



Resolving disputes in China through arbitration



Contents

Introduction	1
Dispute resolution mechanisms	2
Ultimate means of dispute resolution – arbitration or litigation?	4
Mediation and the advantages of arbitration over litigation in China-related disputes	7
Arbitration in China	9
International arbitration in China	12
China Maritime Arbitration Commission (CMAC)	14
CIETAC arbitration	15
Arbitration under CIETAC rules	16
The composition and selection of the arbitral tribunal	20
The award	29
Drafting a CIETAC arbitration clause	32
The validity of certain types of arbitration agreements	34
Enforcement of CIETAC awards outside China	35
Enforcing or challenging CIETAC awards in China	36
The enforcement of foreign arbitral awards in China	38
Are arbitration awards enforced in practice?	40
Resolving disputes through arbitration outside China	44
The method of arbitration – institutional or ad hoc	51
Appendix A	56
Appendix B	58
Appendix C	63

For further information
please contact

Richard Chalk
Patrick Swain
11th floor
Two Exchange Square
Hong Kong
T+ 852 2846 3400
F+ 852 2810 6192
E richard.chalk@freshfields.com
E patrick.swain@freshfields.com
W freshfields.com

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Introduction

Arbitration is usually the preferred method of dispute resolution for investors in China and this guide aims to describe the most significant features of the arbitral process and the requirements for an arbitration clause. The guide also considers the option of arbitrating China-related disputes outside China and the possibility of resolving disputes through dispute resolution procedures contained in most bilateral investment treaties.

Before considering the specifics of arbitrating China-related disputes we outline the possible methods of dispute resolution and set out the advantages of arbitration over litigation. These advantages are particularly relevant in the context of China-related disputes.

Dispute resolution mechanisms

Negotiation

An important part of any dispute resolution strategy is negotiation. Although dispute resolution clauses often provide for a phase of compulsory negotiation before either party is allowed to begin court or arbitration proceedings, the ability to negotiate is of course not dependent on any prior agreement.

Negotiation plays a particularly important role in China-related disputes. Regardless of whether the parties are legally obliged to attempt to settle a dispute through negotiation, initial negotiations are inherent to the manner in which most Chinese will approach dispute resolution. Most Chinese counterparts will insist on including a process of negotiation or friendly consultation before either party is entitled to begin formal dispute resolution procedures such as arbitration or litigation. Indeed, some Chinese legislation states that the parties should, if possible, first consult or mediate before resorting to arbitration or litigation.

While those outside China tend to think of a contractual problem in terms of the parties' strict legal rights and obligations laid down in the contract, Chinese businesses are more inclined to be guided by concepts of fairness and equity, which lead to an expectation either that the strict terms of the contract should not be enforced or that the contract should be renegotiated according to changing circumstances. Similar attitudes may affect how Chinese conciliators and arbitrators approach the task of resolving disputes.

To avoid any uncertainty as to how long consultations should last, it is best to provide in the dispute resolution agreement that the parties should proceed to arbitration if consultations fail to produce a settlement within a set period. This is important as negotiations in China can be protracted.

Non-binding dispute resolution process

This normally takes the form of mediation or conciliation (the terms tend to be interchangeable) whereby a third party is introduced to assist the parties with negotiations. Again, because of the consensual and non-binding nature of the process, it is not essential that the parties come to any prior arrangement over its application. Because the success of the process depends on both parties acknowledging throughout that it is in their interests to participate, a prior commitment at the time the contract is signed may be ineffectual if either party has turned against it by the time the dispute has arisen. This is not to say that it is not useful to have thought about and, where appropriate, inserted a commitment to mediation or conciliation at the contract stage; however, it is not essential.

Expert determination

Often where contracts raise particularly technical issues the parties may opt for expert determination as a dispute resolution mechanism. Typically the parties will agree to appoint an expert or to have a third party appoint an expert to finally determine particular disputes within a set time frame. Expert determinations are usually final, binding and enforceable. They do not allow appeal to either civil courts or an arbitrator.

Arbitration/litigation

It is essential that the parties include in their contract a clause outlining how a binding solution to any dispute can be reached.

Failure to reach agreement over this issue will often leave the claimant with no alternative but to sue the defendant in the courts of the defendant's home jurisdiction. This is unlikely to constitute an attractive proposition and, once a dispute has arisen, the defendant will not want to concede its home-turf advantage. Even where a dispute resolution mechanism has been agreed, a bad choice may commit the parties either to having their disputes determined by an incompetent or biased tribunal, or to a process that will result in a judgment or award that will not be recognised or enforced in the jurisdiction where the defendant has its assets.

Split clauses

One of the disadvantages of arbitration is that there is usually no equivalent to the summary judgment procedure in civil litigation where one party can apply for judgment on the basis that the other has no defence and without the need for a full trial. Accordingly, financial institutions in particular often include dispute resolution provisions whereby the parties agree to arbitrate disputes but the bank has the option to commence court proceedings in a particular jurisdiction where the defendant is likely to have assets.

However, when governed by Chinese law these clauses are invalid, as discussed below.

Ultimate means of dispute resolution – arbitration or litigation?

If negotiations break down, the claimant may consider resorting to litigation or arbitration as a means of compelling the other party to satisfy its claim. In the context of international contracts, arbitration rather than litigation will usually provide the most appropriate means of resolving any disputes. The most common reasons for choosing arbitration are set out below.

Neutrality

Parties to an international contract are frequently unwilling to allow their disputes to be resolved in the courts of a country connected with the other party. Sometimes this desire for neutrality is misconceived in that justice can be obtained even if litigation is commenced in such a country. However, this concern may be well founded in so-called emerging markets. Whatever the position, the parties' preference for a neutral venue can be met more easily in the context of an arbitration provision than in a submission to jurisdiction. The ability to choose the tribunal is seen by many as one of the most important aspects of arbitration.

Moreover, the parties may, through the arbitration clause, ensure that any tribunal is itself neutral both as regards the parties and, if appropriate, the arbitration venue.

Expert determination

Litigation is time-consuming and costly. Arguably, it is made all the more so by the need to explain technical matters to a judge who will probably have little or no familiarity with the issues involved.

Even in those jurisdictions where this is not the case, the judges will lack the experience gained from commercial (as opposed to judicial) involvement in such disputes. This problem may be resolved by choosing arbitrators who have a background in the relevant industry or business sector and who therefore understand the technical issues and commercial realities involved.

Privacy

Unlike most court proceedings, arbitral hearings are usually carried out in private, confidentiality is normally maintained and awards are not published.

Flexibility

National rules of court procedure usually contain detailed rules, forms and precedents that must be followed.

By way of contrast, arbitration permits the parties at the time of contracting (or subsequently by agreement) to agree or shape the

procedure that will be followed in the course of any arbitration proceedings, to take into account the nature of the dispute.

Accordingly, there is perhaps more scope for discovery to be curtailed and for the relevant issues to be quickly and accurately identified.

Finality

Arbitral awards are usually final and not subject to a review on the merits. As a result, the lengthy appeal procedures, which can result in parties being subject to years of litigation, can be avoided.

Speed and cost

The flexibility of the arbitration procedure can lead to substantial savings of both time and money. However, it should not be assumed that arbitration is always quicker and cheaper than court proceedings. In practice, the time and cost involved will depend on the procedure adopted, the degree of co-operation between the parties, the availability of arbitrators and the fees charged by them.

Enforceability

This is perhaps the single most important advantage arbitration has over litigation and is one of particular significance in Asia where there are difficulties in enforcing civil judgments.

Enforcing a civil judgment quickly in any jurisdiction usually requires the country in question to have entered into an appropriate treaty with the country whose courts have made the judgment. In Asia, there are very few such treaties permitting the easy enforcement of civil judgments.

If there is no treaty allowing this, a fresh action must be commenced in the courts of the country where enforcement of the judgment is being sought. This may lead to the matter being relitigated with little or no regard for the original decision of the foreign court. In turn this leads to a duplication of costs and often puts the successful litigant in no better position than if it had started proceedings in that jurisdiction in the first place.

By way of contrast, under the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention), enforcement of arbitral awards made in another convention country is made far easier and subject to only very limited grounds of challenge. Most importantly the New York Convention does not permit any review of the merits of an award. Recognition and enforcement may only be denied on the grounds that:

- the parties were under some incapacity or the arbitration agreement was invalid;

- the party against whom enforcement is sought was denied a fair hearing;
- the arbitrators exceeded their authority or lacked jurisdiction over the subject matter of the dispute (although the non-offending part of the award may still be allowed to stand);
- there were procedural irregularities;
- the award is not yet binding on the parties or is otherwise invalid according to the laws of the country in which the award was made;
- the subject matter of the dispute cannot be arbitrated according to the laws of the state in which enforcement is sought; and
- the recognition or enforcement of the award will be contrary to the public policy of the state in which enforcement is sought.

At the time of writing, over 130 countries have ratified the New York Convention. China ratified the treaty in 1987. Notable exceptions in Asia are Myanmar and Taiwan.

Mediation and the advantages of arbitration over litigation in China-related disputes

Clearly, the factors listed above in favour of choosing to arbitrate rather than to litigate apply equally to arbitrations in China. However, the following points are of particular relevance when considering the resolution of China-related disputes.

- China is not a party to treaties or any other arrangements that provide for the enforcement of civil judgments given by the courts of its major trading partners such as the US, Japan, Hong Kong, Germany and the UK. It has treaties with a small but growing number of countries, including: Argentina, Belgium, Bulgaria, Cuba, Cyprus, Egypt, France, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Mongolia, Morocco, North Korea, Poland, Romania, Russia, Spain, Tajikistan, Tunisia, Turkey, Ukraine and Vietnam.
- However, China, together with over 130 other countries, is a signatory to the New York Convention and so arbitration awards made in those countries may be easily enforced within the PRC, and arbitration awards made in the PRC may be easily enforced in those countries.
- Chinese counterparties are more likely to agree to arbitrate in regional venues such as Singapore, Kuala Lumpur or Hong Kong than to agree to subject themselves to the courts of a foreign jurisdiction with which they have no familiarity or experience.
- Thus opting for arbitration in, for example, Singapore is likely to be well received by Chinese counterparties and is likely to be equally acceptable to foreign companies doing business in China, usually from bases in the Asian region.
- Finally, it should be noted that Chinese law (articles 34 and 246 of the Civil Procedure Law 1991 (CPL)) prohibits parties from submitting certain disputes to foreign courts but does allow the parties to select arbitration. The types of disputes covered include those involving real estate or those arising out of Sino-foreign joint ventures.

Mediation in China

Mediation is probably used more in China than anywhere else in the world. Mediation for foreign-related disputes can take one of the following three forms in China:

- mediation by a court;

- mediation by CIETAC (China International Economic and Trade Arbitration Commission); or
- mediation by the Beijing Mediation Centre (a special semi-official institution that exclusively handles foreign-related mediation cases).

The legal effects of the settlement agreement concluded by way of each of these mediations are different.

With mediation by a court, the settlement agreement concluded by the parties will be endorsed by the court. This will have the effect of a court judgment and is not subject to appeal.

With mediation by CIETAC, the settlement agreement will normally be endorsed by CIETAC and will take the form of an arbitral award, which the parties must comply with.

A settlement agreement concluded under the auspices of the Beijing Mediation Centre will be treated as no more than a new contract between the parties. If there is non-performance of the settlement agreement, the performing party can only sue the non-performing party for breaching the settlement agreement.

Arbitration in China

Sources of law

Although there is a specific arbitration law that came into force on 1 September 1995, it is not the sole source of law and reference must be made to numerous regulations and other laws, including the CPL.

In particular, although there is an element of duplication between the Arbitration Law and the CPL, insofar as the CPL deals with the subject of arbitration, the CPL and the Supreme People's Court's interpretation of the CPL will remain in force. However, it should also be noted that article 78 of the Arbitration Law states that it takes precedence over the CPL because it post-dates the CPL.

Domestic arbitration

The Arbitration Law seeks to separate domestic arbitration from government administration and thereby diminish the influence of local government in the dispute resolution process.

It provides for the establishment of arbitration commissions in many cities throughout China with arbitrators of a certain level of qualification. It allows parties to select the arbitral tribunal, albeit by reference to a panel of arbitrators selected by the commission in question.

Article 6 of the Arbitration Law allows the parties freedom to choose the arbitration commission that is to have jurisdiction over any disputes, regardless of location. This is aimed at breaking down the influence of local protectionism.

It is also significant that this article excludes any right of appeal from an arbitration award to the People's Courts (although as discussed below, awards may be 'set aside' or 'cancelled' by the People's Courts under certain circumstances as prescribed under the CPL). Under the previous regime domestic arbitration awards were amenable to appeal and this represented one of the less attractive characteristics of the system.

The establishment of this new order is under way. At this point, it is understood that approximately 170 arbitration commissions have been established and are in operation. In 1995, a set of model domestic arbitration rules was published that local arbitration commissions have adopted virtually unchanged. In 2004, the Beijing Arbitration Commission had accepted 1,796 cases.

Although the domestic arbitration commissions have only been established for a short time, old problems of lack of competence and political interference have not entirely disappeared. Although they are no longer affiliated with the State Administration of Industry

and Commerce, the Arbitration Law authorises the local people's governments to organise the establishment of the arbitration commissions, including funding. According to anecdotal information, staff in some local arbitration commissions, as well as some local arbitrators, are unfamiliar with arbitration.

The domestic arbitration rules are less sophisticated than those of CIETAC rules, which were specifically drafted to meet the needs of international arbitration. Some, but not all, domestic arbitration commissions permit foreign lawyers to appear as advocates. The choice of arbitrators is more limited than before CIETAC. The Beijing Arbitration Commission accepted 33 foreign-related cases in 2004. The enforcement of a relatively small number of awards made by domestic arbitration commissions has been sought outside mainland China.

We also understand that some local governments are encouraging their affiliated companies to include arbitration clauses designating the local arbitration commission in their standard contracts. And, in 1997, the Supreme People's Court issued a circular in which it confirmed that the Chinese courts shall enforce arbitral awards made by the domestic arbitration commissions, including foreign-related awards.

Since the previous revision of the CIETAC arbitration rules, which came into force on 1 October 2000 (the 2000 rules), CIETAC has been able to take jurisdiction over all kinds of domestic disputes in the same manner as local arbitration commissions. Chapter 5 of the latest CIETAC arbitration rules contains a number of provisions that apply exclusively to domestic arbitrations. These include shorter time limits for the exchange of written submissions and a fee schedule for domestic cases that follows that of local arbitration commissions. In most other respects the conduct of domestic arbitration before CIETAC follows the same rules that govern international cases (see below).

It is worth pointing out that foreign businesses may easily confuse the Beijing, Shanghai, or Shenzhen arbitration commissions, which are domestic arbitration commissions, when they intend their contracts to refer to CIETAC's head commission in Beijing and its sub-commissions in Shanghai and Shenzhen. Special care should therefore be taken when reviewing arbitration clauses to ensure they refer to CIETAC arbitration rather than arbitration before the domestic arbitration commissions.

Challenge of domestic awards

Under article 58 of the Arbitration Law domestic awards may be challenged on the following grounds:

- there is no arbitration agreement between the parties;
- matters determined in the award fall outside the scope of the arbitration agreement or of the jurisdiction of the arbitration commission;
- the composition of the arbitral tribunal or the arbitration procedure contravened the applicable legal procedure;
- evidence on which the award is based was falsified;
- the other party concealed evidence that affected the impartiality of the arbitration; or
- the arbitrator(s) demanded or accepted bribes or in some other way were corrupt or perverted the law in making the arbitral awards.

In addition to cancellation on one of the above grounds, the court can cancel the award if it decides that the award is 'contrary to the social and public interest'.

Enforcement of domestic awards

Enforcement of a domestic award may be refused on a number of grounds, set out in article 63 of the Arbitration Law and article 217 of the CPL:

- there was no written arbitration agreement;
- the arbitration body exceeded its jurisdiction or the matter arbitrated was not within the scope of the arbitration agreement;
- the composition of the tribunal or proceedings violated legal procedure;
- there was insufficient evidence on which to ascertain facts;
- the law was applied incorrectly; and
- during the course of the arbitration, the arbitrators committed embezzlement, accepted bribes, practised favouritism for personal benefit or perverted the law.

In addition, if execution of the award would contradict 'social and public interest' it may also be refused. As can be seen from the above, the grounds on which the enforcement of a domestic award may be refused are very broad and could lead to a complete review of the merits of the decision.

International arbitration in China

Arbitrations held in China that involve a foreign element are conducted under the auspices of:

- CIETAC in cases involving trade, investment and other commercial disputes;
- CMAC in maritime disputes; or
- less frequently, the domestic arbitration commissions (discussed above).

Both CIETAC and CMAC are agencies of the China Council for the Promotion of International Trade (CCPIT).

Of all of these, CIETAC is by far the most important. Parties arbitrating international disputes within China will almost inevitably do so according to the rules of CIETAC. Since May 2003, CIETAC arbitrates cases under both its arbitration rules (CIETAC arbitration rules), and its financial disputes arbitration rules (financial arbitration rules) (together referred to as CIETAC rules). The financial arbitration rules can be used in disputes involving financial institutions or finance instruments and offer a faster and cheaper alternative. The latest revisions to the CIETAC arbitration rules and financial arbitration rules, which came into force on 1 May 2005, aimed at further enhancing CIETAC's competitiveness as an arbitration institution.

CIETAC has a virtual, but not complete, monopoly over foreign-related arbitrations conducted in China. Chinese law does not recognise the validity of ad hoc arbitration. Although we are aware of cases where the Chinese courts have recognised clauses providing for foreign ad hoc arbitration to take place outside China, the December 2003 draft Supreme People's Court opinion on arbitration issues (the SPC draft provisions) provides that an arbitration agreement in which an ad hoc arbitration has been agreed between the parties shall be invalid, except if the domicile of the relevant parties is a country which is party to the New York Convention and does not prohibit ad hoc arbitration. It appears, therefore, that under the SPC draft provisions an arbitration agreement providing for ad hoc arbitration entered into by a Chinese party would be invalid.

Disputes can be submitted to foreign arbitral institutions for settlement (see article 257 of the CPL and article 128 of the Contract Law of the PRC). Although it is implicit that any arbitration conducted under the auspices of such institutions could, if the parties chose, be held inside China, there is uncertainty over whether

any mechanism currently exists under Chinese law to enable the enforcement of an award made in those circumstances.

In particular, although the PRC became a member of the International Chamber of Commerce (ICC) in November 1994, there is no clear mechanism for conducting ICC arbitrations in China and enforcing such awards. Indeed, CIETAC's monopoly over arbitrations conducted in China was not broken by China joining the ICC, as many would have wished, but by the domestic arbitration commissions referred to above. This was no doubt a considerable disappointment to the ICC, particularly given the fact that under the new CIETAC arbitration rules, it is now possible for CIETAC to conduct CIETAC arbitrations outside China, making CIETAC (in theory at least) a competitor with the ICC. The prospect of one of its member countries refusing to allow ICC arbitrations to be held within that country's territory is bound to be a source of embarrassment to the ICC, which has established a regional office in Singapore. It remains to be seen whether the increased profile of the ICC in the region will lead to ICC arbitrations taking place in China.

But it is surely only a matter of time before China's drive towards a market economy will cause it to establish a legislative framework for holding foreign arbitrations in China. For the time being, however, there are few signs of this taking place.

China Maritime Arbitration Commission (CMAC)

CMAC's original jurisdiction included disputes relating to salvage, collisions and charter parties. This was further extended in 1982, 1988, 1995 and 2001, when most other types of maritime cases were added.

The organisation of CMAC is similar to that of CIETAC and its current arbitration rules, which came into effect on 1 January 2001, are similar to CIETAC's arbitration rules. Its panel of arbitrators comprises 185 arbitrators, 38 of whom are foreign nationals.

By comparison with CIETAC, CMAC conducts few arbitrations; an average of about 23 cases for each of the last few years.

CIETAC arbitration

Structure of CIETAC

The governing body of CIETAC is its arbitration commission whose primary membership comprises a chairman and several vice-chairmen. The commission is based in Beijing but has sub-commissions in Shanghai and Shenzhen. The day-to-day business of the commission and its sub-commissions (including the administration of cases) is handled by secretariats.

Like the ICC, CIETAC does not decide cases. It administers the arbitrations according to its rules and provides assistance to the parties and arbitrators.

The arbitration commission maintains several panels of arbitrators. Arbitrators appointed to act in CIETAC arbitrations – wherever they take place in China – must be selected from these panels unless the parties agree otherwise, in which case the appointment must be approved by the chairman of CIETAC.

The panel for international or foreign-related cases includes 738 arbitrators, of which around 206 are foreign nationals, and 39 are non-mainland Chinese (including many arbitration specialists of international repute).

The panel for domestic cases includes approximately 439 mainland Chinese arbitrators. In domestic cases involving a foreign investment enterprise, foreign arbitrators may be selected. CIETAC has established a panel of financial arbitrators, most of whom are not on the above CIETAC panels of arbitrators and none of whom is a foreigner. However, the parties are free to select an arbitrator from either the panel of financial arbitrators or other CIETAC panels.

The growth in CIETAC's caseload has been spectacular in recent years. In 1986 CIETAC recorded 78 new cases, in 1993 it received 504 new cases and between 1996 and 2003 it handled around 600-700 cases a year. In 2004, CIETAC accepted 850 new cases.

Arbitration under CIETAC rules

The main features that differentiate CIETAC arbitrations from those administered by other international arbitration institutions are the following:

- unless agreed otherwise, parties must choose an arbitrator from a limited list comprising both mainland Chinese and foreigners;
- a greater emphasis on determining facts rather than analysing and applying the law; and
- most cases are determined after a single hearing lasting no more than a day, with the remainder determined after two or three hearings.

This section sets out the main features of arbitrating international disputes under CIETAC rules. However, the recently revised CIETAC arbitration rules provide for a major overhaul of CIETAC arbitration procedures and are likely to have a profound influence on the future direction of arbitration in China. Given the fact that the revised rules have only been in force for less than 10 months at the time of writing, there is some uncertainty as to how certain new features introduced by the new rules will affect the way in which international disputes will be arbitrated. Where appropriate, a discussion on the changes introduced by the new rules as compared with the 2000 rules is included.

Agreement to arbitrate

Arbitration under CIETAC arbitration rules and financial arbitration rules may take place only if the parties have agreed to submit the dispute to arbitration by CIETAC. Such agreement may be reached before the dispute arises (usually in the contract signed by the parties) or at any time thereafter. The agreement may take the form either of an arbitration clause in the original contract or any other form of agreement in writing. CIETAC will apply the financial disputes arbitration rules only if parties have agreed on their application.

Jurisdiction

CIETAC's jurisdiction under its arbitration rules was previously defined by reference to whether the disputes were 'international or foreign-related'. This requirement was removed in the 2000 rules and since then CIETAC has been exercising jurisdiction over disputes 'arising from economic and trade transactions, contractual or non-contractual'. Under the financial arbitration rules, CIETAC's jurisdiction applies to financial transactions between financial institutions or between financial institutions and other natural or

legal persons in the currency, capital, foreign exchange, gold and insurance markets.

The 2000 rules identified six types of disputes over which CIETAC has jurisdiction. The list appeared to be non-exhaustive but the description was repetitive and overlapping. Under the latest CIETAC arbitration rules, the six categories are now consolidated into three, namely:

- international and foreign-related (*she-wai*) disputes¹;
- disputes involving parties from the Hong Kong SAR, the Macao SAR and Taiwan; and
- domestic disputes exclusively involving Chinese domestic legal persons.

Disputes falling within the third category – domestic disputes – are governed by special provisions set out in chapter 5 (articles 59 to 66) of the CIETAC arbitration rules.

The previous uncertainty arising from the phrase ‘international or foreign-related’ as to whether disputes between two Chinese legal persons (for example a wholly owned foreign enterprise and a Chinese party) could be subject to CIETAC arbitration was removed in the 2000 rules, and CIETAC has been exercising jurisdiction over disputes between two foreign investment enterprises (as defined above) or between any foreign investment enterprise and a Chinese legal person. This remains the case under the latest CIETAC arbitration rules. Also, a large number of disputes involving foreign investment are likely to fall within the above provisions so that CIETAC has jurisdiction.

Article 2 of the financial arbitration rules identifies 10 types of financial disputes over which CIETAC has jurisdiction, including disputes involving loans, deposit certificates, guarantees, letters of credit, negotiable instruments, fund transactions and fund trusts, bonds, collection and remittance of foreign currencies, and factoring and reimbursement agreements between banks, including financial instruments and documents denominated in RMB and foreign currencies, including securities.

¹ In an opinion issued by the Supreme People’s Court in 1992, a ‘foreign-related’ (*she-wai*) dispute is defined to include cases in which:

- one or both parties is a foreigner, foreign enterprise or foreign organisation;
- the contract or other legal relationship was established, modified or terminated in a foreign country; or
- the subject matter of the dispute is located in a foreign country.

Objections to jurisdiction

The CIETAC arbitration rules provide that objections to jurisdiction must be raised before the first hearing conducted by the arbitration tribunal or, where the case is dealt with on the basis of documents only, before the first substantive defence is submitted. Because the financial arbitration rules lack a similar stipulation, this provision will apply to cases heard under those rules.

CIETAC, not the arbitral tribunal, is empowered to determine such questions. It may, if it deems necessary, authorise the tribunal to make the determination on any question regarding the jurisdiction of the tribunal. Also, any decision CIETAC makes on the question of jurisdiction based on *prima facie* evidence submitted by the parties at the start of the arbitration will not prevent CIETAC from making another decision on the same question in light of any new fact or evidence discovered by, or disclosed to, the tribunal in the course of hearings.

However, it should be noted that the People's Court has the power to intervene in disputes on jurisdictional issues (as a result of a notice issued by the Supreme People's Court in 1993), and where a decision by CIETAC differs from a ruling of the People's Court on the validity of an arbitration agreement and/or jurisdiction over a given arbitration case, the ruling of the People's Court shall prevail.

Commencing an arbitration

Under article 10 of the CIETAC arbitration rules and article 9 of the financial arbitration rules, to start an arbitration the claimant must submit an application for arbitration to the arbitration commission. This must:

- specify the names, addresses and other contact details of the parties;
- give details of the arbitration agreement relied on by the claimant;
- set out the facts of the case and a summary of the main issues in dispute; and
- give details of the claim and the supporting evidence.

It should be accompanied by a fee (according to the commission's fee schedule) and by relevant documentary evidence in support of the claim.

The application for arbitration is then scrutinised by the commission's secretariat, which determines whether the proper requirements have been complied with. If it decides that they have not, it may demand that the claimant rectify the fault. Otherwise, it will send the respondent a notice of arbitration, together with a copy of the application for arbitration and attachments. Proceedings are

deemed to commence on the date CIETAC sends the notice of arbitration to the respondent.

Under CIETAC arbitration rules, following receipt of the notice of arbitration the claimant and the respondent have 15 days in which to appoint an arbitrator or to authorise the chairman of the commission to make the appointment on their behalf. Under the financial arbitration rules, the claimant and respondent have seven days to make such appointments or authorise the commission chairman.

Under CIETAC arbitration rules, the respondent's defence and supporting documentation must be filed within 45 days (which may be and often is extended) and any counterclaim filed within 45 days of receipt of the notice of arbitration (a time limit that may now be extended but that in the past has been strictly enforced). In contrast, under the financial arbitration rules, the respondent is required to submit its defence or counterclaim within 15 days of the notice of arbitration.

Both the claim and any counterclaim may be amended with the arbitral tribunal's permission, which may be refused if it considers that the amendment would be too late and might affect the proceedings.

The composition and selection of the arbitral tribunal

Appointment of arbitrators

Under article 20 of the CIETAC arbitration rules, in the absence of any agreement between the parties to the contrary, the arbitral tribunal consists of three arbitrators. Under the financial arbitration rules, the CIETAC chairman decides whether a case should be heard by three arbitrators or a sole arbitrator, unless the parties have agreed otherwise.

Under both the CIETAC arbitration rules and financial arbitration rules, the parties may either jointly appoint the presiding arbitrator or jointly authorise the chairman of the arbitration commission to make such an appointment. Under the CIETAC arbitration rules, if the parties choose jointly to appoint the presiding arbitrator but fail to do so within 15 days from the date the respondent receives the notice of arbitration, the chairman of the arbitration commission shall make the appointment pursuant to 22(3), where a 'list procedure' is to be followed (please see further details below).

Article 23 contains a similar provision for the appointment of a sole arbitrator: the parties may either jointly appoint the sole arbitrator or jointly authorise the chairman of the commission to make the appointment within 15 days of when the respondent receives the notice of arbitration. In the absence of an agreement within this time, the chairman of the arbitration commission must make the appointment pursuant to article 22(3).

Both the CIETAC arbitration rules and financial arbitration rules contain a mechanism to provide for the appointment of the arbitral tribunal where there is more than one claimant and/or more than one respondent. The claimant's side and/or the respondent's side must consult and agree on their choice of arbitrator within the 15-day period or ask the chairman of CIETAC to make the appointment. If they fail to appoint within this period, the chairman of CIETAC will make the appointment pursuant to article 22(3).

Neutrality of arbitrators

Given that a CIETAC arbitration award is final and cannot be appealed, the composition of the arbitral tribunal is critical. The parties should ensure that their own appointees are well qualified to understand and determine the dispute in question. The choice of presiding arbitrator is vital as in the absence of a majority decision the presiding arbitrator's decision prevails.

One of the unusual features of CIETAC arbitrations under the 2000 rules had been the requirement that arbitrators be chosen from the CIETAC panel of arbitrators. Although the CIETAC panel was

restricted to Chinese nationals until 1988, the number of foreign nationals on the panel has been increased in recent years. Still, the requirement that parties choose their arbitrators from a pre-selected list had been frequently criticised as a limitation on party autonomy. Under article 21(2) of the current CIETAC arbitration rules, parties are now allowed to appoint arbitrators outside the panel maintained by CIETAC, provided that (i) the parties agree to do so, and (ii) the appointment is approved by the chairman of CIETAC.

Where the parties are of different nationalities it will often be desirable for the sole or presiding arbitrator to be from a neutral jurisdiction. Indeed, the recent amendments to the CIETAC arbitration rules now permit this outcome by giving the parties the opportunity to reach agreement over the choice of the sole or presiding arbitrator.

However, under the 2000 rules if no such agreement exists, the choice of the presiding or sole arbitrator laid with the chairman of the arbitration commission. The 2000 rules, unlike the rules of a number of arbitration institutions (for example the ICC), did not stipulate that if the choice is left in the hands of that institution, the appointee must be neutral. Although in recent cases CIETAC has appointed a foreigner to sit either as a sole arbitrator or as the chairman of a three-member tribunal, the general trend has been for the CIETAC appointee to be Chinese.

However, CIETAC has now sought to deal with this issue by introducing a 'list procedure' under which each side will nominate one to three candidates and provide their names to CIETAC. Under article 22(3), where one candidate appears in common on both lists, they will be appointed as the chairman of the tribunal. If there is more than one candidate nominated by both sides, CIETAC will appoint the nominee it believes is best suited. Where no common candidate is identified from the parties' nominations, CIETAC will appoint the chairman, but the appointee will be someone who has not been nominated by either side. There is therefore a danger that if one party puts all of its preferred candidates on its list, and none of them is on the other party's list, then none of the preferred candidates listed by the first party has any chance of being appointed.

Accordingly, it would be prudent to insist through the arbitration agreement that CIETAC adheres to the principle of neutrality if it is required to exercise its choice of sole arbitrator or the presiding arbitrator. The draft CIETAC arbitration clause that is set out below provides for a neutral tribunal. Although it is unclear as to whether, in the absence of parties' agreement, CIETAC would take it upon itself to follow the normal practice of international arbitration. It

would appear that it is more likely to do so now given the fact that under the latest amendments to the CIETAC arbitration rules (as discussed further below) parties may choose to apply other international rules (such as the ICC rules), which generally provide that if the choice is left to that institution, the appointee must be neutral. Furthermore, by allowing CIETAC arbitrations to be conducted outside China (as discussed below), CIETAC clearly intends to open itself to international competition, which should also suggest that CIETAC would follow this international practice.

Removal or replacement of arbitrators

Article 26 of the CIETAC arbitration rules allows a party to request the removal of an arbitrator on the grounds of lack of impartiality or independence. These provisions will be applicable to arbitrations held under the financial arbitration rules. Any such challenge is decided by the chairman of the arbitration commission but must be made no later than the first oral hearing if the grounds of the challenge are apparent at that stage.

Challenges made on grounds that become known after the first hearing may be raised at any time before the end of the final hearing, although such a challenge must be made within 15 days of the party being aware of the relevant circumstances. The CIETAC arbitration rules also contain a provision that requires an appointed arbitrator having a personal interest in the case to declare that fact to CIETAC and to request his own withdrawal. If the arbitrator in question does not request his own withdrawal, a party seeking to remove the arbitrator must make the request within 10 days of receiving the arbitrator's declaration.

If for any reason an arbitrator needs to be replaced, his successor is appointed in accordance with the same procedure that governed his appointment. The CIETAC arbitration rules provide that in these circumstances the arbitral tribunal then has discretion over whether, and to what extent, it should call for a repeat of any previous oral hearings.

Exchange of statements of case

Under the CIETAC arbitration rules, the respondent must file a defence within 45 days of receiving the notice of arbitration, unless CIETAC extends the deadline. The defence must contain its responses to the claimant's case with supporting facts and reasoning, together with any evidence it wishes to rely on. If a counterclaim is to be filed, the respondent must do so within 45 days of receiving the notice of arbitration proceedings.

A claimant must file a defence to any counterclaim within 30 days of receiving a copy of the counterclaim. If the deadline is not met, the

tribunal has a discretion over whether to admit the claimant's defence to any counterclaim.

Discovery

Although the CIETAC arbitration rules compel the parties to produce evidence for the facts on which their claim, defence or counterclaim is based, wide ranging discovery is unusual. Although it is not entirely clear it seems to be accepted that a CIETAC tribunal does have the power to order a party to produce documents. This is supported by article 38 of the CIETAC arbitration rules which, in the context of the tribunal consulting an expert, does provide that the tribunal has the power to order the parties to produce documents related to the case, as well as article 16 of the financial arbitration rules, which authorises an arbitral tribunal to issue procedural orders and questionnaires.

In terms of the timing for provision of evidence, there is a positive stipulation under article 36(2) that the tribunal may disallow any evidence that is filed out of time. Furthermore, under article 36(3), a party who fails to file evidence within the prescribed time limit ordered by the tribunal will be liable for any adverse consequences that may flow from its default (for example, the costs of any adjournment necessitated by the need for a party to deal with any late filing of evidence).

Hearings

Hearings tend to be short and informal. Emphasis is placed on discovery of the facts rather than legal analysis, although this is largely due to the fact that Chinese law (which will often be the law that governs the substantive issues) is relatively underdeveloped. Lengthy hearings involving multiple sessions over a period of months or years are almost unheard of. The vast majority of arbitrations are resolved through a single session lasting a few days at most, although this partly reflects the nature of the disputes that CIETAC currently handles.

Most arbitrations involve oral hearings. Under CIETAC rules, only where both parties and the tribunal agree may the tribunal reach its decision on the basis of documents alone. Under the financial arbitration rules, subject to any contrary agreement by the parties, the arbitration tribunal shall decide whether to hold oral hearings.

The procedure for the oral hearing is determined by the tribunal. Although the tribunal rarely discloses the final hearing procedure until the actual date of the hearing, it is at least envisaged under the current version of the CIETAC arbitration rules that the tribunal may (i) issue pre-hearing procedural directions, (ii) convene a pre-hearing conference, and (iii) define the scope of the matters/issues

that need to be determined (a document which, it would appear, would not be too dissimilar to the ICC's terms of reference).

Typically in a CIETAC hearing, the tribunal gives the parties an opportunity to debate the case but they are not often given the opportunity to question each other directly. Instead, they present their arguments and counter-arguments alternately over a period of time determined by the tribunal. During the debate, the tribunal gives the parties an opportunity to present witnesses. The tribunal may also allow each party to ask the witness a limited number of questions, but the process is generally strictly controlled, and generally the scope for cross-examination is rather limited. However, under the latest CIETAC arbitration rules, tribunals are expressly permitted to conduct inquisitorial or adversarial proceedings. It is hoped therefore that there would be more scope for conducting proper cross-examinations of witnesses.

As mentioned above, the tribunal may conduct an oral hearing in an adversarial or inquisitorial manner. Our experience to date is that it is usual for Chinese arbitrators to adopt the latter approach. The CIETAC arbitration rules also empower the tribunal to undertake investigations and collect evidence on its own initiative (although it is obliged to give the parties notice of this so that they can attend if they so wish). Article 37(3) also provides that evidence collected by the tribunal on its own initiative must also be provided to the parties so as to allow them an opportunity to comment and give their opinion.

The place of arbitration and the seat of arbitration

Both the CIETAC rules and financial arbitration rules provide that the parties may agree to have their case handled by the arbitration commission in Beijing or by either of the sub-commissions in Shanghai and Shenzhen. In the absence of agreement the choice lies with the claimant.

Under the 2000 rules, provided the parties have agreed, hearings may take place elsewhere. Article 20 of the financial arbitration rules have similarly provided that unless otherwise agreed by the parties, the arbitral tribunal may hold oral hearings or conduct other activities relating to the dispute between the parties, at any place that it considers appropriate.

CIETAC has gone one step further by drawing a distinction between the place or 'seat' of the arbitration and the place of the hearing², and parties are now free to select the seat of the arbitration. This is a very significant development for CIETAC. It opens the way for the conduct of CIETAC arbitrations outside China, making CIETAC (in theory at least) a competitor with the ICC. At the very least, it will now become more difficult for foreign parties engaged in commercial negotiations in China to reject CIETAC arbitration on the grounds that they prefer to submit their disputes to a neutral venue outside China.

It remains to be seen how these provisions will work in practice, but one thing is clear: although under articles 31 and 32 of the CIETAC arbitration rules, CIETAC arbitrations will be allowed to be conducted outside China, these provisions must be read subject to any restrictions imposed by the PRC arbitration laws.

In this context, it is worth pointing out that under article 27 of the SPC draft provisions, an arbitration agreement that provides for 'domestic' parties to conduct arbitration in a 'foreign country' regarding a dispute that does not contain a foreign element is unenforceable. Although the SPC draft provisions fail to clarify whether disputes involving foreign investment enterprises are 'foreign-related' or 'domestic', it would appear that, at present, the answer is that they are to be treated as domestic entities. If so, then if a foreign investment enterprise owned by a US corporation were to have a dispute with another foreign investment enterprise owned by a French corporation, for example, this would be deemed a 'domestic' dispute, with the consequence that the parties would be prohibited from arbitrating their dispute under CIETAC rules outside China.

Therefore, although CIETAC may well allow such arbitrations to take place outside China, any resulting award may not be enforceable in China on the grounds that the arbitration has taken place contrary to article 27 of the SPC draft provisions.

Applicable rules

Under article 4(2) of the CIETAC rules, where the parties have agreed on the application of other arbitration rules, or any modification of these rules, the parties' agreement will prevail (unless such agreement is incapable of being performed or is in

² Articles 31 and 32 of the CIETAC arbitration rules and article 20 of the financial arbitration rules (as revised on 1 May 2005).

conflict with a provision of the mandatory laws of the place of arbitration). Under this article, the parties' agreement to apply other arbitration rules does not need to be approved by CIETAC, giving full effect to the parties' agreement. The exception relating to the mandatory law of the place of arbitration appears to reflect the fact that under the CIETAC arbitration rules, parties are now allowed to conduct CIETAC arbitrations outside China (please see above for further detail).

Applicable law

Article 43 of the CIETAC arbitration rules provides that, in arriving at the arbitral award, the tribunal shall take into consideration not only the governing law of the contract, but also 'international practices and in compliance with the principle of fairness and reasonableness'. A similar provision is contained in the financial arbitration rules.

'International practices' for these purposes is the equivalent of 'trade usages' as referred to in the ICC and UNCITRAL arbitration rules and the Model Law and therefore accords with normal arbitration practice.

The reference to 'fairness and reasonableness' may appear to demand that the arbitrators should decide the issues according to principles of equity rather than on the basis of a strict legal interpretation according to the governing law of the contract; in other words that they should act as amiable compositeurs. However, it is more likely intended to enable arbitrators to supplement relevant law with 'fairness and reasonableness'.

Representation

Although previously there had been no objection to foreign lawyers representing parties in arbitrations (either under the CIETAC arbitration rules or according to Chinese law), Ministry of Justice regulations prohibit foreign lawyers from providing opinions or comments in the capacity of an attorney in arbitration on the application of Chinese law and on facts that involve Chinese law. Therefore in practice, foreign lawyers generally work with a Chinese lawyer in CIETAC cases involving Chinese law.

Language

The CIETAC arbitration rules provide that although the official language of the arbitration commission is Chinese, proceedings may be conducted in a foreign language by agreement between the parties. Unless the point is covered before any dispute arising it is unlikely that the Chinese party will concede the advantage of having proceedings conducted in Chinese.

The importance of language in this context should not be underestimated. It may have an effect on a party's ability to use its counsel of first choice. In addition, a party's representatives giving evidence are more likely to make a favourable impression on the tribunal if they are able to communicate directly rather than through interpreters. Moreover, the need for documents to be translated and for oral evidence to be given through interpreters can add substantially to the cost, length and effectiveness of the proceedings.

In practice, even if the parties have specified English or Chinese as the only language, both languages tend to be used, particularly where a foreign party wishes to use foreign counsel who cannot speak Chinese and also given that many of the documents will be in both English and Chinese. The position is further complicated by the tendency for provisions in Chinese contracts to state that both the English and Chinese versions are of equal validity.

The foreign party will, in any event, need to bear in mind that one or more members of the tribunal may not be English speakers and that even if English is the chosen language of the arbitration, translation will have to be provided if the case is to be presented effectively.

Confidentiality

Unless otherwise agreed, hearings take place behind closed doors. Neither the parties nor anyone who is privy to the hearings, is permitted to make any disclosure regarding the substance or procedure involved in those hearings to outsiders. There is, however, no express prohibition against disclosure of the fact of the proceedings or, once it has been published, the award.

Experts

Under article 38 of the CIETAC arbitration rules the arbitral tribunal 'may consult or appoint experts and appraisers for clarification on specific issues of a case' and is empowered to order the parties to produce to the expert or appraiser any materials, documents, properties or goods relating to the case for inspection. The article also provides that the expert's or appraiser's report should be copied to the parties so that they may comment on it. These provisions also apply to cases heard under the financial arbitration rules.

Ancillary proceedings before the People's Courts

Article 5 of the Arbitration Law makes it clear that if the parties have concluded an arbitration agreement, the People's Courts are not to accept jurisdiction over a case between the parties unless the arbitration agreement is void.

Notwithstanding the above, a party to a CIETAC arbitration can apply for property or evidence preservative measures. Such an

application is made to CIETAC, which in turn will pass it on to the People's Court in the place of a counterparty's domicile or the place where the property or evidence is located. Property preservation measures include sealing up, confiscating or freezing the assets in dispute.

However, as a matter of Chinese law, although it is possible to obtain a limited property preservation order or an evidence preservation order, it is not possible to obtain an injunction in support of the arbitration preventing a party from acting, say, in breach of the relevant contract. This is in marked contrast to nearly every other jurisdiction where the local courts will grant such an injunction.

The party against whom a preservation order is made may have the order discharged by providing security equivalent to the value of the asset subject to the preservation order. Further, as a pre-condition to granting the preservation order the court may demand that the applicant provide security to cover the possibility that the application was wrongfully made.

The award

Timing

Under article 42(1) of the CIETAC arbitration rules, awards are to be made within six months of the tribunal being constituted, or within four months for domestic arbitrations. Awards are generally rendered within this time frame although extensions have been obtained where necessary. Because one of the aims of the financial arbitration rules is to provide more rapid dispute settlement, those rules provide that unless otherwise agreed by the parties, the arbitral tribunal shall render an arbitral award with 45 working days of the tribunal being formed.

Majority awards and awards made by the presiding arbitrator

In the case of three-member tribunals the award is decided by majority opinion. If there is no majority, the view of the presiding arbitrator prevails. The tribunal's minority decision may be attached at the end of the award, although it will not form part of the award.

Interim and partial awards

Article 44 of the CIETAC arbitration rules empowers the tribunal to make an interim or partial award at any time during the arbitration. This also applies to cases heard under the financial arbitration rules.

Interim awards may be made where it is thought that determining certain key issues at an early stage in the proceedings may mean it is unnecessary for the tribunal to consider and decide on other matters, so saving considerable time and money.

Partial awards tend to be made where a dispute involves a number of separable claims that lend themselves to the making of independent awards.

Finality

The award is final and binding on the parties who are prohibited from seeking to have the award revised either by the courts or by any other organisation.

Default awards

Under article 34 of the CIETAC arbitration rules, if one of the parties fails to appear at the hearing, the arbitral tribunal may nevertheless proceed with the hearing and make an award by default.

This also applies to cases heard under the financial arbitration rules.

Fees and costs

An arbitration fee is payable by the claimant (and by the respondent if it raises a counterclaim) at the start of the arbitration, in accordance with the arbitration commission's fee schedules set out in Appendix A. The fees differ depending on whether CIETAC

accepts jurisdiction under the CIETAC rules or financial arbitration rules. CIETAC charges much less for handling cases brought under the financial arbitration rules than under the CIETAC rules. Further, the fees charged under the financial arbitration rules are the same, regardless of whether the dispute is domestic or international in nature. Under the CIETAC arbitration rules, fees charged depend on whether the case is domestic or international. Fees are payable on an ad valorem basis and are intended to cover the arbitrators' fees as well as the Commission's administrative expenses. For cases with large amounts in dispute, the fees for domestic cases may be significantly higher than those charged by arbitral institutions abroad. An additional registration fee of RMB10,000 is also payable for each application for arbitration.

The commission may call for the payment of additional fees to cover specific disbursements, for example, the cost of an expert or appraiser brought in by the tribunal as well as additional costs incurred if an overseas arbitrator is appointed.

Although the losing party is normally ordered to pay the arbitration fees, the question of whether it should also pay the successful party's legal fees and other expenses incurred in connection with the arbitration is left to the tribunal's discretion.

Costs will be assessed by the tribunal according to various factors, including the complexity of the case, the expenses actually incurred by the winning party, the disputed amount and the reasonableness of the expenses, all of which are in line with international practice.

Conciliation

Under article 40 of the CIETAC arbitration rules the arbitral tribunal is empowered to conciliate the dispute during the arbitration 'with the consent of the parties'. The process of conciliation must terminate at the request of either party, whereupon the arbitrators will revert to acting as before. This rule also applies to cases heard under the financial arbitration rules.

Nothing exchanged between the parties or the tribunal during the conciliation process may be relied on by the parties in subsequent arbitration proceedings. However, it is doubtful the parties will engage in free and frank discussion with the conciliator if they know that any weaknesses they reveal in their case or bargaining position may influence the outcome of the arbitration if the conciliation is unsuccessful.

Also under article 40, where a settlement agreement is concluded during such a conciliation, the agreement should be embodied in an arbitration award made by the tribunal. Accordingly, if either party

fails to respect the terms of the agreement, the award can then be enforced in the same way as any other award.

Most CIETAC awards are made as decisions by the tribunal rather than the result of a settlement agreement.

Summary procedure

The CIETAC arbitration rules provide a summary procedure for use where the amount in dispute is RMB500,000 or less. Where there is no monetary claim, or where the claimed amount is unclear, the tribunal may decide that the summary procedure is to be used in light of the complexity of the facts, the interests of the parties, and the suitability of the procedure. However, if as a result of a subsequent amendment of the application for arbitration or a counterclaim, the claimed amount exceeds RMB500,000, the case can no longer be decided according to the summary procedure unless the parties agree otherwise.

Where the summary procedure applies, the arbitration is conducted by a sole arbitrator on the basis of documents alone, although the arbitrator has a discretion to hear the case orally. The arbitral tribunal (ie the arbitrator) is required to render his award within three months from his appointment; regardless of whether the case is determined on documents only or involves oral hearing.

Award without arbitration

The CIETAC arbitration rules permit parties who have agreed to resolve their disputes under the CIETAC rules, but who reach a settlement without commencing an arbitration, to convert their settlement agreement into an award by application to CIETAC. In fact, the latest CIETAC arbitration rules provide that parties do not need to go through any formal CIETAC-assisted mediation/ conciliation process before applying to CIETAC to convert their settlement agreement into a CIETAC arbitral award.

Drafting a CIETAC arbitration clause

A suggested CIETAC arbitration clause (which is based on CIETAC's suggested wording) is set out below. Whether it will be accepted by Chinese negotiators remains to be seen on a case-by-case basis. An additional obstacle might be the PRC Ministry of Commerce (MOFCOM) and its local counterparts whose approval must be sought for all contracts involving foreign investment (and would therefore include all joint ventures).

Suggested clause (CIETAC arbitration rules)

[].1 Any dispute, controversy or claim arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be [settled through friendly consultations between the parties upon the written request of any party. In the event that no settlement is reached within [30] days after such written request has been given, then it shall be³] submitted to the China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the Commission's arbitration rules [for financial disputes, in accordance with the Commission's Financial Disputes Arbitration Rules] in effect at the time of applying for arbitration. The arbitral award is final and binding upon the parties⁴.

[].2 The place of arbitration shall be [Beijing/Shanghai/Shenzhen/other]⁵.

[].3 The language of the arbitration shall be [English]⁶.

[].4 The tribunal shall consist of three arbitrators. Two arbitrators shall be selected by the respective parties. [The presiding arbitrator

³ For use where applicable Chinese law stipulates or the parties opt for prior consultations as a pre-condition to the commencement of arbitration.

⁴ The basic formulation is adapted from the general-purpose model clause recommended by CIETAC.

⁵ Article 31 of the CIETAC arbitration rules permits the parties to agree which of these or other venues the arbitration will take place in. Where, however, the dispute is solely domestic (as discussed above), the place of arbitration should be in mainland China.

⁶ Article 65 of the CIETAC arbitration rules allows the parties to choose the language of the arbitration. In the absence of any agreement, the official language of the arbitration commission (Chinese) will be used. The secretariat of the arbitration commission may require translations into Chinese of documents relied on by the parties to be supplied to it.

shall be selected by agreement between the parties or, failing agreement within [20] days of the appointment of the two party-nominated arbitrators, in accordance with the Commission's arbitration rules.]

or:

[].4 The tribunal shall consist of one arbitrator who shall be selected by agreement between the parties⁷ or, failing agreement, in accordance with the Commission's arbitration rules.

[].5 The [sole/presiding] arbitrator shall not be a national of the country of domicile of either of the parties to this Contract.

Alternative for use where the domicile of one or more of the parties to the Contract does not reflect the domicile of the 'true' contracting party (such as where one party enters into the Contract through a company incorporated in a country with which it has no real connection).

[].5 The [sole/presiding] arbitrator shall not be a national of [set out list of the countries of the parties and of any other party that is interested in the Contract].

The following points should be noted:

- a failure to specify English as the language of the arbitration will result in Chinese being applied;
- the clause provides a time within which the parties must try and conciliate or mediate the disputes before agreeing to CIETAC arbitration; and
- the clause provides that the chairman or sole arbitrator must be of a nationality different from that of the parties. Although the CIETAC rules do not expressly state that CIETAC will be bound by such a nationality requirement, it would appear highly difficult for CIETAC to refuse to respect a requirement that has been accepted by both parties and that may be perfectly satisfied by naming one of the numerous arbitrators of neutral nationality that appear on CIETAC's own list. In fact we have had CIETAC confirmation of the acceptability of a variant of this clause in a transaction.

⁷ Article 21 of the CIETAC arbitration rules allows the parties to agree that the arbitration shall be before one arbitrator. In the absence of the parties' agreement of that arbitrator, the 'list procedure' under paragraphs 2, 3 and 4 of article 22 of the CIETAC arbitration rules will apply.

The validity of certain types of arbitration agreements

The December 2003 draft Supreme People's Court opinion dealing with arbitration agreements mentioned above in part restates existing law and practice, and in part contains a number of new and controversial provisions.

According to the draft opinion and current law, the validity of an arbitration clause should be interpreted in accordance with article V (1)(a) of the New York Convention, ie by applying the law of the place of the arbitration, unless the parties have specifically designated a different governing law for the arbitration clause in the contract.

If governed by Chinese law:

- an agreement under which disputes may be submitted either to an arbitration commission for arbitration or to a court for litigation is deemed as invalid. An example of such agreement is 'disputes arising from this contract may be submitted to an arbitration commission for arbitration, or to a court for litigation'; and
- an arbitration agreement that deprives one party's equal right to choose arbitration is invalid. An example of this type of clause is an agreement that stipulates that 'if any dispute arises, the seller shall have the right to choose an arbitration commission which the seller thinks appropriate for arbitration'.

Accordingly, in a document that contains an arbitration clause governed by Chinese law or where the place of arbitration is China, the following dispute resolution mechanisms may create problems:

- an option for disputes to be resolved either by the courts or, at the option of one party, CIETAC; and
- disputes to be resolved either by the courts or, at the option of one party, any other arbitral tribunal.

In either of these clauses CIETAC may refuse jurisdiction and the Chinese courts may refuse to enforce an arbitration award made by a foreign arbitral tribunal.

If the arbitration agreement is governed by English law, it may be possible to have any or all of the above. Split clauses are often favoured by foreign investors for their flexibility. However, careful drafting is necessary to ensure the validity of a split clause governed by foreign law.

Enforcement of CIETAC awards outside China

This section assumes that a foreign party has succeeded in obtaining an arbitration award against a Chinese company. If the Chinese company then refuses to respect the terms of the award, the foreign party would have to consider enforcement of the award.

This will generally involve a two-stage process. First, the foreigner will need to identify what assets the Chinese company owns and where these are located (although this may have been investigated well before the need for enforcement became apparent). Second, the foreigner will need to apply to the relevant national court in whose jurisdiction those assets lie for an order allowing the arbitration award to be executed against those assets.

The Chinese company may own assets outside China. By virtue of the New York Convention, CIETAC arbitral awards are widely enforceable throughout the world. The procedure for enforcement will of course depend on the laws of the jurisdiction where enforcement is sought. Further, even if the Chinese company does not at the time of publication of the award have overseas assets, this does not mean that it does not have international aspirations and if it is made to realise that an unsatisfied arbitration award may interfere with those aspirations, then it may be more willing to discuss payment of the award.

Enforcing or challenging CIETAC awards in China

The circumstances in which a CIETAC award may be set aside or enforcement refused are set out in paragraph 1 of article 260 of the CPL. They are that:

- the parties neither included an arbitration clause in their contract nor subsequently concluded a written arbitration agreement;
- the party against whom enforcement is sought was not asked to appoint an arbitrator or to participate in the arbitration proceedings or failed to state its case for reasons for which it cannot be held responsible;
- the composition of the arbitral tribunal or the arbitral proceedings did not conform with the relevant arbitration rules; and
- certain items of the award exceeded the scope of the arbitration agreement or were outside the jurisdiction of the arbitration institution.

Article 260 also provides that if a People's Court decides that enforcement of the award would be against the social and public interest, it shall refuse the enforcement application. Although the relevant provisions of the Arbitration Law do not refer to refusing to enforce an award on the grounds of social and public interest, this probably remains a valid ground for refusing enforcement.

On its face, the application of article 260 depends on who gave the award (ie CIETAC) and not on whether the award concerns 'international or foreign-related disputes'.

In practice, the People's Courts will not apply this article to domestic (as opposed to international or foreign-related) awards made by CIETAC. Instead, the People's Courts will apply article 217 and review the award on its merits.

Procedure

Applications for enforcement of CIETAC foreign-related or CMAC arbitration awards should be made to the Intermediate People's Court either in the place of domicile of the party against whom enforcement is sought, or in the place where that party has assets. Applications should be submitted in writing accompanied by the original award. Applications for enforcement of CIETAC domestic awards should be made to the Basic Level People's Court either in the place of domicile of the party against whom enforcement is sought, or in the place where that party has assets. Similarly, applications should be submitted in writing accompanied by the original award.

Article 261 prescribes that if an application for execution of an arbitration award is refused then the parties to the dispute may, in accordance with the written arbitration agreement, reapply for arbitration or institute legal proceedings in a People's Court.

The suggestion that the same dispute might be the subject of further arbitration proceedings would surely be untenable if enforcement of the award had been refused because the arbitration agreement between the parties was either defective or did not cover the dispute in question. This may explain the reference to the possibility of the parties settling their dispute through the courts, which plainly would not be 'in accordance with the written arbitration agreement' if that agreement were valid and applied to the relevant dispute.

Unfortunately this source of confusion has not been addressed by the Arbitration Law, article 9 of which is similar to article 261 in the relevant respect.

Applications for the enforcement of both domestic and foreign-related arbitration awards must be made within one year where one of the parties is a Chinese natural person and six months where both parties are legal persons. The time runs from the final date upon which, under the award, the losing party is obliged to comply with its terms.

Further, two notices issued by the Supreme People's Court in 1995 and 1998 respectively provide that an Intermediate People's Court or a Higher People's Court must follow an approval procedure when considering refusing to enforce a foreign-related arbitration award and/or to set aside a foreign-related arbitration award made in China.

The enforcement of foreign arbitral awards in China

As mentioned above, China ratified the New York Convention in 1987. In doing so, it adopted two reservations:

- the reciprocity reservation by which China's agreement is restricted to foreign arbitral awards made in the territory of a state which is also a party to the New York Convention; and
- the commercial reservation whereby the subject matter of the award in respect of which enforcement is sought must be commercial according to Chinese law.

The significance of the reciprocity reservation continues to diminish over time as the list of countries that are parties to the New York Convention grows.

The meaning of the term commercial was the subject of clarification in the Supreme People's Court's notice on the implementation of China's accession to the New York Convention in 1987. This stated that China would apply the New York Convention only to disputes arising out of what are to be considered as 'commercial legal relationships of a contractual nature or non-contractual nature' but excluding disputes between foreign investors and governments of host countries.

Subject to an objection (based on the grounds referred to on pages 5-6 above) being raised as an obstacle to enforcement, the court should act upon an application that is accompanied by the award and the arbitration agreement under which it was made (if originals are not available, duly certified copies will suffice), together with officially certified Chinese translations.

Procedure

A party applying for the recognition and enforcement of a foreign arbitral award in China must bring its application to an Intermediate People's Court in one of the following locations:

- in the place of domicile of the party against whom enforcement is sought; or
- the location of the property of the party against whom enforcement is sought.

With regard to arbitration awards made in countries that are not parties to the New York Convention, article 269 of the CPL provides that these may nevertheless be enforced 'according to the principle of reciprocity', meaning in effect that the courts should agree to enforce awards made in those countries whose courts have a track

record of enforcing Chinese arbitration awards. In practice, it would be unwise to rely on the courts agreeing to implement this article.

As mentioned above, a 1995 Supreme People's Court notice provides that an Intermediate People's Court or a Higher People's Court must follow an approval procedure when considering refusing to enforce a foreign arbitration award.

Are arbitration awards enforced in practice?

That a problem exists is undeniable. The real difficulty lies in obtaining information regarding enforcement. Until recently, the courts were not required to report information regarding the enforcement of arbitral awards to higher courts.

Lack of training and unfamiliarity with the relevant law on the part of judges may contribute to the problem. However, it will rarely be possible to determine whether the improper refusal of an enforcement application has been the product of a simple error or local protectionism.

Most commentators consider that the main root of the problem lies with local protectionism. Local judges are susceptible to a variety of social, economic and political pressures. It is hardly surprising that if enforcement of an arbitration award is sought against an important local company or person, the judge allocated to take charge of the case may come under pressure to resist the application.

The problem of local protectionism is openly acknowledged by China's central authorities. In 1995, the Supreme People's Court issued a notice entitled 'Concerning the handling of issues regarding foreign-related arbitration and foreign arbitration matters by the People's Courts' (1995 notice).

Under the terms of the 1995 notice, the Intermediate People's Court must refer a matter to the Higher People's Court if it is invited to exercise jurisdiction where there is an arbitration agreement that is void, invalid or too vague to be enforced. In turn, the Higher People's Court must refer the matter to the Supreme People's Court before accepting the case.

As regards the enforcement of arbitration awards, a similar process of approval must take place so that an Intermediate People's Court or Higher People's Court cannot refuse to enforce a CIETAC (or CMAC) or foreign arbitration award unless the matter has received the approval of the Supreme People's Court.

In a 1998 circular, the Supreme People's Court decided that this approval process applies to applications to the Chinese courts to set aside foreign-related awards made in China.

Parties seeking to enforce foreign and foreign-related arbitral awards have often complained about the lack of clear deadlines in respect of the acceptance by the People's Courts of applications for enforcement. For example, because the 1995 notice does not set any deadline for reporting, to avoid triggering the reporting mechanism under the 1995 notice, it has not been uncommon for People's

Courts to simply put the application ‘on hold’ and never decide whether to accept the application. The SPC draft provisions provide that the People’s Court is to decide whether to accept an application for enforcement within seven days from the date of receipt of the application.

Moreover, the SPC draft provisions go further and provide that a decision of the People’s Court to refuse to accept an application may be appealed to the Higher People’s Court within 30 days from the date of the lower court’s decision, and that once an application is accepted and a file is opened, the parties must be notified within five days. The parties then have 30 days from the date of notification to raise any objection in respect of the court’s decision.

Another problem in this area had been the lack of clear deadlines from the People’s Courts on the issuance of decisions on whether to enforce an award and the actual time limit for completion of enforcement proceedings. The 1995 notice does not set any such deadlines. The various time limits imposed by other relevant Supreme Court notices are not entirely consistent with one and other. Under the SPC draft provisions, the People’s Courts would be obliged to decide whether to enforce an award within six months from the date on which the application for enforcement is accepted. Moreover, the provision states that enforcement proceedings are ‘generally’ expected to be completed within six months after the decision to enforce.

The establishment of such a reporting system and the imposition of time limits represent an effort on the part of the Supreme People’s Court to ensure that the process of international arbitration is permitted to work properly. One of the effects of this system will be to allow the Supreme People’s Court to police the proper implementation of China’s obligations under the New York Convention. However, bearing in mind the importance of CIETAC, it is helpful that the scope of the notice has been broadened so as to police also the enforcement of CIETAC awards.

In light of the notice and given the increased experience of the local courts in enforcing awards, the adverse effects of local protectionism should diminish and the enforcement of arbitral awards become easier.

Execution measures

Provided that the court agrees to recognise and enforce the arbitration award the successful applicant can proceed to take advantage of the various execution measures permitted by law (as described in articles 221-236 of the CPL). These include:

- the freezing and confiscation of bank deposits (the identification of which may be facilitated through investigations made by the court); and
- the sealing up, confiscation, freezing or selling of the respondent's property (again, the courts may assist this process by, for example, issuing a search warrant to enable a search of premises where property is thought to be concealed).

In addition, articles 199-206 of the CPL contain bankruptcy provisions. These apply to all enterprises other than wholly owned state enterprises and provide further means by which the successful party may seek to enforce the arbitration award.

In practice, the People's Courts cannot always be relied on to apply the law. The organisation of the People's Courts and the background of the judges who staff them is explained below.

Inside the People's Courts

Most commercial disputes involving foreign parties are heard in the first instance at the intermediate court level. It is at this level that applications for the enforcement of foreign and foreign-related arbitration awards must be brought. Intermediate courts are located in the municipal or prefectural centres. A party that is dissatisfied with the decision of an intermediate court may appeal to the higher court that is located in the provincial capital of the relevant municipality or prefecture. Beyond that, there is no right of appeal; however, either party may petition the Supreme People's Court to reconsider the case.

Cases are generally heard by a three-judge panel with one judge taking primary responsibility for the case. Cases that are considered either important or complex will additionally be considered by a judicial committee whose decision will be binding on the panel that heard the case.

Many judges have no formal legal training and for some, their background lies in military service or public security. As with other state institutions, each court has a communist party organisation and virtually all judges are party members. However, the profile of judges is gradually changing as law graduates are recruited into the judiciary. The Judges' Law foresees a more professional judiciary. It requires judges to be graduates of tertiary educational institutions in law, or another subject provided that they have otherwise acquired specialised legal knowledge. As to existing judges who do not satisfy these criteria, the law calls for them to undergo appropriate training.

Judges are paid according to the salary scale for local government officials, with the result that their remuneration is far lower than

lawyers in private practice or company executives. For example, in Shenzhen, where judicial salaries are among the highest in the country, the monthly income of judges is in the range of RMB5,000-6,000. Bribery of judges is not unknown and the Supreme People's Court reported that in 2003 approximately 1,450 court personnel had been punished for various offences. In drafting the Judges' Law, the Supreme People's Court had suggested that judges be paid higher salaries as a means of diminishing corruption. However, this suggestion was overruled by the National People's Congress.

Judicial appointments are made by the Local People's Congress (the local legislature), in practice having been cleared by the personnel division of the local communist party organisation. Judges generally work in their home district and will therefore often be well known and connected in the local community.

Cases that involve important local issues are often discussed by the local Communist Party Political-Legal Committee (which typically comprises representatives of the court, procuratorate, public security, state security, judicial bureau, civil affairs, nationality and religious affairs committees and the supervision bureau at that level of the government). The Political-Legal Committee generally rarely involves itself in commercial matters. It is also normal practice and considered acceptable for government officials with an interest in a particular case to make their views on a case known to judicial officials.

A party that cannot obtain relief at the level of the local intermediate court or higher court is entitled to petition the Supreme People's Court in Beijing to reconsider the case and, in a number of reported examples, the Supreme People's Court has overturned the decision of the local court in favour of the foreign party.

Resolving disputes through arbitration outside China

Notwithstanding the recent changes that provide an opportunity to improve the neutrality of CIETAC arbitrations, foreigners will naturally prefer to maximise the prospects of neutrality by opting for arbitration outside China and (if an arbitration institution is to be involved) conducted by an international arbitration institution. In any negotiations the Chinese party will often try to insist on arbitration in China. Which party prevails will usually reflect the relative strength of the parties' respective bargaining positions and the importance the foreign party attaches to the venue of arbitration.

The choice of venue

For any proposed venue it is important to consider, first, in what respects its local laws might affect the arbitration and, second, whether awards made there would be recognised and enforced in other jurisdictions.

Effect of local laws

The local laws of the venue will apply to the arbitration and the following issues will arise.

- Are the local courts empowered to interfere with the arbitration and, if so, in what circumstances?

Local legislation may undermine the arbitral process by allowing appeals against the award (which would reopen the issues in dispute) or by allowing the local courts to interfere with the arbitral process, thereby undermining party autonomy.

Some countries have used the UNCITRAL Model Law as the basis for their local arbitration legislation. The Model Law provides that courts should support the arbitral process by ordering a stay of court proceedings where there is a valid arbitration agreement, and further limits the role of the court in such arbitrations. Countries whose arbitration laws are based on the Model Law are usually suitable venues for international arbitration.

- Are there any local restrictions (for example, with regard to nationality or residency) on the parties' freedom to choose the arbitrators and counsel?

For example, Singapore was for many years shunned by the international arbitration community because of its refusal to allow foreign lawyers to appear in local arbitrations.

Enforcement

How widely an arbitration award can be enforced outside the country in which it is made usually depends on the nationality of the award (ie where it is made) rather than the parties. As indicated

above, the New York Convention is by far the most important international treaty dealing with the recognition and enforcement of arbitration awards.

Many countries that have ratified the New York Convention (including China) have adopted the so-called reciprocity reservation by which they confine their undertaking to enforce foreign arbitration awards to such awards as are made in other Convention countries. In view of the fact that the number of Convention countries is now over 130 this should rarely be an issue.

The geographical location of the arbitration venue should not play an important role in the decision over the choice of venue. Few arbitrations require lengthy hearings and so the additional expense for China disputes of arbitrating in, say, Stockholm as opposed to Hong Kong will often be relatively small.

It is not within the scope of this paper to include a full discussion of the alternative venues, available arbitration institutions and sets of arbitration rules, together with an analysis of their relative merits⁸. However, some of the more common choices are referred to below. Further model arbitration clauses recommended by the various arbitration institutions and organisations referred to below are set out in Appendix B.

Asian venues

There are few venues in Asia that constitute attractive arbitral environments; a current shortlist would include Hong Kong, Kuala Lumpur and Singapore.

Hong Kong

Hong Kong adopted the Model Law in 1990 and there is evidence that it is a popular choice of venue by parties to transactions involving China.

Shortly before the introduction of the Model Law the Hong Kong International Arbitration Centre (HKIAC) was established. The HKIAC offers good facilities for the staging of arbitrations and, through its own set of arbitration rules (which the parties may adopt if they so choose) promotes the UNCITRAL arbitration rules. It is, however, willing to offer its facilities to parties who have chosen to arbitrate under any other set of arbitration rules, institutional or ad hoc. HKIAC is involved in over 200 arbitration cases each year.

⁸ For a more thorough examination of this subject see the *Freshfields Guide to Arbitration and ADR* (Kluwer, 1999).

Where asked by the parties to act as an appointing authority the HKIAC chooses from a panel of 200 names drawn from approximately 23 different nations.

Because it is now part of China, Hong Kong may not appear to represent a truly neutral venue for the settlement of China-related disputes. It is perhaps for this reason that Chinese parties often propose it as a venue when it has been agreed that the arbitration venue should be outside China.

However, examining this from the perspective of a foreign party, any perceived lack of neutrality is probably more illusory than real. The combination of a stable legal environment and the Model Law gives rise to the promise of a high level of party autonomy over the arbitral process. It is unlikely that an arbitral institution or appointing authority called on to appoint a sole or presiding arbitrator in the absence of agreement between the parties would choose an arbitrator who shared the same nationality as either of the parties and, if the HKIAC is chosen as the appointing authority, its current panel of arbitrators provides it with a wide range of nationalities to choose from. Sensitivity over this issue can be dealt with through the addition in the arbitration agreement of a specific provision to the effect that a sole or presiding arbitrator should not have the same nationality as that of either of the parties.

China has not taken steps to alter Hong Kong's current liberal international arbitration regime. China is currently committed to a policy of liberalising its own international arbitration laws and practices, and it would be inconsistent with that policy for it to seek to encourage interference in Hong Kong arbitrations either by the local executive or the courts. Moreover, the HKIAC is constitutionally and financially independent of government.

Indeed, the transfer of sovereignty over Hong Kong from the UK to China has not affected Hong Kong's position as a venue for international arbitration except in relation to China disputes. For the rest of the world apart from China, the enforceability of Hong Kong arbitration awards after the handover has remained unchanged. Hong Kong remains bound by the terms of the New York Convention after the handover, through China's membership.

The real concern for international practitioners in Hong Kong has not been the impartiality of Hong Kong arbitration but rather the enforceability of Hong Kong arbitral awards in China.

Before 1 July 1997, a large number of China disputes were resolved by international arbitration in the territory and the resulting awards were enforceable in China as foreign awards under the New York Convention (with limited grounds for refusal of recognition and

enforcement). After the handover the fear was that, as part of China, Chinese courts would be inclined to regard Hong Kong arbitral awards as domestic, thus enabling the party against whom enforcement was sought to invoke a wide range of grounds on which to challenge enforcement.

The position has now been clarified following years of delay and is reflected both in the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the Arrangement) and the Arbitration (Amendment) Ordinance 2000 in Hong Kong. The cumulative effect of these changes is that:

- an arbitral award made in mainland China may be enforced in the same way as a New York Convention award in Hong Kong, ie without a review of the merits; and
- an arbitral award made in Hong Kong may also be enforced in mainland China on the same grounds as a New York Convention award.

However, there are several important points to note.

- Only arbitral awards made by certain institutions in China are to be enforceable in Hong Kong. These include awards made under the CIETAC rules and by the many domestic arbitration commissions. However, not included are awards made following ad hoc arbitration in China or awards made in China in arbitrations of other institutions such as the ICC. Accordingly the changes confirm the previous position that CIETAC and the domestic arbitration commissions have a virtual monopoly over arbitration within mainland China and that ad hoc and other institutional arbitration is not recognised within mainland China.
- Currently, all arbitration awards made in Hong Kong – whether ad hoc or under the rules of ICC, LCIA or any other body – will be enforceable in China under the Arrangement. However, if (as discussed above) the provision concerning ad hoc arbitration contained in the SPC draft provisions is adopted in its current form, ad hoc awards made in Hong Kong involving a Chinese party will not be enforceable in China.
- The 1995 notice of the Supreme People’s Court, discussed above, was applicable to Hong Kong awards made before 1997. A 2003 notice of the research office of the Supreme People’s Court indirectly indicates that the 1995 notice will be applicable to Hong Kong awards made after the reversion of sovereignty.

It should be noted that a party can always seek to enforce a foreign arbitral award (whether made by CIETAC or otherwise) by starting

fresh proceedings in Hong Kong on the basis that the award constitutes a debt due by the defendant to the plaintiff.

Lastly, the Arbitration Law in Hong Kong may be amended in the near future, which will substantially change the landscape for the law and practice of arbitration in Hong Kong. Not only will the distinction between domestic and international arbitrations be abolished but also important concepts may be introduced in the new law, including:

- duty of confidentiality relating to the arbitral process;
- making of interim orders for protection in the form of an award;
- abolishment of the payment into court procedures;
- procedures dealing with the appointment of two or more than three arbitrators;
- ability of the HKIAC to appoint all three arbitrators where multiple respondents cannot reach agreement on their appointed arbitrator; and
- ability of the parties to opt in and out of certain provisions relating to security for costs, consolidation of arbitrations by the court, and determination of preliminary points of law by the court.

Kuala Lumpur

The Regional Centre for Arbitration Kuala Lumpur (RCAKL) receives only a handful of international arbitration cases each year. Malaysia's arbitration law is modelled on the English Arbitration Act 1950 and therefore contemplates the possibility of significant court interference in the arbitral process.

However, in an important development, the Malaysian Arbitration Act was amended in 1980 to provide for the exclusion of its application to any international arbitration administered by the RCAKL and conducted under the UNCITRAL arbitration rules, or conducted under the arbitration rules of the ICSID. Under these conditions, the Malaysian courts have no jurisdiction to interfere with the arbitral proceedings or to review the award. As in the case of Hong Kong there are no restrictions on the nationality of arbitrators or lawyers.

However, despite the developments, Kuala Lumpur has not developed to challenge Hong Kong and Singapore as a major regional arbitration centre. This may change following the passing of a new Arbitration Act, which came into force early this year. The new Act is largely based on the UNCITRAL Model law.

Singapore

The Singapore International Arbitration Centre (SIAC) has handled an increasing number of international arbitration cases since its establishment in 1991. Local law is based on the UNCITRAL Model Law and, aided by its political and social stability, Singapore is now Hong Kong's strongest regional competitor both for China-related and international arbitration work.

Legislative changes were quickly enacted to reverse the decision in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2SLR762. That decision disapplied the UNCITRAL Model Law and the internationally accepted grounds for setting aside the award and left the parties with the narrower grounds for challenge under the International Arbitration Act. The restriction on representation by foreign lawyers was removed in 1992 for the arbitration of disputes not governed by Singaporean law. Previously, where Singaporean law applies, a foreign lawyer was permitted to appear in the proceedings only if accompanied by a local lawyer. Since September 2004, foreign counsels can appear in arbitration proceedings involving Singapore law without an advocate or solicitor holding a valid Singapore practising certificate or a legal officer.

European venues

Commonly chosen arbitration venues in Europe are as follows.

Stockholm

The neutral venue traditionally most favoured by Chinese parties, largely for historical reasons. The process of arbitration is well understood in Sweden due to a long tradition of settling domestic commercial disputes through arbitration rather than litigation. Sweden's arbitration laws afford a high degree of party autonomy with regard to the arbitral process. A new Arbitration Law, similar in terms to the UNCITRAL Model Law, came into effect on 1 April 1999.

The Arbitration Institute of the Stockholm Chamber of Commerce (Institute) is a well established arbitration institution. The Institute produced new rules effective from 1 April 1999.

Brussels

The Belgian courts have no jurisdiction under any circumstances over international arbitrations held within its territory that do not involve a Belgian national. However, this absence of jurisdiction will not always prove to be a positive attraction. It means, for example, that the courts are unable to interfere even in the face of evidence that an arbitrator has been guilty of accepting bribes; and although the party that is the victim of the corruption should be able to challenge the enforcement of any award made against it on this

ground in the courts of the jurisdiction in which enforcement is sought, it will always be unsatisfactory that the issue cannot be addressed at the pre-award stage.

London

London has a long tradition as a dispute resolution centre for both litigation and arbitration. Legislation governing arbitration was consolidated in a new Act in 1996 having regard to the UNCITRAL Model Law. This considerably strengthens London's claim to be the leading centre for international arbitration. The legislation also reduces the power of the courts to interfere with an arbitration award and allows the parties to exclude any right of appeal to the courts.

Paris

Paris is the home of the ICC, whose Court of Arbitration is by far the most important international arbitral organisation in the world. ICC arbitrations are of course held all over the world but the fact that approximately one quarter of all ICC arbitrations are held in Paris is an indication of the city's popularity as an arbitration centre.

Geneva

Switzerland has long been favoured as an arbitration centre partly because of its stability and political neutrality. Moreover, provided neither party to the arbitration is domiciled or resident in Switzerland, they may by agreement exclude the jurisdiction of the courts to interfere in the arbitral award.

The method of arbitration – institutional or ad hoc

Having decided to arbitrate and having understood the importance of the venue for arbitration, it is appropriate to consider whether the parties wish to arbitrate according to the rules of one of the main international arbitration institutions or whether they would prefer ad hoc arbitration.

Broadly, the choice between ad hoc or institutional arbitration depends on the extent to which the parties wish to have their arbitration supervised by an institution as opposed to running the arbitration themselves. The UNCITRAL rules are the most widely recognised ad hoc arbitration rules.

However, as discussed above, if the provision concerning ad hoc arbitration contained in the SPC draft provisions is adopted in its current form, ad hoc awards made outside China involving a Chinese party will not be enforceable in China.

International arbitration institutions include the following.

The International Chamber of Commerce (ICC)

The International Court of Arbitration of the ICC is the world's leading international arbitration institution. Although it is based in Paris, the Court's membership is drawn from about 50 countries throughout the world and the arbitrations it conducts are held in many different cities. In 1998 its rules were revised to speed up the process of ICC arbitration.

Unique features of the ICC's arbitral process are:

- that the tribunal and parties are required shortly after the start of proceedings to draw up terms of reference, the main purpose of which is to summarise the claims, the issues to be determined (unless this is inappropriate) and to describe the applicable procedural rules; and
- the comprehensive supervision over the proceedings which is exercised by the Court of Arbitration. This is reflected in particular by its scrutiny of awards, by which the ICC seeks to ensure against cases of procedural irregularities.

Critics claim that this constitutes an unnecessary layer of bureaucracy that serves only to cause delay. On the other hand, one of the advantages of ICC arbitration is the international prestige which an ICC award carries and which therefore enhances its enforceability; and it is probably only through the maintenance of the ICC's high level of supervision that this prestige can survive. It is important to appreciate that the ICC's Court of Arbitration does not

decide cases; rather, this role is undertaken by the arbitral tribunals that it appoints.

The parties to an ICC arbitration are required to pay both administrative and arbitrators' fees.

- Administrative fees start at a minimum of US\$2,500, rising according to the amount in issue; so that the fee for a US\$5m claim would be about US\$32,800.
- Arbitrators' fees are, again, based on the amount in issue although in exceptional cases the ICC may depart from its published scales according to the complexity of the issues in dispute, the duration of the proceedings or the amount of time spent by the arbitrators. A minimum of US\$2,500 per arbitrator is paid for matters valued at US\$50,000 or less. Above this amount, minimum and maximum fees per arbitrator are quoted; for example, for a US\$5m matter, the fee is between US\$23,750 and US\$114,600.

Despite its pre-eminent position in the field of international arbitration the ICC has traditionally been shunned by China, largely because of Taiwan's membership of the ICC. This position was remedied in November 1994, when China was admitted as a member. This should result in a greater willingness on the part of Chinese businessmen to agree on ICC arbitration. However, the Arbitration Law contains nothing to resolve the current uncertainty over the status under Chinese law of ICC arbitrations held in China.

The ICC established its first office outside France in Hong Kong in 1997 with the aim of promoting ICC arbitration in Asia. It relocated this office to Singapore with effect from May 2003.

The International Centre for the Settlement of Investment Disputes (ICSID)

The ICSID was established under the 1956 ICSID Convention, which came into effect in October 1966 and is one of the five organisations that make up the World Bank. One of the goals of the ICSID Convention is to establish an effective regime for neutral resolution of investment disputes that is attractive to states and investors alike. To this end, ICSID has promulgated a set of arbitration rules that set out the procedures for the conduct of arbitration proceedings.

To invoke ICSID arbitration, the following criteria must first be fulfilled.

- The dispute must be between a contracting state of the ICSID Convention and the national of another contracting state.

- The parties must have consented to their dispute being submitted to ICSID arbitration. Such consent may arise (i) directly from investor-state contracts containing express reference to ICSID for dispute resolution; or (ii) by reason of indirect consent to ICSID arbitration contained in a bilateral investment treaty (BIT) between a host state and an investor's home state.

- The dispute is a legal dispute arising directly out of an investment.

To date, more than 140 states have signed and ratified the ICSID Convention, including China, which acceded to the Convention in 1994. Additionally, BITs between these states increasingly provide for submission to ICSID arbitration in respect of breaches of treaty protections, which commonly include the commitment:

- not to expropriate or take measures that deprive a foreign investor from the other contracting state of substantially or the whole of the expected economic benefit of its investment without effective compensation;
- to accord full protection and security to foreign investments, including physical protection of real and tangible property;
- to allow free, unrestricted transfers and repatriation of investments and returns;
- not to treat the foreign investor less favourably than that accorded to its domestic investors; and
- not to treat the foreign investor less favourably than an investor from a third state ('most favoured nation treatment').

While China has signed BITs with more than 100 countries, most of these provide that the decision of whether the Chinese government has breached its obligations under a BIT may only be made by a People's Court or a Chinese administrative body. An international arbitral tribunal may only deal with the question of how much compensation is to be paid to the foreign investor, not the issue of liability. When China notified ICSID of its ratification of the Convention, it also did so with the explicit reservation that '...the Chinese government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization'. For these reasons, neither China's membership of the Convention nor its entry into a large number of BITs has to date provided any effective relief to aggrieved foreign investors.

China has, however, recently signed an amended BIT with the Netherlands, which became effective on 1 August 2004. Under the treaty, China has reversed its previous stance and now gives its

unconditional consent to submit, at the request of a Dutch foreign investor, to arbitration before ICSID or an ad hoc tribunal for final determination under UNCITRAL rules of all disputes arising under the BIT. A similar amended BIT between China and Germany has been signed and is expected to come into effect in the not too distant future.

Although the Chinese government argues that the new right of arbitration under the Dutch and German treaties will only be available to investors from those countries, under the 'most favoured nation treatment' enshrined in most BITs, foreign investors from other countries that have entered into these BITs with China should also be entitled to bring claims against the Chinese government by way of ICSID arbitration for having violated substantive rights under the BITs (where the relevant BIT provides for resolution of disputes through ICSID).

The London Court of International Arbitration (LCIA)

Despite the reference to London in its name, the London Court of International Arbitration can lay claim to being a truly international organisation. Its current president is German and its constitution limits the number of UK nationals who may become members of the Court to 25 per cent of the total membership.

As is the case with the ICC, arbitrations under the LCIA rules may be conducted anywhere in the world and it is the arbitral tribunals appointed by the Court rather than the Court itself that decides them.

In contrast to ICC practice, the Court exercises little supervision over arbitrations, preferring to lay greater emphasis on the autonomy of the tribunal. The appointment of arbitrators is, however, given close attention. In view of the fact that it is often difficult to secure agreement between the parties over the choice of a chairman or sole arbitrator, the importance of this feature should not be underestimated.

Unlike the ICC's ad valorem system of calculating administrative and arbitrators' fees, the LCIA bases its fees according to the amount of work done by its staff and the arbitrators respectively (with the exception of a fixed non-refundable registration fee of £1,500). The fee rates for arbitrators shall be from £150 to £350 an hour for meetings and hearings, but in exceptional cases these may be higher or lower. Fees for other work currently range from £100 to £250 an hour, and a sum equivalent to 5 per cent of the fees of the tribunal (excluding expenses) is imposed for the LCIA's general overhead.

The American Arbitration Association (AAA)

The AAA is one of the most prominent national arbitration institutions. Given the strength of US business interests overseas, its international division – the International Centre for Dispute Resolution (ICDR) – handles significant numbers of international arbitrations. The ICDR updated the international arbitration rules in 2005 and the AAA issued new commercial arbitration rules in 2005.

Ad hoc arbitral rules

The UNCITRAL arbitration rules

The UNCITRAL arbitration rules were developed in 1976 by the United Nations Commission for International Trade Law and are intended for use by parties who wish to hold ad hoc arbitrations (in other words, arbitrations that are conducted without the supervision of an institution such as those described above).

In drafting an arbitration clause that refers to these rules the parties should ensure that they identify an appointing authority. For example if the arbitration were to be held in Hong Kong or Kuala Lumpur, the parties might agree on the HKIAC or RCAKL respectively as appointing authorities. Alternatively the parties may decide to nominate one of the permanent international institutions such as the ICC or LCIA, both of which have published model clauses and rules adopted for this purpose.

The UNCITRAL arbitration rules have been adopted and promoted by certain national arbitration institutions, HKIAC and RCAKL being notable examples.

Appendix A

CIETAC arbitration fee schedule

Effective as from 1 May 2005 in Renminbi (RMB)

(Applicable to the first two types of cases referred to in article 3 of the CIETAC arbitration rules)

Amount of claim (RMB)	Amount of fee (RMB)
1,000,000 or less	3.5 per cent of the claimed amount, minimum 10,000
1,000,000 to 5,000,000	35,000 plus 2.5 per cent of the excess over 1,000,000
5,000,000 to 10,000,000	135,000 plus 1.5 per cent of the excess over 5,000,000
10,000,000 to 50,000,000	210,000 plus 1 per cent of the excess over 10,000,000
50,000,000 or more	610,000 plus 0.5 per cent of the excess over 50,000,000

An additional amount of RMB10,000 yuan is also charged upon acceptance of a case as a registration fee.

Arbitration fee schedule for domestic cases

(Applicable to the last four types of cases referred to in article 2 of the CIETAC arbitration rules)

Registration fee

Amount of claim (RMB)	Amount of fee (RMB)
1,000 or less	Minimum 100
1,001 to 50,000	100 plus 5 per cent of the excess over 1,000
50,001 to 100,000	2,550 plus 4 per cent of the excess over 50,000
100,001 to 200,000	4,550 plus 3 per cent of the excess over 100,000
200,001 to 500,000	7,550 plus 2 per cent of the excess over 200,000
500,001 to 1,000,000	13,550 plus 1 per cent of the excess over 500,000
1,000,001 or more	18,550 plus 0.5 per cent of the excess over 1,000,000

Handling fee

Amount of claim (RMB)	Amount of fee (RMB)
50,000 or less	Minimum 1,250
50,000 to 200,000	1,250 plus 2.5 per cent of the excess over 50,000
200,000 to 500,000	5,000 plus 2 per cent of the excess over 200,000
500,000 to 1,000,000	11,000 plus 1.5 per cent of the excess over 500,000
1,000,000 to 3,000,000	18,500 plus 0.5 per cent of the excess over 1,000,000
3,000,000 to 6,000,000	28,500 plus 0.45 per cent of the excess over 3,000,000
6,000,000 to 10,000,000	42,000 plus 0.4 per cent of the excess over 6,000,000
10,000,000 to 20,000,000	58,000 plus 0.3 per cent of the excess over 10,000,000
20,000,000 to 40,000,000	88,000 plus 0.2 per cent of the excess over 20,000,000
40,000,000 or more	128,000 plus 0.15 per cent of the excess over 40,000,000

Financial arbitration fee schedule

Amount of claim (RMB)	Amount of fee (RMB)
1,000,000 yuan or less	1 per cent of the claimed amount, minimum 5,000 yuan
1,000,000 to 5,000,000 yuan	10,000 yuan plus 0.8 per cent of the amount above 1,000,000 yuan
5,000,000 to 50,000,000 yuan	42,000 yuan plus 0.6 per cent of the amount above 5,000,000 yuan
50,000,000 yuan or more	312,000 yuan plus 0.5 per cent of the amount above 50,000,000 yuan

Upon acceptance of a case, an additional RMB10,000 yuan is also charged as a registration fee.

Appendix B

We set out below the model clauses recommended by some of the institutions and organisations referred to above. While specialist advice should always be obtained before finalising the relevant dispute resolution clause, in general we recommend that the clauses below should be amended (to the extent necessary) as follows:

- to ensure that the clause is as widely drawn as possible, the ICC and the LCIA clauses should refer all ‘disputes, controversies or claims’ to arbitration, so as to neutralise any argument as to arbitral jurisdiction, for example over undisputed claims; and
- provision should also be made for:
 - the number of arbitrators (normally one or three);
 - the place of the arbitration;
 - the language of the arbitration; and
 - the governing law of the contract.

We have also provided below certain other amendments to each specific clause that should be considered.

American Arbitration Association

‘Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association.’

The parties may wish to consider adding:

- a The number of arbitrators shall be ... [one or three];
- b The place of arbitration shall be ... [city and/or country]; and
- c The language of the arbitration shall be...’.

Hong Kong International Arbitration Centre

- a Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.
- b The appointing authority shall be the Hong Kong International Arbitration Centre.

- c The place of arbitration shall be in Hong Kong at the Hong Kong International Arbitration Centre (HKIAC).
- d There shall be only one arbitrator⁹.
- e Any such arbitration shall be administered by HKIAC in accordance with the HKIAC Procedures for Arbitration in force at the date of this contract including such additions to the UNCITRAL Arbitration Rules as are therein contained¹⁰.
- f The language(s) to be used in the arbitral proceedings shall be...'

ICC

'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.'

Apart from the specific changes noted on the preceding page, we recommend that whenever the ICC model clause is used, it should be amended so that the words 'one or more arbitrators' should, if possible, be reduced to a positive choice of 'a sole arbitrator' or 'three arbitrators'.

ICSID

'The parties hereto consent to submit to the International Centre for Settlement of Investment Disputes any dispute relating to or arising out of this Agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.'

The ICSID mechanism is complex. ICSID has issued a special publication (Doc. ICSID /5/Rev.1) containing a number of highly refined additional model clauses adapted to different circumstances (consent in anticipation of subsequent ratification by a state which has not ratified the ICSID Convention; special clauses relating to the nature of the dispute; special clauses relating to contracts signed by government agencies or subdivisions; deemed nationality of the

⁹ This sentence must be amended if a panel of three arbitrators is required.

¹⁰ This sentence may be deleted if administration by the HKIAC is not required. If it is retained, the HKIAC will then act as a clearing house for communications between the parties and the arbitral tribunal; liaise with the arbitral tribunal and the parties on timing of meetings etc; will hold deposits from the parties; and assist the tribunal with any other matters required. Parties should also consider varying the UNCITRAL majority decision rule, as suggested in the text following the UNCITRAL model clause below.

investor; preservation of the rights of the investor after compensation; exhaustion of local remedies; and so on).

It is no coincidence that many ICSID arbitrations have immediately run into jurisdictional objections that could have been avoided by appropriate drafting. We therefore recommend that no ICSID arbitration clause should be agreed without taking specialist advice.

LCIA

‘Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The place of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].’

If the parties wish to have a tribunal of three arbitrators appointed, the relevant part of the clause should be amended to read:

‘The tribunal shall consist of three arbitrators. The parties shall each be entitled to nominate one arbitrator, the third arbitrator being appointed by the [President [or a Vice President] of the LCIA] [two party nominated arbitrators].’

Singapore International Arbitration Centre

‘Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in [Singapore] in accordance with the Arbitration Rules of Singapore International Arbitration Centre (‘SIAC Rules’) for the time being in force which rules are deemed to be incorporated by reference in this clause.

Parties may add:

The Tribunal shall consist of ... arbitrator(s) to be appointed by [the Chairman of SIAC].

The governing law of this contract shall be the substantive law of ...

The language of the arbitration shall be ...’

Stockholm Chamber of Commerce

‘Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof,

shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.’

The parties are advised to make the following additions to the clause, as required:

‘The arbitral tribunal shall be composed of ... arbitrators (a sole arbitrator).

The place of arbitration shall be ...

The language to be used in the arbitral proceedings shall be ...’

Note: It would be rare for an arbitration under these rules to take place outside Sweden; indeed the reason for choosing the Stockholm Institute has generally been thought to be Sweden’s neutrality in the arbitration context.

UNCITRAL

‘Any dispute, controversy or claim arising out of or relating to this contract, or the breach termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.’

Parties may wish to consider adding:

- a The appointing authority shall be ... (name of institution or person);
- b The number of arbitrators shall be ... (one or three);
- c The place of arbitration shall be (town or country);
- d The language(s) to be used in the arbitral proceedings shall be ...’

If the parties wish the appointing authority to be the ICC (rather than LCIA), the appropriate wording (which is recommended by the ICC to deal with the special features of the ICC’s internal structure) should, instead of sub-clause (a) above, be as follows:

‘The appointing authority shall be the ICC acting in accordance with the rules adopted by the ICC for this purpose.’

Consideration may be given to varying the UNCITRAL rules (which absolutely require majority awards) by providing as follows:

‘When three arbitrators have been appointed, the award is given by a majority decision. If there be no majority, the award shall be made by the Chairman of the arbitral tribunal alone.’

It should be noted that parties who favour the UNCITRAL arbitration rules but are uncomfortable with the notion of ad hoc arbitration may refer to an institution as an administering rather than merely as an appointing authority. The ICC does not act in such a role, but other institutions will do so. The LCIA has made it

clear that it is willing to administer arbitrations under the UNCITRAL rules, and has published explanations of how it acts in such circumstances. The LCIA suggests that for those purposes the following be included in addition to clause (a) above:

‘Any such arbitration shall be administered by the LCIA in accordance with the UNCITRAL Arbitration Rules in force at the date of this contract. Unless the arbitral tribunal directs otherwise all communications between the parties and the arbitral tribunal (except at hearings and meetings) shall be made through the LCIA. Any such communications shall be deemed received by the addressee when received by the LCIA. When passed on by the LCIA to any party such notices or communications will be sent to the address of that party specified in the Notice of Arbitration or such other address as may have been notified in writing by that party to the LCIA.’

Given the absence of any express language in the UNCITRAL rules, it is advisable to add a specific waiver of rights to appeal, etc along the following lines (modelled on the equivalent LCIA provision):

‘By agreeing to arbitration pursuant to this clause, the parties waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.’

Appendix C

Addresses of arbitral institutions and other organisations referred to in the text.

American Arbitration Association (AAA)

335 Madison Avenue
Floor 10
New York, NY 10017-4605
US

T +1 212 716 5800

F +1 212 716 5905

W adr.org

China International Economic and Trade Arbitration Commission (CIETAC)

6th Floor, Golden Land Building
32, Liang Ma Qiao Road
Chaoyang District
Beijing 100016
China

T +86 10 6464 6688

F +86 10 6464 3500 /+86 10 6464 3520

W cietac.org.cn

Hong Kong International Arbitration Centre (HKIAC)

38th Floor, Two Exchange Square
8 Connaught Place
Hong Kong SAR
China

T +852 2525 2381

F +852 2524 2171

W hkiac.org

International Centre for Settlement of Investment Disputes (ICSID)

1818 H Street NW
Washington DC 20433
US

T +1 202 458 1534

F +1 202 522 2615

W worldbank.org/icsid/

International Chamber of Commerce (ICC)

International Court of Arbitration
38 cours Albert 1er
75008 Paris
France

T +33 1 49 53 29 05

F +33 1 49 53 29 29

W iccwbo.org

Kuala Lumpur Regional Centre for Arbitration (KLRC)

12 Jalan Conlay
50450 Kuala Lumpur
Malaysia

T +60 3 2142 0103 /+60 3 2142 0702
F +60 3 2142 4513
W rcakl.org.my

London Court of International Arbitration (LCIA)

70 Fleet Street
London EC4Y 1EU
UK

T +44 20 7936 7007
F +44 20 7936 7008
W lcia-arbitration.com

Singapore International Arbitration Centre (SIAC)

City Hall
3 St Andrew's Road
Singapore 178958
Singapore

T +65 6334 1277
F +65 6883 0823
W siac.org.sg

Stockholm Chamber of Commerce (SCC)

Arbitration Institute
PO Box 16050
SE-103 21 Stockholm
Sweden

T +46 8 555 100 50
F +46 8 566 316 50
W sccinstitute.com/uk/home/

**United Nations Commission on International Trade Law
(UNCITRAL)**

Vienna International Centre
PO Box 500
A-1400 Vienna
Austria

T +43 1 26060 4060
F +43 1 26060 5813
W uncitral.org

<p>AMSTERDAM Apollolaan 151 1077 AR Amsterdam T + 31 20 485 7000 F + 31 20 485 7001</p>	<p>DUBAI 42nd floor Emirates Towers PO Box 31303 Dubai T + 971 4 319 7427 F + 971 4 319 7474</p>	<p>HONG KONG 11th floor Two Exchange Square Hong Kong T + 852 2846 3400 F + 852 2810 6192</p>	<p>ROME Piazza di Monte Citorio 115 00186 Rome T + 39 06 695 331 F + 39 06 695 33800</p>
<p>BARCELONA Mestre Nicolau 19 08021 Barcelona T + 34 93 363 7400 F + 34 93 419 7799</p>	<p>DÜSSELDORF Feldmühleplatz 1 40545 Düsseldorf T + 49 211 49 79 0 F + 49 211 49 79 10 3</p>	<p>LONDON 65 Fleet Street London EC4Y 1HS T + 44 20 7936 4000 F + 44 20 7832 7001</p>	<p>SHANGHAI 34th floor Jinmao Tower 88 Century Boulevard Shanghai 200121 T + 86 21 5049 1118 F + 86 21 3878 0099</p>
<p>BEIJING 3705 China World Tower Two 1 Jianguomenwai Avenue Beijing 100004 T + 86 10 6505 3448 F + 86 10 6505 7783</p>	<p>Mailing address Postfach 10 17 43 40008 Düsseldorf</p>	<p>MADRID Fortuny 6 28010 Madrid T + 34 91 700 3700 F + 34 91 308 4636</p>	<p>SINGAPORE Freshfields Drew & Napier 20 Raffles Place #18-00 Ocean Towers Singapore 048620 T + 65 6535 6211 F + 65 6533 5007</p>
<p>BERLIN Potsdamer Platz 1 10785 Berlin T + 49 30 20 28 36 00 F + 49 30 20 28 37 66</p>	<p>FRANKFURT AM MAIN Taunusanlage 11 60329 Frankfurt am Main T + 49 69 27 30 80 F + 49 69 23 26 64</p>	<p>MILAN Via dei Giardini 7 20121 Milan T + 39 02 625 301 F + 39 02 625 30800</p>	<p>TOKYO Ark Mori Building 18F 1-12-32 Akasaka Minato-ku Tokyo 107-6018 T + 81 3 3584 8500 F + 81 3 3584 8501</p>
<p>BRATISLAVA Laurinská 12 81101 Bratislava T + 421 2 5413 1121 F + 421 2 5413 1123</p>	<p>HAMBURG Alsterarkaden 27 20354 Hamburg T + 49 40 36 90 60 F + 49 40 36 90 61 55</p>	<p>MOSCOW Kadashevskaya nab 14/2 119017 Moscow T + 7 495 785 3000 F + 7 495 785 3001</p>	<p>VIENNA Seilergasse 16 1010 Vienna T + 43 1 515 15 0 F + 43 1 512 63 94</p>
<p>BRUSSELS Bastion Tower Place du Champ de Mars/Marsveldplein 5 1050 Brussels T + 32 2 504 7000 F + 32 2 504 7200</p>	<p>Mailing address Postfach 30 52 70 20316 Hamburg</p>	<p>MUNICH Prannerstrasse 10 80333 Munich T + 49 89 20 70 20 F + 49 89 20 70 21 00</p>	<p>WASHINGTON Freshfields Bruckhaus Deringer LLP 701 Pennsylvania Avenue, NW Suite 600 Washington, DC 20004-2692 T + 1 202 777 4500 F + 1 202 777 4555</p>
<p>BUDAPEST Oppenheim és Társai Freshfields Bruckhaus Deringer 1053 Budapest Károlyi Mihály u. 12. T + 36 1 486 22 00 F + 36 1 486 22 01</p>	<p>HANOI #05-01 International Centre 17 Ngo Quyen Street Hanoi T + 84 4 8247 422 F + 84 4 8268 300</p>	<p>NEW YORK Freshfields Bruckhaus Deringer LLP 520 Madison Avenue 34th floor New York, NY 10022 T + 1 212 277 4000 F + 1 212 277 4001</p>	<p>14706</p>
<p>COLOGNE Heumarkt 14 50667 Cologne T + 49 221 20 50 70 F + 49 221 20 50 79 0</p>	<p>HO CHI MINH CITY #1108 Saigon Tower 29 Le Duan Boulevard District 1 Ho Chi Minh City T + 84 8 8226 680 F + 84 8 8226 690</p>	<p>PARIS 2 rue Paul Cézanne 75008 Paris T + 33 1 44 56 44 56 F + 33 1 44 56 44 00</p>	