

中国

China
CHINA

Key points

Domestic arbitration and international or foreign-related arbitration are subject to different regimes.

Venues for CIETAC arbitration are not confined to China and CIETAC arbitrators may be selected by parties outside the CIETAC panel (although their selection must be confirmed by the chairman of CIETAC).

The parties may agree to use rules other than those of CIETAC (for example, UNCITRAL rules). In most cases, hearings are staged once, and are of short duration. There is no standard procedural style: the parties may agree to follow the trial approach; or the tribunal may adopt an inquisitorial or adversarial approach. Under CIETAC rules, the tribunal may be expected to arrive at its conclusion by reference not only to the law governing the dispute but also to international practice and concepts of fairness and reasonableness. There is no requirement to retain Chinese lawyers in CIETAC arbitrations. Security for costs is not available.

There is no right of appeal against a refusal to enforce an award. There is an internal court system for reviewing decisions relating to the enforcement of foreign awards (at least those published in institutional arbitration).

China is a party to the New York Convention and has similar enforcement arrangements with Hong Kong and Macau, but local protectionism and other factors may hinder or prevent enforcement of awards.

Draft rules for arbitration reform are under consideration.

Confidentiality

Under the Arbitration Law arbitration is a private proceeding unless otherwise agreed. CIETAC, CMAC and BAC rules all require proceedings to be private unless the parties desire otherwise and the tribunal agrees. In cases to be heard in private, the rules enjoin parties, witnesses, expert witnesses and the commission's staff to keep the proceedings confidential. The duty to observe confidentiality is reinforced by the Ethical Rules for Arbitrators. This duty extends not only to information, documents, submissions and awards, but also the views of individual arbitrators.

Generally, however, there is no requirement of confidentiality outside hearings and it is advisable to agree a confidentiality provision.

For a model confidentiality clause, see the Arbitration section on drafting arbitration clauses.

Model arbitration clauses

Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

China International Economic and Trade Arbitration Commission (CIETAC)

Any dispute arising out of or in connection with this contract shall be submitted to China Maritime Arbitration Commission for arbitration in accordance with the existing rules of the Commission. The arbitration award shall be final and binding upon the parties.

China Maritime Arbitration Commission (CMAC)

All disputes arising from or in connection with this contract shall be submitted to Beijing Arbitration Commission for arbitration in accordance with its rules of arbitration in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Beijing Arbitration Commission (BAC)

An arbitration agreement must be in writing. Unless otherwise specified, the language will be Chinese; the tribunal will consist of three arbitrators. The parties may stipulate that the third arbitrator should be of a different nationality from either party to avoid the perception of national bias. Care should be taken to use the Commission's correct title.

The model clauses listed above are commonly used, usually with modifications to reflect the desired place and language of arbitration, the composition of the tribunal and the nationality of the third or presiding arbitrator, and responsibility for providing English translations of any Chinese language documents relied upon.

See the Arbitration section for best practice in drafting arbitration clauses.

Weblinks

www.cietac.org.cn/index.cms (English and Chinese)

China International Economic and Trade Arbitration Commission (CIETAC)

www.cmac.org.cn (Chinese only)

China Maritime Arbitration Commission (CMAC)

www.bjac.org.cn (Chinese, English, Korean, Japanese and French)

Beijing Arbitration Commission (BAC)

1 What arbitration bodies are there within the jurisdiction?

Numerous arbitration commissions have been established throughout the country, all working within the framework of China's Arbitration Law 1994 (Arbitration Law). These bodies mainly receive domestic arbitration cases; some are permitted to handle investment disputes between Chinese and foreign parties.

Most international commercial, trade and investment cases are handled by the China International Economic and Trade Arbitration Commission (CIETAC), which is receiving an increasing number of appointments. Cases of a maritime nature may be referred to the China Maritime Arbitration Commission (CMAC). The Beijing Arbitration Commission (BAC) is also proving a popular choice.

The Shanghai Arbitration Commission established the Shanghai Court of Financial Arbitration (December 2007) and the Shanghai Court of International Shipping Arbitration (May 2009).

CIETAC is headquartered in Beijing; it has subsidiary commissions in Shanghai and Shenzhen (called the South China Sub-Commission or *Huanan fenhui*) and liaison offices in various cities. It is permissible for parties in some cases to agree to hold CIETAC arbitrations or hearings outside China; this raises the possibility of administering arbitrations outside China, supervised by local courts.

CMAC is also headquartered in Beijing, with one subsidiary commission in Shanghai.

Foreign arbitration institutions are in an anomalous position in China. For example, although China is a member of the International Chamber of Commerce (ICC), the ICC International Court of Arbitration is not a

arbitration commission for the purposes of the Arbitration Law. Opinion is divided and some regard the enforceability of awards published in ICC arbitrations purportedly conducted in China as doubtful.

2 Is there an Arbitration Act governing arbitration proceedings, and is it based on the UNCITRAL model law?

The Arbitration Law came into force in 1995. It is not based on the UNCITRAL model law although it is comparable to it in its scope. Arbitration in China is also regulated by provisions of the Civil Procedure Law 1991 (Civil Procedure Law), and numerous interpretations, minutes, regulations, replies and notices.

3 What are the available rules?

Domestic arbitration is covered by the Arbitration Law, the Civil Procedure Law and numerous regulations and notices. China also has laws dealing specifically with contracted rural land disputes and labour disputes.

The CIETAC rules were adopted in 1994, and revised in 1995, 1998, 2000 (when CIETAC's jurisdiction was extended to domestic disputes) and 2005 to bring them into line with modern arbitration practice. The rules allow parties to select other arbitral rules (such as UNCITRAL) and apply them in a CIETAC arbitration. The parties are given greater autonomy and, unless they agree otherwise, the tribunal need not follow Chinese court procedure and may adopt an adversarial or inquisitorial approach to proceedings.

The CIETAC rules for financial disputes were introduced in 2003 (and revised in 2005).

The CMAC rules were introduced in 2001 (and revised in 2004).

The BAC rules were revised in 2003, with effect from March 2004.

China is a party to the New York Convention and to ICSID (although it has entered a reservation confining ICSID to cases of misappropriation).

China has no system of case law precedent.

4 What supervision is there of arbitrators and their awards?

The arbitration commission may appoint arbitrators. Under the former CIETAC rules, arbitrators were selected from a panel; however, under the 2005 CIETAC rules, they may be selected from outside the panel by agreement between the parties, subject to confirmation by CIETAC's chairman. The new procedure involves the parties submitting lists of names to CIETAC; if names cannot be matched, CIETAC makes appointments from its panel. It is still thought advisable to state in the arbitration agreement that the third (presiding) arbitrator is not to be of the same nationality as either of the parties, to avoid the risk of national bias.

The Arbitration Law and the rules prescribe ethical standards for arbitrators and impose a general obligation of confidentiality on the tribunal, parties, witnesses and experts, for all substantive and procedural aspects of the case. The Arbitration Law specifies circumstances in which an arbitrator may incur legal liability and have their name removed from the list of arbitrators.

The 2005 CIETAC rules oblige arbitrators to disclose potential conflicts of interest. Any challenge should be made within ten days. Challenges are decided by the chairman of CIETAC. The tribunal may order hearings to be repeated following the replacement of an arbitrator. Proceedings may continue with two arbitrators following the removal or demise of a third arbitrator.

Arbitrators must submit their awards to CIETAC in draft form before signing them. CIETAC may remind the tribunal of issues, but should not interfere with the tribunal's independence in rendering the award. Dissenting opinions may be attached to the award but do not form part of it.

5 How quickly can a tribunal be set up?

Constituting a tribunal usually takes at least five weeks. CIETAC rules permit the parties to decide the tribunal's composition. If they fail to reach agreement within 15 days from receipt of notice of arbitration, the commission may appoint the tribunal. Before the tribunal is constituted, CIETAC will forward any applications for preservation of evidence or property to the court where the respondent resides or where its property is located.

6 What happens if one party refuses to participate in the process?

If a party fails to submit their list of proposed arbitrators, CIETAC will make an appointment from its panel. If the party applying for arbitration fails to appear at a hearing without reasonable cause, or leaves the hearing before its conclusion without the permission of the arbitral tribunal, the application may be deemed withdrawn. In that event, if the respondent has filed a counterclaim, the tribunal may deal with the counterclaim and make an award. If the respondent fails to appear without reasonable cause, or leaves the hearing before its conclusion without permission, a default award may be made, and any counterclaim filed deemed withdrawn.

7 What interim measures are available?

The tribunal may order injunctive relief (excluding anti-suit injunctions) or preservation of evidence. Security for costs is not available.

The CIETAC, CMAC and BAC rules all provide for the granting of interim relief. Application is made to the commission, which forwards the papers to the relevant court for a ruling. Several kinds of interim relief – for attachment, sequestration, posting of security and preservation of evidence – are available under the Civil Procedure Law.

8 What right is there to challenge the appointment of an arbitrator?

A party may, within ten days from receipt of notice of disclosure by an arbitrator, apply to the commission to have the arbitrator removed. Otherwise, a challenge should be submitted to the commission in writing within 15 days from receipt of the notice of the formation of the tribunal. If grounds for challenge do not become apparent until later, a challenge should be made before the final hearing is concluded.

9 Can a party appeal the arbitrator's decision and, if so, are there time limits to be aware of or unusual provisions?

There is no right of appeal from an arbitration award under CIETAC or CMAC rules. A party may, however, apply to the Intermediate People's Court where the commission is located to have the award set aside. The application should not involve a review of the substantive merits of the claim itself.

10 Is China a party to the New York Convention?

Yes, China is a party to the New York Convention. China has exercised both the reciprocity and the commerciality reservations, so it will only recognise and enforce awards that are, as a matter of domestic law, commercial in nature and which are issued in a state that is party to the New York Convention.

11 Will an arbitration award be enforceable in China and, if so, what is the procedure?

Despite the efforts of the Chinese authorities, local protectionism and corruption can hinder or prevent enforcement.

Foreign-related arbitration awards and domestic awards are subject to different rules of enforcement.

When the court is looking at a domestic award, it will examine both the arbitration procedure and the substantive issues in dispute.

Foreign awards may be the subject of an application for enforcement to the Intermediate People's Court where the respondent or their assets are located. If the Intermediate People's Court decides not to enforce an award, the applicant has no right of appeal. However, there is a review procedure, which is provided for in the Notice Concerning the Handling of Foreign-Related Arbitration and Foreign Arbitration 1995. The Intermediate People's Court, having decided not to enforce the award, is required to submit a report for review by the Higher People's Court, which exercises a supervisory role. If that court also decides not to enforce the award, it must in turn submit a report to the Supreme

People's Court. If the Supreme People's Court agrees that the award should not be enforced, that decision is final. It is thought that the review procedure is limited to awards published in foreign institutional arbitration, not ad hoc arbitration.

There appears to be no right to review the report of the Intermediate People's Court or the Higher People's Court, nor to make submissions in relation to the report, nor to appear before the Higher People's Court or the Supreme People's Court. However, there is no objection to lodging directly with the Supreme People's Court a full set of the documents submitted to the Intermediate People's Court; and the Supreme People's Court is open to informal discussion. Although the regulations require a report to be delivered to the Supreme People's Court within two months from receipt of the application to enforce, there is no time limit for the decision of the Supreme People's Court.

The Civil Procedure Law (as recently amended) provides for a two-year time limit for the commencement of enforcement proceedings reckoned from the last day for compliance with the terms of the award. If the award is silent as to the time for compliance, the two-year period should be taken to run from the date when the award took effect.

China is a party to the New York Convention, so an award obtained in China may be enforced in other jurisdictions that have ratified the New York Convention. According to CIETAC, Chinese arbitration awards have been successfully enforced in the UK, the US, Canada, France, Germany, New Zealand, Japan, Italy and Singapore.

Awards in China and Hong Kong have been mutually enforceable since February 2000. Awards in China and Macau have been mutually enforceable since 1 January 2008.

12 What are the likely costs of the arbitration?

Under the CIETAC, CMAC and BAC rules, the arbitration fee must be paid when the application for arbitration is submitted. The fee is calculated in accordance with rate schedules appended to the rules. Fees are calculated as a percentage of the amount claimed, and include the arbitrators' fees.

Remuneration for arbitrators is quite modest; for this reason, a party's arbitrator of choice may declare themselves unavailable.

Under the CIETAC rules, the tribunal can award a portion of the expenses incurred by the winning party, reflecting factors such as the complexity of the case, the workload of the winning party and its lawyers, and the amount in dispute.

The arbitration fee collected by CIETAC is recoverable by the winning party as a separate head of claim.

13 Are split clauses valid and enforceable?

Split clauses allow one or more parties to elect arbitration or litigation after the dispute arises.

The Supreme People's Court has stated that a clause will be considered invalid if it purports to give parties the option of submitting their disputes to an arbitral tribunal or to the court (SPC minutes, Second National Meeting on Foreign-Related Commercial and Maritime Trial, 26 December 2005, paragraph 68). However, it appears that if a party to such an agreement actually commences arbitration and the other party does not object within the time allowed by the Arbitration Law, the arbitration may proceed. The Supreme People's Court would probably also condemn as inequitable an agreement that gives one party the option to arbitrate or to litigate and the other party only the right to arbitrate. ■

