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INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA: HISTORY, NEW DEVELOPMENTS, AND CURRENT PRACTICE

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INTRODUCTION

Since officially "opening its doors" to international trade in 1979, the People's Republic of China (PRC) has become one of the world's major trading countries[1] as well as one of the largest recipients of foreign investment.[2] Corresponding to such rapid growth in international trade and transactions has been an increase in the number of international commercial disputes between Chinese and foreign parties.

In the PRC, as in many other countries, there are typically four ways to resolve disputes. They are: negotiation, mediation or conciliation, arbitration, and litigation. Negotiation and mediation often are unenforceable, and litigation can be time consuming and very expensive. Many parties, therefore, consider arbitration to be

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1. China's total trade account for 1994 will be more than $235 billion. Exports will account for approximately $120 billion; imports for approximately $114 billion. Joseph Kahn, *China Fails to Curb its Runaway Growth*, WALL ST. J., Jan. 3, 1995, at A6. In early 1994, the Chinese Premier announced that China would import $1 trillion worth of goods from foreign countries through the year 2000. Liu Litian, *Helping Each Other, Benefitting Each Other, and Developing Together*, PEOPLE'S DAILY (Overseas Edition), Dec. 20, 1994, at 2.

2. According to the 1994 Investment Report from the World Bank, China attracted the second highest amount of foreign investment of any country in 1993. Liu, *supra* note 1. Through the third quarter in 1994, foreign investment totaled over $80 billion. *Id.*

the most efficient manner to resolve commercial disputes.[3]

On August 31, 1994, the Ninth Session of the Standing Committee of the Eighth National Congress of the PRC adopted the Arbitration Law of the PRC (Arbitration Law).[4] Effective September 1, 1995, the Arbitration Law became the PRC's first law specifically enacted to legislate domestic and international arbitration. The Arbitration Law appears to be a significant measure toward further normalization of economic relationships between Chinese and foreign parties.

This Article briefly examines the history of international commercial (non-maritime) arbitration in the PRC. Then, this Article notes certain recent developments in Chinese arbitration. Finally, this Article explores several practical issues related to arbitration in the PRC.

I. HISTORY OF ARBITRATION

A. FTAC/FETAC

Prior to the adoption of the Arbitration Law, no PRC statute was specifically enacted to regulate arbitration with foreign parties. Rather, arbitration appeared to be regulated by a combination of central government decrees, statutes referring to arbitration, regulations enacted by arbitration authorities, and common practice.

The post-revolution Chinese government first addressed arbitration by creating the Foreign Trade Arbitration Commission (FTAC) in a decision which the Government Administration Council of the Chinese Central People's Government issued on May 6, 1954.[5] The FTAC, under the China Council for the Promotion of International Trade (the CCPIT),[6] acquired jurisdiction to resolve foreign trade disputes relating to "contracts, agreements, and/or other documents between disputing parties."[7] Consistent with arbitration legislation in most other countries, the decision further provided that arbitration awards decided by appointed arbitrators would be final, and that the disputing parties could not bring an appeal for revision before any court or other organization. However, the parties to arbitration could request Chinese courts to en-

3. GE LIU, PRINCIPLES OF ECONOMIC LAW 421, 422 (Yang Zixuan, 1987).

4. For a copy of China's new arbitration law, see *Arbitration Law of the PRC*, PEOPLE'S DAILY (Overseas Edition), Sept. 2, 1994, at 2.

5. Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of A Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade, 1 STAT. AND REG. OF THE PRC 540506 (1987) [hereinafter *Decision*].

6. *Id.* § 1.

7. *Id.* § 2.

force any such award.[8]

The decision further provided that the parties could jointly choose a sole arbitrator from a panel made up by the CCPIT and the body eventually established as FTAC. Alternatively, each party could choose one arbitrator from such a panel and then the chosen arbitrators would jointly select a chief arbitrator, also from such a panel.[9] Furthermore, the arbitration commission was granted the authority to prescribe provisional measures concerning materials, property rights, and/or other matters relating to the parties.[10] Finally, the decision imposed a requirement that the arbitration fee could not exceed one percent of the amount claimed.[11] FTAC's jurisdiction was limited solely to disputes with foreign parties. As a relatively small number of such transactions existed at the time, FTAC arbitrated only thirty-eight cases, and mediated only sixty others between 1956 and 1979.[12]

On February 26, 1980, the China State Council issued a notice authorizing FTAC to change its name to the Foreign Economic and Trade Arbitration Commission (FETAC) and granted that body the authority to accept a wider variety of arbitration cases.[13] As a result, FETAC also began to consider arbitration cases arising from various economic cooperative ventures with foreign entities such as joint ventures, foreign investment projects, and loans from foreign banks.

On June 21, 1988, the State Council again changed the arbitration commission's name to the China International Economic and Trade Arbitration Commission (CIETAC),[14] as the organization is now known, and further broadened its jurisdiction to cover all disputes arising from international economic and trade transactions.

B. CIETAC

Currently, CIETAC is the sole organization in the PRC authorized to hear non-maritime commercial arbitrations between Chinese and foreign parties.[15] CIETAC has become one of the

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8. *Id.* §§ 10, 11.

9. *Id.* § 5.

10. *Id.* § 8.

11. *Decision, supra* note 5, at 9.

12. TAO CHUNMING & WANG SHENGCHANG, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION — PROCEDURE, THEORY AND PRACTICE 3-8 (1992).

13. *State Council's Notice Concerning the Conversion of the Foreign Economic and Trade Arbitration Commission* (Feb. 26, 1980).

14. *The State Council's Official Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Amendment of Its Arbitration Rules* (June 21, 1988).

15. CIETAC has also handled several international arbitrations between foreign

largest commercial arbitration centers in the world.[16] Since 1990, CIETAC has accepted over 1,500 arbitrations, including 486 arbitrations in 1993 and over 500 arbitrations in 1994.[17]

CIETAC's growth as an international commercial arbitration center can be attributed to a number of factors. First, as stated, the Chinese government has authorized CIETAC as the sole international commercial arbitration center in China. Second, a number of regulations and provisions under Chinese law specifically recommend that Chinese and foreign parties involved in certain transactions send their disputes to CIETAC for arbitration. Third, not surprisingly, along with the dramatic increase in international transactions in China has come a corresponding increase in the number of arbitrable disputes. Finally, Chinese parties, who generally have little experience with international business practices, are not very familiar with other international arbitration forums such as the International Chamber of Commerce in Paris or the Arbitration Institute of the Stockholm Chamber of Commerce. Consequently, Chinese parties dealing with foreigners often attempt to include a standard arbitration clause in their contracts naming CIETAC as the venue for arbitration. As CIETAC gains experience in international arbitration matters and educates more arbitrators in the field of international arbitration, more foreign parties appear willing to name CIETAC as the designated arbitration commission.

Currently, more than fifty percent of the arbitration cases which CIETAC accepts relate to international trade disputes. Approximately one-third are equity and contract joint venture disputes. Most of the remaining cases involve disputes over intellectual property, construction contracts, processing production, or compensation.[18] In the near future, a sharp increase is expected in the number of arbitrations relating to securities and real estate matters.[19]

In addition to CIETAC's headquarters in Beijing, there are two sub-commissions located in Shanghai and in the Shenzhen Special Economic Zone. CIETAC's Shenzhen Sub-Commission

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parties in recent years. CIETAC & CMAC (China Maritime Arbitration Commission), YEARBOOK OF CHINA INTERNATIONAL COMMERCIAL ARBITRATION 4 Chinese Version (CV), 73 English Version (EV) (1992) [hereinafter 1992 YEARBOOK].

16. CHINA LEGAL SYSTEM J., Sept. 25, 1990. The largest center for international commercial arbitration is the International Chamber of Commerce in Paris. *Id.*

17. Interview with Wang Shengchang, Arbitrator of CIETAC and Conciliator of Beijing Conciliation Center, in Beijing, China (Nov. 14, 1994).

18. Interview with Professor Li Fang, Professor at Peking University Law School and CIETAC Arbitrator, in Beijing, China (Nov. 12, 1994); Interview with Lu Song, Professor at Beijing Diplomatic College, and CIETAC Arbitrator, in Beijing, China (Nov. 12, 1994).

19. Interview with Wang Shengchang, *supra* note 17.

accepted 57 arbitration cases in 1993,[20] and approximately 120 cases in 1994.[21] CIETAC's Shanghai Sub-Commission accepted forty arbitration cases in 1993,[22] and approximately sixty cases in 1994.[23]

C. Laws and Regulations

Since 1979, the PRC has enacted a number of laws and regulations directly or indirectly relating to international commercial arbitration in China, including the Law of the PRC on Sino-Foreign Joint Equity Enterprises.[24] This was the first statute to address arbitration as a means of resolving disputes between Chinese and foreign parties.[25] More important, however, was the Civil Procedure Law of the PRC (Trial Civil Procedure Law), provisionally adopted on March 8, 1982.[26] That statute was the first Chinese law to govern civil procedure in the PRC since the 1949 Communist Revolution. Although adopted on a preliminary basis, the Trial Civil Procedure Law remained in effect until the passage of the Civil Procedure Law of the PRC in 1991.

Under the Trial Civil Procedure Law, the Chinese courts have no jurisdiction over disputes where the parties agree to arbitrate the matter. For purposes of that law, there is no distinction between original agreements to arbitrate and subsequent agreements after disputes arise. Furthermore, all disputes with foreign parties would be arbitrable in the PRC by the Chinese foreign arbitration organization, then known as FETAC.[27] That statute also provided that if a party failed to abide by a FETAC arbitration award, the other party could apply to a Chinese court for enforcement of that award.[28] Many Chinese experts in interna-

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20. CIETAC & CMAC, YEARBOOK OF CHINA INTERNATIONAL COMMERCIAL ARBITRATION 70 Chinese Version (CV), 182 English Version (EV) (1993-94) [hereinafter 1993 YEARBOOK].

21. Interview with Lu Song, *supra* note 18; Interview with Li Fang, *supra* note 18.

22. 1993 YEARBOOK, *supra* note 20, at 182.

23. Interview with Li Fang, *supra* note 18; Interview with Lu Song, *supra* note 18; *see also* 1993 YEARBOOK, *supra* note 20, at 182.

24. Law of the PRC on Sino-Foreign Joint Equity Enterprises, Act of July 1, 1979, as amended April 4, 1990, 1 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 6-500, at 7,801 [hereinafter *Sino-Foreign Joint Equity Enterprises*].

25. *Id.* art. 14, ¶ 6-500(14), at 7,807. "Any dispute arising between joint enterprise partners which the board of directors is unable to settle through consultation may be resolved through conciliation or arbitration by a Chinese arbitral body or through arbitration conducted by any arbitral body agreed on by the joint enterprise partners." *Id.*

26. The Civil Procedure Law of the PRC (Provisional), Act of Mar. 8, 1982, 1 STAT. AND REG. OF THE PRC 820308.

27. *Id.* ch. XX, art. 192, at 20.

28. *Id.* ch. XX, art. 195, at 21.

tional arbitration thought these provisions of the Trial Civil Procedure Law constituted a milestone in Chinese international arbitration history.[29]

The PRC also adopted or issued the following laws and regulations relating to international arbitration:

(1) On January 30, 1982, the State Council issued Regulations of the PRC on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises.[30] These Regulations provided that any dispute between a foreign and Chinese enterprise during a cooperative exploitation must be resolved through friendly consultation. If the parties failed to resolve a dispute in this manner, they could apply to FETAC for mediation or arbitration.

(2) On September 20, 1983, the State Council issued Regulations for the Implementation of the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment.[31] These Regulations provided that parties to a joint venture could agree to submit their disputes to FETAC arbitration, or if the parties so desired, to an arbitration organization located either in the foreign party's home jurisdiction or in any other mutually agreed upon jurisdiction.

(3) On March 21, 1985, The National People's Congress adopted the Foreign Economic Contract Law of the PRC.[32] This Law provided that parties in a contractual dispute could, according to the arbitration clause or a subsequent written agreement, submit the dispute to arbitration proceedings either at a Chinese or non-Chinese arbitration organization.

(4) On April 13, 1988, The National People's Congress adopted the Law of the PRC Law on Sino-Foreign Co-Operative Enterprises.[33] This Law provided that the disputing parties could file a lawsuit with a Chinese court either if there was not an arbitration clause in their contract, or if they could not reach a subsequent written agreement to resort to arbitration.

(5) On April 22, 1993, the State Council issued Provisional Regulations on the Administration of the Issuing and Trading of

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29. Interview with Wang Shengchang, *supra* note 17.

30. Regulations of the PRC on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, Act of Jan. 12, 1982, art. 27, 2 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 14-560(27), at 17,935.

31. Regulations for the Implementation of the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment, Act of Sept. 20, 1983, art. 110, 1 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 6-550, at 7,971.

32. Foreign Economic Contract Law of the PRC, Act of Mar. 21, 1985, art. 37, 1 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 5-550, at 6,635 [hereinafter *Foreign Contract Law*].

33. Law of the PRC on Sino-Foreign Co-Operative Enterprises, Act of Apr. 13, 1988, art. 26, 1 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 6-100, at 7,561.

Stocks.[34] These Regulations covered disputes relating to the issuance and trading of securities, and specified that parties to a contract could include an arbitration clause in their contract requiring that disputes be settled by mediation or arbitration by an approved arbitration organization. In addition, disputes between securities institutions, or between a securities institution and a stock exchange, had to be submitted to an arbitration organization formed or approved by the Securities Committee of the State Council (SCSC). For the present, the SCSC has designated CIETAC as such an arbitration organization to be used for securities disputes.[35]

D. Prior Arbitration Rules

Prior to the adoption of CIETAC's current arbitration rules, the following two sets of procedural rules governed international commercial arbitrations in the PRC: (1) the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, adopted on March 31, 1956, at the Fourth Session of the CCPIT (the 1956 Rules);[36] and (2) the Arbitration Provisions of the China International Economic and Trade Arbitration Commission, adopted on September 12, 1988, at the Third Session of the First Meeting of the CCPIT (the 1988 Rules).[37]

1. The 1956 Rules

The CCPIT drafted the 1956 Rules based on the twelve Sections of the May, 1954, Central Government Decision which established FTAC.[38] The 1956 Rules contained thirty-eight Articles, most of which mirrored the arbitration rules of the Soviet Union because the PRC lacked practical experience in international commercial arbitration at that time.

In retrospect, the 1956 Rules appear very simple and closely

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34. Provisional Regulations on the Administration of the Issuing and Trading of Stocks, Act of Apr. 22, 1993, art. 79-80, 2 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 13-574, at 17,423.

35. Interview with Li Fang, *supra* note 18; Interview with Lu Song, *supra* note 18.

36. Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, Act of March 31, 1956, 2 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 10-500, at 12,801 [hereinafter *Rules of Procedure of FTAC*].

37. Arbitration Provisions of the China International Economic and Trade Arbitration Commission, Act of Sept. 12, 1988, 2 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 10-505, at 12,821 [hereinafter *Arbitration Provisions*].

38. See *Decision*, *supra* note 5 and accompanying text for a discussion of the decision.

resemble the standards and principles which were then commonly used in international practice. FTAC was granted jurisdiction over all international commercial arbitrations.[39] In general, the disputing parties were each to select an arbitrator from among FTAC's membership, and then the two chosen arbitrators jointly selected the third and chief arbitrator, also a member of FTAC.[40] The disputing parties then had the responsibility to provide evidence to support their arguments and claims.[41] Any arbitration award required a majority vote of the tribunal,[42] and once rendered, the award was deemed final.[43] Finally, Chinese courts had the authority to enforce the arbitration award upon request by the prevailing party.[44]

2. The 1988 Rules

The 1956 Rules remained in effect for thirty-two years, during which time (especially after 1985) China gained substantial experience in international commercial arbitration. In the meantime, significant development occurred in international commercial arbitration practice and theory outside of the PRC.[45]

In an effort to maintain modern arbitration practice and reflect certain changes resulting from the adoption of the Trial Civil Procedure Law in 1982, the CCPIT adopted new arbitration rules on September 12, 1988, known as the Arbitration Provisions of the China International Economic and Trade Arbitration Commission.[46] These new rules became effective on January 1, 1989.[47] The 1988 Rules contained three Chapters and forty-three Articles. These changes and improvements were designed to align arbitration in the PRC with international standards. One of the

39. *Rules of Procedure of FTAC*, *supra* note 36, art. 3, ¶ 10-500, at 12,801.
40. *Id.* arts. 4, 9, 11, ¶ 10-500, at 12,803-05.
41. *Id.* art. 12, ¶ 10-500, at 12,805.
42. *Id.* art. 15, ¶ 10-500, at 12,803-05.
43. *Id.* at 12,809.
44. *Id.* art. 32, ¶ 10-500, at 12,809.
45. For a discussion of major documents related to international commercial arbitration, see KARL JOANSON, INTERNATIONAL CIVIL AND COMMERCIAL CONVENTIONS AND PRACTICES 1849-71. During the 30-year period (1958-1988), international organizations adopted or published the following major documents related to international commercial arbitration: (1) UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (June 10, 1958); (2) Convention on International Commercial Arbitration in Europe (Apr. 21, 1961); (3) UN Model Law of International Commercial Arbitration (June 21, 1985); (4) Mediation and Arbitration Rules of International Chamber of Commerce (June 1, 1975 and amended Jan. 1, 1988); (5) Arbitration Rules of London Institute of International Arbitration (Jan. 1, 1985); (6) Arbitration Rules of UN International Trade Law Commission (1976). *See also* LIU, *supra* note 3, at 428-33.
46. *Arbitration Provisions*, *supra* note 37.
47. *Id.* art. 43, ¶ 10-505, at 12,853.

more important changes in the 1988 Rules was the possibility that foreigners could appear on the list of arbitrators made available by CIETAC. While the PRC had not previously allowed foreigners to become designated arbitrators, the 1988 Rules specifically permitted the appointment by the CCPIT of Chinese and foreign persons with professional knowledge and actual experience in fields such as international economics and trade, science, technology, and law.[48] Interestingly, the 1988 Rules also provided that the Chairman of CIETAC was to appoint the chief arbitrator of each tribunal. This represented a considerable change from the 1956 Rules, which provided that the two arbitrators chosen by the disputing parties would select the chief arbitrator.[49] This provision was not only a departure from the 1956 Rules, but also from most other countries' international commercial arbitration rules.[50] In all likelihood, the 1988 Rules included that provision to ensure that there would be a majority of Chinese arbitrators on any tribunal which might include a foreign national.

Conforming to international standards, the 1988 Rules also provided that if any arbitrator had an interest in the dispute being decided, thus creating a conflict, he was to notify CIETAC and excuse himself from the dispute.[51] Furthermore, the 1988 Rules provided that the disputing parties could submit a written application to CIETAC requesting to remove an interested arbitrator from the case.[52] One other noteworthy change was the inclusion of a provision providing that the disputing parties could provide evidence in support of their arguments and claims. Similarly, the tribunal could undertake its own investigation and collect evidence where it deemed necessary.[53] The 1988 Rules remained in effect until the adoption of revised Arbitration Rules of CIETAC in 1994. Those rules became effective on June 1, 1994.[54]

E. New York Convention

On December 2, 1986, the China National Congress authorized the Chinese government to join the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). The Chinese government submitted its application to join the New York Convention on January 22, 1987. After the PRC's convention accepted the application, the PRC's member-

48. *Id.* art. 4, ¶ 10-505, at 12,823.
49. *Id.* art. 14, ¶ 10-505, at 12,833.
50. *Id.*
51. *Id.*
52. *Id.* art. 18, ¶ 10-505, at 12,841.
53. *Id.* art. 26, ¶ 10-505, at 12,843.
54. For a discussion of the revised Arbitration Rules of CIETAC, see *infra* note 105 and accompanying text.

ship took effect on April 22, 1987. As a member of the New York Convention, all courts in more than eighty foreign countries were to recognize as enforceable all CIETAC awards on the condition that arbitration awards rendered in such foreign countries were given similar enforcement status in the PRC.[55]

However, at the time the PRC joined the New York Convention, it made a "reciprocity" and "commercial" reservation to its membership. The Supreme Court of the PRC explained the two reservations as follows:[56]

(1) The "reciprocity" reservation means that if a contracting country of the New York Convention renders an arbitration award, Chinese courts will recognize and enforce the awards under the New York Convention even though Chinese civil procedure may differ from that of the other members of the New York Convention. However, Chinese courts would not recognize a foreign arbitration award from a non-contracting country unless a treaty to which the PRC is a signatory requires recognition, or the other country recognizes and enforces CIETAC arbitration awards.

(2) The "commercial" reservation means that the provisions of the New York Convention cover only commercial disputes between parties, not non-commercial disputes such as administrative disagreements between foreign investors and PRC government ministries.[57]

F. Qualifications of Arbitrators

The initial arbitration rules adopted by the CCPIT in 1956 did not contain any provisions regarding the qualifications of arbitrators.[58] The CCPIT appointed the first twenty-one arbitrators in China under the authority of the May, 1954 decision by the Government Administration Council. Most of these arbitrators were not legal experts. Instead, these arbitrators were famous scholars or experts in certain business fields.[59]

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55. Through January of 1994, 97 countries have joined the New York Convention. UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE 296-97 (1994). Among the Convention's membership, some countries have stipulated certain conditions or reservations. *Id.*

56. China Supreme Court, Notice on Implementation of "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," which China joined on April 10, 1987

57. *Id.; see also* CHENG DEJUN ET AL., INTERNATIONAL CUSTOMS AND FOREIGN ARBITRATION PRACTICE 252 (1993).

58. *Decision, supra* note 5.

59. For example, Professor Ma Yinchu, arbitrator and member of FTAC, was President of Peking University at that time. *See* Decision, *supra* note 5. "The Arbitration Commission shall be composed of 15 to 21 members to be selected and appointed by the CCPIT for a term of one year from among persons having special knowledge and experience in foreign trade, commerce, industry, agriculture, trans-

After 1980, the number of arbitrators increased dramatically. In 1989, the CCPIT selected the first non-Chinese citizens as arbitrators, including eight from Hong Kong and Macao, and five from other foreign countries.[60] The newest list of CIETAC's arbitrators, selected on April 1, 1994, includes 87 arbitrators from Hong Kong, Macao, and other foreign countries, and 203 arbitrators from the PRC. Almost all of the new arbitrators are members of the legal profession, either working as lawyers, in-house counsel, government attorneys or professors.[61] CIETAC selects the arbitrators based on their level of education and degrees received, their experience in law, and recommendations from CIETAC members.[62] The Chairman's Council of CIETAC interviews all potential arbitrators. Then, CCPIT receives the list of arbitrators in order to make its appointment.[63]

II. RECENT DEVELOPMENTS

Several divisions of the Chinese government have taken steps to facilitate the burgeoning number of arbitrations in the PRC. The National People's Congress adopted the final Civil Procedure Law in 1991, which included a number of Articles related to international arbitration. CIETAC adopted Articles of Association and Ethical Rules for its arbitrators in 1993. The CCPIT adopted new arbitration rules in 1994. Finally, the National People's Congress adopted the Arbitration Law in 1994, to become effective in 1995.

The direction of these new developments places Chinese international commercial arbitration on the international track, and conforms most aspects of the PRC's arbitration system to international arbitration standards and practice. In general, this means that: (1) parties to international transactions have the right to choose arbitration rather than litigation to resolve their disputes in virtually all situations; (2) parties also have the right to decide who will arbitrate their case and where the hearing will take place; (3) Chinese courts do not have jurisdiction over the dispute if the parties have reached an effective arbitration agreement, either before or after the dispute occurs; (4) arbitration awards are final and, upon application by a successful party, Chinese courts may enforce arbitration awards through a very simple

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portation, insurance and other related matters as well as in law." *Id.*

60. In 1983, FETAC had 65 members who were arbitrators; by 1987, that number had reached 71. TAO & WANG, *supra* note 12, at 7.

61. CIETAC's Arbitrators (Apr. 1, 1994), provided by CIETAC.

62. Interview with Li Fang, *supra* note 18; Interview with Lu Song, *supra* note 18. At the time of the author's interview with Professor Li Fang, the latter indicated that he was still uncertain as to who recommended him to become a CIETAC arbitrator.

63. 1993 YEARBOOK, *supra* note 20, at 67 CV, 179 EV.

procedure under the Civil Procedure Law; and (5) Chinese courts may enforce arbitration awards by foreign arbitration bodies located in a foreign country which is a member of the New York Convention.

A. The Civil Procedure Law of the PRC

The Trial Civil Procedure Law[64] was updated in 1991 by the enactment of Civil Procedure Law of the PRC (Civil Procedure Law).[65] The Civil Procedure Law currently consists of 4 Parts, 29 Chapters and 270 Articles. Chapter 28 and several other Articles in Part Four, entitled Special Provisions Governing Procedure for Civil Actions Involving Foreign Nationals, relate to international arbitration. Pertinent parts of these Articles are detailed below.

1. Jurisdiction

Article 257 of the Civil Procedure Law provides for exclusive arbitration jurisdiction if two factors are present. First, the dispute must arise out of foreign economic, trade, transportation or maritime activities. Second, the parties must have reached a written agreement calling for arbitration, either before or after the dispute occurred. Once these factors are met, the case may go to arbitration, and may not be litigated in Chinese courts.[66]

2. Property Preservation Measures

Upon the request of a party, a Chinese Intermediate Court[67] may rule on whether it is necessary to apply property preservation measures against one of the disputing parties. The court's venue shall either be in the place of domicile of the party whose property is subject to the preservation measure, or where the property is located.[68]

3. Final Judgment

In general, a party to an arbitration proceeding under CIETAC may not institute legal proceedings in any Chinese court, other than to seek enforcement of an award.[69] Accordingly, arbitration awards made by CIETAC are final and not subject to

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64. Code of Civil Procedure of the People's Republic of China, Act of Apr. 9, 1991, 3 CHINA L. FOR FOREIGN BUS. REG. (CCH) ¶ 19-201, at 23,891 [hereinafter *Code of Civil Procedure*].

65. *Id.* ch. 29, art. 270, ¶ 19-201, at 24,009.

66. *Id.* ch. 28, art. 257, ¶ 19-201, at 24,001-03.

67. The People's Court system in the PRC is divided into four levels: District Court, Intermediate Court, Superior Court, and Supreme Court.

68. *Code of Civil Procedure*, *supra* note 64, ch. 28, art. 258, ¶ 19-201, at 24,003.

69. *Id.* ch. 28, art. 259, ¶ 19-201, at 24,003.

change or reversal by a court.

4. Enforcement

Chinese courts shall order the enforcement of an arbitration award unless the party against whom enforcement is sought can provide evidence proving that one of the following situations exists: (1) the parties have no binding arbitration agreement; (2) the party against whom enforcement is sought did not receive proper notice regarding the appointment of an arbitrator or of the commencement of arbitration proceedings; (3) that party is unable to state its opinions and arguments due to reasons beyond its control; (4) the composition of the arbitration tribunal or the arbitral proceedings does not conform with applicable arbitration rules; (5) certain items in the award exceed the scope of the arbitration agreement or are beyond the jurisdiction of the arbitration body; or (6) the Chinese court believes the arbitration award to be contrary to Chinese social and public interests.[70]

5. Provisional Remedy

If a Chinese court refuses to execute an arbitration award rendered by CIETAC under one of the circumstances described above, the disputing parties have two choices. The parties may either reapply for a new arbitration, or they may bring their dispute to a Chinese court for trial.[71]

6. International Convention and Principle of Reciprocity

A party with a legally effective arbitration award from CIETAC may apply directly to a foreign court for enforcement. The party may only apply for enforcement, however, when the property subject to the award is not located in the PRC.[72] To recognize and enforce an arbitration award made by a foreign arbitration organization, the Chinese courts will, upon the request of the party, handle the matter in accordance with the provisions of any of the international conventions which China has joined, or according to the principle of reciprocity.[73]

B. The Arbitration Law of the PRC

The adoption of the Arbitration Law was another landmark development in Chinese arbitration history.[74] The Arbitration

70. *Id.* art. 260, ¶ 19-201, at 24,003.
71. *Id.* art. 261, ¶ 19-201, at 24,005.
72. *Id.* ch. 29, art. 266, ¶ 19-201, at 24,009.
73. *Id.* art. 269, ¶ 19-201, at 24,009.
74. The 9th Session of the Standing Committee of the 8th National People's

Law consists of eight Chapters and eighty Articles, and applies to almost all arbitration cases, both domestic and foreign.[75] Chapter 7 (which includes nine Articles) contains the provisions relating to international arbitration, and is very similar to Chapter 28 of the Civil Procedure Law. Other provisions of the Arbitration Law may also apply to arbitration matters involving foreigners.[76]

1. Disputes Subject to Arbitration

Virtually all contractual disputes and other property disputes may be arbitrated. However, disputes arising from marital, adoption, guardianship, support or succession cases are exempt from arbitration. Administrative disputes with the government are also exempt.[77]

2. Qualifications of Arbitrators

The Arbitration Law requires every arbitrator to meet at least one of the following requirements: to have eight years of experience in arbitration work; to have eight years of experience as a lawyer or a judge; to have performed legal research or legal education work with a senior title (e.g., Associate Professor of Law); to have legal knowledge with a senior title in the areas of economics and trade (e.g., Senior Economist).[78] Additionally, foreigners who have special knowledge in the fields of law, economics, trade, science and technology may be appointed by CIETAC as arbitrators.[79]

3. Arbitration Agreement

The Arbitration Law requires that an arbitration agreement include an expression of intent to apply for arbitration. Furthermore, the arbitration agreement must specify those matters which are subject to arbitration, and must designate an arbitra-

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Congress adopted the Arbitration Law of the PRC on August 31, 1994. It will become effective on September 1, 1995. *Arbitration Law of the PRC*, PEOPLE'S DAILY (Overseas Edition), Sept. 2, 1994, at 2.

75. The Arbitration Law does not apply to labor disputes and disputes arising from certain agricultural contracts. *Id.* ch. 8, at 77. The legislature will address laws and regulations regarding these two types of arbitration at a later date. *Id.*

76. *Id.* ch. 7, at 77. Chapter VII of this law, the Special Provisions for Arbitration Involving Foreign Elements applies to "the arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element. For matters not covered in this Chapter, other provisions of this law shall apply." *Id.* This provision may cause some confusion when it conflicts with the Arbitration Rules of CIETAC.

77. *Id.* ch. 1, art. 2.

78. *Id.* ch. 2, art. 13.

79. *Id.* ch. 7, art. 67.

tion organization.[80] In any contract, an arbitration provision must be deemed to be an agreement independent from the remainder of the contract such that any amendment, rescission, termination or invalidation of the contract will not affect the validity of the arbitration agreement. Although the arbitration tribunal has the power to decide whether a contract is valid,[81] a party challenging the validity of the arbitration agreement may seek a ruling either from CIETAC or from a Chinese court.[82]

4. Provisional Measures of Property Preservation

Article 28 of the Arbitration Law provides that if a disputing party believes that execution of an award may become impossible or difficult to enforce, the disputing party may apply to CIETAC for provisional measures of property preservation. Further, the application should then be submitted to the Chinese courts pursuant to the provisions of the Civil Procedure Law. However, if the application contains incorrect facts, the applicant may have to compensate the other party for its losses.[83]

5. Chief Arbitrator

Article 31 of the Arbitration law provides that, if the parties have agreed to a tribunal composed of three arbitrators, each party shall appoint one arbitrator, and the parties shall jointly select a third, to be the chief arbitrator. Alternatively, the parties may jointly entrust CIETAC's Chairman to appoint the chief arbitrator.[84]

6. Withdrawal of an Arbitrator

The Arbitration Law provides that an arbitrator may voluntarily withdraw from a case. Moreover, a party to the dispute may challenge the selection of an arbitrator under any one of the following circumstances: (1) the arbitrator is a party to the case; (2) the arbitrator is a close relative of a party or of a party's counsel; (3) the arbitrator has a personal interest in the case; (4) the arbitrator has a relationship with a party or a party's counsel which may affect justice in the arbitration proceeding; or (5) the arbitrator meets privately with a party or a party's counsel, or accepts gifts or social invitations from a party or a party's counsel.[85]

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80. *Id.* ch. 3, art. 16.
81. *Id.* art. 19
82. *Id.* art. 20.
83. *Id.* ch. 4, art. 28.
84. *Id.* art. 31.
85. *Id.* art. 34.

7. Setting Aside An Award

As discussed above, the Civil Procedure Law provides certain limited circumstances in which a Chinese court may decline to enforce an award upon a disputing party's application.[86] If a party to a dispute requests a court not to enforce an award, the court must announce its ruling within two months.[87] Interestingly, while the Civil Procedure Law permits a Chinese court to decline to enforce an arbitration award, the Arbitration Law specifically permits a court to set aside an award in the same manner specified in the Civil Procedure Law. Additionally, Chinese courts may set aside the award if: (1) the award is based on false evidence; (2) a disputing party has withheld evidence which might have been sufficient to affect the result of the arbitration; (3) an arbitrator in the proceeding conducted himself in an illegal manner (e.g., by accepting bribes); or (4) an arbitrator rendered an award which is clearly inconsistent with the law.[88]

If a Chinese court which receives an application to set aside an award believes that a re-hearing before the same arbitration tribunal is possible, that court may notify the tribunal and request a re-hearing within a specified period of time. In the meantime, the court will terminate all proceedings related to the matter. If the arbitration tribunal refuses to conduct another hearing, the court restores the proceedings.[89] However, under the Arbitration Law, the court's authority in these circumstances would be limited to setting aside the award rather than modifying it.

C. Articles of Association and Ethical Rules for Arbitrators

CIETAC is a self-regulating organization. Therefore, two documents, the Articles of Association of the CIETAC (By-Laws)[90] and the Ethical Rules for Arbitrators of the CIETAC (Ethical Rules),[91] are very important with respect to CIETAC's routine operations. The By-Laws set forth the structure of the CIETAC and its manner of operations. The Ethical Rules list the professional standards of conduct for CIETAC's arbitrators.

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86. *See* note 70 and accompanying text; *see also supra* note 63, ch. 28, art. 260.

87. *Arbitration Law of the PRC*, *supra* note 74, ch. 5, art. 72.

88. *Id.* art. 58.

89. *Id.* art. 61.

90. Articles of Association of CIETAC were considered and adopted in principle at the 1st Session of the Member's Council of the 12th Arbitration Commission on April 6, 1993. The Chairman's Council of the Arbitration Commission adopted them on May 12, 1993. *See* 1993 YEARBOOK, *supra* note 20, at 65-69 (CV), 175-79 (EV).

91. CIETAC adopted the Ethical Rules for Arbitrators on April 6, 1993. 1993 YEARBOOK, *supra* note 20, at 68, 69 (CV), 180, 181 (EV).

1. Structure of CIETAC

CIETAC's By-Laws are quite detailed compared with the simple provisions regarding CIETAC's structure mentioned in the Arbitration Law and Arbitration Rules. Among other provisions, the By-Laws provide that:

(1) CIETAC is a "non-governmental arbitration organization of China for handling contractual or non-contractual economic and trade disputes that are international or that involve a foreign element";[92]

(2) CCPIT shall appoint a number of well-known Chinese citizens from relevant fields to serve as members of CIETAC;[93]

(3) CIETAC has one Chairman, several Vice Chairmen, One Secretary General and several Deputy Secretaries General;[94]

(4) CCPIT shall nominate the Chairman, Vice Chairmen and Secretary General, whose appointments shall be considered and approved by CIETAC's Members' Council;[95]

(5) CCPIT shall appoint the Deputy Secretaries General;[96]

(6) CIETAC and its sub-commissions shall each have a Secretariat that is responsible for the routine operations of CIETAC and its sub-commissions; currently, there are more than sixty staff members in CIETAC's Secretariat;[97]

(7) Under the Secretariat, there shall be an arbitration study entity responsible mainly for investigating and studying theoretical and practical issues related to arbitration;[98]

(8) CIETAC is to establish a committee of expert consultants numbering no more than fifteen, who shall be responsible mainly for studying and rendering advice on major procedural and substantive difficulties in the area of arbitration;[99] and

(9) CIETAC shall provide a list of arbitrators who are appointed by the CCPIT.[100]

2. Professional Standards for Arbitrators

The Ethical Rules provide seventeen simple, but specific standards of conduct for the arbitrators. These rules include the following provisions:

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92. *Id.* at 65 (CV), 175 (EV).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* art. 14, at 66 (CV), 178 (EV).
98. *Id.* art. 7, at 65 (CV), 176 (EV).
99. *Id.* art. 6. Professors Lu Song and Mr. Wang Shenchang, whom the author interviewed in Beijing, are also members of the Expert Consultants Committee.
100. *Id.* art. 16, at 67 (CV), 179 (EV).

(1) If an arbitrator has previously discussed a case with a disputing party or has provided advice to one of the parties, that arbitrator may not serve as an arbitrator in that case;[101]

(2) Except during mediation proceedings, an arbitrator may not meet with a party to discuss the case unless the other party is present;[102]

(3) When arbitrators hold a hearing, they should:

(a) avoid partiality;

(b) pay close attention to the form and method of posing questions and expressing opinions;

(c) avoid reaching premature conclusions regarding key issues; and

(d) avoid disputes or confrontation with the parties.[103]

(4) The arbitrator should voluntarily withdraw from a case if he is a relative of a party, or has a relationship with a party involving a debt, property, money, business or commercial cooperation.[104]

III. ARBITRATION RULES OF CIETAC AND PROCEDURES OF ARBITRATION

CIETAC's Arbitration Rules (the Arbitration Rules), adopted on March 17, 1994, consist of four Chapters and eighty-one Articles.[105] These new Rules substantially revised and modified the 1988 Rules. As amended, the Arbitration Rules reflect recent experience in arbitration practice. They closely match provisions of other new laws such as the Civil Procedure Law, which relate to international arbitration. Moreover, the Arbitration Rules are now more consistent with international arbitration principles and practice than in the past. According to CIETAC, the Arbitration Rules reflect the principle of party autonomy, refer to international practices, are complete in their coverage, and are easy to use.[106]

A. Overview of the General Procedure and Timing of CIETAC Arbitrations

Rules relating to the general procedure are detailed below:

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101. *Id.* art. 3, at 68 (CV), 180 (EV).

102. *Id.* art. 4.

103. *Id.* art. 10.

104. *Id.* art. 5.

105. The 1st Session of the Standing Committee of the 2nd National Congress of CCPIT (China Chamber of International Commerce) revised and adopted the Arbitration Rules on March 17, 1994; the Rules have been in force since June 1, 1994. *Id.* at 56-64 (CV), 160-74 (EV).

106. Chen Dejun, Vice-Chairman and Secretary General of CIETAC, Report on the Draft Amendment to the Arbitration Rules of CIETAC. *Id.* at 4 (CV), 76 (EV).

(1) In order to commence an arbitration proceeding under CIETAC, a claimant must submit the required application, attach evidence to support its claims, appoint its designated arbitrator, and pay the required fee.[107]

(2) CIETAC's Secretariat is not bound by any time limitations for its review of the application for arbitration. If the Secretariat deems that the claimant has completed all the necessary formalities, the Secretariat shall immediately send an arbitration notice to the respondent.[108]

(3) The respondent must appoint its designated arbitrator within twenty days of receiving the notice of arbitration proceedings. Then, the respondent must submit its defense and relevant documents to the Secretariat within forty-five days. The respondent may also file a counterclaim along with any supporting evidence within sixty days.[109] However, if the respondent fails to file its defense in writing, or if the claimant fails to submit its defense against the Respondent's counterclaim, the arbitration proceedings shall continue unaffected.[110]

(4) After the two parties appoint their arbitrators, CIETAC's Chairman shall "immediately" appoint the third arbitrator as the tribunal's chief arbitrator.[111] The date on which the chief arbitrator is appointed becomes the date that the tribunal is officially formed.

(5) If a party wishes to remove the appointment of an arbitrator, it must set forth a written challenge at least fifteen days prior to the first hearing. If a party first learns of grounds for challenging the appointment after the first hearing has begun, it may raise the challenge at any time during the hearings. However, no party may raise a challenge after the end of the last arbitration hearing.[112]

(6) After the arbitration tribunal and the Secretariat jointly decide on the hearing date, the Secretariat shall notify both parties at least thirty days prior to the hearing date.[113]

(7) If necessary, the tribunal may make an interlocutory or partial award on any issue at any time during the course of arbitration.[114] Although this type of award is not enforceable, it may clarify certain issues and thus constitute part of the final award.

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107. *Id.* art. 14, at 56-64; *see also* Appendix A to this article.
108. *Id.* art. 15.
109. *Id.* arts. 16-18.
110. *Id.* art. 21.
111. *Id.* art. 24.
112. *Id.* art. 29.
113. *Id.* art. 33.
114. *Id.* art. 57.

(8) If the parties so desire, the tribunal may conciliate the case during the process of arbitration. If the conciliation is successful, the tribunal will make an award in accordance with the terms of the settlement. This award will be final and enforceable. If the conciliation is unsuccessful, upon the request of one of the parties or of the tribunal itself, the tribunal will terminate conciliation efforts and continue the arbitration proceedings.[115] Many Chinese arbitration experts believe that the combination of arbitration and conciliation is a unique feature of Chinese arbitration and a valuable contribution to the progress of international arbitration.[116]

(9) The arbitration tribunal must render its final award within nine months of the tribunal's formation.[117]

B. Summary Procedure and Timing

Summary Procedure rules are:

(1) As an alternative to CIETAC's three arbitrator panel provisions, if the amount claimed does not exceed RMB 500,000 Yuan (China's official currency) or if the parties otherwise agree, CIETAC provides single arbitrator summary arbitration procedures.

(2) In a summary procedure, a sole arbitrator shall "immediately" be appointed by both parties or by the Chairman of the CIETAC.

(3) The respondent shall submit its defense and counterclaim, if any, within thirty days.

(4) The Secretariat shall notify both parties ten days prior to the date of hearing.

(5) The tribunal shall hold a single hearing, or may decide only to examine the written materials and evidence that the parties submit, without holding a hearing.

(6) The tribunal shall make any award within thirty days of the hearing. If, however, the tribunal decides to base its decision on documents only, it shall make its award within ninety days of the tribunal's formation.[118]

IV. PRACTICAL ISSUES

A. Arbitration Agreement

In order to be binding on the parties, an arbitration agree-

115. *Id.* arts. 46-51.

116. Tang Houzhi, *Arbitration in China*, 1993 YEARBOOK, *supra* note 20, at 20 (CV), 99 (EV).

117. Arbitration Rules, *id.* art. 52.

118. *Id.* arts. 64-74.

ment must be in writing.[119] The agreement to arbitrate a dispute may arise from an arbitration clause stipulated in the contract underlying a dispute. Alternatively, the parties may decide to resort to arbitration after realizing they are in dispute.

1. *Model Arbitration Clause*

CIETAC has recommended the following model arbitration clause for international commercial arbitration in the PRC:

> Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration, which shall be conducted by the Commission in Beijing or by its Shenzhen Sub-Commission in Shenzhen, or by its Shanghai Sub-Commission in Shanghai, at the Claimant's option, in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitration award is final and binding upon both parties.[120]

2. *Independent Arbitration Clause*

The Arbitration Law, Foreign Contract Law, and the Arbitration Rules all state that the arbitration clause exists independent of the other clauses contained in a contract. Furthermore, they provide that any modification, rescission, termination or revocation of the contract in dispute shall not affect the validity of an arbitration clause or agreement.[121] This language does not clarify whether an agreement to arbitrate can ever be amended or terminated in the PRC. However, it is unlikely that the PRC's legislature intended this result in drafting these provisions. Given this ambiguity, if the parties wish to terminate or amend their agreement to arbitrate, they should unequivocally manifest their intent.

B. Jurisdiction

CIETAC's jurisdiction extends to arbitrations arising from disputes involving international contracts or non-contractual business transactions, disputes between foreign or solely Chinese parties.[122] As indicated above, the Civil Procedure Law precludes a Chinese court from addressing substantive disputes be-

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119. *Arbitration Law of the PRC*, *supra* note 74, ch. 3, art. 16.

120. 1993 YEARBOOK, *supra* note 20, at 185.

121. *See* Arbitration Rules, *id.*, art. 5; *Arbitration Law of the PRC*, *supra* note 74, art. 19; *Foreign Contract Law*, *supra* note 32, art. 35.

122. Arbitration Rules, 1993 YEARBOOK, *supra* note 20, art. 2, at 56-64 (CV), 160-74 (EV).

tween parties who have agreed to arbitration.[123] However, Article 4 of the Arbitration Rules provides that CIETAC may decide on the existence and validity of an arbitration agreement and, therefore, whether it has jurisdiction over a particular dispute.[124] Accordingly, it is not clear who would have jurisdiction over a case where CIETAC rules that an arbitration agreement is not binding, but a court subsequently rules that it does not have jurisdiction over the matter because of the arbitration agreement.[125]

Article 61 of the Arbitration Law poses an additional dilemma for Chinese courts. This Article grants courts the authority to set aside a CIETAC award under certain circumstances. The Article also permits, but does not require, a court to request the CIETAC tribunal to re-arbitrate the matter. If the tribunal refuses the court's request, the court's authority appears somewhat limited. The court may set aside an award, but does not have the power to make a modification. Accordingly, if the court believes that the award should be modified rather than set aside in its entirety, but the CIETAC tribunal refuses to re-arbitrate the matter, the court is essentially powerless to modify the award.

C. Chief Arbitrator

As with arbitrator tribunals all over the world, the third arbitrator often plays a crucial role in arbitrations. In the PRC, this individual's role is even more important. In the event of a deadlock among arbitrators, the opinion of the chief arbitrator will form the basis of the award.[126] As mentioned above, however, the third and chief arbitrator is appointed from the list of arbitrators by the Chairman of CIETAC.[127] However, the Arbitration Law provides that "the parties shall jointly select or jointly entrust the Chairman of the arbitration commission to appoint the third arbitrator, who shall be the chief arbitrator."[128] Although the Arbitration Law brings Chinese practice in line with international standards, this provision directly contradicts Article 24 of the Arbitration Rules promulgated by CIETAC. To date, it is unclear when this inconsistency will be revised. However, CIETAC will be required to amend its Arbitration Rules to conform with the Arbitration Law.[129]

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123. *See supra* note 67 and accompanying text.

124. Arbitration Rules, 1993 YEARBOOK, *supra* note 20, art. 4, at 56-64 (CV), 160-74 (EV).

125. *See Code of Civil Procedure*, *supra* note 64, art. 257.

126. Arbitration Rules, 1993 YEARBOOK, *supra* note 20, at 56-64 (CV), 160-74 (EV).

127. *Id.* art. 24.

128. *Arbitration Law of the PRC*, *supra* note 74, art. 31.

129. *Id.* art. 73. That article provides: "Foreign related arbitration rules may be

D. Provisional Measures of Property Preservation[130]

The Arbitration Law and the Arbitration Rules permit a claimant to apply for property preservation measures permitted by law, such as sealing, confiscation or freezing of assets.[131] These measures apply if a claimant believes that execution of the arbitration award may be impossible or difficult to implement. This right extends to the claimant whether the situation is the result of an act by the other party, or an independent cause.[132] The property which may be subject to preservation measures will be limited to the scope of the underlying claim or to the property relevant to the arbitration case.[133] Currently, parties seek property preservation measures in more than thirty percent of the arbitration cases in the PRC.[134]

1. Property Preservation Measures

The Property Preservation Measures include the following:

(1) Under the current Arbitration Law and Rules, a claimant subject to an arbitration agreement must apply for arbitration with CIETAC prior to requesting property preservation measures.

(2) Upon CIETAC's acceptance of the matter for arbitration, the claimant may apply to CIETAC for property preservation measures.

(3) CIETAC will then submit the claimant's application to an Intermediate Level Chinese court located in the respondent's place of domicile, or where the respondent's property is located.[135]

(4) A court may issue a property preservation measure ruling if it deems the measure necessary. The court may further order

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formulated by the China Chamber of International Commerce (which is CCPIT) in accordance with this Law and the relevant provisions of the Civil Procedure Law." *Id.* Article 78 further provides: "In the event of conflict between the regulations and rules governing arbitration promulgated prior to the implementation of this Law and the provisions of this Law, the provision of this Law shall be prevail." *Id.* art. 78

130. In 1985, Ge Liu represented a client in an arbitration case in the FETAC, in which Professor Tang Houzhi was the chief arbitrator. Mr. Liu applied for property preservation measures against the other party under the provisions of the Trial Civil Procedure Law. Mr. Li Xiaoming of the CIETAC Secretariat went to the court many times and learned that no one had ever requested the implementation of such measures, and that the court did not know how to deal with the request in an international commercial arbitration case.

131. *Code of Civil Procedure*, *supra* note 64, ch. 9, art. 94.

132. *Id.* ch. 9, art. 92; *see also* Arbitration Law of the PRC, *supra* note 74, ch. 4, art. 28.

133. *Id.*

134. Interview with Wang Shengchang, *supra* note 17.

135. Arbitration Rules, 1993 YEARBOOK, *supra* note 20, art. 23

the claimant to provide a security guaranty for the property preservation measure. If the claimant fails to provide the guaranty, the court shall deny the application for property preservation.[136]

(5) If a claimant believes that the case is urgent, it may apply for an emergency ruling on his application for property preservation. The court may make its ruling within forty-eight hours, and execution of property preservation measures will commence immediately.[137]

(6) After the court grants the application for property preservation measures, it may cancel that ruling if the opposing party provides a security guarantee to replace the court's measures.[138]

(7) If the court ultimately learns that the application for property preservation measures contained untruthful information, the claimant must compensate the other party for any losses resulting from the granting of property preservation measures.[139]

2. *Practical Issue of Property Preservation Measures*

As mentioned above, the Arbitration Law and the Arbitration Rules direct a party to apply for property preservation measures through CIETAC, which then submits the application to a court in accordance with the Civil Procedure Law. However, it is not clear whether the claimant may apply directly to a court for property protection under Article 93 of the Civil Procedure Law. That law clearly recognizes the need for emergency measures and permits a litigant to apply for property preservation measures prior to the institution of litigation.[140] The Arbitration Law, however, does not provide for such emergency measures. Rather, it seems to require that the arbitration commence prior to a party's application for property preservation. This unnecessary time consuming requirement poses a dilemma for parties who believe that the property which may be used to satisfy an arbitration award, could dissipate once a respondent learns of the pending arbitration. Requiring the commencement of arbitration is unnecessary and time consuming. Therefore, this requirement should be abolished to provide parties to arbitration the same rights as those which a party enjoys under the Civil Procedure Law.

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136. *Code of Civil Procedure*, *supra* note 64, ch. 27, art. 251, ch. 9, art. 92.

137. *Id.*

138. *Id.* art. 253.

139. *Id.* art. 254.

140. *See Code of Civil Procedure*, *supra* note 64, ch. 9, art. 93 (providing that property preservation measures may be granted by a Chinese court prior to the initiation of litigation; provided, however, that such measures will be terminated if the applicant fails to initiate such litigation within 15 days).

E. Issuance of Arbitration Award

Article 53 of the Arbitration Rules provides the basis of all CIETAC arbitration tribunal awards. That Article requires that tribunals consider the facts of the case, relevant provisions of law, the terms of the contract in dispute, international practices, and principles of fairness and reasonableness.

In general, CIETAC should render final arbitration awards within nine months of the tribunal hearing.[141] The chief arbitrator and CIETAC Secretariat play a key role in determining whether a tribunal will deliver its award within the nine month period. After the tribunal conducts its hearing, the chief arbitrator will call on the other two arbitrators to discuss the case. Based on this discussion, the chief arbitrator will draft the tribunal's opinion and provide the Secretariat with a copy. The Secretariat then drafts the award in accordance with the tribunal's opinion, and sends the draft back to the tribunal. The chief arbitrator will call the other two arbitrators again to discuss and revise the draft of tribunal's award, and will then give the award back to the Secretariat for finalization. Once issued by the Secretariat, the award becomes final.[142]

F. Enforcement of International Arbitration Awards

The enforcement of international arbitration awards[143] falls into two categories. One category is inbound, whereby an award rendered by a foreign arbitration organization is enforced in the PRC. The second category is outbound, whereby a CIETAC award is enforced outside the PRC. Both the inbound and outbound execution of arbitration awards have become much easier since the PRC joined the New York Convention. The first Chinese arbitration award enforced outside of the PRC was an award by CIETAC's Shenzhen Sub-Commission. This award was enforced in Hong Kong in 1989. Since then, approximately ninety arbitration awards have been enforced outside the PRC, including three in the United States.[144]

1. Enforcement Under the New York Convention

The party who prevails in a foreign arbitration proceeding may apply for judicial enforcement in another country provided

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141. Arbitration Rules, 1993 YEARBOOK, *supra* note 20, art. 52.

142. Interview with Li Fang, *supra* note 18; Interview with Lu Song, *supra* note 18.

143. An arbitration award made by CIETAC is enforceable in China under China's Civil Procedure Law, *supra* note 64, ch. 28, art. 259, 260.

144. Interview with Wang Shengchang, *supra* note 17.

that both countries are members of the New York Convention. When the party seeks to enforce the award in the foreign country, it need only provide a duly authenticated original award or a duly certified copy thereof, as well the original arbitration agreement or duly certified copy thereof.[145]

However, if the non-prevailing party in the arbitration can prove the existence of at least one of the five situations in which enforcement may be denied under Article 5 of the New York Convention,[146] the foreign court may refuse to execute the arbitration award. Additionally, if the foreign court finds that recognition or enforcement of the award would be contrary to that country's public policy, it may refuse to execute the arbitration award.[147]

2. Enforcement Under Chinese Law

If the prevailing party in a foreign arbitration proceeding seeks to enforce the award in the PRC, the following provisions of the Civil Procedure Law apply:

(1) The time limit for enforcement of an arbitration award when either or both of the parties is an individual, is one year. If neither party is an individual, the time limit is six months.[148] This time period begins on the last day of the fixed period of time under which the award was executed.[149] Compared with other countries such as the United States (three years) and Great Britain (six years), this period of time for filing an enforcement application is very short.[150]

(2) The party seeking enforcement should file an application for enforcement with the Intermediate Level Chinese court in the place of domicile of the opposing party, or the place where the property which is the subject of the enforcement action is located.[151]

(3) The Chinese court will handle the application for enforcement in accordance with the New York Convention's principles.[152]

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145. JOANSON, *supra* note 45, at 1881.

146. The five situations include: (1) invalid arbitration agreement; (2) no proper notice of the appointment of the arbitrator or of the arbitration proceedings, or unable to present the case; (3) the award rendered is beyond the scope of the submission to arbitration; (4) the arbitration procedure is not in accordance with the arbitration agreement; or (5) the award is not binding. *Id.* at 1885.

147. *Id.*

148. *Code of Civil Procedure*, *supra* note 64, ch. 21, art. 219.

149. CHENG ET AL., *supra* note 57, at 253-54.

150. *Id.* at 258.

151. *Code of Civil Procedure*, *supra* note 64, ch. 29, art. 269.

152. *Id.* ch. 28.

3. *Enforcement of CIETAC's Award in the PRC*

A CIETAC award enforced within the PRC is not subject to the New York Convention and the related provisions of the Civil Procedure Law. However, it would be subject to other provisions of the Civil Procedure Law, which are similar to the enforcement provisions relating to foreign arbitration awards and to Article 5 of the New York Convention.[153]

4. *Practical Issues Of Enforcement*

In accordance with Article 260, the Civil Procedure Law also provides certain remedies which apply if a Chinese court decides not to enforce a CIETAC arbitration award. Those provisions permit the parties either to re-arbitrate their case (after entering into a valid arbitration agreement, if necessary) or commence judicial proceedings.[154] In those cases where a court denies enforcement because of the arbitration tribunal's composition, or because the award is contrary to the Chinese social and public interest, however, it is not clear whether Article 257 of the Civil Procedure Law grants a court jurisdiction.

There are not any provisions under the New York Convention or China's Civil Procedure Law which provide a remedy if a Chinese court refuses to enforce a foreign arbitration award pursuant to Article 5 of the New York Convention. If a court decides to exercise its powers based on that provision, it is unclear what remedy would be available, other than an appeal to a higher Chinese court.

CONCLUSION

In conclusion, the PRC has made great strides in modernizing its arbitration processes available to foreigners. While CIETAC may need to update the Arbitration Rules to take into account certain provisions of the newly adopted Arbitration Law, the PRC appears to have instituted basic mechanisms to avail both Chinese and foreign businesses the benefits of modern arbitration which currently are available in other nations.

153. *Id.* arts. 259, 260.
154. *Id.* art. 261.

APPENDIX A

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION – ARBITRATION FEE SCHEDULE

AMOUNT OF CLAIM (RMB)	AMOUNT OF FEE (RMB)
100,000 Yuan or less	4% of the claimed amount, minimum 2,000 Yuan
100,000 Yuan to 500,000 Yuan	4,000 Yuan plus 3% of the excess over 100,000 Yuan
500,000 Yuan to 1,000,000 Yuan	16,000 Yuan plus 2% of the excess over 1,000,000 Yuan
1,000,000 Yuan to 5,000,000 Yuan	26,000 Yuan plus 1% of the excess over 1,000,000 Yuan
5,000,000 Yuan or more	66,000 Yuan plus 0.5% of the excess over 5,000,000 Yuan

If an application for arbitration proceedings does not state the amount of the claim, the Secretariat of CIETAC or one of its Sub-Commissions shall determine the fee for arbitration.

If the arbitration fee is stated in a foreign currency, the parties shall pay an amount of foreign currency equivalent to the corresponding RMB value specified in this schedule.

Apart from charging arbitration fees according to the above-mentioned Arbitration Fee Schedule, CIETAC or its Sub-Commissions may collect additional, reasonable and actual expenses pursuant to the relevant provision of the Arbitration Rules.[155]

155. Fee schedules may be obtained from CIETAC.