CHAMBERS GLOBAL PRACTICE GUIDES

International Arbitration 2023

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China: Law & Practice
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GEN Law Firm
Law and Practice

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GEN Law Firm is a rapidly growing boutique law firm with offices in Beijing, Shanghai, Shenzhen and Chengdu. Recently recognised as the “rising law firm of the Year 2023” by ALB, and also the recipient of many other prestigious accolades, GEN has quickly gained a reputation for excellence. The firm has approximately 100 professionals, specialising in business areas with commercial transactions at core, specifically focusing on dispute resolution (DR), intellectual property, government regulation, data protection, and antitrust. GEN also has diversity clients, including multinational corporations, state-owned enterprises, emerging technology and innovative enterprises. The DR practice of GEN has developed its expertise in domestic and multi-jurisdiction disputes arising from a wide range of fields such as finance & guarantees, international trade, international construction, etc. With a deep understanding of the complexities of commercial disputes, the DR team is adept at handling complex disputes and delivering tailored legal solutions to meet the clients’ needs.

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1. General

1.1 Prevalence of Arbitration

Despite the global challenges posed by a series of internal and external factors concerning the COVID-19 pandemic, the Ukraine crisis and relevant trade sanctions, China's general economic situation has demonstrated resilience with steady growth. Furthermore, the restrictive measures imposed by the Chinese government in response to COVID-19 have been terminated in late 2022, thereby restoring confidence for both foreign and domestic investors.

In 2022, the prevalence of arbitration in China had been on the rise, signalling a promising trend for dispute resolution within the country. According to the 2022 annual work reports of major Chinese arbitration institutions, the overall trend indicates a steady growth in the number of international arbitration cases in China (32% for the Shanghai International Arbitration Center (SHIAC), 11% for the Shenzhen Court of International Arbitration (SCIA), and 0.9% for the China International Economic and Trade Arbitration Commission (CIETAC)).

The preference for a certain dispute resolution mechanism in practice varies depending on the business industry and the size of the company. Domestic parties targeting the Chinese mainland market frequently choose Chinese courts for dispute resolution, while industries with substantial international market engagement tend to prefer international arbitration. According to the research jointly published by CIETAC and JunZe-Jun Law Offices in 2022, 86% of the surveyed enterprises engaged in outbound commercial activities indicated a preference for arbitration, and 70% of them included arbitration clauses in their international contracts.

International arbitration is generally employed as a prominent method of alternative dispute resolution in China. In scenarios involving Chinese parties on both sides, it is conventional to incorporate arbitration clauses in the main contracts. Typically, these clauses designate a Chinese arbitration institution for resolving disputes.

In cross-border transactions involving a Chinese party and a foreign party, a neutral third country is often selected as the seat of arbitration. This ensures that potential future disputes are impartially arbitrated.
1.2 Key Industries
Major arbitration institutions in China have published statistical data revealing the top five sectors that predominantly rely on arbitration for dispute resolution. These encompass the trade of goods, finance and capital market, construction, equity investment and transfer, and service and agency contracts.

The statistical data reveals a significant surge in arbitration cases within industries such as construction and trade of goods compared to the previous year. Notably, the Beijing International Arbitration Center (BAC/BIAC) and CIETAC reported substantial year-on-year increases of approximately 47% and 37% respectively in construction cases. Additionally, SHIAC witnessed a remarkable surge of around 90% in cases related to international trade and the sale of goods.

Furthermore, it is worth noting that there was no significant decrease in arbitration cases in any industry, highlighting the continued significance of arbitration as a dispute resolution mechanism across various sectors.

Likewise, in 2022 there were numerous cases arising from defaults in the performance of commercial contracts directly or indirectly attributed to the impact of the COVID-19 pandemic. However, as aforementioned, the pandemic did not lead to a substantial decrease in international arbitration activities in any specific industry. On the contrary, there was only a slight decrease in arbitration cases within real estate and finance sectors.

1.3 Arbitral Institutions
According to the provided data, CIETAC has handled the highest number of international arbitration cases with 642 cases and a year-on-year growth rate of 0.9%. This indicates its continued popularity and prominence as an arbitration institution. BAC has handled 221 international cases, experiencing a decrease of 11% in its year-on-year growth rate.

Despite the decline, BAC still remains an important institution for international arbitration. SHIAC has seen significant growth in its international cases, handling 196 cases with a year-on-year growth rate of 32%. This shows a growing preference for SHIAC as an arbitration institution. SCIA has handled 384 international cases with an 11% year-on-year growth rate, indicating its steady growth and recognition as a reliable arbitration institution. Overall, the data demonstrates that CIETAC remains the most widely used institution for international arbitration, while other institutions like SHIAC and SCIA are experiencing notable growth in their caseloads.

During the period of 2021-2022, no new arbitration institution has been established in China. The existing arbitration institutions in China continue to provide reputable arbitration services and maintain a stable and trusted platform for international arbitration.

1.4 National Courts
In China, intermediate courts have the authority to hear disputes related to arbitrations. This includes matters such as determining the validity of arbitration clauses, deciding on application to set aside and not to enforce domestic awards and ruling on recognition and enforcement of foreign arbitral awards.

Additionally, the power to grant interim measures, such as injunctions or asset preservation orders, is exclusively designated to the courts in accordance with the Civil Procedure Law of
the People's Republic of China (PRC). If a party wishes to seek an interim measure in arbitration proceedings, the arbitral tribunal or the secretary of the institution before the tribunal is constituted and will forward such application to the court where the property/evidence is preserved or to the court of the address of the respondent for decisions and the execution of the interim orders made by the court.

Certain arbitration institutions allow for the issuance of interim measures by the tribunals or emergency arbitrators. It is essential to underscore that the authority of tribunals or emergency arbitrators in granting these measures is based on arbitration rules, rather than statutory provisions under Chinese law. Interim measures granted by tribunals or emergency arbitrators under these Chinese arbitration institution rules, if not voluntarily complied with by the parties, cannot be recognised or enforced within China. However, these measures may be recognised and enforced in other jurisdictions. An example highlighting this enforceability outside of China is the GKML case handled by BIAC in 2017.

As in a recent ruling by Beijing Fourth Intermediate Court, which was subsequently upheld by the Beijing High Court, Chinese courts have demonstrated a willingness to acknowledge and respect the validity of emergency arbitrator orders issued by a tribunal under the rules of a foreign arbitration institution. By this ruling, the enforcement of a foreign arbitral award was suspended based on the emergency arbitrator’s order of restraining any enforcement of the award unless the new arbitration is concluded or the tribunal orders otherwise.

2. Governing Legislation

2.1 Governing Legislation
The primary legislation governing arbitration in China includes the PRC Arbitration Law (revised in 2017) and the PRC Civil Procedure Law (revised in 2012). These laws provide the legal framework for arbitration proceedings and the enforcement of arbitral awards in China. Additionally, there are also other regulations and judicial interpretations that supplement these laws and provide further guidance on arbitration-related matters.

Types of Arbitration
Generally, Chinese law distinguishes three types of arbitration: domestic arbitration, foreign-related arbitration and foreign arbitration. These are based on the seat of arbitration and whether any foreign-related elements involved:

- domestic arbitration (the arbitration is seated in China, only involving domestic parties and domestic subject matters);
- foreign-related arbitration (the arbitration is seated in China, with foreign-related elements involved);
- foreign arbitration (the seat of arbitration is out of China).

It is noteworthy that the PRC Civil Procedure Law was amended pursuant to the Decision of the Standing Committee of the National People’s Congress on 1 September 2023, and these amendments will take effect on 1 January 2024. A relevant change within these amendments pertains to the characterisation of foreign arbitration, which provides that foreign arbitration refers to “an arbitral award made outside of the PRC” instead of “an arbitral award of an overseas arbitration organisation”. This adjustment emphasises that the nationality of an arbitration
award will no longer be determined by the location of the arbitral institution.

However, arbitral awards made in Hong Kong SAR, Macao SAR or Taiwan are not treated as domestic awards and are subject to special arrangements between these regions and mainland China respectively.

In practice, foreign-related arbitration and foreign arbitration are often referred to collectively as “international arbitration”.

Pursuant to Article 520 of the Supreme People’s Court (SPC) Interpretation of the PRC Civil Procedure Law, an arbitration shall be categorised as a foreign-related arbitration when any of the following circumstances are present:

- where either party or both parties are foreigners, stateless persons, foreign enterprises/organisations;
- where either party or both parties have their habitual residence located outside of China;
- where the subject matter involved is situated outside of China;
- where the legal fact that establishes, modifies or terminates the civil relationship occurred outside of China; or
- any other circumstances that may also warrant a foreign-related arbitration classification.

For domestic arbitration and foreign-related arbitration, there is a comprehensive regulatory framework that governs the arbitration agreements, qualifications of arbitrators, constitution of arbitral tribunals, conduct of the arbitral proceedings, issuance of arbitral awards, application to set aside arbitral awards and enforcement of arbitral awards, including:

- PRC Arbitration Law;
- PRC Civil Procedure Law;
- PRC Law on the Application of Laws to Foreign-related Civil Relations;
- the SPC’s judicial interpretations on the application of relevant laws, such as the SPC Interpretation of the PRC Arbitration Law, the SPC Interpretation of the PRC Civil Procedure Law, the SPC Provisions on Several Issues Concerning Enforcement of Arbitral Awards by Courts 2018, the SPC Provisions on Several Issues relating to Judicial Review of Arbitration 2018, etc.

Arbitration seated in Hong Kong SAR, Macao SAR or Taiwan are subject to the following special arrangements between mainland China and these special administration regions:

- the special arrangements administering the recognition and enforcement of awards made in Hong Kong SAR, Macau SAR and Taiwan Region; and
- the special arrangements governing the mutual assistance in court-ordered interim measures in aid of arbitration seated in Hong Kong SAR and Macao SAR, including the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong SAR; and the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Macao SAR (coming into force on 15 March 2022).

The primary focus of foreign arbitration revolves around the recognition and enforcement of foreign arbitral awards within the boundary of China which are subject to laws and regulations, including:
National Legislation and UNCITRAL Model Law

The PRC Arbitration Law, drawing inspiration from the UNCITRAL Model Law, incorporates key principles like party autonomy and separability of arbitration agreements. However, it currently lacks provisions for ad hoc arbitration, the power of an arbitral tribunal to order interim measures and the emergency arbitrator scheme. Despite this, in practice, if interim measure orders are intended for enforcement outside of China, they can be procured from the tribunal, deriving its authority from the arbitration rules of Chinese arbitration institutions, contingent upon the enforceability under the laws of the respective enforcement country.

2.2 Changes to National Law

On 30 July 2021, a draft amendment to the PRC Arbitration Law (“Draft Amendment to the PRC Arbitration Law”) was released for public comment, which includes, among others, the following proposed changes:

Expanding the Scope of Arbitrable Subject Matters

Article 2 of the Draft Amendment to the PRC Arbitration Law removes the constraint that the dispute must occur between parties on an equal footing, establishing the legal ground for resolving disputes between non-equal parties, such as investment arbitration.

Introducing Foreign-related Ad Hoc Arbitration

Under Article 91 of the Draft Amendment to the PRC Arbitration Law, it is provided that for disputes involving foreign-related elements, the parties can choose to refer the dispute to either institutional arbitration or ad hoc arbitration.

Introducing the Concept of “Seat of Arbitration”

Article 27 of the Draft Amendment to the PRC Arbitration Law adopts the concept of “seat of arbitration” from international arbitration practice, which will significantly improve the clarity of the applicable legal regime to each category of arbitration.

Enhancing the “Competence-competence” Doctrine

Article 28 of the Draft Amendment to the PRC Arbitration Law expressly stipulates that it is the arbitral tribunal itself, instead of the arbitration institution, who will decide on its jurisdiction.

Empowering the Arbitral Tribunal to Grant Interim Measures

Pursuant to Article 43 of the Draft Amendment to the PRC Arbitration Law, besides the court, the arbitral tribunal is also entitled to grant interim measures under the parties’ application.

Other means of empowerment include:

• Introducing the emergency arbitrator mechanism (Article 49 of the Draft Amendment to the PRC Arbitration Law).
• Entitling the arbitral tribunal to the court’s assistance with evidence discovery (Article 61 of the Draft Amendment to the PRC Arbitration Law).
• Integrating and establishing unified standards for setting aside purely domestic arbitral
awards and foreign-related arbitral awards (Article 77 of the Draft Amendment to the PRC Arbitration Law).

• Facilitating enforcement of arbitral awards by shortening the limitation period for a party to apply for setting aside an arbitral award from original six months to three months (Article 78 of the Draft Amendment to the PRC Arbitration Law).

• Removing the parties’ rights to apply for non-enforcement of the arbitral award, so as to avoid the repetitive judicial review of the arbitral award imposed by legal systems of setting aside and application for non-enforcement of an arbitral award, which are simultaneously subsisting under current Chinese law (Article 82 of the Draft Amendment to the PRC Arbitration Law).

As of the day of writing, ie, 13 July 2023, the Draft Amendment to the PRC Arbitration Law is subject to further review and approval by the National People’s Congress, the supreme legislative authority in China. According to the Standing Committee of the National People’s Congress, the amendment of the PRC Arbitration Law is included in the legislative agenda for the year of 2023.

Additionally, on 18 November 2022, a draft SPC Interpretation on Anti-trust Cases (“Draft SPC Interpretation on Anti-trust Cases”) was published for public comment, under Article 3 of which anti-trust disputes are non-arbitrable and can only be decided by Chinese courts.

3. The Arbitration Agreement

3.1 Enforceability

In China, courts typically uphold the enforceability of arbitration agreements provided they comply with the compulsory stipulations outlined in the PRC Arbitration Law. An arbitration agreement can manifest either as an arbitration clause within a contract or as a standalone accord. According to Article 16 of the PRC Arbitration Law, an arbitration agreement, to be deemed enforceable under Chinese law, must include the following elements:

• a clear expression of the parties’ mutual intention to arbitrate;
• an outline of the subject matter to be arbitrated, which must be arbitrable; and
• the selection of an arbitration institution.

3.2 Arbitrability

Under Chinese law, parties may refer contractual disputes or property-related disputes to arbitration for resolution.

Pursuant to Article 3 of the PRC Arbitration Law, certain disputes fall exclusively within the jurisdiction of the Chinese court and are, thus, non-arbitrable. These include disputes related to matrimonial matters, adoption, custody, fostering, and succession, as well as administrative disputes. These categories of disputes necessitate the direct involvement of the court and are not eligible for arbitration.

Determining Whether or Not a Dispute is “Arbitrable”

In practice, Chinese courts frequently deem contractual disputes involving intellectual property, such as trade secrets infringement, and disputes concerning false or misleading securities statements, as arbitrable. However, there remains a divergence of opinion within Chinese courts regarding the arbitrability of disputes arising from public-private-partnerships (PPP), and anti-trust disputes. This divergence results in a spec-
trum of decisions where some courts consider these disputes as arbitrable, while others do not.

If and when the Draft SPC Interpretation on Anti-trust Cases comes into force, the antitrust disputes are to become non-arbitrable.

3.3 National Courts’ Approach
For foreign-related arbitration, as articulated in Article 13 of the SPC Provisions on Several Issues relating to the Trial of Cases Concerning Judicial Review of Arbitration 2018, the governing law selected by the parties to resolve the disputes arising from the performance of the contract does not automatically extend to the arbitration agreement since under Chinese law the arbitration agreement or the arbitration clause contained in the contract is separate from the contract and parties are free to select a different governing law for arbitration agreement in a foreign-related contract, independent from the law governing the contract.

Article 16 of the SPC Interpretation of the PRC Arbitration Law, combined with Article 18 of the PRC Law on Application of Laws, establishes a hierarchical framework for determining the applicable law for foreign-related arbitration agreements. This framework proceeds as follows:

- The law mutually agreed upon by the parties takes precedence.
- In the absence of an agreed governing law, but where the parties have determined a seat of arbitration, the law of that location applies.
- If the parties fail to agree on both the governing law and the seat of arbitration, then the default application is the PRC law.

The enforceability of an arbitration agreement hinges on the presence of specific elements outlined in Section 3.1. If a party wishes to challenge the validity of an arbitration agreement, it is entitled to file the case with a Chinese intermediate court. Subsequently, the court’s decision concerning the agreement’s validity will be predicated on the aforementioned elements.

Additional circumstances could potentially render an arbitration agreement unenforceable. For instance, an arbitration agreement that offers parties the option of resolving their disputes through either a court or an arbitration institution is deemed invalid, unless the opposing party neglects to challenge the agreement’s validity prior to the first hearing, as stipulated in Article 7 of the SPC Interpretation of the PRC Arbitration Law. Nevertheless, in practical judicial scenarios Chinese courts typically uphold the validity of an arbitration agreement that grants a single party the unilateral right to choose between dispute resolution via arbitration or litigation.

Additionally, the arbitration agreement which states that the parties submit a dispute without any foreign-related element to be arbitrated out of mainland China is invalid, and the subsequent arbitration award will not be recognised and enforced by Chinese courts.

Agreements Enforced by Courts
As previously stated, Chinese courts typically uphold the “validation principle”, frequently declaring arbitration agreements as valid and enforceable. In the calendar year 2022, there were a total of 461 cases regarding the validity of arbitration agreements, among which over 80% of the disputed arbitration agreements were affirmed as valid by Chinese courts.

3.4 Validity
Under Chinese law, the doctrine of separability in arbitration agreements is vigorously upheld. Pursuant to Article 19 of the PRC Arbitration
Law and Article 10 of SPC Interpretation of the PRC Arbitration Law, an arbitration agreement embedded within a contract is to be regarded as a distinct entity, independent from the remainder of the contract. Consequently, its validity remains unaffected by any modifications, terminations, or declarations of invalidity pertaining to the overall contract.

4. The Arbitral Tribunal

4.1 Limits on Selection
Parties generally have the flexibility to form an arbitral tribunal comprising either a sole arbitrator, agreed upon by all parties, or three arbitrators, where the presiding arbitrator is selected by mutual agreement. Importantly, there are no additional restrictions on the parties’ autonomy in nominating arbitrators.

However, in practice, parties frequently encounter difficulties agreeing on the appointment of either the presiding arbitrator or the sole arbitrator. Under such circumstance, it becomes necessary to adhere to certain default procedures. These procedures will be further discussed in 4.2 Default Procedures.

Additionally, there exist situations wherein an arbitrator, appointed by one party, may be subjected to challenge by the opposing party. Please refer to 4.4 Challenge and Removal of Arbitrators for details.

4.2 Default Procedures
Upon selection of a specific arbitration institution’s applicable rules by the parties, these rules inherently detail the procedures for arbitrator appointment and are binding on all involved. Many arbitration institutions, like CIETAC, SHIAC, and BAC, maintain their own panels of arbitrators for parties to select from. Additionally, certain institutions permit parties to nominate arbitrators outside of their established panels, subject to the approval of the institution’s chairman, as seen in the practices of CIETAC and SHIAC.

Where no such procedure for appointing arbitrators is agreed upon by the parties or set up in the institutional rules, Articles 31 and 32 of the PRC Arbitration Law provide default procedure for the parties to nominate arbitrators as follows:

- Where a three-arbitrator tribunal is to be constituted, each party can nominate one arbitrator or authorise the chairman of the arbitration institution to appoint one. The third arbitrator shall be appointed jointly by the parties or by the chairman of the institution under the parties’ joint authorisation. The third arbitrator shall be the presiding arbitrator.
- Where a sole-arbitrator tribunal is to be constituted, the parties shall jointly nominate that arbitrator, or jointly authorise the chairman of the arbitration institution to make such appointment.
- Where the parties fail to decide how to nominate arbitrators, or fail to choose the arbitrator within the time limit prescribed by the arbitration rules, the chairman of the arbitration institution shall make the appointment.

Pertaining to Chinese law, there is currently no distinct default procedure in place for arbitrator selection in the context of multiparty arbitration. However, certain institutional rules may define a specific default procedure for such circumstances. For instance, under Article 29 of the 2015 CIETAC Arbitration Rules, if either the claimant or respondent fails to jointly nominate or delegate the appointment of an arbitrator to the
CIETAC chairman within a defined timeframe, the chairman is then tasked with appointing all three members of the arbitral tribunal and designating one as the presiding arbitrator.

4.3 Court Intervention
Under Chinese law, courts lack the authority to intervene in the selection of arbitrators, as there is no legal basis for them to exercise such power. The extent of the court’s involvement is limited to conducting a judicial review of the arbitrator appointments. However, this review only occurs after the rendering of the arbitral award and upon application by one party for setting aside or non-enforcement of the arbitral award.

One of the grounds for Chinese courts to set aside or refuse to enforce an arbitral award is that the constitution of the tribunal is in breach of the parties' arbitration agreement, arbitration rules or the law of the arbitration seat. Please refer to 11.3 Standard of Judicial Review for more details.

4.4 Challenge and Removal of Arbitrators
Article 34 of the PRC Arbitration Law sets out the following grounds for the parties to challenge or for the arbitration institution to proactively remove the arbitrator, if the arbitrator:

• is a party to the case or a close relative of a party or of its representatives;
• has interests in the case;
• has some other relationship with the parties or their representatives which may affect the arbitrator's impartiality;
• has private meetings with a party or its representative, or accepts gifts from a party or its representative.

In the above circumstances, the parties can request for the removal of the arbitrator and such request shall be made before the first hearing. Where the requesting party is aware of the reason for removing the arbitrator only after the first hearing, the requesting party shall make the removal application at least prior to the conclusion of the last hearing (Article 35 of the PRC Arbitration Law).

In practice, different arbitration rules will apply in this circumstance which will be slightly different from the laws. For example, under CIETAC arbitration rules, a party wishing to challenge an arbitrator on the grounds of the facts or circumstances disclosed by the arbitrator shall forward the challenge in writing within ten days upon receipt of the declaration and/or the written disclosure of the arbitrator and a party may challenge an arbitrator in writing within 15 days from the date it receives the notice of formation of the arbitral tribunal.

Upon the parties’ request, the chairman of the arbitration institution shall decide on whether the challenged arbitrator should be removed. Where the chairman happens to be the challenged arbitrator, the removal shall be decided by the arbitration institution (Article 36 of the PRC Arbitration Law). Following the removal of the arbitrator due to conflicts of interest, a new arbitrator shall be reappointed.

However, in practice, arbitrators would not prefer to be challenged by parties. Thus, in some cases, the arbitrator will apply to remove himself/herself voluntarily even if there is no statutory event, as long as one of the parties applies to challenge the appointment of the arbitrator.

4.5 Arbitrator Requirements
The general requirement is that the arbitrator shall not have any close relationship with the parties or their representatives which may lead
to the arbitrator’s partiality when deciding the case. This general requirement is then specified in the PRC Arbitration Law and rules of arbitration institutions. For detailed law and regulations concerning the requirement, see 4.4 Challenge and Removal of Arbitrators.

Under the rules of Chinese major arbitration institutions, an arbitrator nominated by the parties or appointed by the chairman of the arbitration institution shall sign a declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence (such as Article 31 of the CIETAC Arbitration Rules and Article 22 of the BIAC Arbitration Rules).

5. Jurisdiction

5.1 Matters Excluded From Arbitration
Under Chinese law, disputes concerning marriage, adoption, custody, fostering and succession, and administrative disputes are not arbitrable. Please refer to 4.4 Challenge and Removal of Arbitrators.

5.2 Challenges to Jurisdiction
Chinese law only adopts the principle of competence-competence to a limited extent. Under the PRC Arbitration Law, an arbitral tribunal is not entitled to the power to rule on its own jurisdiction. Instead, this power lies in arbitration institutions. Whilst under the rules of Chinese arbitration institutions, the arbitration institution can delegate the power to determine a party’s jurisdiction objection to the arbitral tribunal.

The substantial element to confirm the jurisdiction of an arbitration case is to confirm the validity of an arbitration agreement. According to Article 20 of the PRC Arbitration Law, where a party disputes the validity of an arbitration agreement, a party can submit this matter to either arbitration institutions or Chinese courts to rule upon. Where a party refers it to the arbitration institution, while another party refers it to the court simultaneously, the court shall decide on the validity of the arbitration agreement.

Nevertheless, Article 28 of the Draft Amendment to the PRC Arbitration Law provides that the arbitral tribunal itself is the competent body to decide on the validity of the arbitration agreement. This provision aligns with globally recognised arbitration practice.

5.3 Circumstances for Court Intervention
Chinese courts would rule on the issue of the arbitral tribunal’s jurisdiction:

- When a party challenges the validity of the arbitration agreement and a party submits this dispute to the court; the court would then address the issue of the tribunal’s jurisdiction on the party’s request.
- When a party applies to the court for setting aside or non-enforcement of an arbitral award, the court can exercise its judicial review over the issue of arbitral tribunal’s jurisdiction. When the court finds out that there was no valid arbitration agreement, or the subject matter arbitrated does not fall under the scope of the arbitration agreement envisaged or is non-arbitrable, the court may determine that the arbitral tribunal does not have jurisdiction over this case and then will set aside/refuse to enforce such arbitral award.
- When a party breaches the arbitration agreement and directly refers the dispute to the Chinese court, and the other party raises its objection to the court’s jurisdiction by invoking the arbitration agreement, the court will
determine the issue of jurisdiction on a prima facie basis.

It is a general principle that the court shall not intervene with arbitration except for certain circumstances stipulated by the law, as mentioned above.

The Upholding of the Arbitration Institution’s Rulings by the Court
If the arbitration institution decides that the arbitral tribunal has no jurisdiction over this case, under Chinese law there is no legal ground for courts to review such decision of the arbitration institution.

Where an arbitration institution has already decided on the validity of an arbitration agreement and a party subsequently applies to the court to determine the validity of the arbitration agreement or overturn the arbitration institution’s decision, the court shall dismiss such application (Article 13 of the SPC Interpretation of the PRC Arbitration Law).

5.4 Timing of Challenge
Article 20 of the PRC Arbitration Law sets out that the parties shall raise their objections to the jurisdiction of the arbitral tribunal prior to the first hearing before the tribunal. If the parties fail to challenge the arbitral tribunal’s jurisdiction before the first hearing but subsequently apply to the court to challenge the jurisdiction, the court shall dismiss such application (Article 13 of the SPC Interpretation of the PRC Arbitration Law).

After the arbitral award is rendered, a party may apply for setting aside or non-enforcement of the award based on the ground that the arbitration agreement is invalid, provided that the party has previously objected to the validity of the arbitration agreement during arbitration proceedings. However, if its previous objection is rejected by the tribunal or the arbitration institution, it is likely to be rejected by the court as well.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility
In the process of judicial review of arbitral awards, Chinese courts, adhering to the statutory standards delineated in sections 3.1 Enforceability and 3.2 Arbitrability, will conduct a de novo review focusing on admissibility and jurisdiction issues. Specifically, they will scrutinise the existence of a valid arbitration agreement.

5.6 Breach of Arbitration Agreement
Should a party commence court proceedings in breach of an existing arbitration agreement, the opposing party is entitled to contest the court’s jurisdiction. This is achieved by invoking the arbitration agreement prior to the court’s first hearing.

Under such circumstances, the courts, upon identifying prima facie evidence of a valid existing arbitration agreement, would generally exhibit reluctance to proceed with the case, leading to its likely dismissal.

5.7 Jurisdiction Over Third Parties
Arbitration, an alternative dispute resolution method, operates on mutual consent, necessitating prior agreement between parties. Consequently, it cannot be enforced against any third party without such a mutual accord.

Namely, the jurisdiction of the arbitral tribunal stems primarily from the mutual consent of the contracting parties and typically does not extend to a non-contracting party. However, there are exceptional circumstances where a third party may become a party involved in an arbitration:
• In the event of a merger or division, the arbitration agreement remains binding on the successors of the party to the initial arbitration agreement.
• Should a party to an arbitration agreement pass away, the arbitration agreement continues to bind the party’s heirs.
• If an assignee assumes all rights and obligations under a contract that includes an arbitration agreement, the arbitration agreement remains binding on the assignee.
• In the context of a principal-agent relationship, if the agent, acting on behalf of the principal, enters into a contract that contains an arbitration agreement with a third party under its own name, the contract, including the arbitration clause, may directly bind the principal and the third party, assuming the third party is aware of such agency relationship.

The above rules apply equally to both foreign and domestic third parties, regardless of nationality.

6. Preliminary and Interim Relief

6.1 Types of Relief
In China, interim measures are not available from an arbitral tribunal, but only from the competent Chinese court. However, as highlighted in 2.2 Changes to National Law, the convention may undergo a transformation. Once the Draft Amendment to the PRC Arbitration Law is enacted, it will empower Chinese arbitral tribunal with the authority to order interim measures.

However, some arbitration institutional rules grant the arbitral tribunal with the powers to award interim measures in foreign-related arbitrations, such as Article 23 of CIETAC Arbitration Rules, Article 62 of BAC Arbitration Rules and Article 25 of SCIA Arbitration Rules.

By the parties’ mutual consent to choose the applicable arbitration rules, the relevant arbitral tribunal can order interim measures pursuant to arbitration rules. Such orders shall be binding to the parties and the parties may voluntarily comply with these interim measures.

However, as Chinese law does not entitle the tribunal to power of granting interim measures and such powers currently is only limited to Chinese court, the interim measures ordered by the arbitral tribunal are unenforceable in China, but the parties may apply for enforcement of such interim measures in other jurisdictions, provided that the laws of hosting jurisdiction allow the enforcement of such interim measures.

Depending on arbitration rules, in foreign-related cases the arbitral tribunal generally can order the following three types of interim relief:

• preservation of property;
• preservation of evidence; and
• ordering an injunction to restrain a person from doing anything or to compel a person to do something.

6.2 Role of Courts
As mentioned in 6.1 Types of Relief, in China, under the current legal regime, the Chinese court is the only competent authority to order interim relief.

However, in scenarios where a party believes it is critical to initiate preservation measures to prevent the potential destruction of key evidence or transfer or disposal of property–actions which could impede the enforcement of a future final award–there is a procedure in place. This party
can forward an application for interim measures to the arbitral tribunal. Subsequently, this tribunal will relay the application to the intermediate court located either at the respondent’s place of residence or the location where the property or evidence in question resides.

In the realm of international arbitration, the arbitral tribunals, when adjudicating upon applications for interim measures, are guided by a minimum of three criteria. These requirements form the cornerstone of their decision-making process for granting interim measures:

- emergency/irreparable harm;
- prima facie case (the applicant has a reasonable possibility to succeed on the merits of its claim); and
- proportionality (whether the harm of rendering such interim relief caused to the respondent and/or third parties outweighs the benefit that would be gained by the applicant).

Contrary to the stringent international arbitration standards, the Chinese court typically adopts a more lenient approach towards the approval of interim measures. Emphasis is primarily placed on the element of urgency. Consequently, within the context of foreign-related arbitration, parties may find it comparatively simple to secure interim measures from a Chinese court.

Interim Relief in Aid of Foreign-seated Arbitrations

For foreign arbitrations, generally Chinese courts do not grant any interim measures in aid of them (except for maritime arbitrations). There is no legislation providing for such channel for Chinese courts to aid foreign arbitrations via ordering interim relief.

For arbitrations seated in Hong Kong SAR and Macao SAR, pursuant to the special arrangements between the courts of Mainland China and the Hong Kong SAR/Macao SAR, under the application of a party the Chinese court can grant interim measures in aid of arbitrations seated in these two regions. Additionally, for maritime arbitrations seated outside of China, subject to the PRC Special Maritime Procedure Law, a Chinese court can also order interim relief in aid of the arbitration proceedings (Article 21 of the SPC Interpretation of PRC Special Maritime Procedure Law).

Intervention of National Courts

Chinese law does not recognise the concept of emergency arbitrators. However, analogous to the power vested in the tribunals by arbitration institutions to order interim measures, these institutions also codify emergency arbitrator procedures within their arbitration rules. This is demonstrated in the rules of organisations such as CIETAC, BAC, and SCIA. Decisions made by emergency arbitrators under these procedures are solely binding on the parties involved, but lack enforceability within Chinese jurisdiction.

6.3 Security for Costs

In accordance with Chinese law, no legislative provisions authorise courts or arbitral tribunals to instruct a claimant to furnish security for costs. This contrasts with the international practice but aligns with China’s unique approach where the claimant pre-pays all arbitration fees. These pre-paid fees are later allocated between the parties in accordance with the principle of “costs follow the event”. This allocation occurs subsequent to the issuance of the arbitral award by the tribunal, ensuring a fair distribution of costs based on the outcome of the arbitration proceedings.
7. Procedure

7.1 Governing Rules
In accordance with the principle of party autonomy, parties have the discretion to select the governing law for the arbitration procedure. However, it is rarely exercised in practice. Instead, parties typically prefer to opt for specific arbitration rules which encompass detailed provisions concerning the arbitration procedure. This approach provides a structured framework, thereby facilitating a more efficient and predictable arbitration process.

Accordingly, the arbitration procedure will be conducted in accordance with the selected arbitration rules and the law of the arbitration seat. In cases where the arbitration is seated in China, the procedure will be governed by the following legislation:

- the PRC Arbitration Law;
- the SPC Interpretation of the PRC Arbitration Law;
- the PRC Civil Procedure Law; and
- the SPC Interpretation of the PRC Civil Procedure Law.

7.2 Procedural Steps
Chinese law only outlines general procedural steps for how arbitration proceedings should be conducted. However, institutional arbitration rules provide more detailed guidance. These rules typically cover all aspects of the arbitration process, from the initiation of proceedings to the rendering of the award, ensuring a comprehensive and clear framework for dispute resolution.

Generally, the arbitration procedure shall be subject to the following rules under Chinese law:

- The arbitration institution shall decide within five days as of the date of receiving the request for arbitration whether to hear the case or to dismiss it (Article 24 of the PRC Arbitration Law).
- Arbitration shall be conducted by oral hearings unless the parties agree otherwise (Article 39 of the PRC Arbitration Law).
- Arbitration must be conducted confidentially unless the parties agree otherwise, except where a case involves state secrets (Article 40 of the PRC Arbitration Law).
- Evidence shall be produced during the course of the hearing and the parties can cross-examine the evidence (Article 45 of the PRC Arbitration Law).
- The parties have the right to debate in the course of the hearing (Article 47 of the PRC Arbitration Law), etc.

7.3 Powers and Duties of Arbitrators
Under Chinese law, arbitrators can exercise their powers to manage the arbitration proceedings, to collect evidence on their own initiative (Article 43 of the PRC Arbitration Law), to mediate between the parties (Article 51 of the PRC Arbitration Law) and to issue the award based on majority opinion. For the specific procedures of how to conduct the mediation under the auspices of arbitration institutions, the rules of some arbitration institutions provide clear procedural steps, such as Article 47 of CIETAC Arbitration Rules and Article 43 of BIAC Arbitration Rules.

Though the PRC Arbitration Law does grant arbitrators the power to independently collect evidence, this is rarely exerted in practice. This is primarily due to the fact that under Chinese law, the exclusive right for enforcement in a judicial process is vested in the national court. Therefore, arbitrators typically rely on the evidence
presented by the parties rather than gathering their own collection.

Meanwhile, arbitrators shall exercise their powers independently and impartially (Article 34 of the PRC Arbitration Law).

7.4 Legal Representatives
Under Chinese law, for legal representatives (i.e., attorneys of a party) appearing in arbitration seated in China, there is no particular requirement in respect of their nationality and Bar qualification. That is to say, in China, both foreigners and foreign lawyers can represent a party in arbitration proceedings as long as they hold the relevant power of attorney (Article 29 of the PRC Arbitration Law).

Only in litigation proceedings is there a statutory requirement that the attorney representing the parties before the Chinese court shall be PRC lawyer (Article 270 of the PRC Civil Procedure Law).

8. Evidence
8.1 Collection and Submission of Evidence
In the arbitral proceedings, the collection and submission of evidence is mostly carried out by the party with the burden of proof following the principle that whoever is making the claim bears the burden of proof (Article 67 of the PRC Civil Procedure Law).

A party with the burden of proof shall produce evidence within the time period specified by the arbitral tribunal. If a party experiences difficulties in producing evidence within the specified timeframe, it may apply for an extension. The parties are often cross-examined on the evidence submitted by way of oral hearing or by means of writing (Article 45 of the PRC Arbitration Law). Under Chinese law, there is no procedure of evidence discovery, although under Article 112 of the SPC Interpretation of the PRC Civil Procedure Law the court may compel a party to a litigation to produce evidence that is under the party’s control upon another party’s request. However, this new system is not so widely used in Chinese court proceedings.

Generally, the evidence can take forms of the parties’ statement, documentary evidence, physical evidence, electronic data, witness statement and expert report. However, in practice, especially in civil cases, the parties rarely submit the witness statement and call the witness to testify in court hearing, as judges/arbitrators are more used to documentation evidence and subpoenaing witnesses can be costly and may complicate and delay the procedure. Relatively, the expert report is more often used, as in some professional fields, the arbitral tribunal may need to consult experts or appoint appraisers for clarification on specific technical issues of the case.

8.2 Rules of Evidence
It should be noted that China does not have a systematic rule of evidence specifically applicable to arbitral proceedings seated within the country. Hence, the arbitral process primarily relies on the evidence presented by the disputing parties and the discretion of the arbitrators in evaluating its relevance and weight.

The PRC Arbitration Law, the PRC Civil Procedure Law, the SPC Provisions on Evidence Production for Civil Actions and the arbitration rules of the chosen institution set out some provisions on how evidence shall be produced, such as the stipulation that evidence be submitted by the parties on time and where one party expressly
admits any fact unfavourable to them during the trial or in any written submissions, such as the statement of claim or statement of defence, the other party does not need to assume the burden of proof regarding this piece of fact.

Additionally, if the parties agree to apply other specific evidence rules, such as IBA Rules on the Taking of Evidence in International Arbitration, such rules regarding evidence shall prevail.

8.3 Powers of Compulsion
Chinese law is silent on the tribunal’s powers to compel or to order the production of documents or require the attendance of witnesses.

Upon application of a party, the tribunal may forward the party’s application to preserve evidence to the court for enforcement.

In practice, the tribunal may order the party to produce evidence; however, it will not seek court assistance since there is no legal basis for the tribunal to do so. Nor will the tribunal order non-parties to produce documents or require the attendance of witnesses since the powers of the tribunal only extend to the parties.

9. Confidentiality

9.1 Extent of Confidentiality
Under Article 40 of the PRC Arbitration Law, arbitral proceedings are mandated to be conducted with strict confidentiality, barring certain exceptional circumstances warranting disclosure. This confidentiality clause extends to all individuals involved in the arbitration process, including the parties, arbitrators, witnesses, translators, experts and other individuals, all of whom are obligated to adhere to the confidentiality requirement. Failure to comply with these obligations may result in legal liabilities.

Although arbitral proceedings are typically characterised by confidentiality, specific situations may necessitate the disclosure of certain information. Parties may consent to disclose specific details to enforce or contest an arbitral award in court. Certain criminal or civil cases may demand disclosure, driven by public policy stipulations where documents from the arbitral proceedings are required as evidence. Furthermore, a publicly listed company may need to disclose information related to arbitration cases, in accordance with its obligatory transparency requirements.

In exceptional situations, a breach of confidentiality may lead to the nullification of contracts. In a dispute related to third-party funding, the court rendered a significant decision by invalidating the third-party funding agreement. The court found that the terms of the contract contradicted the confidentiality requirement of arbitration proceedings, thus rendering it void.

10. The Award

10.1 Legal Requirements
An arbitral award shall be determined based on the majority opinion of the tribunal. Where a majority opinion cannot be reached, the award shall be decided according to the presiding arbitrator’s opinion (Article 53 of the PRC Arbitration Law). An award shall be legally binding from the date on which it is made.

The arbitral award shall include the following contents (Article 54 of the PRC Arbitration Law):

- the reliefs sought by the parties;
• the relevant facts unless the parties agreed otherwise;
• the tribunal’s reasoning unless the parties agreed otherwise;
• the tribunal’s decision;
• the allocation of arbitration costs between the parties; and
• the date of rendering the arbitral award.

The arbitral award shall be signed by the arbitrators (the arbitrator who holds a different opinion on the award may or may not sign it) and be sealed by the arbitral institution.

Under Chinese law, there is no statutory time limit for the tribunal to render the award. However, to conduct the arbitration and resolve the dispute in an efficient way, rules of arbitral institutions often set out the time period for the tribunal to render the award, such as in CIETAC Arbitration Rules, the tribunal is required to render an arbitral award within four months from the date on which the tribunal is formed. In BIAC Arbitration Rules, the time limit is six months. While rules of arbitration institutions often provide that if there are special circumstances justifying an extension to this period, the chairman of the arbitral institution may approve an extension of an appropriate time period at the request of the tribunal. In practical terms, normally this time period for rendering the arbitral award can be extended once in exceptional situations.

10.2 Types of Remedies
Chinese law does not expressly set out what types of remedies can be awarded by the tribunal, hence there are no legal restraints on this matter.

In practice, the arbitral tribunal often awards remedies as follows:

• legal remedies, such as damages including compensatory damages and liquidated damages if it is reasonable in light of the expected/actual harm;
• equitable remedies, such as specific performance, injunction relief and declaratory remedies.

10.3 Recovering Interest and Legal Costs
The arbitral tribunal shall decide on the allocation of legal costs between the parties in the arbitral award (Article 54 of the PRC Arbitration Law). In practice, the legal costs often include arbitration fees, attorney’s fees, and other third-party fees such as expert fees, appraisal fees, audit fees, notary fees, translation fees, etc. Interests will also be concluded in an award provided that the party made such a petition regarding the interests.

The tribunal normally allocates the legal costs between the parties based on the parties’ prior agreement. In the absence of such prior agreement, the tribunal will determine the cost allocation pursuant to the principle of “costs follow the event”. Namely, the legal costs shall in principle be borne by the losing party. If either party only partially succeeds in the case, the arbitral tribunal shall determine the proportion of each party’s share of the legal costs on the basis of the extent of each party’s liability.

As for the interest, the parties are entitled to recover the interest as agreed within their agreement as long as the agreed interest rate does not exceed the statutory rate cap under Chinese law, which is four times the loan prime rate (LPR) of the People’s Bank of China. If there is no agreed interest rate between the parties (including previously consented in an agreement or where an agreement is reached in the process of the arbi-
11. Review of an Award

11.1 Grounds for Appeal
Under Chinese law, an arbitral award cannot be appealed since it is final and binding as of the date of its issuance. However, the parties are entitled to the following recourses to raise their objections to the award:

• application to the Chinese courts for setting aside the award; and
• application to the Chinese courts for non-enforcement of the award.

11.2 Excluding/Expanding the Scope of Appeal
Under Chinese law, grounds for a party to challenge an arbitral award are established by legislation and are considered mandatory. Therefore, parties cannot exclude or expand the scope of these grounds through mutual agreement. This means the rules for contesting an arbitral award are fixed and cannot be modified by the parties involved.

11.3 Standard of Judicial Review
Under the purview of the PRC Arbitration Law and the PRC Civil Procedure Law, Chinese courts undertake a judicial review of arbitral awards. Typically, this review is conducted in a deferential manner, highlighting the court’s respect for the arbitral tribunal’s decision on the case’s merits. The court primarily focuses on ensuring compliance with arbitration procedures rather than re-evaluating the case’s substantive aspects. This approach underscores the central tenets of these laws, which form the primary foundation for the court’s review standards and grounds concerning arbitral awards.

Article 58 of the PRC Arbitration Law and Article 244 of the PRC Civil Procedure Law provide grounds for setting aside or non-enforcement of a purely domestic award, which are the following:

• no arbitration agreement subsists between the parties;
• the arbitral award rules on matters which are not envisaged to be arbitrated by the parties and are beyond the scope of the arbitration agreement, or the subject matter of the dispute is non-arbitrable;
• the composition of the arbitral tribunal or the arbitral procedure is running against statutory requirements;
• the evidence based on which the arbitral award is rendered is falsified;
• the opposing party has concealed evidence that can substantially undermine the fairness of the tribunal’s determination;
• the arbitrator has been involved in any conduct of corruption and bribery, malpractice or abusing of the law when adjudicating on the case; or
• the enforcement of the award would be inconsistent with public interests.

Pursuant to Article 70 of the PRC Arbitration Law and Article 281 of the PRC Civil Procedure Law, the grounds for a foreign-related arbitral award to be set aside or refused for enforcement are as follows:

• the parties did not conclude an arbitration clause in the main contract, or have not subsequently reached an arbitration agreement in writing;
• the respondent was not given proper notice of the appointment of the arbitrator or of the commencement of the arbitral proceedings, or was unable to present its case in the proceedings due to any reason that was not attributable to it;
• the composition of the arbitral tribunal or the arbitration procedure was running inconsistently with the arbitration rules;
• subject matters arbitrated do not fall under the scope of the arbitration agreement achieved or are non-arbitrable; or
• the enforcement of the award would be contrary to public interests.

The grounds for refusing to recognise and enforce a foreign arbitral award are set out under Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).

For the enforcement of an award made in Hong Kong SAR, Macau SAR and Taiwan Region, the grounds for refusal are provided in special arrangements respectively, which are largely analogous to the grounds contained within Article V of the New York Convention.

There is an internal reporting regime governing Chinese courts’ decision on setting aside/non-enforcement of arbitral awards. A ruling on setting aside/non-enforcement of a foreign-related award or non-recognition/non-enforcement of an award made out of mainland China can only be rendered subject to the SPC’s approval. For a domestic award, the Chinese High Court’s approval is sufficient to make such a ruling.

12. Enforcement of an Award

12.1 New York Convention
On 2 December 1987, China officially ratified the New York Convention, thus becoming a contracting state, with the following two reservations:

• Reciprocity reservation: on the basis of reciprocity, China declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state.
• Commercial reservation: China declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such a declaration.

12.2 Enforcement Procedure
If a foreign-related/foreign award (made in a contracting state to New York Convention) is not complied with voluntarily by the respondent, the claimant may file the application for enforcing the award to the Chinese intermediate court of the place where the respondent is domiciled or where the respondent’s property is located (Article 29 of the SPC Interpretation of the PRC Arbitration Law and Article 290 of the PRC Civil Procedure Law).

Additionally, the recent amendment to PRC Civil Procedure Law endorsed on 1 September 2023, and set to be effective from 1 January 2024, introduces pivotal updates. Specifically, even if the respondent neither resides in China nor has assets within the country, the Chinese party seeking enforcement can also apply to the Intermediate People’s Court either at their own place of residence or at a location that has a relevant connection to the dispute at hand. This
revision further provides greater convenience and efficiency for Chinese applicants to enforce a foreign award.

The time limit to apply for enforcement is two years from either (Article 246 of the PRC Civil Procedure Law):

- The last day of the performance period specified in the arbitral award.
- The last day of each performance period if the arbitral award requests performance in instalments.
- The effective date of the arbitral award if the award does not specify a performance period.

The two-year time period can be suspended or re-run in certain circumstances.

There is no precedent that an award that has been set aside by the court at the place of the arbitration is recognised or enforced in China.

Ongoing Set-aside Proceedings
If the award applied to be enforced in Chinese court is subject to ongoing set-aside proceedings at the seat of arbitration, the Chinese court will tend to adjourn the decision on the enforcement of the award.

For foreign arbitral awards made within a non-contracting state to the New York Convention, the party can apply for recognition and enforcement of the award based on the relevant treaties and the principle of reciprocity (Article 282 of the PRC Civil Procedure Law).

Raising a Defence of Sovereign Immunity
Currently, states and state agencies are immune from enforcement proceedings in China. However, this court’s approach may be overturned, as on 30 December 2022, China released the Draft PRC Law on State Immunity for public comment. Articles 12 and 13 of the Draft PRC Law on State Immunity provide that a party can apply for enforcement of an arbitral award against a state or state agencies.

12.3 Approach of the Courts
For the Chinese court’s approach towards the recognition and enforcement of arbitral awards, please refer to 11.3 Standard of Judicial Review.

Public policy plays a crucial role in the enforcement of arbitration awards, yet it is undefined by both the New York Convention and the Model Law. The concept of public policy can be interpreted to encompass domestic, international, and transnational aspects, each with its own implications. Domestic public policy, in particular, has the broadest reach and can differ significantly between jurisdictions. This can result in considerable variations in how arbitration awards are enforced from one country to another, depending on the local understanding and application of public policy.

In the enforcement of foreign arbitration awards, Chinese courts principally adhere to domestic public policy standards. However, the invocation of public policy as a ground for refusal is a rare occurrence. In the last two decades, only two foreign awards have been denied enforcement in China due to public policy violations. The SPC holds the interpretive authority on matters of public policy, thanks to the internal reporting system employed by the Chinese judicial system. This ensures a uniform and consistent application of public policy across the country.

Generally, the SPC will deem a foreign award as contravening public policy only if the award violates the fundamental legal principles, state
sovereignty, national or public security, social and public interests or moral standards. A mere contravention of mandatory regulations does not necessarily equate to a public policy violation in China. The threshold typically requires a breach of fundamental rules and values to substantiate a claim of public policy infringement.

Based on established judicial precedents, it can be inferred that a foreign award’s recognition and enforcement might be deemed a violation of public policy under Chinese law if it directly conflicts with a prior, enforceable decision rendered by a Chinese court on the same dispute. This principle is articulated in Article 531 of the SPC Interpretation of the PRC Civil Procedure Law.

13. Miscellaneous

13.1 Class Action or Group Arbitration
PRC law does not provide for class action arbitration or group arbitration.

13.2 Ethical Codes
Counsel
Ethical standards for counsels in arbitral proceedings are provided by the PRC Lawyers’ Law (amended in 2017) and detailed by national and local lawyers’ associations.

While the PRC Lawyers’ Law provides a general guidance for licensed lawyers, lawyers’ associations at national and local level describe the detailed code of conduct in arbitral proceedings specifically. For instance, the All China Lawyers Association issued the Rules of Counsels’ Participation in Arbitration in 2013, which serves as a significant reference for the conduct and participation of counsels in arbitral proceedings.

Arbitrator
Unlike lawyers, arbitrators in China are not governed by specific legislation or self-disciplinary organisations regarding their ethical standards and code of conduct.

The China Arbitration Association was officially registered and established on 14 October 2022 according to the information disclosed on “National Social Organization Credit Information Disclosure Platform” of the Ministry of Civil Affairs. But the association has yet to commence its formal operations at present.

Despite the absence of regulations provided by self-disciplinary associations, each arbitration institution has developed its own set of arbitration rules that arbitrators must adhere to upon their appointment. These rules serve as a framework to ensure the ethical conduct and professional integrity of arbitrators throughout the arbitral proceedings.

13.3 Third-Party Funding
Third-party funding is an emerging practice in China, currently with no specific legislation in place to regulate its use. As for arbitration rules, CIETAC has played a leading role by incorporating provisions specifically addressing third-party funding within its International Investment Arbitration Rules. Additionally, the Hong Kong Arbitration Center of CIETAC has established Guidance for Third-Party Funding Arbitration to provide applicable principles and codes of conduct for parties involved in third-party funding disputes.

In theory, third-party funding was historically prohibited by law, constituting offences such as maintenance and champerty in common law jurisdictions. However, as the business world has evolved, arbitration institutions have shifted
their priority away from concerns about potential interference by third-party funders in the procedural and outcome aspects of cases. Instead, they are more focused on the cost and efficiency of dispute resolution. This has led to the emergence of litigation financing services.

It is critical to underscore the existing disparity in court rulings concerning the legitimacy of third-party funding agreements. This discrepancy may engender potential enforcement risks. For instance, Shanghai Second Intermediate Court, in case (2021) Hu 02 Min Zhong 10224, deemed a third-party funding agreement invalid, citing a violation of public order. Conversely, Beijing Fourth Intermediate Court, in case (2022) Jing 04 Min Te 368, ruled that such agreements do not present any issues regarding information disclosure, conflicts of interest, or confidentiality—thereby affirming their enforceability.

This lack of uniformity underscores the inherent complexities and risks in adopting and enforcing third-party funding agreements.

13.4 Consolidation
Chinese law is silent on consolidation of separate arbitral proceedings. However, the majority of arbitration institutions have established rules regarding consolidation of arbitral proceedings.

To be specific, consolidation of arbitration involves merging independent and related arbitration cases accepted by the same institution into a unified arbitration proceeding. Concurrent hearing involves the simultaneous adjudication of multiple arbitration cases within the same proceedings, under certain conditions. Although the cases are heard together, each case maintains its individual procedures, and separate awards are issued for each case. Single arbitration under multiple contracts refers to the consolidation of disputes arising from interrelated contracts based on the same underlying transaction. This consolidation allows the applicant to seek arbitration for all related disputes as a single case.

The initiation of single arbitration under multiple contracts requires an application from the parties involved. Consolidation of arbitration can be initiated either by mutual agreement between the parties or by one party’s application with the approval of the arbitral tribunal. Concurrent hearing, on the other hand, necessitates the agreement of the parties and similarity in the composition of the arbitral tribunals.

In addition to these factors, several elements must be considered:

- Consolidation of arbitration: the relationship between the contracts, parties, legal relationships, and subject matters; the composition of the arbitral tribunals.
- Concurrent hearing: the existence of a connection between the cases, and the similarity in the composition of the arbitral tribunals.
- Arbitration under multiple contracts: the relationship between the multiple contracts, parties, legal relationships, and subject matters.

The institutional rules of BAC, SHIAC, and SCIA emphasise the element of the same subject matter, while the CIETAC rules prioritise the importance of the same arbitration agreement and legal relationship. It is noteworthy that nearly all major arbitration institutions mandate the parties’ mutual agreement to commence concurrent hearing procedures.

13.5 Binding of Third Parties
While arbitration agreements or awards are typically binding only upon the direct parties involved, there exist exceptional scenarios
where a domestic or foreign third party might find themselves obligated by such agreements, relevant proceedings, or subsequent awards. This principle is encapsulated succinctly in Article 8 and 9 of the SPC Interpretation of the PRC Arbitration Law. These provisions stipulate that successors and transferees inheriting rights and obligations under contracts with a valid arbitration clause must comply with the stipulations of such a clause.

While legislation does not explicitly address a court’s authority to obligate foreign third parties, it is widely recognised that if the legal prerequisites for binding third parties are satisfied, the arbitration agreement, proceedings, or award’s implications can extend to the third party, irrespective of their nationality.
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