, there may be a difference of opinion. If a majority opinion can be reached, then the award should be made on that basis. If a majority consensus cannot be reached, the president arbitrator will be empowered to make the award on the basis of his or her assessment. In each case, the dissenting arbitrator(s) may or may not sign the arbitral award. Any dissenting opinions are frequently attached to the arbitral award and also served on the parties, although such opinions are not deemed to be a part of the award.

Some arbitral institutions have specialist committees that provide advisory opinions to arbitral tribunals where differences in opinion cannot be resolved. For instance, CIETAC's Expert Consultation Committee, composed of one director, two vice-directors and fifty-five members, serves this purpose. As regards the BAC, although there is no such specialist committee, the arbitrators may consult experts in the relevant field on their own initiative if they are unable to come to an agreement. Alternatively, arbitrators may raise specific issues with the competent officer of the

relevant department of the BAC for further comments. The rules of both CIETAC and the BAC do not require the tribunal to give notice to the parties that the committees or 'experts' have been consulted.

The arbitrators are meant to sign their award, although any dissenting arbitrator may choose not to do so. The award will then be sealed by the arbitral institution.

18.3 SERVICE OF ARBITRAL AWARD

Service of the arbitral award on the parties in accordance with the applicable rules will conclude the arbitration proceedings. As the Arbitration Law does not specify the methods by which an award is to be served, arbitral institutions generally address this issue in their own procedural rules. In practice, personal service and service by post are the methods most frequently employed by Chinese arbitral institutions.

Personal service means delivery of the award directly to a party, who would be expected to acknowledge receipt (either personally or by an authorised representative). Service by post is usually taken to refer to registered mail. Awards can also be transmitted to the parties by fax or email, where the applicable rules permit this. Article 8.1 of the CIETAC Arbitration Rules (2015) provides that:

> All documents, notices and written materials in relation to the arbitration may be delivered in person or sent by registered mail or express mail, fax, or by any other means considered proper by the Arbitration Court or the arbitral tribunal.

We discuss a number of key issues relating to service of the arbitral award below:

(1) Service by Publication

Publication is one of the most important methods of service in civil litigation in China. The arbitration rules of many Chinese arbitral institutions also permit service of documents by publication. For instance, Article 83.1 of the Arbitration Rules of the Shanghai Arbitration Commission states that:

> All arbitration documents, notices and other materials may be delivered to the parties concerned or their agents directly or by registered mail, express mail service, facsimile, telegram, and public announcement and other methods.

(2) Even though service by publication features in the rules of arbitration of many institutions, the procedure can be criticised as unnecessarily introducing an aspect of civil procedure into arbitrations. Service by publication tends to delay the arbitration proceedings significantly. It is also entirely inconsistent with the confidential nature of arbitration. CIETAC and the BAC have both abandoned this method. Attempted Delivery.

When introducing the major amendments of the BAC's Arbitration Rules 2008,[2] Ms. Wang Hongsong, the Vice-Chairperson of the BAC noted that:

2. http://www.bjac.org.cn/news/view.asp?id=1161, accessed on 14 July 2013.

> The requirements for the notarisation of documents in the context of service, and service by publication, have been abolished. These are two important changes regarding the methods for service of documents. The introduction by the BAC of the notion of taking sufficient steps to effect service, as commonly reflected in international commercial arbitration practice, in domestic arbitrations has proven controversial. The BAC Arbitration Rules 2004 accordingly referred to civil procedure rules and introduced a number of methods by which service could be effected, such as leaving the documents at the addressee's domicile and service by publication. However, these methods have been criticised for conflicting with the confidential nature of arbitration, and as being wasteful of time and resources, causing delay … As early as 1999, when the Arbitration Rules were under revision, the BAC considered adopting the notion of an 'attempted delivery' [i.e. taking sufficient steps to effect service]. However, ultimately this was not implemented. The 2004 Rules the introduced the concept of 'attempted delivery' in commercial cases with a foreign element, providing that: 'If despite reasonable inquiries, the addressee's place of business, place of habitual residence or other postal address cannot be determined, service shall be deemed to have been effected if the document, notice or material is delivered to the addressee's last known place of business, place of habitual residence or other postal address by mail, courier or any other means of delivery supported by proof of an attempt to deliver.' The 2008 Rules further extended the scope of this provision to all cases under the auspices of the BAC. This rule promotes cooperation between the parties, urging them to provide accurate contact information, or else face unfavorable consequences.

Article 71.3 of the BAC Rules 2015 is:

> If despite reasonable inquiries, the addressee's place of business, place of registration, place of residence, address indicated on ID card, hukou address,[3] the address for service agreed by the parties, or other correspondence address cannot be found, service shall be deemed to have been effected if the document, notice, or material is delivered to the addressee's last known place of business, place of registration, place of residence, address indicated on ID card, hukou address, the address for service agreed by the parties, or other correspondence address by mail, courier, or by any other means of delivery which allows for record of delivery.

Article 8.3 of the CIETAC Rules 2015 provides:

> Any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention.

3. A system of household registration in China.

Where the address of a party cannot be ascertained despite reasonable enquiries having been made, an 'attempted delivery' that is put on record to one of the addresses that are deemed reasonable (as set out above) will constitute effective service. Both the CIETAC and BAC arbitration rules stress that any attempted delivery should be through a method that can be recorded. The CIETAC Rules also specify certain further methods, in addition to registered or express post, for instance service by a public notary or 'by retention'.

'Service by retention' means leaving the award at a party's address. In practice this is often used when the recipient refuses to accept personal service, or service by post. Reflecting the common practice in civil litigation, the rules of many other arbitral institutions in China make reference to this method of service. For instance, Article 83.2 of the Arbitration Rules of the Shanghai Arbitration Commission provides that:

> Where a party refuses to accept service of documents pertaining to the arbitration, the documents may be served by leaving them the party's domicile or place of business.

'Service by a public notary' involves a public notary certifying an attempted delivery by the arbitral institution. This can be used by way of further support for, or proof of, other methods of service.

The rules relating to service that are set out in this chapter also apply to service of any other documents in arbitration proceedings.

18.4 ALLOCATING RESPONSIBILITY FOR THE COSTS OF THE ARBITRATION

Arbitral tribunals have the power to allocate the costs of the arbitration between the parties. In principle, although under Chinese law the parties are free to provide for how these costs are to be borne between them in their arbitration agreement, they rarely do so in practice. As a result, the parties' liability for costs usually requires to be addressed either in the award or any conciliation statement.

Article 54 of the Arbitration Law provides that:

> The award shall set out the claims made in the arbitration, the matters in dispute, the grounds on which the award is made, the tribunal's determination, the responsibility of the parties for the fees of the arbitration and the date of the award.

In this, Chinese law follows the arbitration laws of many other jurisdictions worldwide. By way of example, Article 61.1 of the English Arbitration Act 1996 provides that:

> The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreements of the parties.

Section 1057(1) of Code of Civil Procedure of Germany states that:

> Unless the parties agree otherwise, the arbitral tribunal shall allocate the costs of the arbitration as between the parties by means of an arbitral award …

Section 42 of the Swedish Arbitration Act provides that:

> Unless otherwise agreed by the parties, the arbitrators may, upon request by a party, order the opposing party to pay compensation for the party's costs...

The costs of the arbitration will include the charges of the relevant arbitral institution, which in turn generally includes administrative fees, the professional fees of the tribunal and expenses or disbursements incurred in relation to the proceedings. The tribunal will be expected to allocate these costs of its own initiative. Further, as regards the legal (and other) costs incurred by the parties themselves in the arbitration, the parties would be expected to apply to the tribunal for an order that these '*inter partes*' costs be allocated. Any such claim for the costs incurred by a party will need to be supported by sufficient evidence, most importantly as regards the actual amount of costs that the party has incurred.

Foreign arbitral tribunals tend to adopt one of two distinct approaches as to how costs are allocated between the parties, which are considered below.

18.4.1 The 'English' Approach

A number of jurisdictions adopt the approach favoured by English tribunals, that 'costs follow the event' – or, in other words, that the losing party is to pay the successful party's costs, including legal fees. This general rule is reflected in section 61 of English Arbitration Act 1996, which states that:

> ... unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part or the costs.

Section 1057 of the German Code of Civil Procedure states that, when deciding the allocation of costs, the arbitral tribunal:

> ... shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.

Consistent with the above arbitration laws, which may well influence the practice adopted by arbitrators whose legal background lies in these jurisdictions, the starting point in many international arbitration proceedings is that costs should follow the event. However, that principle is not adhered to as a rigid rule. Costs remain a matter within the discretion of the tribunal. International arbitrators will consider a range of factors when deciding how to allocate costs, including the conduct of the parties and the relative degree of success of individual claims, rather than only identifying which party was successful 'overall'. In conclusion, however, a party whose claims or defences have been rejected by an international arbitral tribunal is likely to find itself bearing at the very least some liability for the costs of the opposing party.

18.4.2 The 'American' Approach

By way of a contrast, the so-called 'American approach' is that each party bears its own legal costs, and an equal share of the costs of the arbitral institutions and the tribunal. The reasons for adopting this approach are generally said to be that (i) since the outcome of legal proceedings tends to be uncertain, it could well be unfair to require the losing party to pay costs, (ii) a party in financial difficulties or with limited means may be deterred from seeking redress if it faces a liability in costs, and (iii) parties might be tempted to use the prospect of making the opponent liable for their costs as a tactical tool, increasing their legal spend in the hope that this forces the other party to consider settling the claim.[4]

This approach is based on the prevalent practice of the US Courts in civil litigation, but it has also been adopted in domestic arbitration proceedings in the United States. However, the American approach is not generally followed by international tribunals sitting in the United States, who have power to award legal costs (and who do so in practice), and even the US Courts may in certain circumstances hold the losing party responsible for attorney's fees. It has also been noted that in some US states, a party may bring an action for legal costs in the state courts if such a claim has not been properly determined by an arbitral tribunal.[5]

18.4.3 The Chinese Rules Governing Allocation of the Costs of the Arbitration

Chinese arbitral practice as regards the allocation of the costs of the arbitration essentially follows the English approach, as discussed further below.

18.4.3.1 The Arbitral Tribunal Determines the Allocation of Costs

As regards the acceptance and administration fees levied by the arbitral institution, the tribunal will determine how these are to be allocated of its own initiative. Other costs incurred by a party, such as legal costs, will need to be claimed specifically. A claim for costs must be supported by sufficient evidence. Article 52 of the CIETAC Rules 2015 provides that:

> 1. The arbitral tribunal has the power to determine in the arbitral award the arbitration fees and other expenses to be paid by the parties to CIETAC.
> 2. The arbitral tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party is to compensate the winning party for the expenses reasonably incurred by it in pursuing the case...

4. Ye Qing, *Research on China's Arbitration Regime*, 224 (the Press of Shanghai Academy of Social Sciences, 2009).
5. For a discussion of the recent trends affecting the American approach referred to in this paragraph, see Yao Junyi, *On Arbitration Costs*, Collection of Essays on Civil and Commercial Laws, Vol. 28 (the Law Press, 2003).

Article 51 of the BAC Rules 2015 provides that:

> (1) The Arbitral Tribunal shall have the power to determine in its award the arbitration fees and the expenses actually incurred to be borne by the parties, including but not limited to appraisal fees, evaluation fees, and audit fees ...
> (4) The Arbitral Tribunal shall also have the power to order in its award, pursuant to a party's request, that the losing party bears the winning party's reasonable costs and expenses for the conduct of the arbitration ...

18.4.3.2 'Loser Pays'

Chinese arbitral practice follows the usual rule in international arbitration proceedings that the unsuccessful party ought to be liable for the reasonable costs of the successful party. Article 9 of the Measures for Charging Arbitration Fees by the Arbitration Commission provides that: *'In principle, the arbitration costs shall be borne by the losing party.'* As the arbitral tribunal will have found that the unsuccessful party has infringed the rights of, or failed to perform the obligations owed to, the successful party, an award of costs against the unsuccessful party would generally seem to be fair.

Article 52.2 of the CIETAC Rules and Article 51.4 of the BAC Rules, both quoted above, echo this principle. As to what constitutes reasonable expenses, Article 52.2 of the CIETAC Rules provides that:

> ... In deciding whether or not the winning party's expenses incurred in pursuing the case are reasonable, the arbitral tribunal shall take into consideration various factors such as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), the amount in dispute, etc.

Article 51.4 of the BAC Rules specifies that the winning party's reasonable costs and expenses shall include, without limitation, *'attorney's fees, costs of preservation measures, travel expenses, and notarial fees'* and that:

> [w]hen the Arbitral Tribunal determines the amount of the above costs and expenses, it shall take into consideration relevant factors such as the outcome of the case, the complexity, the actual workload of the parties or their attorneys as well as the amount in dispute. [6]

18.4.3.3 Allocating Costs According to the Merits of the Parties' Respective Positions

In practice, it may not be possible to identify any absolute winner or loser in a particular arbitration. The parties may each have advanced specific claims and defences which the tribunal upheld. The rule that 'costs follow the event' ought not to be rigidly applied in these circumstances. Rather, an award of costs should reflect the respective merits, or relative degree of success, of the positions adopted by both parties to the proceedings.

Article 9 of the Measures for Charging Arbitration Fees by the Arbitration Commission provides that:

> ... if a party succeeds with some aspects of its case, but is unsuccessful in others, the arbitral tribunal shall determine the proportion of arbitration fees to be borne by each party according to the liability of each party. If the parties settle their disputes by agreement, or if the case is settled through conciliation before the arbitration tribunal, the parties agree the proportion of the arbitration fees to be borne by each party.

This more nuanced approach is also reflected by Article 51.2 of the BAC Rules 2015.

18.4.3.4 Costs Penalties for Delaying the Proceedings

In addition to the general principle that the 'loser pays', Article 51.3 of the BAC Rules introduced an additional, and unfettered, basis for the allocation of costs that is intended to deter parties from intentionally delaying the proceedings (else they may find themselves exposed to an increased liability for costs):

> Where a party is under the circumstance provided for in paragraph (7) of Article 22 of the Rules, or any other circumstances violating the Rules which results in delay in arbitral proceedings, its allocation of arbitration costs shall not be limited by the provisions of the preceding paragraph. Where other costs are incurred or increased due to such delay in proceedings, the delaying party shall also bear such costs.

18.4.4 Prepayment of Arbitration Fees by the Claimant

In China, arbitration proceedings will not be commenced until the arbitration fees have been paid. One of the reasons for this is to ensure that arbitrators will be paid for their work. Although the costs of the arbitration will in all likelihood ultimately be borne by the losing party, or by both parties in a proportion reflecting their relative degrees of success, it is of course impossible to form a view on the merits at the outset of the proceedings, nor is it sensible to ask the respondent to bear some of the fees payable in respect of a claim that is commenced against it. As a matter of practicality, the claimant is therefore required to make an advance payment of the arbitration fees.

Article 4 of the Measures for Charging Arbitration Fees by the Arbitration Commission states that:

> The claimant shall, within 15 days of receipt of notification of acceptance by the arbitration commission, pay in advance the fees for accepting the case in accordance with the provisions of the Fee Schedule for Accepting Arbitration Cases. When raising a counterclaim, the respondent shall pay in advance the fees for

6. Where a party, after being aware of the composition of the arbitral tribunal, appoints attorneys whose appointment may give rise to grounds for challenge of any arbitrator.

accepting the case in accordance with the provisions of the Fee Schedule for Accepting Arbitration Cases.

18.5 INTERPRETATION OF THE ARBITRAL AWARD BY THE ARBITRAL TRIBUNAL

Chinese laws, judicial interpretations and the arbitration rules of the major arbitration institutions are all silent on the arbitral tribunal's powers or obligations to interpret arbitral awards. The Chinese legal framework only deals with necessary corrections to an award, as set out below. In our view, there is a need for the tribunal's interpretative powers to be addressed either by legislation or through consistent arbitral practice ultimately reflected by relevant amendments to institutional rules.

Many other jurisdictions lay down clear rules as to what a tribunal can and cannot do when it comes to interpreting an award. For instance, awards made under the auspices of the HKIAC are to be interpreted in accordance with Article 33(b) of the UNCITRAL Model Law, which empowers the tribunal to make corrections to or interpret an award as follows:

> ... if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

A similar provision exists in Article 35 of the Swiss Rules of International Arbitration:

> Within thirty days after the receipt of the award, a party, with notice to the Secretariat and to the other parties, may request that the arbitral tribunal give an interpretation of the award. The arbitral tribunal may set a time-limit, as a rule not exceeding thirty days, for the other parties to comment on the request. 2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The Court may extend this time limit. The interpretation shall form part of the award and Articles 32(2) to (6) shall apply.

18.6 OMISSIONS AND MANIFEST ERRORS IN ARBITRAL AWARDS

Article 56 of the Arbitration Law of China provides that:

> If there are typographical or mathematical errors in an arbitration award, or if matters which have been decided by the arbitration tribunal are omitted from the arbitration award, the arbitration tribunal shall correct or supplement the award as appropriate. The parties may, within 30 days from the date of receipt of the award, request the arbitration tribunal to make such corrections or to supplement the award.

Both CIETAC and the BAC have supplemented Article 56 with more specific rules, which differ slightly.

Article 53 ('Correction of Award') of the CIETAC's Rules 2015 provides that:

> 1. Within a reasonable time after the award is made, the arbitral tribunal may, on its own initiative, make corrections in writing of any clerical, typographical or computational errors, or any errors of a similar nature contained in the award.
> 2. Within thirty (30) days from its receipt of the arbitral award, either party may request the arbitral tribunal in writing for a correction of any clerical, typographical or computational errors, or any errors of a similar nature contained in the award. If such an error does exist in the award, the arbitral tribunal shall make a correction in writing within thirty (30) days of receipt of the written request for the correction.
> 3. The above written correction shall form a part of the arbitral award and shall be subject to the provisions in Paragraphs 4 to 9 of Article 47 of these Rules.

Article 54 ('Additional Award') continues:

> 1. Where any matter which should have been decided by the arbitral tribunal was omitted from the arbitral award, the arbitral tribunal may, on its own initiative, make an additional award within a reasonable time after the award is made. 2. Either party may, within thirty (30) days from its receipt of the arbitral award, request the arbitral tribunal in writing for an additional award on any claim or counterclaim which was advanced in the arbitration proceedings but was omitted from the award. If such an omission does exist, the arbitral tribunal shall make an additional award within thirty (30) days of receipt of the written request. 3. Such additional award shall form a part of the arbitral award and shall be subject to the provisions in Paragraphs 4 to 9 of Article 47 of these Rules.

The CIETAC Rules are considerably more detailed than Article 56 of the Arbitration law, and provide for specific time limits. In our view, the legislation should be amended to deal with the matters that CIETAC has sensibly addressed in its Rules.

Article 52 of the BAC Rules 2015 provides that:

> (1) The Arbitral Tribunal shall correct in its award any error in computation, any clerical or typographical error, and any omission from its decision of claims on which it has made a judgment in its reasoning. In the event any claim is omitted entirely from the award, the Arbitral Tribunal shall make a supplementary award. (2) Any party may, on discovering the existence of any of the circumstances stipulated in the preceding paragraph, request in writing within 30 days of the date of receipt of the award that the Arbitral Tribunal rectify the award or make a supplementary award. (3) Any rectification by or supplementary award of the Arbitral Tribunal shall be an integral part of the original arbitral award.

Comparing the CIETAC Rules and the BAC Rules, slight differences can be found. Pursuant to CIETAC's rules, where there are omissions in the arbitral award, the tribunal is to render a supplementary award. In contrast, the rules of the BAC further differentiate between omissions in two separate sets of circumstances, i.e., '*any omission from its decision of claims on which it has made a judgment in its reasoning*' and '*any claim [that] is omitted entirely from the award*', and prescribe that the award shall either be corrected or supplemented, respectively.

In the Reply of the Supreme People's Court to a Request for an Instruction Whether to Set Aside two Chengde Arbitration Commission Awards,[7] the Supreme People's Court stressed that the arbitral tribunal should not revoke an effective award on the ground of omissions. Instead, a supplementary award shall be made, which would constitute an integral part of the award.

APPENDIX 18-1A

Reply of the Supreme People's Court to a Request for an Instruction regarding Whether to Set Aside two Awards made by the Chengde Arbitration Commission

Supreme People's Court (2005) Min Si Ta Zi No.51

To the Hebei High People's Court:

This is to acknowledge our receipt of your Request for Instruction regarding Whether to Set Aside Chengde Award (2000) No.33 and Chengde Supplementary Award (2000) No.1 (Ji Li Min Han Zi No.89). Having deliberated on the matter, we hereby reply as follows:

This is a case where one of the parties has applied to the people's court to set aside an award with a foreign element made by a Chinese arbitral institution. According to your Request for an Instruction and the documents provided with it, in a dispute between Beijing Penghua Commercial Tech Development Company and Good Fortune Co., Ltd of the British Virgins, an arbitral tribunal of the Chengde Arbitration Commission rendered Chengde Award (2000) No.33 on December 26th, 2000, and thereaftered rendered Chengde Supplementary Award (2000) No.1 to revoke the previous award on December 28th, 2000.

Article 56 of the Arbitration Law provides that:

> *"If there are typographical or mathematical errors in an arbitration award, or if matters which have been decided by the arbitration tribunal are omitted from the arbitration award, the arbitration tribunal shall correct or supplement the award as appropriate. The parties may, within 30 days from the date of receipt of the award, request the arbitration tribunal to make such corrections or to supplement the award."*

Article 46.3 of the Chengde Arbitration Commission Arbitration Rules also states that:

> *"A correction to an award, or a supplementary award, shall be deemed an integral part of the original award."*

Chinese law and the arbitration rules allow the arbitral institution to render a supplementary award on procedural matters or issues that have been omitted from an award, rather than revoking an award that has already been made, and which has been

7. Appendix 18-1A.

served and so has become effective. The issuing by the Chengde Arbitration Commission of a supplementary award which purports to revoke the existing award regarding the same dispute lacked any legal basis and was not in conformity with the Chengde Arbitration Commission Arbitration Rules.

This matter therefore falls within the circumstances provided for in Article 260.1.3[8] of the Civil Procedure Law, namely that *"the composition of the arbitration tribunal or the procedure for the arbitration is not in conformity with the rules of arbitration"*. The people's court may set aside the awards according to Article 70 of the Arbitration Law.

The major issue affecting these awards was the fact that they did not comply with the appropriate legal procedures. The effect of such procedural irregularity, i.e. revoking an award with a supplementary award, on the rights of the parties can be remedied by notifying the arbitral tribunal to hear the matter afresh. Considering the circumstances of the awards involved in this case, we hold that the arbitral tribunal should be notified to re-arbitrate the matter within the relevant time limit pursuant to Article 61 of the Arbitration Law, and that the procedure for setting aside the awards should be suspended. If the arbitral tribunal refuses to re-arbitrate, the procedure for setting aside the awards shall resume, and both awards shall be set aside.

24 January 2006

APPENDIX 18-1B

Request for an Instruction regarding Whether to Set Aside Chengde Award (2000) No.33 and Chengde Supplementary Award (2000) No.1

The High People's Court of Hebei Province [2005] Ji Li Min Han Zi No.89

To the 4th Civil Division of the Supreme People Court:

According to the instruction set out in your letter ([2004] Min Si Ta Zi No. 45), the Intermediate People's Court of Chengde accepted and publicly heard the dispute between Beijing Penghua Commercial Tech Development Company ("**Penghua**") and Good Fortune Co., Ltd of the British Virgin Islands ("**Good Fortune**") regarding the setting aside of an arbitral award. The Intermediate People's Court of Chengde's opinion is as follows:

When submitting its application for arbitration to the Chengde Arbitration Commission, Good Fortune did not provide evidence that the company was validly incorporated. The identification of the company's legal representative was not notarized by the PRC Ministry of Foreign Affairs' offices in Hong Kong. During the public oral hearing, Good Fortune also failed to submit the aforementioned documents within the time limit to the court. Hence, according to the PRC Civil Procedural Law and the replies by the

8. Civil Procedure Law 1991. The same rule can be found in Article 274 of the Civil Procedure Law 2012.