Quaderni dei colloqui sull'arbitrato internazionale

02 COLLOQUIA PAPERS ON INTERNATIONAL ARBITRATION

Milan, 12 June 2013 **Investment Arbitration at ICSID**

Milan, 29 October 2013 **Arbitration in China**

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MILAN CHAMBER OF ARBITRATION

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FOREWORD

This volume brings together the contributions written by Natalí Sequeira, Caroline Berube and Deborah Loedt, Mohamed Abdel Raouf, Doug Jones and Janet Walker prepared on the occasion of the C*olloquia on international arbitration*, held in Milan throughout 2013 and 2014.

The C*olloquia on international arbitration* are held periodically in an informal round-table setting and are addressed to professionals and in-house counsels who can, thus, exchange views with arbitration experts from different jurisdictions.

The *Colloquia papers on international arbitration* publish the papers written by the *Colloquia*'s speakers on the subject treated.
The *Colloquia papers* are published yearly and are issued in an electronic form with free access to the full text.

With its open-access publishing, the Milan Chamber of Arbitration offers an easy access to information on alternative justice contributing to its widest diffusion.

We wish to acknowledge the authors of the articles who have devoted time and attention to our project.

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He has acted as sole arbitrator, co-arbitrator and chairman of arbitral tribunals in numerous domestic and international commercial arbitrations (institutional and ad hoc). He has also acted as counsel, for private and public entities, including the Egyptian government, in many international commercial and investment arbitrations (under the Rules of CRCICA, UNCITRAL, ICC, AAA, ICSID, DIAC, CAS, GCC, and the ADCCAC).
He is the author and co-author of several legal publications on arbitration (in Arabic, English and French).

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- Act as a liaison between arbitrators and parties by providing advice on applicable arbitration rules and standards.
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- Analysis and screening of incoming requests for arbitration and preparation of registration memoranda.

- Assistance during the constitution of arbitral tribunals, including the preparation of conflict checks to identify potential arbitrators according to the parties' requirements and the individual characteristics of each case.
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Janet Walker is Secretary General of the International Association of Procedural Law, elected member of the American Law Institute, and past President of the International Law Association, Canadian Branch. Since 2001, Janet Walker has been Foreign Research Professor at the Faculté des sciences juridiques de Tunis; and she has taught as a visitor as the Leverhulme Professor at University College, Oxford; Hauser Global Law Professor at NYU and NYU/NUS in Singapore; and in Australia, Italy, Israel, Croatia and China.

I

INVESTMENT ARBITRATION AT THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

Natalí Sequeira

SUMMARY: 1. Introduction. – 2. The ICSID Convention and Arbitration Rules. – 3. ICSID Caseload. – 4. Article 25 of the ICSID Convention. 5 – Legal disputes arising directly out of a dispute. 6 – Consent. 7 – Features of ICSID Arbitration. 8 – Conclusion. 9 – Bibliography.

This article is based on the information provided during the Colloquium on Investment Arbitration at ICSID, held at the Milan Chamber of Arbitration on June 12, 2013. Data and graphics referred to in this article have been updated to February 2014.

1. Introduction

Since its establishment in 1966, the International Centre for Settlement of Investment Disputes (ICSID) has been the most recognized entity dealing with the settlement of investor-state disputes. The prominence of ICSID's role in investment arbitration is reflected in the statistics of the United Nations Conference on Trade and Development (UNCTAD), according to which, out of the 514 known treaty-based arbitration proceedings in 2012, a total of 314 (representing approximately 61% of all known treaty cases), have been brought under the ICSID rules.[1] According to UNCTAD, in 2012 there were 58 new arbitration proceedings pursuant to

[1] See the UNCTAD document, "IIA Issues Note - Recent Developments in Investor-State Dispute Settlement (ISDS) No. 1," May 2013, p. 3, available at https://unctad.org/diae. These figures include cases registered both according to the ICSID Convention and the ICSID Rules governing the Additional Facility for the Administration of Proceedings by the Secretariat (the "Additional Facility Rules"). The Additional Facility allows ICSID to administer proceedings involving: i) a State that has not ratified the ICSID Convention; or ii) an investor whose State is not an ICSID Contracting State. ICSID also provides administration services pursuant to other mechanisms such as the UNCITRAL Arbitration Rules and other *ad hoc* proceedings agreed to by the disputing parties.

investment treaties, 39 of which, that is over 67%, were submitted to ICSID.[2] The Centre is currently composed of 60 staff members from over 30 countries.

This article briefly describes the jurisdictional requirements provided for by the ICSID Convention. It also provides an overview of statistics on ICSID cases, distribution per sector, geographical areas, main sources of consent and discusses some distinctive features of ICSID arbitration.

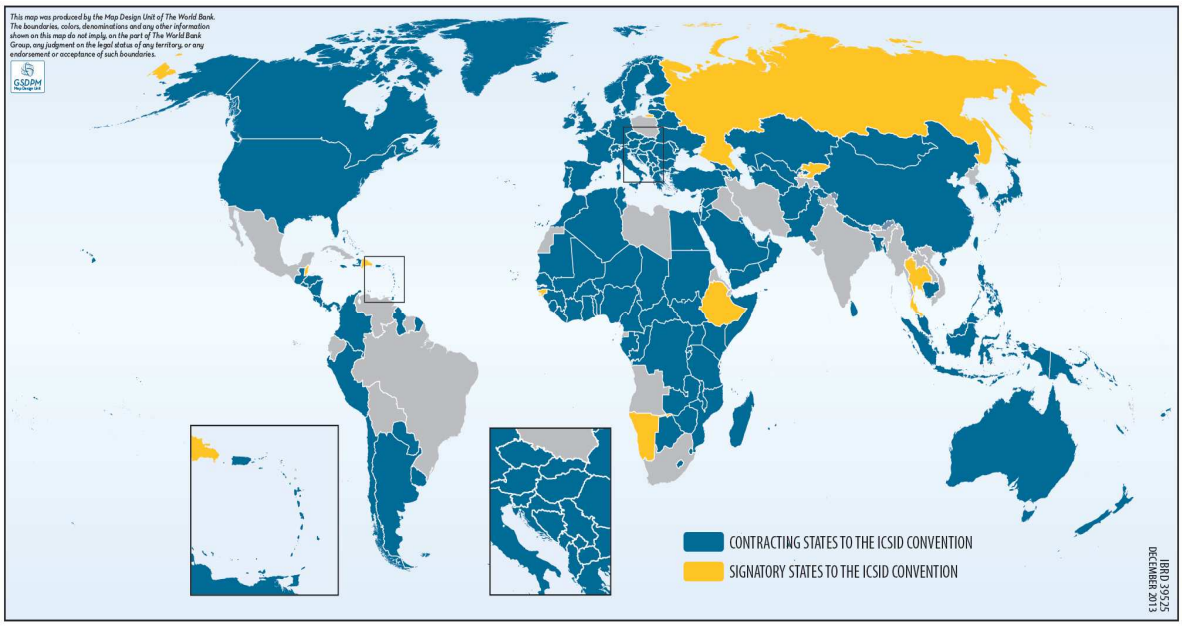
2. The ICSID Convention and Arbitration Rules

The ICSID Convention is a multilateral treaty setting out the mandate and the structure of the Centre and the main rules of procedure of the dispute settlement mechanisms, developed by the Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules") and the Rules of Procedure for Conciliation Proceedings ("ICSID Conciliation Rules"), both adopted by the Administrative Council of the Centre pursuant to Article 6(1) of the ICSID Convention.

The Convention was opened for signature on March 18, 1965 and entered into force on October 14, 1966, at which time it was ratified by 20 countries. As of February 15, 2014, 158 States have signed the ICSID Convention and 150 States have ratified it.

[2] According to UNCTAD, this is a record number of cases, *op. cit.*, p. 2.

ICSID Contracting States and Other Signatories to the ICSID Convention as of December 31, 2013[3]



The ICSID Arbitration Rules entered into force on January 1, 1968 and have been amended on three occasions.[4] The Arbitration Rules provide the procedural framework for ICSID proceedings, from the registration of a request for arbitration to the rendering of an award, and for all possible challenges under the ICSID Convention.

The Arbitration Rules are supplemented by the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules") that apply from the receipt of the request for arbitration until its registration.

3. ICSID Caseload

I. Cases registered per year

The first ICSID case was registered in 1972. From that year until 1996, the Centre registered a total of 38 cases (an average of 1.6 cases per year).

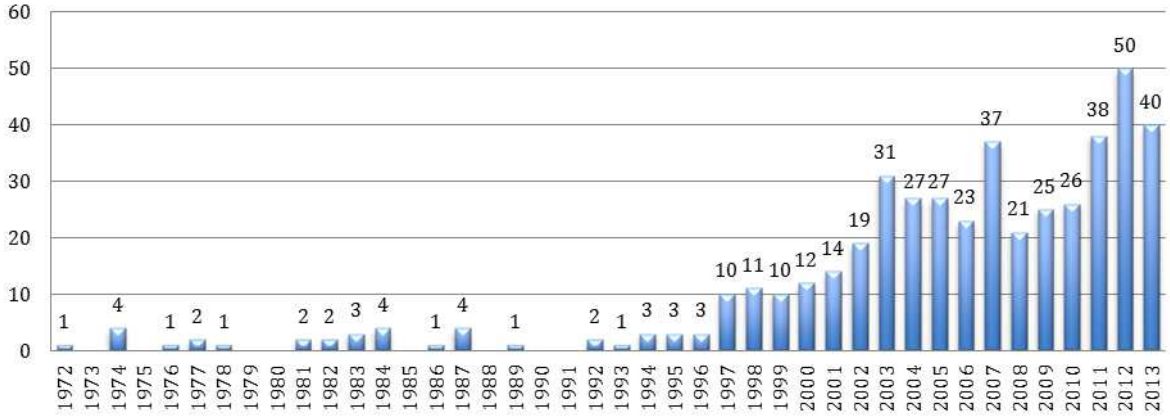
As shown in the graphic below, the number of registered ICSID cases has increased dramatically since then, particularly from 1997 through 2002. During this 5-year period the Centre registered an average of 15.5 cases per year.

[3] The ICSID Caseload – Statistics, Issue 2014-1, p. 6, available at https://icsid.worldbank.org.
[4] The amendments came into effect on September 26, 1984, January 1, 2003 and April 10, 2006.

This trend continued during the last decade and from 2003-2013, the Centre registered an average of 34.5 cases per year, with 40 new cases registered in 2013. By December 31, 2013, the Centre had registered a total of 459 cases.[5]

This rise in the number of ICSID cases is undoubtedly influenced by the increase in the number of bilateral and multilateral investment and trade agreements, as well as cross-border investment worldwide.

Total Number of ICSID Cases Registered by Calendar Year[6]



II. Cases by State Party

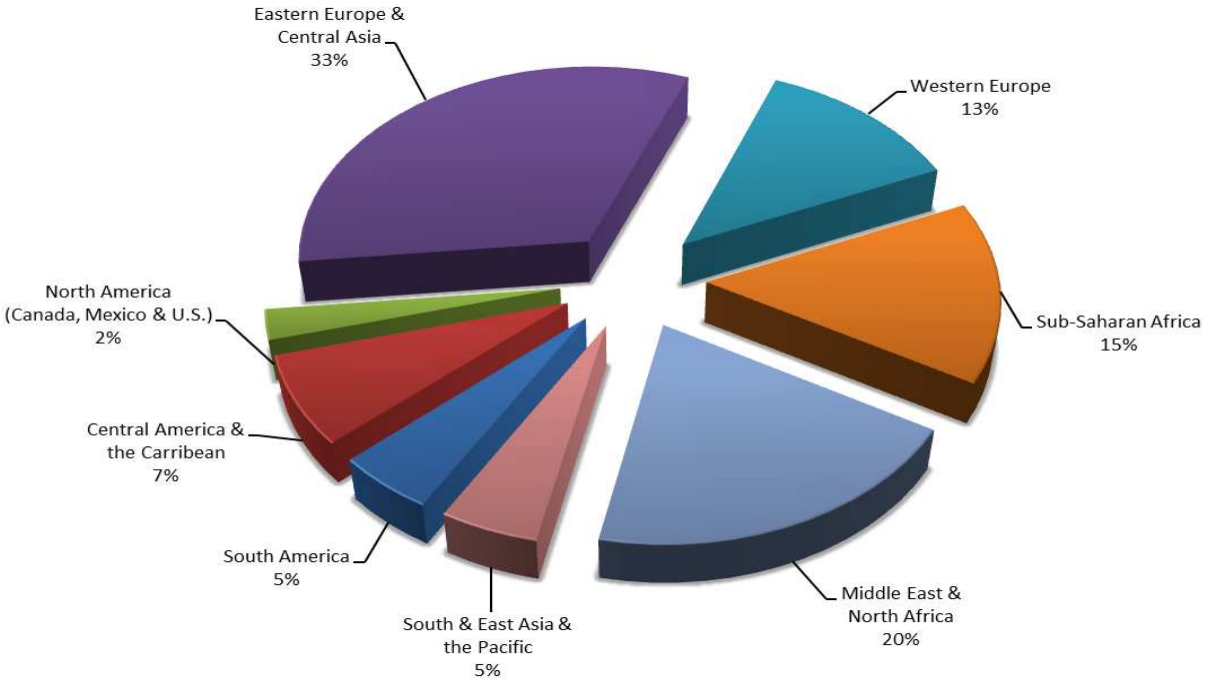
The geographical regions represented in ICSID cases are diverse and include States from every region of the world.

Historically, Latin American countries appeared as respondent parties in a considerable number of ICSID proceedings when compared to other regions.[7] This seems to be gradually changing. As illustrated in the graphic below, there has been a gradual increase of cases involving European, Central Asian, and African countries.

We are also observing an increasing number of developed and mid-income States acting as respondents in ICSID proceedings and, in general, a more even distribution of cases by State Party involved.

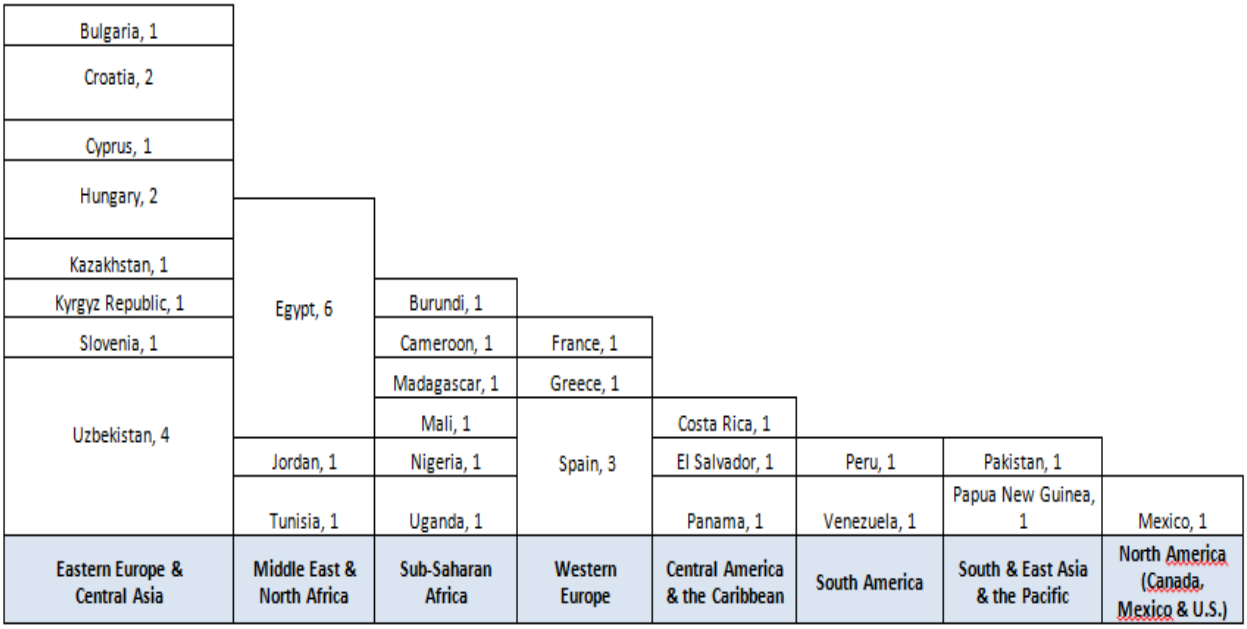
[5] These figures include cases registered both under the ICSID Convention and the Additional Facility Rules.
[6] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 7.
[7] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 11. States from South America, Central America and the Caribbean have participated in 34% of the cases registered by ICSID since its inception until December 31, 2013.

Geographical Distribution of New ICSID Cases Registered in 2013, by State Party involved [8]



[8] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 24.

Geographic Distribution of New Cases Registered in 2013 under the ICSID Convention and Additional Facility Rules, by State Party Involved[9]:



III. Cases by Economic Sector

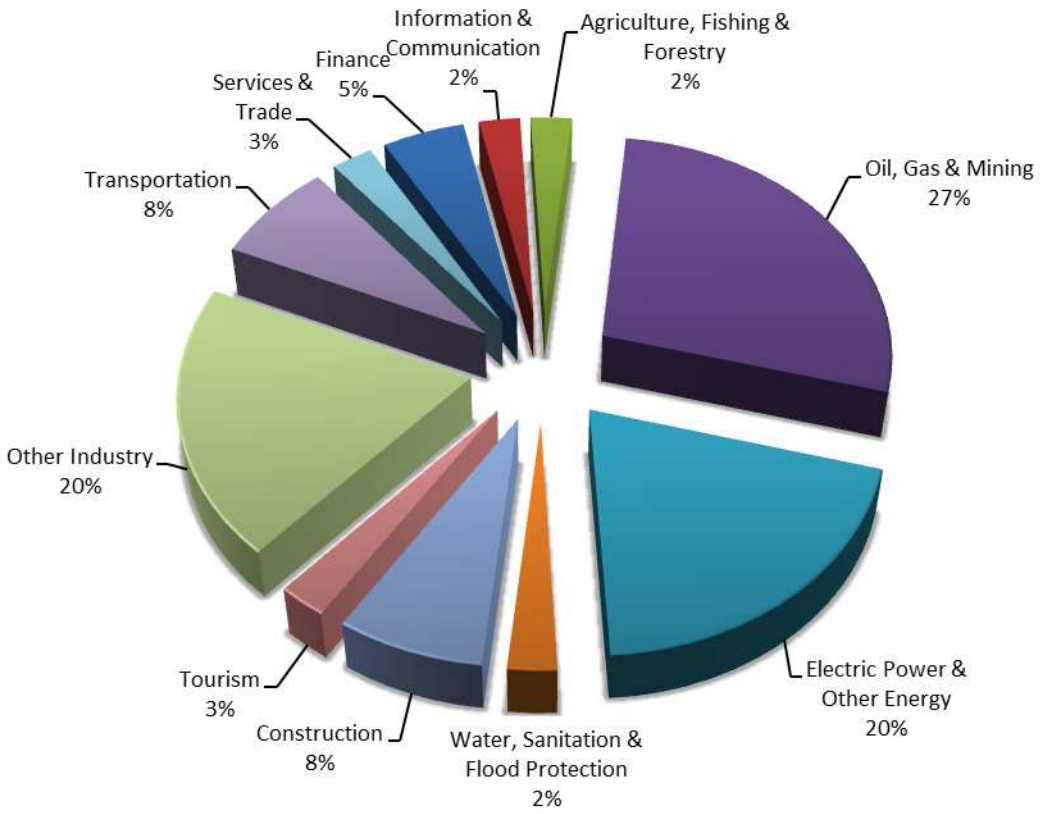
The disputes handled in ICSID proceedings arise in a wide variety of economic sectors and industries.

The oil, gas and mining sectors represented approximately 27% of all ICSID cases registered in the year 2013, while disputes involving the electricity sector represented 20% of the cases. Nevertheless, as shown in the graphic below, the Centre has seen an increase in the diversity of other economic sectors involved, including transportation and renewable energies.[10]

[9] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 25. The classification of the geographic regions above is based on the World Bank's regional system, available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html.

[10] By the end of 2013 and the beginning of 2014, the Centre registered at least five cases dealing with disputes arising out of investments in the renewable energy sector: *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31), *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), and *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3).

Distribution of New Cases Registered in 2013 under the ICSID Convention and Additional Facility Rules, by Economic Sector [11]



4. Article 25 of the ICSID Convention

The drafters of the ICSID Convention referred to the term "jurisdiction" broadly by defining it as "the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings."[12]

ICSID's jurisdictional requirements are outlined in Article 25(1) of the Convention, which provides the following:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the

[11] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 26. The sector classification is based on the World Bank's sector codes, available at http://siteresources.worldbank.org/PROJECTS/Resources/SectorCodesLists.pdf.
[12] Report of the Executive Directors, para. 22.

> dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) 'National of another Contracting State' means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

These jurisdictional requirements are briefly explained below.

I. Contracting State

Article 25 of the Convention provides that ICSID arbitration proceedings are restricted to "*a Contracting State* (…) *and a national of another Contracting State*." From this, it follows that the Convention provides a forum for dispute settlement *only between* States and foreign investors, excluding from its jurisdiction disputes among investors and State-to-State disputes.[13]

For a State to participate as a party in an ICSID proceeding, it must have signed and ratified the Convention. This requirement cannot be waived by agreement of the disputing parties.[14]

In accordance with Article 68(2), the Convention enters into force 30 days after the deposit of the ratification instrument at the World Bank, which notifies the other signatory States of such deposit. The list of current Contracting States, which includes the date of signature, date of deposit of ratification and date of entry into force of the Convention for each State, is published on ICSID's website.

[13] The Centre has administered State to State disputes under the rules specified in applicable treaties. The Secretariat, at the request of the parties, also provides administrative and logistical support under other international dispute settlement rules (e.g. UNCITRAL).

[14] There have been a few instances in which states appear as the claimant party. See *e.g. Gabon v. Société Serete S.A.* (ICSID Case No. ARB/76/1).

II. Constituent Subdivision or Agency of a Contracting State

The Convention further provides that "*any constituent subdivision or agency of a Contracting State*" may also appear as a party in ICSID proceedings, provided that they have been duly authorized and designated before the Centre by the Contracting State.

Constituent subdivisions and agencies have appeared in ICSID arbitration proceedings not only as respondent parties,[15] but also as claimants.[16] ICSID maintains a complete list of such designations of constituent subdivisions and agencies on its website.[17]

III. National of another Contracting State

Pursuant to Article 25(1) of the ICSID Convention, the party opposing a Contracting State in an ICSID arbitration proceeding shall always be a *national* of another Contracting State. Article 25(2) of the Convention provides that an investor can be either an individual or a corporation.

(i) Individual Investors

Individual investors may not have access to ICSID's jurisdiction if they possess the host State's nationality. Thus, pursuant to Article 25(2)(a) of the ICSID Convention, an individual must be a "*national of another Contracting State*" both: i) at the date of consent; and ii) at the date of ICSID's registration of the request for arbitration.

This nationality requirement in the ICSID Convention may not be waived by agreement between the disputing parties and must be expressly stated in the request for arbitration (Institution Rule 1(d)(ii)).[18] The Convention does not allow for exceptions concerning this requirement. Thus, a natural person may not bring an ICSID claim against its own State.

(ii) Juridical Persons

Similar to the provision for natural persons in Article 25(2)(a), the first section of Article 25(2)(b) requires that a legal entity participating in an ICSID proceeding must have the nationality of "*another Contracting State*", different from that of the State party.[19]

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[15] See *e.g. Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10).

[16] See *e.g. Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3) and *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8).

[17] See ICSID/8-C "*Designations by Contracting States in Regarding Constituent Subdivisions or Agencies (Art. 25(1) and (3) of the Convention)"* in "*Contracting States and Measures Taken by Them for the Purpose of the Convention*" available at: https://icsid.worldbank.org.

[18] ICSID Institution Rule 2 provides that: "*(1) The request shall: (…) (d) indicate with respect to the party that is a national of a Contracting State: (i) its nationality on the date of consent; and (ii) if the party is a natural person: (A) his nationality on the date of the request; and (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request.*"

[19] Most ICSID tribunals have adopted a traditional approach by looking into the place of incorporation to determine the nationality of a juridical person. See *e.g.* Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed on November 14, 1991 (the "US-Argentina BIT").

However, the second section of Article 25(2)(b) contains two relevant distinctions as to the requirements for juridical persons: i) that the relevant date for a company to have the nationality of "*another Contracting State*" is only the date of consent (and not the date of registration which is also required for natural persons); and ii) that juridical persons may bring a claim against its own State, provided that "*because of foreign control, the parties have agreed* [that the juridical person] *be treated as a national of another Contracting State*."

It follows from the above that the exception contained in the second clause of Article 37(2)(b) allows foreign investors operating through local companies (*e.g.* due to legal requirements of the host States or other business or technical reasons) to participate as parties in ICSID proceedings.

Although the Convention does not specify any particular formalities as to the way in which the "parties' agreement" on the foreign control requirement must be proved, such agreement is usually reflected in the instrument of consent itself (*e.g.* contract, investment treaty, local law).[20]

It is important to note that this provision does not preclude the possibility of a foreign investor bringing a claim against the host State in its own right (*e.g.* as a "*national of another ICSID Contracting State*",) under the first section of Article 37(2)(b).

1. Italy and Italian Investors in ICSID Proceedings

On November 18, 1965, Italy was one of the first countries to sign the ICSID Convention. The ratification instrument was deposited with the World Bank on March 29, 1971 and it became a Contracting State on April 28, 1971, pursuant to Article 68(2).[21]

Italy has not designated any "*constituent subdivision or agencies*" to participate as parties in ICSID proceedings instead of or jointly with the State itself pursuant to Article 25(1).[22]

While a number of ICSID tribunals have dealt with disputes between a Contracting State and investors relying upon their Italian nationality,[23] it was not until February 21, 2014,

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[20] See *e.g. Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic* (ICSID Case No. ARB/04/5) a case in which this agreement was reflected in a concession contract. Many bilateral investment treaties contain these types of agreements. See *e.g.* Article VII(8) of the US-Argentina BIT and Article X(4) of the *Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones* signed on September 22, 1994 (the "Bolivia-Chile BIT").

[21] See document ICSID/3 "*List of Contracting States and other Signatories of the Convention as of November 1, 2013*", available at https://icsid.worldbank.org.

[22] See the document ICSID/8-C "*Designations by Contracting States in Regarding Constituent Subdivisions or Agencies (Art. 25(1) and (3) of the Convention)"* in "*Contracting States and Measures Taken by Them for the Purpose of the Convention*" available at: https://icsid.worldbank.org.

[23] See *e.g. AGIP S.p.A. v. People's Republic of the Congo* (ICSID Case No. ARB/77/1), pursuant to a contract between a subsidiary of AGIP S.p.A., an Italian company and the Government of the Congo; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), pursuant to the 1990 Morocco-Italy BIT; *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/2), pursuant to the 1997 Pakistan-Italy BIT; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), pursuant to the 1994

that the Centre registered the first request for arbitration in which Italy appears as a respondent party (*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* - ICSID Case No. ARB/14/3).[24]

5. Legal disputes arising directly out of a dispute

I. Legal Disputes

The jurisdiction of the Centre only comprises disputes of a legal nature, namely divergences among the parties regarding obligations and rights, and not mere "interests."

> "*The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.*"[25]

A dispute can be qualified as "legal," if the claim is grounded on rights protected in a legal instrument, such as an investment treaty, a contract, or a local legislation, and when the remedies sought by the claimant party are also of a legal nature, such as compensation of damages or restitution of rights.[26]

Thus, political or purely commercial disputes are not covered by ICSID jurisdiction.

II. Investment

The term "investment" is not defined by the ICSID Convention. Its definition is left for the disputing parties to define the type of investments that will be covered by the dispute settlement mechanisms foreseen by the ICSID Convention.

Notwithstanding the above, a majority of ICSID tribunals have considered that the term "investment" has an objective and independent meaning apart from the definition given by the parties.[27] Most tribunals have generally applied a "double test," analyzing not only whether the investment complies with the definition agreed to by the parties in the applicable instrument, but also, if the investment should be considered as such within the framework of the ICSID Convention.[28]

Bangladesh-Italy BIT; and *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (ICSID Case No. ARB/05/15), pursuant to the 1989 Italy-Egypt BIT, among others.

[24] As of the date of this presentation at the Chamber of Arbitration of Milan, held June 12, 2013, ICSID had not registered any arbitration proceedings in which Italy participated as the respondent party.

[25] Report of the Executive Directors, *op. cit.*, para. 26.

[26] See Schreuer, *op. cit.*, para. 60.

[27] See, among others, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, September 27, 2012, paras. 210-217 and *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, July 14, 2010, para. 108.

[28] See Schreuer, *op. cit.*, paras. 122-125. The Centre's jurisdiction does not cover disputes arising out of merely commercial disputes.

6. Consent

One of the main features of an arbitration proceeding administered by ICSID, is its voluntary nature,[29] thus the submission of a dispute to the Centre would necessarily require consent from both parties.

The fact that a State has ratified the Convention cannot be considered, by itself, as a manifestation of consent to ICSID arbitration by that State.

As provided by the Preamble of the Convention:

> *"(…) no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."*

Thus, the ratification of the ICSID Convention by a State signals the commitment to apply the dispute settlement mechanisms provided for in the ICSID Convention. However, such commitment alone is not sufficient. It is therefore necessary to provide evidence of the Contracting State's explicit consent to submit specific types of disputes that may arise between that State and investors of other ICSID Contracting States.

Article 25(1) of the Convention provides that such consent must be granted in writing. This requirement is reflected in Article 2(1)(c) of the Institution Rules[30] that provides that, together with the request for arbitration, it is necessary to attach the documents containing such consent, *e.g.* an investment contract between the State and an investor from another Contracting State, local investment laws, or bilateral or multilateral instruments (such as bilateral investment treaties).

For the purpose of the registration of a request for arbitration before ICSID, "*Consent of the parties must exist when the Centre is seized.*"[31]

Article 2(3) of the Institution Rules provides that:

> "[The] '*[d]ate of consent' means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.*"

Article 2(3) suggests that the parties' consent may be reflected in different instruments. For example, in a local investment law of a Contracting State providing for ICSID arbitration, the State's consent would be reflected in the law itself, while the investor's consent would be reflected in another written instrument, *e.g.* the request for arbitration, or a previous communication to the State, accepting the "offer" to arbitration.

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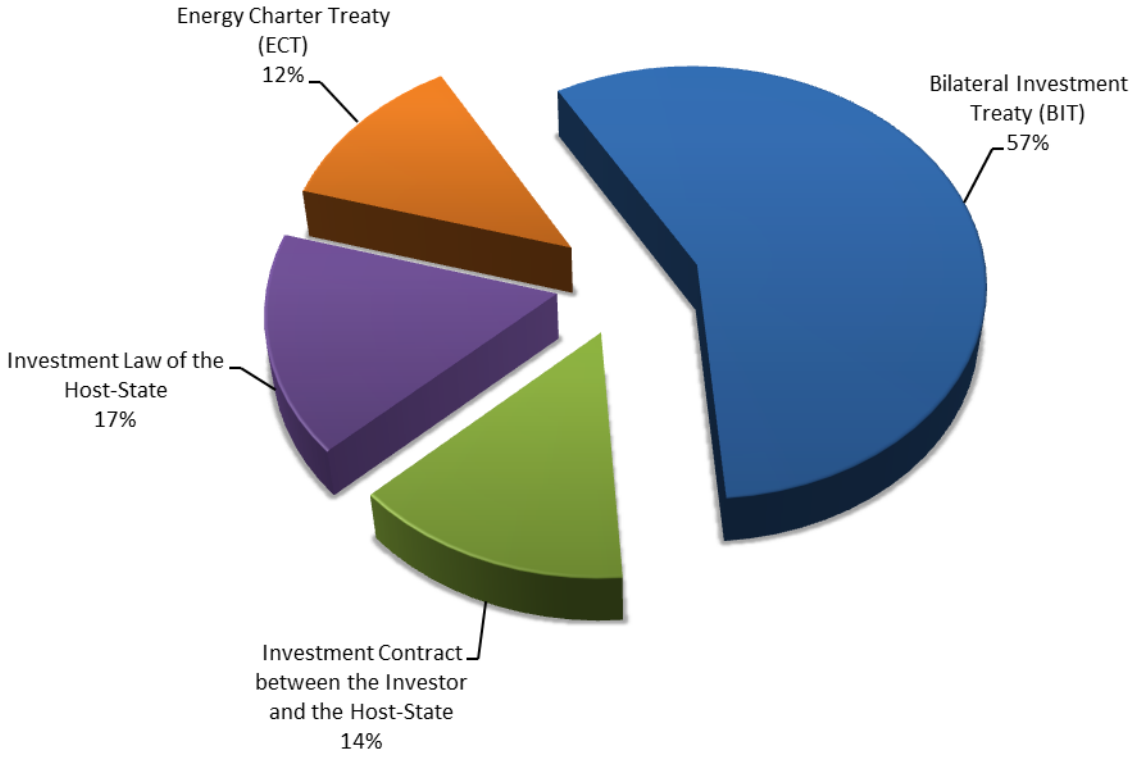
[29] "*Consent of the parties is the cornerstone of the jurisdiction of the Centre.*" Report of the Executive Directors, *op. cit.*, para. 23.
[30] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules").
[31] Report of the Executive Directors, *op. cit.*, para. 24.

The graphic below illustrates the basis of consent invoked to establish ICSID jurisdiction in cases registered under the ICSID Convention or the Additional Facility Rules as of December 31, 2013.[32]



I. Consent reflected in an investment contract

The incorporation of arbitration clauses in investment contracts between investors and States was the main source of consent invoked in the first ICSID arbitration proceedings.[33]

It was not until the mid-1980s that the first cases based on local laws and bilateral investment treaties were registered by ICSID.[34]

From 1966 through December 2013, 19% of ICSID cases have been based on an arbitration clause contained in an investment contract between an investor and a State. During the year 2013 only 14% of the ICSID cases were brought pursuant to these clauses.[35]

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[32] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, p. 10.
[33] The first ICSID case, *Holiday Inns S.A and others v. Morocco* (ICSID Case No. ARB/72/1), registered in 1972, invoked consent in an investment contract between a company and Morocco.
[34] The first ICSID case based on a local law was *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), while *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3) was the first ICSID case invoking a bilateral investment treaty.
[35] The ICSID Caseload – Statistics, Issue 2014-1, *op. cit.*, pp. 10 and 23.

II. Local laws

Some ICSID cases are brought pursuant to local legislation. During the year 2013, 17% of the cases that were registered by the Centre relied on a local law as a source of consent, which represents 8% of all cases registered by ICSID since its inception.[36]

III. Bilateral Investment Treaties

According to UNCTAD: "*the international investment regime consists of more than 3,200 agreements, which includes over 2,860 bilateral investment treaties (BITs) and over 340 "other international investment agreements" (e.g. free trade agreements (FTAs), economic partnership agreements (EPAs) or framework agreements with an investment dimension).*"[37]

Simultaneously, together with the increase in the number of BITs, the treaties of many contracting parties also became more detailed, for example, by including more extensive definitions of investment, protection standards, and arbitration clauses.

Bilateral investment treaties are undoubtedly the main source of consent in ICSID arbitration proceedings. These instruments have been invoked for consent in 63% of the 459 cases that have been registered by the Centre as of December 31, 2014.[38]

According to UNCTAD, as of June 31, 2013 Italy had concluded a total of 94 bilateral investment agreements, 74 of which are currently in force.[39]

7. Features of ICSID Arbitration

As stated in the Preamble to the Convention, the Centre was conceived to address the growing need to provide appropriate facilities – both for States and foreign investors – to settle investment disputes that may arise between them.

The fact that parties to ICSID arbitration must always be a State, on one side, and a private foreign investor on the other, requires certain assurances and a particular range of services that distinguish ICSID from other *fora* dealing with international arbitration.

Some of these particular features are listed below:

- *Impartiality* (Articles 18-24 of the ICSID Convention)[40]: The Centre's function is to provide services and facilities for the settlement of investment disputes.

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[36] *Ibid.*
[37] UNCTAD, "*IIA Issues Note – International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal No. 4,*" June 2013, p. 1, available at https://unctad.org/diae.
[38] *Ibid.*
[39] See "*Full list of Bilateral Investment Agreements concluded by June 1, 2013*", available at: http://unctad.org/Sections/dite_pcbb/docs/bits_italy.pdf

Thus, it has an administrative role, and does not engage itself in the adjudication of claims, a role reserved to the tribunals and conciliation commissions.

- *Delocalized facility* (Article 44 and 53 of the ICSID Convention): ICSID arbitration proceedings are not attached to any national court system, thus they are independent from their judicial control. Pursuant to the Convention, ICSID awards are not subject to an appeal or any other remedy, except those provided by the Convention itself.

- *Immunity* (Articles 19-22 of the ICSID Convention): in order to enable the Centre to fulfill its functions, by signing the Convention, the ICSID Contracting States grant international law immunities to the tribunal members, counsel, witnesses and the Centre.[41]

- *Inviolability of records* (Article 23 (1) of the ICSID Convention): provides that the archives of the Centre are inviolable. This guarantees the confidentiality of proceedings, when agreed by the parties.

- *Cost-effective fee structure* (Article 17 of the ICSID Convention and Regulations 14-19 of the ICSID Administrative and Financial Regulations)*:* the Centre is a non-profit facility within the World Bank Group. The institution promotes cost efficient proceedings *e.g.* fixed annual fees for all ICSID administrative services of US$32,000 and a US$3000 per day cap on arbitrator fees. All other direct expenses related to individual proceedings and hearing services are charged at cost (no premium or additional fees are charged to the parties).

- *Worldwide facilities*: ICSID has access to the World Bank premises and conference rooms at no additional costs for the parties. Washington D.C. and Paris are very common locations for ICSID hearings. The Centre has also made arrangements with other arbitration and international institutions around the world.

- *Confidentiality/Transparency of ICSID Proceedings*: The Convention and the Arbitration Rules do not contain a general presumption of confidentiality in ICSID proceedings and encourage transparency of ICSID proceedings.

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[40] See also the Report of the Executive Directors, para. 15 and Chapters IV and V of the ICSID Administrative and Financial Regulations, dealing with the "*General Functions of the Secretariat*" and "*Functions with Respect to Individual Proceedings*".

[41] Pursuant to Article 20 of the ICSID Convention, the Centre enjoys "*immunity from all legal process*". Article 21 of the Convention further provides that conciliators, arbitrators and the officers of the Secretariat also enjoy immunity *"with respect to acts performed by them in the exercise of their functions"*. The provisions of Article 21 also apply to "*parties, agents, counsel, advocates, witnesses or experts* (…) *in connection with their travel to and from, and their stay at, the place where the proceedings are held*."

- *Compliance* (Article 53 of the ICSID Convention): Parties to ICSID proceedings are bound by awards and therefore must voluntarily comply with them without further process. Awards are not subject to local remedies.

- *Enforcemen*t (Article 54 of ICSID Convention): Contracting States must recognize awards rendered by ICSID tribunals as if they were a final judgment of their own courts.

8. Conclusion

Arbitration proceedings before the Centre have increased significantly during the last fifteen years due to the proliferation of investment and trade agreements and cross-border investment.

While most ICSID cases still arise from disputes in the oil, gas, electricity and mining sectors, during the last few years the Centre has seen significant changes in the identity of the parties involved in ICSID proceedings. Particularly, there seems to be a growing number of developed and middle income states acting as respondents and a more diverse and balanced distribution of cases per country.

The special features of ICSID arbitration rules and practices have allowed the Centre to meet these new realities and challenges of a globalized and diversified economy. In this context ICSID continues to provide a neutral forum for States and investors to settle their disputes and play a critical role by reinforcing legal stability in international investment relations.

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II

ARBITRATION IN CHINA

Caroline Berube, Deborah Loedt

SUMMARY: 1. Introduction. – 2. Arbitration Agreements. – 3. Arbitration Commissions Options for Foreign Parties Doing Business in China. – 4 The Real Picture of Arbitration in China. –5. Enforcement of Arbitration Awards. – 6. Conclusion

1. Introduction

A. Historical evolution

Although an arbitration commission was set up in the 1950's, China only promulgated its Arbitration Law in 1994[1]. Before that, matters were regulated essentially by scattered laws and regulations relating to domestic disputes. Some of these laws still remain[2]. In addition, general laws such as the Civil Procedure Law and the Contract Law remain applicable as they define the general principles for disputes and contract.

The promulgation of the Arbitration Law in 1994 defines the framework for both domestic and international arbitration disputes. This law is, in fact, a result of China's open door policy and was a necessary step to its accession to the World Trade Organization[3].

B. Current law

Domestic arbitration law

Domestic arbitration is governed by the Arbitration Law that came into force on September 1st, 1995. This law defines the general legal framework of arbitration in China included arbitrability, hearings, evidence, arbitrators and award. The main goal of the Arbitration Law is to remove domestic arbitration from the government's rule4. The Arbitration Law expanded the scope of arbitration and imposes arbitration agreements and final and binding decisions.

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[1] Promulgated on August 31st, 1994.
[2] The Law on Mediation and Arbitration of Labour Disputes.
[3] Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p. 10. The author explains the steps taken by China to become a member of the WTO.
[4] Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p. 11.

The Civil Procedure Law remains applicable and supplements the Arbitration Law.

International arbitration law

A specific chapter[5] on international arbitration regulates international arbitration in China. The provisions related to international disputes concern mainly the assistance by local Courts, the award, and international arbitration organizations. The China International Chamber of Commerce is the authority in any international arbitration centre setup in China[6].

Due to its brevity, the Arbitration Law fails to provide for all the aspects of arbitration as is the case in order arbitration acts[7]; however, the law was modelled under the UNCITRAL Model Law[8] and as such it follows international principles. The Civil Procedure Law is also applicable[9] to international arbitration.[10]

Law reform projects

The Arbitration Law has never been amended. Because of its brevity, it can be adapted to the changes in arbitration practice. The Arbitration Law refers to other regulations and notices as supplemental regulations. These supplements have been amended from time to time[11].

C. Confidentiality and publication of awards

Privacy of proceedings

In accordance with Article 40 of the Arbitration Law, arbitration hearings may only be public if all the parties agree to it. However, cases involving State secrets must be kept confidential. The Arbitration Law does not define State secrets. In fact, few arbitrations are public as parties usually prefer the hearings to be kept private, which in fact, is one of the advantages of arbitration.

Publication of awards

Because most arbitration proceedings are kept private, few awards are rendered publicly.

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[5] Chapter 9 Special provisions on arbitration involving foreign interests of the Arbitration Law.
[6] Article 73 of the Arbitration Law.
[7] Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p.15. The author details the gaps in the new law.
[8] Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p. 17.
[9] Article 73 of the Arbitration Law.
[10] Article 73 of the Arbitration Law.
[11] For example, a new version of the CIETAC Rules came into effect on May 1st, 2012.

2. Arbitration Agreements

A. Clauses and submission agreements

Principles

According to Article 4 of the Arbitration Law, the parties must contractually agree to dispute resolutions through arbitration. The arbitration agreement can exist as a clause incorporated in a contract or as a separate arbitration agreement made before or after the dispute arises.

Doctrine of severability

The applicable legal provisions[12] confer severability of an arbitration clause from its underlying agreement. According to Article 19 of the Arbitration Law, the arbitration agreement "shall not be affected by the alteration, dissolution, termination or invalidity of the contract". Before the enactment of the Arbitration Law, it was unclear whether arbitration clauses were severable. This is no longer the case. Not only does the Arbitration Law provide for severability, but so does the Contract Law[13].

B. Incorporation by reference

The question of the validity of an arbitration clause incorporated by reference is resolved by Article 16 of the Arbitration Law. This article provides that the arbitration clause must be contained in the contract or in any "other written agreements for arbitration".

The arbitrators will ensure that the common intention of the parties was to submit the dispute to arbitration. A problem might arise when, for example, a buyer signs a purchase order which refers to annexed general terms of the sale and conditions which contains an arbitration clause.

The Supreme People's Court validated that when a contract refers to an arbitration clause contained in another contractual document without copying the said arbitration clause[14], the scope of the arbitration clause should be extend and apply to any dispute related to this first contractual agreement and the related ones.

This interpretation is extended when an agreement is silent as to arbitration but refers to another contractual document containing an arbitration clause.

A decision made by the Intermediate People's Court of Yunnan Kunming[15] illustration how the Chinese courts will interpret the issue of incorporation by reference of arbitration clauses. In this case, two parties entered into an agreement transferring exploration rights and containing an arbitration clause. The two parties subsequently entered into an agreement with two individuals to assign their respective positions regarding the exploration rights, and the second agreement did not contain any arbitration clause. A dispute arose among the assignees and one of the parties filed a lawsuit in court claiming that it was not bound by the arbitration clause in the initial agreement. The Intermediate People's Court of Yunnan Kunming ruled that the

[12] Article 19 of the Arbitration Law.
[13] Article 57 of the Contract Law.
[14] Article 11 paragraph 1 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
[15] Intermediate People's Court of Yunnan Kunming, September 15, 2008, (2008) Li Shouwei vs. Jinning County Tongxin Recycling Resource Utilization Co., Ltd., Chengjiang County Gaoxi Construction Co., Ltd., Zhou Bing.

arbitration clause was not affected by the changes made to the initial agreement and apply to subsequent agreements related to the same subject. The People's Court considered the new agreement as an assignment of the initial contract[16]. The court deemed that an assignment agreement signed by all the parties was linked to the initial agreement, thereby incorporating the general clauses of the initial agreement into the assignment agreement.

The Supreme People's Court ruled that in the event that an international treaty is applicable to an agreement involving a foreign party and the international treaty provides that any dispute arising from this contract shall be submitted to arbitration, the arbitration clause would apply[17].

C. Arbitrability

Minimum essential content

The minimum content of the arbitration agreement is defined in Article 16 of the Arbitration Law. The arbitration agreement needs to clearly state that the dispute will be resolved through arbitration, the scope of the application of the arbitration and the arbitration commission selected by the parties[18].

Further, the method of appointment of the arbitrator and language should be defined in advance in order to avoid possible difficulties deciding on the arbitrators, such as collusion between the arbitrators and one of the parties. Electing the applicable law of the agreement and the location of the arbitral hearing are also recommended as a clear and detailed arbitration clause will make the arbitral process easier.

Subjective arbitrability

Natural persons are permitted to resolve their dispute through arbitration. However, the arbitration law specifies that citizens must be of "equal status"[19]. Similarly, legal persons may also choose to resolve their disputes through arbitration in China[20]. A legal person refers to an enterprise or corporation[21], and includes other types of commercial organisations.

In China, the state cannot be a party to arbitration. However, state-owned enterprises are allowed to submit their disputes to arbitration. A recent case about the Wang Lao Ji trademark, a famous health drink, was referred to arbitration and involved the owner of the trademark, a state-owned company from Guangzhou and a Hong Kong company, user of the trademark and producer of the drink[22].

Objective arbitrability

Objective arbitrability refers to matters that cannot be submitted to arbitration. The matters that can and cannot be submitted to arbitration are set out in Articles 2 and 3 of the Arbitration Law.

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16 Please see below Section 2. G) Effects against third parties.
17 Article 11 paragraph 2 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
18 The arbitration clause will be deemed valid if the arbitration institution is not clearly designated but the details given are enough to identify it, in accordance with the article 3 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
19 Article 2 of the Arbitration Law.
20 Article 2 of the Arbitration Law.
21 Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p. 145.
22 Guangzhou Pharmaceutical Holding Ltd. vs. JDB Group.

Arbitrable matters are in general matters arising from property rights and contractual disputes[23], and are disputes involving private (non-State) commercial issues.

Certain matters can not be resolved through arbitration and may only be dealt with by the People's courts. These are any questions involving personal status (marriage, adoption, guardianship, inheritance) and matters settled by administrative organisations[24]. Labour disputes in China must in first instance go to mediation and arbitration labour commission before parties can go to the People's court[25].

D. Form requirements

Written arbitration agreements are required by the Arbitration Law, as per the above[26].

E. Interpretation

General comments

Before a dispute arises or an arbitration application is filed, any party can approach an arbitration tribunal or a court to interpret and establish the validity of the arbitration agreement[27]. The fact that the parties can submit the matter to the People's court demonstrates the powers of the court relating to the enforceability of the arbitration.

In the event that one party approaches an arbitration tribunal and the other party approaches the People's court, the People's court have priority to rule on whether the arbitration agreement is valid[28]. In the event that a decision has already been rendered by the arbitration institution before the People's court is requested to hear the issue, the decision made by the arbitration institution is final and cannot be challenged at the People's court[29].

The validity of an arbitration agreement can also be raised before the commencement of a hearing held before the arbitral tribunal[30].

The People's court[31] interprets arbitration provisions broadly. An arbitration clause will apply to any dispute relating to the agreement including any dispute arising from the formation, validity, modification, transfer, performance, liabilities for breach, interpretation and rescission of the agreement.

Competence principle

The arbitration panel has the jurisdiction to decide whether the dispute may be submitted to arbitration by examining the arbitration application (i.e. determining whether the documents are satisfactory[32]).

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[23] Article 2 of the Arbitration Law.
[24] Article 3 of the Arbitration Law.
[25] Articles 2 and 17 of Law on mediation and arbitration of labour disputes.
[26] Article 16 of the Arbitration Law.
[27] Art. 20 of the Arbitration Law.
[28] Art. 20 of the Arbitration Law.
[29] Article 13 paragraph 2 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
[30] Art. 20 of the Arbitration Law.
[31] Article 2 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
[32] Article 24 of the Arbitration Law.

Parties can also challenge the jurisdiction of the arbitrators and the arbitration institution has the power to make a decision. This is the prima facie determination of the validity and jurisdiction of the arbitration application. The prima facie determination can be challenged during the arbitration procedure on factual grounds found by the arbitral tribunal.

According to Articles 5 and 26 of the Arbitration Law, the People's court's power is limited to determining the validity of the arbitration agreement and not to other issues.

F. Enforcing arbitration agreements

According to Article 5 of the Arbitration Law, where parties have agreed to resolve the dispute through arbitration and have reached an agreement to do so, a People's court cannot hear the case, save for the enforceability of an arbitration provision. The People's court must limit its authority to ruling on the validity of the agreement before hearing any dispute.

In practice, the judge will not always address whether arbitration should apply and, as a result, it is the defendant's obligation to object immediately before any other issue is heard. The defendant at the trial is required to immediately object to court proceedings on the basis that there is an arbitration agreement between the parties, failing which he will be deemed to have waived the right to submit the case to arbitration[33].

The People's court will, at the request of either party, rule on the validity of the arbitration clause[34]. This is a declaratory action and can be taken at any time. In fact, there are no other requirements other than one of the parties' raising the issue.

The People's court competent to hear the case is the Intermediate People's Court where the arbitration institution designated by the arbitration clause is located, the place where the arbitration agreement is executed or the place of domicile of the claimant or respondent[35].

G. Effects on third parties

The Supreme People's Court ruled on the effect of an arbitration clause on third parties in three (3) cases[36]:

i. Where a party merges or split up, the arbitration clause automatically binds the successor, except where otherwise stated in the arbitration clause;

ii. Where a party dies, the arbitration clause automatically binds the successor, except where otherwise stated in the arbitration clause;

iii. In the event that credits or debts are assigned partially or in full, the arbitration automatically binds upon the assignee[37]:

    (a) Except where otherwise stated in the arbitration clause;

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[33] Article 26 of the Arbitration Law. The issue must be raised before the hearings.
[34] Article 20 of the Arbitration Law.
[35] V&T Law Firm, "The Formulation of Foreign-Related Arbitration Agreements and the Enforcement of Arbitration Awards", April 20th, 2010, published on www.legalstudio.com.
[36] Articles 8 and 9 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Applicability of the Arbitration Law.
[37] Please see the case Intermediate People's Court of Yunnan Kunming, September 15, 2008, (2008) Li Shouwei vs. Jinning County Tongxin Recycling Resource Utilization Co., Ltd., Chengjiang County Gaoxi Construction Co., Ltd., Zhou Bing. The arbitration clause contained in the initial agreement that is assigned via a separate assignment agreement is applicable to the assignment agreement and is binding on the new parties.

(b) Except where the assignee objected to the assignment of the credits or debts;

(c) Except where the arbitration clause is a separate agreement and the assignee is not aware of such agreement.

3. Arbitration Commissions Options for Foreign Parties Doing Business in China

A. China International Economic and Trade Arbitration Commission (CIETAC)

Introduction to CIETAC

Arbitration in China is institutional and not private[38], with the largest arbitration institution being the China International and Economic Trade Arbitration Commission (CIETAC), formerly known as the Foreign Trade Arbitration Commission, and established in April 1956. In 1980, after the adoption of the Open Door policy, it was re-named the Foreign Economic and Trade Arbitration Commission, and then as the China International Economic and Trade Arbitration Commission in 1988. Since 2000, CIETAC is also sometimes referred to as the Arbitration Court of the China Chamber of International Commerce (CCOIC).

The CIETAC is headquartered in Beijing and opened sub-commissions in Shenzhen (near Hong Kong), Shanghai, Tianjin (Northeast) and Chongqing (Southwest)[39] though a split occurred in 2012 and 2013 with the Shenzhen and Shanghai CIETAC sub-commissions. All these locations had been strategically opened to follow foreign investment incentives and development programs.

The CIETAC is able to handle disputes in various business sectors, such as commerce, commodities, real estate and finance. Furthermore, the CIETAC has set up a domain name dispute resolution service and online resolution platform for e-commerce disputes.

The CIETAC has enacted general arbitration rules[40], as well as specific rules relating to financial disputes and online arbitration[41]. Online arbitration is an innovative tool promoting both arbitration and online commerce. Evidence may be submitted via the internet or any other means of communication such as facsimile or regular mail. The procedure is mainly on paper but if oral hearings are required, distance communication methods are used.

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[38] Steven C. Bennett, "Litigation in China: Ten Things You Must Know", dated October 1st, 2008, The Metropolitan Corporate Counsel. See also Wang Sheng Chang, *Resolving Disputes Through Arbitration in Mainland China*, Law Press, China, June 2003, p. 17. The author states that the parties are in practice denied to use ad hoc arbitration, being a normal practice in many countries.

[39] In 2012 and 2013, South China Sub-Commissions in Shenzhen and Shanghai Sub-Commission were disaffiliated from CIETAC and registered themselves as independent arbitrations commission with their own set of rules. This happened following the issuance of 2012 CIETAC Rules providing that if the parties to the arbitration agreement appoint CIETAC without reference to the location,the case would be referred to CIETAC Beijing. This aims to direct further cases to CIETAC Beijing instead of Shenzhen and Shanghai sub-commissions which were the preeminent sub-commissions of CIETAC. In response, these two commissions refused to apply the new set of rules issued by CIETAC. This resulted in uncertainties regarding arbitration clauses giving competence to CIETAC Shanghai and South China CIETAC. CIETAC Beijing addressed the issue and setup secretariat in the two cities. But as former South China CIETAC and Shanghai CIETAC still exist, they handle the resolution of disputes for which they were designated under their former names. Please see hereinder for further comments.

[40] This article is limited to the review of the general arbitration rules as issued by the CIETAC.

[41] The Online Arbitration Rules are applicable for online commercial transactions and also when referred to by the parties.

Number of cases and other statistics

The CIETAC publishes its statistics from time to time. The last statistics published are as follows:

Cases Resolved by CIETAC

Year	Beijing Headquarters	Shanghai Sub-Commission	South China Sub-Commission	Tianjin Arbitration Center	Southwest Sub-Commission	Total
2012	688	5	2	16	9	720
2011	645	417	188	21	11	1282
2010	664	507	200	4	7	1382
2009	593	498	233	3	2	1329
2008	561	366	170	-	-	1097
2007	582	292	177	-	-	1051
2006	481	315	171	-	-	967
2005	448	301	209	-	-	958
2004	379	180	141	-	-	700
2003	390	206	108	-	-	704
2002	408	175	111	-	-	694
2001	429	147	136	-	-	712
2000	493	127	118	-	-	738
1999	459	120	127	-	-	738
1998	508	110	118	-	-	736
1997	560	85	121	-	-	766
1996	569	77	151	-	-	797
1995	628	89	158	-	-	875
1994	430	87	57	-	-	574
1993	217	21	56	-	-	294
1992	-	-	-	-	-	236
1991	-	-	-	-	-	205
1990	-	-	-	-	-	203

Total Cases Accepted By CIETAC (Foreign-Related and Domestic)

Year	Beijing Headquarters	Shanghai Sub-Commission	South China Sub-Commission	Tianjin Arbitration Center	Southwest Sub-Commission	Total
2012	975	37	16	19	13	1060
2011	668	523	218	21	5	1435
2010	672	476	182	12	10	1352
2009	c 650	610	216	3	3	1482
2008	598	427	204	1	–	1230
2007	630	332	156	–	–	1118
2006	495	306	180	–	–	981
2005	462	304	213	–	–	979
2004	453	238	159	–	–	850
2003	373	205	131	–	–	709
2002	401	174	109	–	–	684
2001	420	173	138	–	–	731
2000	410	123	100	–	–	633
1999	428	130	111	–	–	669
1998	451	111	116	–	–	678
1997	490	110	123	–	–	723
1996	543	88	147	–	–	778
1995	660	96	146	–	–	902
1994	600	88	141	–	–	829
1993	389	40	57	–	–	486
1992	196			–	–	267
1991	211	10	53	–	–	274
1990	186	8	44	–	–	238
1989	231	–	–	–	–	231
1988	162	–	–	–	–	162
1987	129	–	–	–	–	129
1986	75	–	–	–	–	75
1985	37	–	–	–	–	37

Arbitration cases almost doubled in 1994 compared to 1993 following the enactment of the Arbitration Law. However, disputes submitted to arbitration dropped from 1995 to 2000 and only peaked above 1995 levels in 2003. Since 2003, the number of cases submitted to CIETAC arbitration has been increasing and reached 1,435 applications in 2011[42].

The number of cases resolved reflects that the more applications are submitted to the CIETAC, the longer it takes to resolve a dispute. At present, CIETAC is not resolving as many cases as it is receiving applications.

In 2011, CIETAC accepted 6.14% more cases year-on-year including 470 foreign-related cases (up by 12.44% year-on-year) and 965 domestic cases (up by 3.32% year-on-year)[43]. Foreign cases involved parties from 54 different countries and regions. However, compared to litigation filed in People's courts in China, the number of foreign-related arbitrations is significantly lower[44].

B. Shanghai Arbitration Commission (SAC)

SAC is operating since September 18th, 1995 and arbitrates disputes in various areas including contractual disputes, real estate, engineering projects, financial disputes (including insurance, equities and financings), shipping, international trade, international agency, international engineering projects, international investments, and international technological cooperation. These are also the matters listed in the Arbitration Law.

SAC is a smaller arbitration commission but still counts more than 800 arbitrators to hear disputes.

C. Shanghai International Arbitration Centre (SHIAC)

SHIAC was created in May 2013 after its split from CIETAC and formed an independent commission approved by the Shanghai Municipal Government and by the Shanghai Commission for Public Sector Reform. SHIAC accepts cases previously referred in arbitration agreements to CIETAC Shanghai.

SHIAC has an extensive list of arbitrators (around 500) from 39 countries and covers various business and technical areas. SHIAC deals with both domestic and foreign business disputes and also can deal with other alternative dispute resolution methods.

SHIAC's published statistics are as follows:

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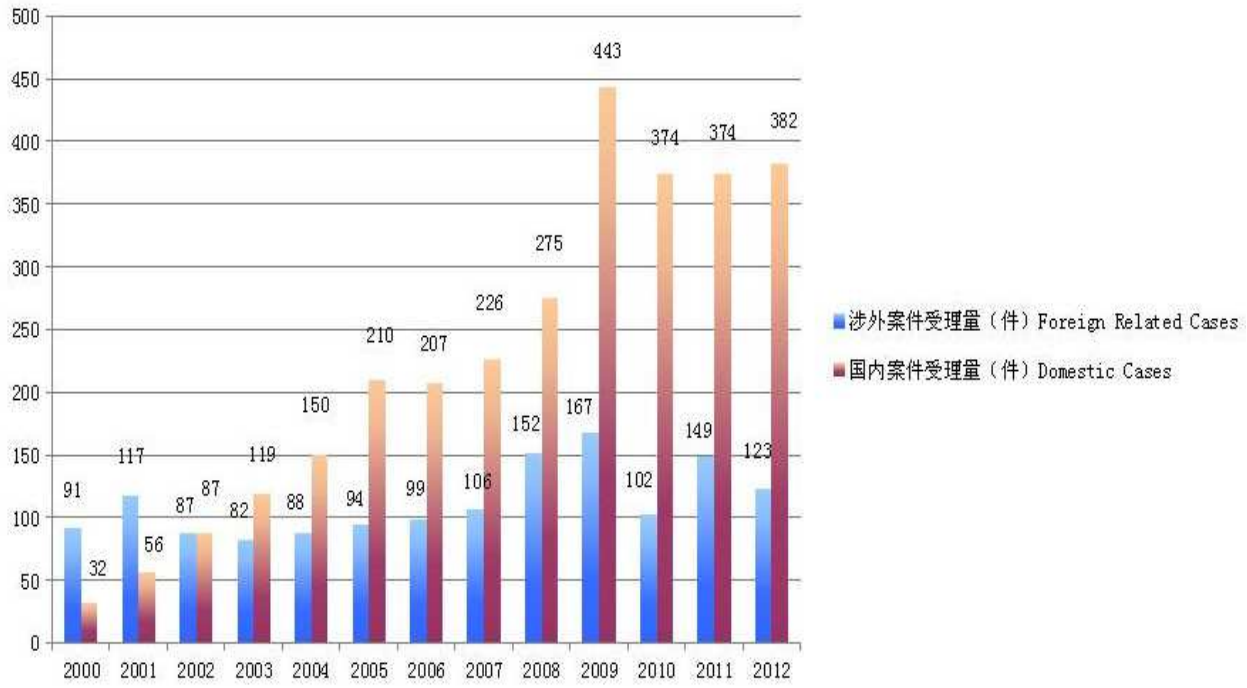
[42] Because of the the separation of two sub-commissions from CIETAC in 2012 and 2013, the statistics in 2012 do not provide a clear picture of the cases accepted and resolved by CIETAC. However, CIETAC Beijing may have benefited from the uncertainty created by the split of the Shanghai and Shenzhen sub-commissions.

[43] Working Report of 2011 and Working Plan of 2012 (excerpt), Yu Jianlong, Vice Chairman and Secretary-General of CIETAC, January 5th, 2012, on www.cietac.org.

[44] Foreign-related litigations numbered 7,631 in 2004 according to the report made by Guangzhou Maritime Court, dated May 25th, 2005. www.gzhsfy.org/shownews.php?id=5974.



年份（Year）	裁决（Award）	和解裁决（Conciliation）	撤案（Withdrawal）	合计（Total）
2002	121	6	48	175
2003	143	7	56	206
2004	131	8	41	180
2005	169	47	85	301
2006	222	27	66	315
2007	188	27	77	292
2008	231	44	91	366
2009	290	58	150	498
2010	314	65	128	507
2011	241	57	119	417
2012	264	63	187	514

SHIAC is sophisticated as it is the former Shanghai CIETAC. It has the experience, facilities and arbitrators to handle arbitrations efficiently and independently.

SHIAC predominantly deals with domestic cases (almost 73% of the cases dealt were domestic between 2008-2012).

D. Shenzhen Court of International Arbitration (SCIA)

SCIA is also known as South China International Economic and Trade Arbitration Commission, SCIA is the former Southeast China Sub-Commission of CIETAC. This sub-commission was the first to include foreign arbitrators on its panels and appears to be one of the most reliable and experienced in China. SCIA, like SHIAC, also hears cases referring to the South China Sub-Commission of CIETAC.

The list of arbitrators is also very extensive (around 380) with numerous foreign arbitrators approved (about one third of the arbitrators).

E. Chinese European Arbitration Centre (CEAC)

CEAC is headquartered in Hamburg and specializes in dispute resolutions regarding China-related trade matters. CEAC operates since 2008 and counts more than 80 arbitrators, including five from China following discussions between the Hamburg Bar Association and the Tianjin Bar Organization starting in 2004.

Some parties prefer the extra level of neutrality provided by the CEAC as it is not located in China.

F. Beijing Arbitration Centre (BAC)

BAC was set up in 1995 and handles all types of alternative dispute resolutions. By 2012, BAC had handled 20,407 cases. 1,473 were filed in 2012 including 26 cases involving foreign interests. The caseload remains mainly focused on domestic disputes. 58% of the foreign cases involve parties from Hong Kong, Taiwan and Macao.

Among its 391 arbitrators, BAC's panel includes 81 arbitrators from Europe, America, Oceania and other Asian countries and 17 from Hong Kong, Macao and Taiwan.

4. The Real Picture of Arbitration in China

A. Arbitral tribunal

Number of arbitrators

The parties can appoint one or three arbitrators[45].

Qualifications and accreditation requirements

According to the Arbitration Law[46], to be qualified as arbitrator, an individual must meet at least one of the following criteria:

i. Have at least eight (8) years of work experience in arbitration;

ii. Have at least eight (8) years of experience as a lawyer;

iii. Have at least eight (8) years of experience as a judge; or

[45] Article 30 of the Arbitration Law.
[46] Article 12 of the Arbitration Law.

iv. Engage in law research and teach with a senior academic title.

With regard to a foreign-related arbitration, arbitrators can be foreign nationals but must have knowledge of law, economy or trade, science and technology[47].

Appointment of arbitrators

In the event of a sole arbitrator panel, the parties must appoint an arbitrator jointly or entrust the chairman of the arbitration institution to appoint an arbitrator[48].

Where the parties have chosen to appoint three (3) arbitrators, the appointment can be done as follows:

i. Each party appoints one (1) arbitrator or jointly entrust the chairman of the arbitration institution to appoint two (2) arbitrators;

ii. Parties jointly appoint the third arbitrator, who is the chairman of the arbitral tribunal, or jointly entrust the chairman of the arbitration institution to appoint the third arbitrator.

If the parties fail to appoint the tribunal arbitral within the time limit given by the arbitration institution's rules, the chairman of the arbitration institution shall proceed with the appointment of the arbitrators[49]. It seems that no difficulties should arise with the appointment in the event of issues appointing arbitrators, the institution has the power to appoint the arbitrators. In practice, using the timeline for appointment of the arbitral tribunal and rules regarding the dismissal of arbitrators can result in stonewalling.

The commissions' arbitration rules can provide assistance to appoint arbitrators.

Arbitrator liability and immunity

According to the Arbitration Law, in the event that an arbitrator is found to have met the parties or their attorneys in private, has accepted gifts or attended events hosted by the parties or their relatives and the case is severe, involves bribery, or perverted the law in the award[50], the arbitrator will not only be removed from the arbitral tribunal but also bear legal liability of such conduct and the arbitration institution will remove the arbitrator from the arbitrators panel[51].

B. Arbitration procedure

Law governing procedure

In the event that the designated rules conflict with mandatory legal provisions, the law will prevail.

As a consequence of the above, as the seat of the arbitration institution determines the law applicable to the procedure, there is a great emphasis on the role of the seat of arbitration. However, as the parties have the possibility to agree otherwise, the seat of the arbitration plays a role only where the parties have not designated other procedural rules as applicable.

[47] Article 67 of the Arbitration Law.
[48] Article 31 of the Arbitration Law.
[49] Article 32 of the Arbitration Law.
[50] Article 58 of the Arbitration Law.
[51] Article 38 of the Arbitration Law.

Style and characteristics of the oral hearing

According to Article 39 of the Arbitration Law, the hearings are by default oral and only open to the public if agreed in writing by the parties. Arbitration commissions can therefore arrange different types of hearings and the parties choose between the different possibilities offered by the appointed commission.

According to the CIETAC rules[52], the hearings shall be, by default, held *on camera*. This means hearings are strictly confidential and any attendees are bound by the confidentiality of the hearings. Oral hearings can be recorded by stenographic or audio/video means and the arbitral tribunal can require the parties, attorneys, witnesses and any persons attending the hearings to sign the minutes or stenographic records[53]. Oral hearings of a domestic arbitration are required to be recorded in writing and the record file will be signed by the arbitrators, recorder, parties and any other participants[54].

Documents-only arbitration

Upon agreement by both Parties, the proceedings can be done on a documents-only basis[55].

Taking of evidence

Each party is required to submit supporting evidence of the claim or response it files[56]. The arbitral tribunal can also decide to further investigate the case itself[57]. Such evidences are notified to the parties for comments.

Interim measures of protection

Either party can apply for protective measures regarding evidence if the evidence might be destroyed or lost. Such a request must be then submitted by the arbitration institution to the competent People's court[58].

Interaction between national court and arbitration tribunal

As previously mentioned, the People's courts may be involved regarding arbitration matters at different stages, including determining the validity of the arbitration agreement and to order protective measures. However, the role of the People's courts is limited. For example, a judge cannot be involved in the arbitrator's appointment process, even when the parties cannot come to an agreement.

In practice, arbitration institutions are largely independent, a key objective of the Arbitration Law.

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[52] Article 36 of the CIETAC Rules.
[53] Article 38 of the CIETAC Rules.
[54] Article 68 of the CIETAC Rules.
[55] Article 39 of the Arbitration Law.
[56] Article 43 of the Arbitration Law.
[57] Article 43 of the Arbitration Law.
[58] At the location where the evidence is obtained, article 46 of the Arbitration Law. The competent court for international arbitration is the Intermediate People's Court where the evidence is produced, article 68 of the Arbitration Law.

C. Applicable rules and law

Determining the applicable law and rules

In domestic disputes, the parties are not permitted to choose the applicable law of the dispute[59].

According to Article 3 of the Law on the Application of Relevant Laws to Civil Relationships with Foreign Parties, the parties to an arbitration involving foreign elements can choose the law applicable to the dispute, except where otherwise provided for by mandatory provisions under the laws and regulations of China[60]. Article 5 of the said law provides that foreign law cannot be applicable if it may harm public interest.

If the parties fail to specify the applicable law in the arbitration agreement, the arbitration institution has the authority to determine the applicable law but the parties are required to provide the arbitration institution with the content of the applicable law once determined[61]. In determining the applicable law, the arbitration institution will not use criteria set forth in foreign law[62], but rather the determination method must be according to China laws and regulations. Furthermore, when a foreign law cannot be determined, the laws and regulations of China are applicable by default.

The general criteria to determine the applicable law of the arbitration agreement is quite simple, as Article 18 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties provides that the "law of the place where the arbitration institution is located or where the arbitration is held shall apply", thereby granting significant power to the seat of the arbitral institution or seat of the hearings.

Depending on the issue to be arbitrated, the arbitration panel will evaluate specific criteria of the case to determine the applicable law. In general, the most closely-connected law will be applicable[63].

With regard to contractual obligations, the law defines two (2) criteria:

a. The law of the place where the party bearing the obligation under the contract has its habitual residence; or

b. The law which is the most-closely related due to the type of contract.

In cases where damages were incurred, in general it will be the law of the place where the damages occurred[64].

Also, in the same dispute, different laws may be applicable to different legal aspects. For example, the law applicable to the civil status of the parties shall remain applicable[65], whereas

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[59] See Huang Tao and Dai Yue, "Forum Shopping in China: CIETAC VS. UNCITRAL", dated June 28th, 2012, published on www.legalstudio.com.
[60] Article 4 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[61] Article 10 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[62] Article 9 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[63] Article 6 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[64] Article 44 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[65] Article 7 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.

the law determining the nature of the dispute remains the law of the arbitration seat[66].

D. Costs

In accordance with the Arbitration Law, [67] the fees chart is approved by the Pricing Administrative Department.

CIETAC

For foreign related disputes, there are registration fees in the amount of RMB 10,000 (approximately USD 1,600) which includes the expenses for reviewing the arbitration application, initiating the arbitral proceedings, computerized management and filing of documents.

There are also handling fees according to the chart below:

Amount of Claim (RMB)	Amount of Fee (RMB)
1,000,000 Yuan or less	4% of the Claim Amount, minimum 10,000 Yuan
1,000,000 Yuan to 2,000,000 Yuan	40,000 Yuan plus 3.5% of the amount above 1,000,000 Yuan
2,000,000 Yuan to 5,000,000 Yuan	75,000 Yuan plus 2.5% of the amount above 2,000,000 Yuan
5,000,000 Yuan to 10,000,000 Yuan	150,000 Yuan plus 1.5% of the amount above 5,000,000 Yuan
10,000,000 Yuan to 50,000,000 Yuan	225,000 Yuan plus 1% of the amount above 10,000,000 Yuan
50,000,000 Yuan to 100,000,000 Yuan	625,000 Yuan plus 0.5% of the amount above 50,000,000 Yuan
100,000,000 Yuan to 500,000,000 Yuan	875,000 Yuan plus 0.48% of the amount above 100,000,000 Yuan
500,000,000 Yuan to 1,000,000,000 Yuan	2,795,000 Yuan plus 0.47% of the amount above 500,000,000 Yuan
1,000,000,000 Yuan to 2,000,000,000 Yuan	5,145,000 Yuan plus 0.46% of the amount above 1,000,000,000 Yuan
2,000,000,000 Yuan or more	9,745,000 Yuan plus 0.45% of the amount above 2,000,000,000 Yuan, maximum 15,000,000 Yuan

[66] Article 8 of the Law on the Application of Relevant Laws to Civil Relationship with Foreign Parties.
[67] Article 76 of the Arbitration Law.

The CIETAC Rules require parties to pay the arbitration fees in advance[68].

Furthermore, CIETAC may charge any reasonable costs borne by CIETAC for the arbitration, including travel and accommodation expenditures for arbitrators, expenses for experts and interpreters.

SAC

Filing fees vary between RMB 100 to RMB 18,550 according to the tranche of the disputed amount and an additional fee calculated as a percentage on the disputed amount. In addition to the filing fees, the parties must pay handling fees which vary between RMB 2,000 to RMB 18,250 in addition to a percentage of the disputed amount.

SHIAC

At the SHIAC, parties must pay a registration fee in the amount of RMB 10,000 and a handling fee according to the chart below:

- Dispute up to RMB 1,000,000: 3.5% or minimum RMB 10,000;
- RMB 1,000,001 to RMB 5,000,000: RMB 35,000 + 2,5% of the disputed amount;
- RMB 5,000,001 to RMB 10,000,000: RMB 135,000 + 1.5% of the disputed amount;
- RMB 10,000,001 to RMB 50,000,000: RMB 210,000 + 1% of the disputed amount;
- Above RMB 50,000,000: RMB 610,000 + 0.5% of the disputed amount.

SCIA

When filing arbitration claims at the SCIA the below fees must be paid:

- Registration fees: RMB 10,000; and
- Handling fees:
    - Dispute up to RMB 1,000,000: 3.5% or minimum RMB 10,000;
    - RMB 1,000,001 to RMB 5,000,000: RMB 35,000 + 2,5% of the disputed amount;
    - RMB 5,000,001 to RMB 10,000,000: RMB 135,000 + 1.5% of the disputed amount;
    - RMB 10,000,001 to RMB 50,000,000: RMB 210,000 + 1% of the disputed amount;
    - Above RMB 50,000,000: RMB 610,000 + 0.5% of the disputed amount.

CEAC

[68] Article 12 paragraph 3 of the CIETAC Rules. In practice CIETAC is paid before any hearing as the claimant must pay at the time the application for arbitration is made.

The calculation of fees at the CEAC is more complicated and the parties must seek the confirmation of the CEAC's secretariat. For disputed amount up to EUR 15,000, the fees are as follows:

a. Administration fee: EUR 500;

b. Sole arbitration/presiding arbitrator: EUR 2,700;

c. Co-arbitrator: EUR 1,950 each.

BAC

At the BAC, the parties pay a filing fee which amount varies between RMB 100 to RMB 18,550 depending on the disputed amount and in addition to a percentage of such disputed amounts. Furthermore, the parties must pay handling fees which are based on the same structure divided into a fixed amount varying from RMB 5,000 to RMB 112,000 depending on the disputed amount and a variable fee according to a percentage applied to the amount in dispute but which percentage varies depending on the tranche of the disputed amount.

E. Language

Even though the Arbitration Law does not provide expressly that the arbitration proceedings, hearings and documentation can be in another language than Mandarin, the arbitration commissions that deal with foreign arbitrations all provide for this possibility. At the CIETAC, Mandarin is the default language. However, the parties can choose another language and the CIETAC itself can decide that another language fits better.

Unfortunately, SAC, CEAC and BAC rules do not provide the option for the commission to choose another language.

With CEAC, if the parties have agreed the commission will choose the chosen language).

We therefore recommend always inserting in the arbitration clause the arbitration language in order to avoid that the default language, Mandarin, applies for CIETAC, SAC, SHIAC and BAC.

English should be stated for CEAC.

For SCIA to avoid uncertainties or procedural difficulties which rules do not provide any default language.

5. Enforcement of Arbitration Awards

A. Types of awards

Partial awards

The Arbitration Law does not specifically provide for a partial award[69]. However, this is permitted in practice as provided in Article 48 of the CIETAC Rules, which allows the arbitral tribunal to make a partial award where it deems necessary, or upon the request of either party

[69] Article 55 of the Arbitration Law.

and the arbitral tribunal agrees with such request. The partial award may be rendered on any part of the claim before rendering the final award and the partial award is final and binding upon all parties.

Final awards

Arbitral proceedings end with the arbitral tribunal ruling on the issue in dispute between the parties. The arbitration award is final and once issued, neither party may approach the arbitration commission or the People's court concerning the same dispute nor may either party make a request to any other organization for an appeal of the award[70].

Interim awards

The arbitral tribunal does not have the power to grant interim relief for interim property protection measures and interim evidence protection measures; only the People's court has such power.[71] Where a party believes that evidence or property may be vulnerable, the party concerned may apply to the arbitration commission to place such evidence or property under custody. The arbitration commission must submit the application to the People's court at the place where the evidence or property is located[72]. In practice, the People's court will usually request that the applicant party provide security, and if an applicant fails to provide security, the application will be rejected by the People's court. Property may be deemed to be vulnerable if it may become impossible or difficult to implement the award due to an act of the other party or other causes[73]. Evidence may be deemed to be vulnerable where the evidence may be lost or difficult to obtain at a later time[74].

Consent awards

Under the Arbitration Law, the parties may, upon their own initiative, reach a settlement after applying for arbitration and before the arbitral tribunal renders its final award. The arbitral tribunal may try to resolve the dispute during the arbitration proceedings, at the request of, or with the consent of both parties[75].

In the event that a settlement is reached, the parties may request that the arbitral tribunal make an award based on the agreement, or alternatively, the parties may withdraw the arbitration application[76]. In the event that the parties request an arbitral award be made, such document must clearly set forth the claims in dispute and the terms on which the parties have agreed to settle the dispute. The document must be signed by the arbitrators and affixed with the seal of the relevant arbitration commission before being served on the parties, and becomes legally binding on both parties upon being received by both parties.

A 'consent award' and a final arbitral award are equally binding legally[77].

Default awards

Pursuant to the Arbitration Law, where a respondent party is absent from the arbitral hearing

[70] Article 9 of the Arbitration Law.
[71] Article 28 of the Arbitration Law.
[72] Articles 28, 46 and 68 of the Arbitration Law and Article 272 of the Civil Procedure Law.
[73] Article 28 of the Arbitration Law.
[74] Article 46 of the Arbitration Law.
[75] Article 51 of the Arbitration Law.
[76] Article 49 of the Arbitration Law.
[77] Article 52 of the Arbitration Law.

without justifiable reasons after receiving written notice, or in the event that the respondent withdraws from an on-going hearing without the prior permission of the arbitral tribunal, an award may then be granted in default[78].

Awards and other decisions of the tribunal

As mentioned above, the arbitral tribunal can make other decisions, including the validity of the arbitration agreement, orders on its own jurisdiction, orders to appoint an expert and orders to submit documents, or an inspection.

B. Form requirements

Essential content

The arbitral tribunal is required to provide an award in writing which must specify the arbitration claim(s), the facts in dispute, the reasons on which the award is based, the nature of the award, the allocation of arbitration costs and the date on which the award was made[79]. The award must be signed by the arbitrator(s) and affixed with the seal of the arbitration commission[80].

Reasons

The arbitrators are required to provide their reasoning for their final decision. However, should the parties object to the facts of the dispute or the reasons for the award being specified in the award, such specifications may be omitted[81].

Time limits for making award

The Arbitration Law does not provide for a time limit for rendering an award, and as such, this will be determined by the rules of the relevant arbitration commission.

Notification to parties and registration

The Arbitration Law does not specifically set out the notification procedure to be followed once the award had been finalised. In practice, the parties will be notified of the award in the same manner as other notices, such as the notice confirming the commencement of the dispute.

C. Remedies

The Arbitration Law does not expressly refer to any particular type of remedy and as such, an arbitral tribunal may grant any kind of relief or remedy available under substantive law, including awarding damages or specific performance. However, no remedy may be granted which may violate any public interest[82].

CIETAC allows for the arbitral tribunal to determine the specific time period for the parties to carry out the award and the liabilities for the failure to do so within the specified time.

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[78] Article 42 of the Arbitration Law.
[79] Article 54 of the Arbitration Law.
[80] Article 54 of the Arbitration Law.
[81] Article 54 of the Arbitration Law.
[82] Article 58 of the Arbitration Law.

D. Decision making

Deliberations

The arbitral tribunal is required to reach a decision in accordance with applicable law.

Majority decision

An award must be decided by the majority of the arbitrators, and where a majority vote cannot be reached, the award shall be decided based on the decision of the chief arbitrator[83].

Dissenting and concurring opinions

A written dissenting opinion, or the written opinion where the award is made in accordance of the chief arbitrator, will be kept on file and may be attached to the award. However, such opinion shall not form part of the award[84].

Signature

The arbitral award must be signed by the arbitrators and affixed with the arbitration commission seal[85].

E. Effects of award

Effects between parties

An arbitral award has an *inter partes* effect and is legally binding on all parties to the arbitration.

Effects against third parties

In practice, an arbitral award is only binding on the arbitrating parties themselves, and cannot confer an obligation on to a third party who is not a party to the arbitration.

Currently there are no provisions relating to third parties with respect to arbitrations. There are still doctrinal arguments about whether to include third party provisions to the arbitration regulation system.

Res judicata

An arbitral award is final and binding, and once rendered, no parties may take action in the People's court for the same dispute[86].

F. Challenges and other appeals against the award

Setting aside a domestic award

The Arbitration Law[87] provides the following grounds on which a domestic award can be set-aside:

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[83] Article 53 of the Arbitration Law.
[84] Article 53 and 54 of the Arbitration Law.
[85] Article 54 of the Arbitration Law.
[86] Article 273 of the Civil Procedure Law.
[87] Article 58 of the Arbitration Law.

a. There was no arbitration agreement between the parties;

b. The matter ruled is outside of the scope of the arbitration agreement or off limits of the arbitration institution's authority;

c. The composition of the arbitral tribunal or the arbitral proceedings violates the arbitration institution's rules;

d. The evidence on which the award was based is forged;

e. Evidence has come to light that that had been concealed by the opposite party;

f. Arbitrators have accepted bribes, resorted to deception for personal gain or misuse the law in the award; or

g. The award is against public interest.

This means that a domestic award can be set aside upon substantial review of the merits of the case, for example if the application of the law is found to be erroneous.

Setting aside a foreign-related award

The Civil Procedure Law provides the following grounds on which a foreign-related award may be set aside:

i. There was no arbitration agreement between the parties;

ii. The person against whom the arbitration award was made was not asked to appoint an arbitrator or take part in the arbitration proceedings or the person was unable to state his opinion due to reasons for which he is not responsible;

iii. The composition of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of the relevant arbitration institution; or

iv. The matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration commission.

In foreign-related disputes, the People's court cannot review the merits of the case, but can only set-aside the award where the relevant procedural requirements have not been fulfilled.

The Supreme People's Court has clearly stated that no application will be considered on any grounds other than the grounds listed above.[88]

Time limits

If a party believes it has sufficient grounds to set aside the award, the party may apply to the competent People's court to have the award set-aside and such application should be filed within six (6) months from the date of receipt of the award[89]. The People's court is then required

[88] Article 17 of the Interpretation of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law (Adopted at the 1375th meeting of the Judicial Committee of the Supreme People's Court on December 26th, 2005).
[89] Article 59 of the Arbitration Law.

to render its ruling on whether setting aside the application will be granted or not within two (2) months of receiving the application.

Procedure

The Peoples' court will form a collegial panel to determine whether the award should be set aside or not, and the panel will question interested parties[90]. If one party applies for the enforcement of an award, and the other party has applied to have the award set-aside, the People's court shall suspend the enforcement proceedings until a ruling is made for the setting-aside of the award.

Effects of a successful challenge

Where the People's court finds sufficient grounds to set-aside the award, the court may order that the matter be remitted back to the arbitration institutions for a new ruling. Where a domestic award has been set aside as a result of forged evidence or the opposite party concealed relevant evidence impacting the impartiality of the award, the People's court must order the arbitration commission to re-arbitrate the dispute[91].

Where a party applies for revocation of an arbitral award by reason of the arbitral award exceeding the scope of application of the arbitration agreement, the People's court shall revoke the excessive part in the arbitral award. But, if the excessive part is indivisible from other matters under arbitration, the arbitral award shall be revoked by the People's court[92].

Appeal on the merits

The Arbitration Law does not allow a party to appeal an arbitral award. A party can only either resist enforcement and object to any enforcement application made against him, or apply to have the award set-aside[93].

G. Recognition and enforcement of awards

For the purposes of enforcement in China, arbitral awards are divided into five (5) categories, namely:

1. Domestic arbitral awards;
2. Non-domestic arbitral awards;
3. Foreign-related arbitral awards;
4. Foreign arbitral awards; and
5. Arbitral awards made in Hong Kong, Macau or Taiwan.

Neither the Arbitration Law nor the Civil Procedure Law provide a definitions of these categories, however in practice and through judicial interpretations issued by the Supreme Court,

[90] Article 24 of the Interpretation of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law.
[91] Article 21 of the Interpretation of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law.
[92] Article 19 of the Interpretation of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law.
[93] Article 237 and 274 of the Civil Procedure Law.

rules for each category have been established.

Domestic awards

Domestic arbitral awards are awards made in China with no foreign element and where the arbitration proceedings are under the administration of an arbitration commission established in China. A foreign invested enterprise established in China, such as a wholly foreign-owned enterprise or a sino-foreign joint venture company, is not considered to be a foreign party and thus all related disputes must be heard in accordance with the applicable Chinese laws.

An application to enforce an award must be filed with the People's court within two years of an award, failing which the award will become unenforceable. The time limit is calculated from the last day of performance of the award as stated in the award, or if it is not specified, from the date on which the award became effective. An application to enforce a domestic award must be filed with the Intermediate People's Court located in the jurisdiction where the defendant is domiciled, or alternatively, at the location where the defendant's property or other assets are located. In addition to the enforcement application, the party seeking enforcement must also provide the original or a certified copy of both the award and the arbitration agreement and evidence to support the application[94].

Refusing to enforce an arbitration award may only be done in accordance with Article 63 of the Arbitration Law and Article 237 of the Civil Procedure Law. However, these articles allow the People's court considerable discretion to refuse to enforce domestic arbitral awards on the following grounds[95]:

i. The parties did not agree on arbitration and therefore the arbitration commission had no jurisdiction to arbitrate the dispute[96];

ii. The dispute falls beyond the scope of the arbitration agreement or the arbitration institution or beyond the arbitral authority of the arbitration commission;

iii. The composition of the arbitral tribunal or the arbitration procedure was not pursuant to the arbitration procedures and requirements as specified in the Arbitration Law and the rules of the relevant arbitration commission;

iv. The main evidence for concluding the facts of the case was insufficient;

v. There was an incorrect application of the law;

vi. The arbitrator was involved in bribery, corruption, embezzlement, nepotism, or rendered an award in violation of the law; or

vii. The execution of the award is contrary to public interest.

The subjective elements in these grounds allow for a broad discretion allowing for a domestic arbitral award to be reversed by the People's court in a similar manner as a normal court appeal, meaning that any domestic arbitration is ultimately reliant on the views of the People's court if the losing party challenges the award.

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[94] Interim Provision of the Supreme People's Court on Certain Issues Concerning Enforcement by the People's Court, July 8th, 1998, art 20 and 21.
[95] Article 237 of the Civil Procedure law.
[96] This is the case heard by Suzhou Intermediate People's Court as reported above.

Foreign-related awards

A foreign-related arbitral award is an award resulting from an arbitration that involves foreign elements but which was arbitrated by a Chinese arbitration institution. The following are deemed to be foreign elements[97]:

i. One or both parties are foreign entities, foreign citizens, or stateless individuals;

ii. The subject matter of the dispute is located outside of China; or

iii. The facts establishing, altering, or terminating the parties relationship occur outside of China.

As with a domestic award, an application to enforce a foreign-related award must be filed with the Intermediate People's Court located in the jurisdiction where the defendant to the enforcement application is domiciled, or alternatively, at the location where the defendant's property or other assets are located[98]. The application should be filed within two (2) years from the last date of performance, and in addition to the enforcement application, the party seeking enforcement must also provide the original or a certified copy of both the award and the arbitration agreement and evidence to support the application[99].

The grounds on which the People's court may refuse enforcement of a foreign-related award are similar to those of a domestic award and are as follows:

i. There is no arbitration agreement between the parties;

ii. The person against whom the arbitration award was made was not duly notified to appoint an arbitrator or to proceed with the arbitration, or said person fails to state his opinions due to reasons for which he cannot be held responsible;

iii. The composition of the arbitral tribunal or the arbitration procedure was not the result of the arbitration procedures and requirements as specified in the Arbitration Law and the rules of the relevant arbitration commission;

iv. The dispute falls beyond the scope of the arbitration agreement or the arbitration institution or beyond the arbitral authority of the arbitration commission; or

v. The execution of the award is contrary to public interest.

The grounds for non-enforcement effectively prohibit judicial examination on the merits of an award, save for where the People's court believes the enforcement of the award will be against public policy.

The People's Supreme Court established a reporting regime whereby it monitors the implementation of the enforcement procedures of foreign-related awards and foreign awards[100]. Accordingly, where a People's court determines that the award must not be recognized and

[97] Article 304 of the Opinions on Issues Relating to Application of the PRC Civil Procedure Law, promulgated by the Supreme People's Court on July 14th, 1992.
[98] Article 222 of the Civil Procedure Law.
[99] Article 239 of the Civil Procedure Law and Article 29 of the Interpretations of the Supreme People's Court concerning Several Matters on Application of the Arbitration Law of the PRC.
[100] The Notice on the Handling of Issues Regarding Foreign Related Arbitration and Foreign Arbitration by People's Courts, issued by the Supreme People's Court on August 28th, 2005.

enforced based on one of the grounds provided in Article 274 of the Civil Procedure Law, it shall, prior to making a decision on its enforcement, report to the higher People's court within its jurisdiction for review; and if the higher People's court decides not to enforce or to refuse to recognize and enforce the same, it shall report its decision to the Supreme People's Court. A decision not to enforce or to refuse to recognize and enforce the award will only be upheld after the Supreme People's Court's review[101].

Foreign awards

A foreign arbitral award is an award rendered outside of China, and may either have been made in a contracting state to the New York Convention or in a non-contracting State.

Where either party does not voluntarily comply with the terms of a foreign award, the party seeking to enforce the foreign award must apply to the Intermediate People's Court where the respondent is domiciled or where its assets are located for recognition and enforcement of the award[102]. An application for the enforcement of a foreign award must include either the original or a certified copy of the arbitral award and the arbitration agreement, as well as the Chinese translation thereof, which must be verified by a Chinese embassy or consulate, or a notary public within China[103]. The application will be handled pursuant to any treaties concluded or acceded to by China or in accordance with the principle of reciprocity[104].

China became a contracting state to the New York Convention in 1987. However, China made a reciprocity reservation, and is therefore only obliged to recognize and enforce awards rendered in other contracting States. The Supreme People's Court issued a circular which expressly provides that China will recognize and enforce awards rendered in other contracting states[105]. A second reservation was made by China to the effect that it will only apply the New York convention to those disputes with a commercial subject matter. This may include any relationship of commercial rights and obligations arising out of contract, tort or other relevant provisions of the law, for example, the sale and purchase of goods, lease of property, joint ventures, ownership disputes, technology transfer and product liability[106].

Apart from the reciprocity and commerciality reservations, an application for recognition and enforcement of the award may be refused in accordance with Article V of the New York Convention. Most notably, particularly when considering its application in China, is the provision allowing non-enforcement of an award where the enforcement will violate public policy.

The reporting regime as discussed above also applies to foreign awards.

Between 2000 and 2007, twelve (12) foreign awards were not enforced by the People's courts: five (5) of these awards had been rendered despite the fact that there was no arbitration agreement between the parties; four were refused as the statute of limitations had expired; two (2) were refused for procedural deficiencies and in one case there were no assets available for

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[101] Article 2 of the Notice on the Handling of Issues Regarding Foreign Related Arbitration and Foreign Arbitration by People's Courts, issued by the Supreme People's Court

[102] Article 281 of the Civil Procedure Law.

[103] Article 21 of the Interim Provision of the Supreme People's Court on Certain Issues Concerning Enforcement by the People's Court, July 8th, 1998.

[104] Article 281 of the Civil Procedure Law.

[105] Supreme People's Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, April 10th, 1987.

[106] Article 2 of the Supreme People's Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

enforcement in China[107].

Non-domestic awards

Recent developments suggest that there may be a new category of awards enforceable in China. In the past it was very unlikely that a foreign award rendered in China by a foreign arbitration commission would be recognized and enforced in China. However, the recent decisions in Zueblin international GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co. Ltd (the "**Wuxi Case**")[108] and Dufercos S.A. v. Ningbo Arts & Crafts Import & Export Co. Ltd (the "**Ningbo Case**")[109] possibly opens the door to "non-domestic awards" which are enforceable pursuant to the New York Convention. Both these cases involved applications for enforcement of ICC awards rendered by arbitral tribunals seated in China. The awards could not be considered as domestic awards as the arbitration proceedings were administered by a foreign arbitration institution, yet the awards also could not be considered as foreign as the award was rendered within China.

In the Wuxi Case, the People's Court held that the case concerned the recognition and enforcement of a foreign arbitral award pursuant to Article 281 of the Civil Procedure Law which defines a foreign arbitration award as an award rendered by a foreign arbitration institution, and does not specify that the arbitration should not be rendered within China, and as a result, the New York Convention should be applied. It held that, pursuant to Article 1 of the New York Convention which provides, inter alia, that ''[This Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", the ICC award rendered in China should be considered as non-domestic. However, in this particular case, the award was not enforced as the Wuxi People's court found that the arbitration agreement had been previously ruled to be invalid by another People's court as the agreement did not specify an arbitration institution, a decision that was upheld by the Supreme People's Court.

In the Ningbo Case, the People's Court similarly found that the ICC award should be deemed a non-domestic award pursuant to Article 1 of the New York Convention and ruled that the award should be recognized and enforced.

However, even in light of these positive developments, parties would still be well advised to stipulate in an arbitration agreement that arbitral proceedings that are to be administered by a foreign arbitration institution should be seated outside of China. This is because in China, the doctrine of *stare decisis* is weak and there is no guarantee that a court will find that this type of award is valid and enforceable.

Awards made in Hong Kong, Macau or Taiwan

After the retrocession of Hong Kong to China in 1997, the New York Convention was extended to Hong Kong, and on July 19th, 2005 it was extended to Macau. This means that arbitral awards in China, Hong Kong and Macau can be enforced in any of the contracting States, and awards from contracting States may be enforced in each of these jurisdictions. However, the New York Convention does not apply between these three (3) jurisdictions.

A Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards between Mainland China and HKSAR was signed on June 21st, 1999 which

[107] According to Wan E'Xiang, Deputy Chief Justice of the Supreme People's Court, at a speech held on June 6th, 2008 at the 50th Anniversary Symposium of the New York Convention.
[108] Wuxi Intermediate People's Court July 19th, 2006.
[109] Zhejiang Intermediate People's Court April 22nd, 2009.

provides for reciprocal recognition and enforcement of arbitral awards between Mainland China and Hong Kong.

The Arrangement on Mutual Recognition and Enforcement of Arbitral Awards Made in the Mainland and Macau SAR came into force on January 1st, 2008. It provides for the reciprocal enforcement of arbitral awards in both jurisdictions.

There is no formal bilateral agreement between the Mainland and Taiwan. However, both jurisdictions have enacted complimentary legislation providing for reciprocal enforcement.[110]

6. Conclusion

Arbitration procedure and legal provisions are in line with international practice and detailed enough to provide legal certainty to foreign parties. The main characteristic of arbitration in China is that arbitration is institutional and not fully private.

The recognition and enforcement of foreign judgements in China is limited, which makes arbitration seated within China the best option for ensuring award enforcement in China

However, regarding award enforcement, there is one major pitfall to avoid in China. The parties must make sure they refer to an existing commission and the name referred to in the arbitration agreement is not confusing. Also, the parties who intend to submit their disputes to CIETAC in Shanghai or Shenzhen or to SHIAC or SCIA must make sure they refer to the correct names of either of these commissions.

The split of the two (2) sub-commissions from CIETAC in 2012 and 2013 created uncertainty with regards to the validity of clauses designating CIETAC Shanghai or South China CIETAC as arbitration centres. This question mainly refers to the case when the parties elected arbitration to former CIETAC Shanghai and South China (Shenzhen) CIETAC to hear their cases[111]. The former commissions of CIETAC still accept cases in spite of enforcement issues. In a case heard in Suzhou Intermediate People's Court[112] regarding the claim for the enforcement of an award issued by the former South China sub-commission of CIETAC, the court decided not to enforce it. The court judged that the parties had no agreement to submit the case to an independent arbitration commission as the agreement referred to CIETAC. Therefore, the award was issued without jurisdiction over the case.

Other judgements enforcing the awards in similar circumstances were reported with the difference that the courts hearing the enforcement claim where local courts from the same jurisdictions as the two former CIETAC sub-commissions. Therefore, parties should be cautious and assess the risks of enforcement before filing an arbitration claim.

[110] Taiwan enacted the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area. In 1998, the Supreme Court issued the Regulations Concerning Recognition by People's Courts of Civil Judgments of Taiwan Courts, which includes the recognition and enforcement of arbitral awards.

[111] For cases heard by CIETAC Beijing but seated in these cities, there would be no issue as the reference to CIETAC refers to a valid arbitration centre having a secretariat and therefore a seat in these two cities.

[112] LDK Solar Co. Ltd. v. Suzhou Canadian Solar Inc., May 2013.

III

OVERVIEW OF ARBITRATION IN EGYPT

Mohamed Abdel Raouf

SUMMARY: 1. Law on Arbitration. – 2. Arbitration Infrastructure. – 3. The Practice of Arbitration. – 4. Investor-State Dispute Settlement.

1. Law on Arbitration

1. The principal national arbitration statute in Egypt is Law No. 27/1994, promulgating the Law concerning Arbitration in Civil and Commercial Matters (the "Law"). The Law was published in the Official Gazette issue No.16 on 21 April 1994 and came into effect on 22 May 1994.

2. The Law applies to both domestic and international arbitrations. Article 1 of the Law provides that it applies to arbitrations having their seat in Egypt as well as to those arbitrations taking place abroad, and to which the parties have agreed to adhere to the provisions of the Law.

3. The Law has been subject to the following amendments:

    a. The application of the Law to disputes arising out of administrative contracts:

4. On 13 May 1997, Law No. 9/1997 was enacted adding to Article 1 of the Law the following paragraph: "With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his powers with respect to public juridical persons. No delegation of powers shall be authorized in this respect."[113]

[113] The law No. 9/1997 was published in the Official Gazette on 15 May 1997 and came into force the day following the day of its publication.

b. Procedures for challenging arbitrators:

5. The original Article 19 of the Law at the time of its adoption followed exactly the procedures for challenging arbitrators provided for under Article 13 of the UNCITRAL Model Law, according to which the arbitral tribunal has jurisdiction to decide on the challenge of any of its members.

6. In November 1999, the Supreme Constitutional Court of Egypt held unconstitutional the following provision of Article 19 of the Law: 'the arbitral tribunal shall issue a decision on the challenge.' The Supreme Court decided that in case the challenged arbitrator does not withdraw or the challenge is not accepted by the other party, the matter should be referred directly to the State court to decide thereon.[114] In 2000, Law No. 8/2000 was enacted to accommodate this Supreme Constitutional Court decision. The said law was published in the Official Gazette on 4 April 2000. Henceforth, paragraph 1 of Article 19 of the Law reads as follows: 'The challenge request, incorporating the reasons for such challenge, shall be submitted in writing to the arbitral tribunal within fifteen days from the date the challenging party becomes aware of the constitution of the arbitral tribunal or of the circumstances justifying such challenge. Unless the challenged arbitrator withdraws from his office within fifteen days from the date of submitting such request, the request shall be forwarded, at no cost, to the court referred to under Article (9) of this Law for a final ruling that is subject to no appeal.'

c. Appeal of the order granting enforcement of the award:

7. Paragraph 3 of Article 58 of the Law provides that the order granting enforcement (exequatur) is not subject to appeal. However, the order refusing to grant enforcement may be subject to appeal. In 2001, the Supreme Constitutional Court of Egypt held this paragraph unconstitutional on the grounds that there should be equality between the rights of the parties.115 Accordingly, the party against whom the exequatur is issued may challenge it before the competent court within thirty days of the date of the decision.

8. The following legal texts also governs arbitration in Egypt:

a. Ministerial Decrees Nos. 8310/2008, 6570/2009 and 9739/2011 regarding the deposit of arbitral awards

9. By virtue of Ministerial Decree No. 8310/2008 issued on 21 September 2008 and entered into force as of the date of its publication in the Official Gazette on 7 October 2008, the Egyptian Minister of Justice introduced certain provisions governing the deposit of arbitral awards under Article 47 of the Law.

[114] Challenge No. 84 of the judicial year 19, Session of 6 November 1999.
[115] Challenge No. 92 of the judicial year 21, Session of 6 January 2001.

10. Pursuant to this Ministerial Decree, the application to deposit the arbitral award should be forwarded to the special Technical Bureau on Arbitration of the Ministry of Justice to decide in writing whether such application is acceptable. Among the reasons for rejecting the deposit of the arbitral award are: violation of public policy; if the award relates to any real estate title, its posession, delivery or the confirmation of its ownership or division; if the award relates to matters pertaining to the personal status or criminal issues; if the award confirms a settlement in any of the above matters; and if the award is rendered with respect to matters in which the settlement is not allowed.

11. This Ministerial Decree was slightly amended by virtue of another Ministerial Decree (No. 6570/2009) issued on 7 July 2009 and entered into force as of the date of its publication in the Official Gazette on 13 July 2009, confirming that the rejection of the deposit of the award relating to an estate is limited to real estate rights.

12. In spite of such amendment, the Ministerial Decree was widely contested by the vast majority Egyptian jurists and practicionners, especially that the Egyptian judiciary, even prior to the adoption of the Ministerial Decree, has duly excercised its supervisory role and has repeatedly set aside several arbitral awards rendered in respect of real estate title issues owing to the mandatory requirement of registration of title and to avert any fraudulent practices in this regard. Such contestation was reflected in a very important judgment of the Cairo Court of Appeal, which refused to apply the Ministerial Decree on the grounds that it has created restrictions that are not warranted under the Law.[116] This development led to the third and hitherto the last amendment of the Ministerial Decree by virtue of another Ministerial Decree (No. 9739/2011) issued on 5 October 2011 and entered into force as of the date of its publication in the Official Gazette on 15 October 2011, which has actually neutralized the negative ramifications of the first Ministerial Decree by stiuplating that the role of the Technical Bureau on Arbitration of the Ministry of Justice is henceforth to issue an opinion rather than deciding as to whether the application to deposit the arbitral award is acceptable. The reasons for rejecting the deposit of the arbitral award are now limited to the violation of public policy and if the award is rendered with respect to matters in which the settlement is not allowed.

    b. Law No. 13 of 1968 promulgating the Code of Civil and Commercial Procedure (the "CCCP")

13. The CCCP was published in the Official Gazette issue No.19 on 9 May 1968 and became effective as of that date.

14. Egypt has adopted the UNCITRAL Model Law of 1985. The main differences between the Egyptian Law on Arbitration and the UNCITRAL Model Law are as follows:

[116] Cairo Court of Appeal, challenge No. 10 of the judicial year 127, Session of 6 September 2010.

- the broad application of the Law covering both domestic and international arbitrations;
- the possible extra-territorial application of the Law to arbitrations conducted abroad if the parties have agreed to such application;
- the number of arbitrators under the Law should be odd;
- the ruling on a challenge made against an arbitrator is vested with the competent national court under the Law and not the arbitral tribunal;
- the arbitral tribunal does not have the powers to order interim or provisional measures unless the parties have agreed to grant the arbitral tribunal such power; and
- an award may be set aside if the arbitral tribunal has excluded the law chosen by the parties to govern the merits of the dispute.

2. Arbitration Infrastructure

15. Egypt adhered with no reservations to the New York Convention in 1959, which was implemented through Presidential Decree No. 171 of the year 1959 dated 9 March 1959, and came into effect as of 8 June 1959.

16. Egypt is a party to the following two arbitration-related multilateral conventions:

- The Convention of 1974 on the Settlement of Investment Disputes between the States hosting Arab Investments and Nationals of other Arab States. This Convention was signed on 10 June 1974 and entered into force on 20 August 1974. Egypt adhered to this Convention by virtue of the Presidential Decree No. 1700 of the year 1974 dated 22 October 1974. It was published in the Official Gazette issue No. 45 on 4 November 1976 and became effective as of 19 August 1976.
- The Unified Agreement for the Investment of Arab Capital in the Arab States dated 26 November 1980. Egypt became member to this Convention on 19 April 1992.

3. The Practice of Arbitration

3.1. General

17. Arbitration is a popular method of dispute resolution in Egypt; it is regularly used for the settlement of most commercial and construction disputes. Statistics confirm the increasing number of institutional arbitration cases. Arbitration clauses are increasingly inserted in small and medium-size contracts, for example, lease contracts and attorneys' fees agreements. An increasing number of sports-related disputes are also referred to institutional arbitration.

3.2 Arbitral institutions

18. The main active arbitral institution in Egypt is:

The Cairo Regional Centre for International Commercial Arbitration ("CRCICA")
Address: 1 Al-Saleh Ayoub Street – Zamalek 11211, Cairo-Egypt
Tel.: + (202) 2735 1333/5/7
Fax: + (202) 2735 1336
info@crcica.org
www.crcica.org

19. CRCICA adopted, with minor modifications, the UNCITRAL Arbitration Rules of 1976.

20. CRCICA amended its Arbitration Rules in 1998, 2000, 2002 and 2007 to ensure that they continue to meet the needs of their users, reflecting best practice in the field of international institutional arbitration.

21. In 2011, CRCICA amended its Arbitration Rules based upon the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre's role as an arbitral institution and an appointing authority.

22. The New CRCICA Arbitration Rules entered into force on 1 March 2011 and apply to arbitral proceedings commencing after this date.

23. CRCICA has administered the following numbers of cases from 2007-2012:

    2007: [29] domestic and [28] international cases; Total: 57
    2008: [36] domestic and [12] international cases; Total: 48
    2009: [38] domestic and [13] international cases; Total: 51
    2010: [50] domestic and [16] international cases; Total: 66
    2011: [47] domestic and [19] international cases; Total: 66
    2012: [58] domestic and [20] international cases; Total: 78
    2013: [59] domestic and [13] international cases; Total: 72

3.3 Courts

24. Pursuant to Article 9 of the Law, in domestic arbitrations, jurisdiction to review arbitration-related matters referred to by the Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in international commercial arbitrations, whether conducted in Egypt or abroad, jurisdiction lies with the Cairo Court of Appeal unless the parties grant jurisdiction to another appellate court in Egypt.

25. Pursuant to Article 13 of the Law, the court before which an action is brought concerning a disputed matter that is the subject of an arbitration agreement shall hold this action inadmissible, provided that the respondent invokes this objection before submitting any demand or defence on the merits of the dispute. The filing of a judicial action shall not prevent the arbitral proceedings from being commenced or continued, or the making of the arbitral award.

26. Pursuant to Article 14 of the Law, upon the request of either party to the arbitration, the court referred to in Article 9 of the Law may order the taking of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings.

27. The Egyptian judiciary is cooperative and has proven to be 'arbitration-friendly' through the assistance of the parties to arbitration (mainly for the appointment and challenge of arbitrators) and the supervision of the arbitration proceedings.

28. In an important decision that has put an end to an interesting debate.[117] the Egyptian Court of Cassation considered whether arbitrations taking place in Egypt according to the UNCITRAL Arbitration Rules, as applied by the CRCICA, are subject to the time limit stipulated in Article 45 of the Law. The Court held that the said provision is not a 'mandatory procedural rule' of public policy. This position was later confirmed in another decision of the Court of Cassation, which held that the Egyptian legislator has left the determination of the time limit to render the final award to the sole discretion of the parties. Based on this clear position, the Court concluded that the failure to object to exceeding the agreed upon time limit during the whole proceedings and until the issuance of the final award is deemed a waiver of the right to object in accordance with Article 8 of the Law.[118]

3.4 Enforcement of awards

3.4.1 Procedure for enforcement

29. Arbitral awards issued according to the Law are final and binding, enjoying the authority of res judicata (Article 55 of the Law). They could be forcibly enforced subject to applying and obtaining an enforcement order ('*exequatur'*) from the competent national judge according to Articles 55 to 58 of the Law.

30. Pursuant to Article 56 of the Law, an arbitral award is enforceable by virtue of an *exequatur* (an enforcement order). An application for an *exequatur* should be accompanied by:
    - the original award or a signed copy;
    - a copy of the arbitration agreement;

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[117] Court of Cassation, challenges Nos. 648 of the judicial year 73; 5754; 6467 and 6787 of the judicial year 75, Session of 13 December 2005.

[118] Court of Cassation, challenges Nos. 3869 and 7016 of the judicial year 78, Session of 23 April 2009. It should be noted that the same position has already been adopted by the Cairo Court of Appeal, which held that the failure to object to the extension of the period of the arbitration during the proceedings and until the closure of the hearings is deemed a waiver of the right to object in accordance with Article 8 of the Law as well as an implicit acceptance to extend such period until the last hearing session [Cairo Court of Appeal, challenge No. 29 of the judicial year 122, Session of 25 September 2005].

- an Arabic translation of the award authenticated by the competent authority if the award is not issued in Arabic; and
- a copy of the procès-verbal evidencing the deposit of the award with the competent court in Egypt.

31. Pursuant to Article 58 of the Law, the leave to enforce shall be granted subject to the following conditions:
    - The award does not contravene any judgment rendered by the Egyptian courts on the subject matter of the dispute;
    - the award does not contravene any principle of Egyptian public policy; and
    - the award has been duly and validly notified to the party against whom it was rendered.

32. Courts are generally willing to enforce foreign arbitral awards against Egyptian nationals and against the State itself. Practice shows that national courts generally adopt a pro-enforcement approach, particularly in the context of foreign arbitral awards. Arbitral awards are reviewed on their merits only in cases involving the violation of public policy, where it is necessary to ascertain compliance with the fundamental principles of public policy.

33. The filing of a setting aside motion does not suspend the enforcement of the arbitral award (Article 57 of the Law). The application for the enforcement of an arbitral award is, however, inadmissible unless the date prescribed for filing the setting aside proceedings has lapsed (Article 58 of the Law). It takes on average from three to six months to enforce a foreign award in Egypt; the total enforcement time depends on whether the other party is challenging the enforcement of the award.

3.4.2 Foreign arbitral awards

34. Foreign arbitral awards are enforceable in Egypt according to the New York Convention of 1958 to which Egypt adhered with no reservations in 1959.

35. The Egyptian Court of Cassation has clearly confirmed that, in accordance with the New York Convention, the provisions of the Law on Arbitration pertaining to the enforcement of arbitral awards, and not those of the CCCP, are applicable in this regard. According to the Court, a foreign arbitral award is enforceable by virtue of an *exequatur* according to the same procedures followed for the enforcement of domestic awards under the Law. These procedures are much easier, swifter and involve less costs than those stipulated under the CCCP.[119]

36. The Court held that, because the Law prescribes an enforcement mechanism materially less onerous than that contemplated by the CCCP, namely an *ex parte* application to a judge in chambers (‘*ordonnance sur requête*’), Art. VII of the Convention (on more

[119] Court of Cassation, challenge No. 966 of the judicial year 73, Session of 10 January 2005. See also challenge No. 945 of the judicial year 69, Session of 8 May 2008.

favourable national enforcement standards) mandates enforcement of foreign awards pursuant to the Law.[120]

37. Some critics believe, however, that this decision is 'unfortunate', arguing that the Law is limited *ratione materiae* to arbitrations conducted in Egypt and therefore regulates the enforcement of Egyptian awards only, but is otherwise silent on the recognition and enforcement of foreign awards, a subject matter which they point out is exhaustively treated by the CCCP (Art. 296 to 301).[121]

38. The Court of Cassation's 2005 decision remains, however, good law. Consequently, foreign arbitral awards, like domestic ones, are enforceable according to the provisions of the Law.

3.4.3 Recourse against awards

39. Regarding recourse against arbitral awards, no appeal of any kind is allowed against arbitral awards under the Law. The only possible means of recourse against arbitral awards is filing a setting aside (annulment) motion invoking one or more of the exhaustive grounds enumerated in Article 53 of the Law. Such grounds include the absence or invalidity of the arbitration agreement, the lack of legal capacity, the violation of the rights of defence and due process as well as the failure to apply the law agreed upon by the parties to govern the merits of the dispute. The court adjudicating the setting aside motion shall also *ipso jure* annul the arbitral award if it is in conflict with public policy in Egypt (Article 53(2) of the Law).

40. An award may not be set aside for an error in law or fact. The action for setting aside may not be excluded by agreement between the parties before issuing the award, but may be effective if concluded after issuing the award.

41. There are no restrictions on foreign lawyers representing parties in arbitral proceedings seated in Egypt.

3.5 Salient judicial trends

42. There is an increasing number of disputes referred to arbitration, especially institutional arbitration. The Egyptian judiciary tends to be arbitration-friendly. However, the Egyptian Administrative Court ('*Conseil d'Etat*') adopts a strict approach regarding the ministerial approval required for arbitrations in administrative disputes. This approach could be attenuated after a recent judgment of the Egyptian Supreme Constitutional Court dated 15 January 2012, which ruled, in a matter of positive conflict of jurisdictions, that, pursuant to Articles 9/1 and 54/2 of the Law, the Cairo Court of

[120] The same argument was adopted in a decision of the Tanta Court of Appeal, challenge No. 42 of the judicial year 42 Banha, Session of 17 November 2009.
[121] Ahmed S. El Kosheri and Karim Hafez, *Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards (Report on Egypt)*, Special Supplement of the ICC Court of Arbitration Bulletin (2008).

Appeal has exclusive jurisdiction over challenges filed against arbitral awards rendered on the basis of an arbitration clause enshrined in an administrative contract, as long as the proceedings pertained to an international commercial arbitration, as defined under Articles 2 and 3 of the Law.[122] The impact of this important judgment is that the Egyptian *Conseil d'Etat* would lack supervisory powers over disputes arising out of administrative contracts that are already referred to any institutional arbitration whether in Egypt or abroad.

43. In an important decision of the Court of Cassation, the Court clearly indicated that the arbitral award cannot be set aside for causes stipulated in the CCCP, which are not explicitly required under the Law. Accordingly, it is not always recommended to fill the gaps of the Law by referring to the provisions of the CCCP.[123]

44. Also, according to the consistent jurisprudence of the Cairo Court of Appeal, the action for setting aside the arbitral award is not an appeal against the award. The said action does not, therefore, extend to reviewing the merits of the dispute or reconsidering the reasoning of the award.[124] Thus, it is not possible to seek the annulment of the award due to an error committed by the arbitral tribunal in interpreting the provisions of the law, in comprehending the facts of the case or in considering the documents, or due to the lack of reasoning of the arbitral award, since such causes are not among the grounds of setting aside arbitral awards, as exhausitively enumerated in Article 53 of the Law.[125]

45. Furthermore, according to the Cairo Court of Appeal, Egyptian courts have no jurisdiction to decide on setting aside motions filed against foreign arbitral awards, as long as the Law is not the *lex arbitri*. The Court of Appeal has confirmed that under Article 1 of the Law, the legislator has limited the territorial scope of application of the Law to arbitrations taking place inside Egypt, unless the parties to international commercial proceedings agree to subject their proceedings to the provisions of the Law.[126]

46. The Cairo Court of Appeal has also confirmed that the courts of the country where the award was rendered have exclusive jurisdiction to decide on its nullity, while the courts of other are only entitled, when seized of an enforcement request, to reject the enforcement of the award based on one or more of the grounds for refusal stipulated in their respective rules of procedure (national laws), or according to one or more of the grounds stipulated in the New York Convention.[127] This principle is considered by the

[122] Supreme Constitutional Court, Challenge No. 47 of the judicial year 31 "Conflicts", Session of 15 January 2012.
[123] Court of Cassation, challenges Nos. 3869 and 7016 of the judicial year 78, Session of 23 April 2009. According to the Court, it is not a mandatory requirement for arbitrators to sign the procès-verbal of the site inspection or to keep a clerk, especially that the Law tends to simplify and facilitate the procedures. Also, the requirements of signing such procès-verbal under Article 25 of the CCCP and Article 131 of the law on civil and commercial evidence do not apply to arbitration cases. The Court, therefore, concluded that Article 28 of the Law grants the arbitral tribunal the liberty to hold sessions wherever it finds it appropriate, including the site inspection and does not bind it to be accompanied by a clerk for the drawing of a procès-verbal.
[124] Cairo Court of Appeal, challenges Nos. 39, 54 and 56 of the judicial year 119, Session of 26 February 2003.
[125] Cairo Court of Appeal, challenge No. 93 of the judicial year 120, Session of 29 January 2006.
[126] Cairo Court of Appeal, challenge No. 40 of the judicial year 119, Session of 29 January 2003.
[127] *See* in this sense, Cairo Court of Appeal, challenge No.10 of the judicial year 119, Session of 26 March 2003.

Court to be a general principle adopted by the majority of modern laws on arbitration to the extent that, according to the jurisprudence of certain countries, the denial of such principle is deemed a proof of bad faith and abuse of rights, engaging the responsibility of the party filing the setting aside motion against the foreign arbitral award.[128]

4. Investor-State Dispute Settlement

47. Egypt signed the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of other States (the "Washington" or the "ICSID" "Convention") on 11 February 1972 further to the Presidential Decree No. 90 of 1971 dated 7 November 1971. The Convention was published in the Egyptian Official Gazette issue No. 30 on 27 July 1972 and became effective as of 2 June 1972.

4.1 MITs and BITs

48. Egypt has entered into the following multilateral and bilateral investment treaties ('MITs'/'BITs').

- Multilateral Investment Treaties:

- The Convention of 1974 on the Settlement of Investment Disputes between the States hosting Arab investments and Nationals of other Arab States. This Convention was signed on 10 June 1974 and has entered into force on 20 August 1974. Egypt adhered to this Convention by virtue of the Presidential Decree No. 1700 of the year 1974 dated 22 October 1974. It was published in the Official Gazette issue No. 45 on 4 November 1976 and became effective as of 19 August 1976.
- The Unified Agreement for the Investment of Arab Capital in the Arab States dated 26 November 1980. Egypt became member to this Convention on 19 April 1992.

- Bilateral Investment Treaties: As of 1 June 2013, Egypt is party to 101 BITs (of which 76 are currently in force). The list comprising the countries with which these BITs were concluded and the date of their entry into force is available at: <http://www.unctad.org/sections/dite_pcbb/docs/bits_egypt.pdf>.

4.3 Investor-State arbitrations

49. Egypt has been a party to the following known investment treaty arbitrations:
    a. ICSID: with more than 100 concluded BITs, Egypt has by far the most important Arab track record of ICSID investment treaty arbitrations. This covers more than twenty cases out of which the following nine cases have already been concluded by a final arbitral award:

[128] *See* in this sense, Cairo Court of Appeal, challenge No.68 of the judicial year 113, Session of 19 March 1997.

- *Wena Hotels Limited v. Egypt* (Case No. ARB/98/4) Award rendered in 12 August 2000;
- *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (Case No. ARB/99/6) Award rendered in 12 April 2002;
- *Joy Mining Machinery Limited v. Egypt* (ICSID Case No. ARB/03/11) Award rendered in 6 August 2004;
- *Champion Trading Company and Ameritrade International, Inc. v. Egypt* (ICSID Case No. ARB/02/9) Award rendered in 27 October 2006;
- *Ahmonseto, Inc. and others v. Egypt* (ICSID Case No. ARB/02/15) Award rendered in 18 June 2007;
- *Helnan International Hotels A/S v. Egypt* (Case No. ARB/05/19) Award rendered in 3 July 2008;
- *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award rendered in 6 November 2008;
- *Waguih Elie George Siag and Clorinda Vecci v. Egypt* (ICSID Case No. ARB/05/15) Award rendered in 1 June 2009; and
- *Malicorp Limited v. Egypt* (ICSID Case No. ARB/08/18) Award rendered in 7 February 2011.

50. In three of the above nine cases, the investors' claims were upheld, at least in part *(Wena v. Egypt, Middle East Cement v. Egypt and Siag v. Egypt)*, while in the remaining six cases the investors' claims were rejected either for lack of jurisdiction *(Joy Mining Machinery Limited v. Egypt)* or on the merits (*Champion v. Egypt, Ahmonseto v. Egypt, Helnan v. Egypt, Jan de Nul v. Egypt and Malicorp Limited v. Egypt*).

b. Arab Investment Court:

- *Lido v. Egypt* (Case No. 1/2) Award rendered in 12 August 2007; and
- *Ofok v. Egypt* (Case No. 2/7) Award rendered in 27 April 2011.

IV

AUSTRALIAN & CANADIAN PERSPECTIVES ON ARBITRATION: A JOINT DISCUSSION

Doug Jones and Janet Walker[1]

SUMMARY: 1. Introduction. – 2. The Legal Systems. – 3. Legislative Framework for Arbitration. – 4. Party Autonomy. – 5. Leading Institutions and Organisations. . – 6. Institutional Rules. – 7. National Courts. – 8. Procedural Distinctions. – 9. Efficiency. – 10. Conclusion.

1. Introduction

In the world of international arbitration, Canada and Australia are newer seats – to be contrasted with the traditional seats of Paris, London, Geneva and Zurich. As Toronto and Sydney begin to establish themselves as hubs for international arbitration in their regions, the legal systems and arbitral practices of Canada an Australia are attracting more attention.

In considering the prospects and challenges that are faced by newer seats of arbitration, a number of questions arise: What are the characteristics of a good seat of arbitration? What is the relationship between the development of a seat of arbitration and the proliferation of arbitral institutions? Can newer seats compete with more traditional seats? This paper examines the experiences in Australia and Canada, which show that newer seats can certainly compete with the more traditional seats.

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2. The Legal Systems

Australia

Having had a long history of indigenous population, Australia was occupied by Europeans as a penal colony for England. After the Americans escaped from the yoke of colonial rule from London, the English had nowhere to send their convicts. As a result, they decided to send them to Australia. To a significant degree, the culture of Australia has been built around that convict heritage. If one can now claim some distant relationship to a convict sent from London, it is often a matter of pride in Australia.

Australian culture has subsequently been enriched by immigration. This includes from Italy and other southern European countries following the Second World War and thereafter by waves of immigration from Asia, and now from the Middle East. Australia is thus a substantially multicultural country.

Because Australia was colonised by the English, the legal system is very much a common law system inherited from England. The colonisation of Australia took place disparately, and being a fairly large continent, these colonies developed as little sovereign entities. This is similar to the United States where there is a very strong legal and cultural history within each of the states of the US. In Australia, it was not until 1900 that the states combined constitutionally into a federation of Australia.

There are still very significant constitutional responsibilities and governance structures for each of the Australian states. Under the Australian Constitution, the federal parliament, also known as the Commonwealth Parliament, has responsibility for only defined areas of legislative authority, such as defence,[2] foreign affairs,[3] and the like. There are a number of these powers that are given specifically to the Commonwealth Parliament.[4] Where the Commonwealth Parliament is given those powers, they have capacity to legislate to the exclusion of the states' responsibilities.[5] Outside those defined areas of power, the states have full sovereign responsibility for legislation. There are separate elected representatives in a Westminster type system of parliaments in each of the Australian states and territories, as well as in the Commonwealth.

Australia's legal history is derived from the English common law system, where commercial law was largely developed by the law of precedent. Judge's decisions have filled the common law over time, so that Australian law in the commercial context is significantly influenced by old English authorities. More recently, we have seen the common law in the commercial context being filled by Australian legal authorities.

Each of the states in Australia has superior courts of unlimited jurisdiction. Then there is the Federal Court, which is responsible for federal matters and commercial matters. There is also an effective cross-vesting system between the various courts in Australia, which has eliminated battles of jurisdiction between the courts of the sort that have been ongoing in the United States. Sources of commercial law made by judges in Australia can be found in the commercial courts of the significant states, mainly New South Wales and Victoria, and also in the Federal Court,

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[2] *Australian Constitution*, s 51(iv).
[3] *Australian Constitution*, s 51(xxix).
[4] For the complete list of powers that are given to the Commonwealth Parliament, see *Australian Constitution*, s 51
[5] *Australian Constitution*, s 109.

where some of the best legal minds take appointment as judges and who produce leading decisions. Of course there is the overlay of statute, but Australia does not have overarching legal codes as in civil law systems.

The historical influences that have built the Australian legal system have come not just from England but from other common law jurisdictions in the Asia-Pacific region. There are significant influences in the development of Australian commercial law, from the United States, Canada, Singapore, Malaysia, Hong Kong, and other common law systems in the region. There is also a significant awareness of other legal systems, due to the huge trade flows with China, Japan and Korea, all of which have traditional civil law legal systems.

The Australian legal community is well trained, as can be seen by the many Australian lawyers around the world. Jurisdictions around the world are replete with Australian lawyers, and it almost seems to be a rite of passage for Australians to travel overseas after they have graduated. The legal training at Australian law schools is of a very high standard, which makes Australian lawyers attractive for law firms all around the world.

In the international arbitration context, there are many Australians as partners in law firms, including in New York, Madrid, London, and Stockholm. Australia is also a great place to live and, even though it is a little distant from Europe and suffers from the "tyranny of distance", quite a number of these Australians who travel overseas to work eventually want to come home. When they come home with their families to live in Australia, that enriches the Australian legal community. Within the Australian legal community, there is therefore a diverse level of experience with respect to international work. In so far as international arbitration is concerned, Australia certainly enjoys a sophisticated legal community.

In terms of where international arbitrations are held in Australia, there would be more international arbitrations in Sydney and Perth than anywhere else in Australia. Melbourne is also a major commercial centre for Australia, and the Melbourne bar is a very strong centre of excellence. However, the logic of seating in Australia seems to favour Perth, as it is the centre of natural resources activity, oil and gas industries and the like, and Sydney. Perth is also quite close to Singapore and other parts of Asia. Further, significant volumes of trade occurs between Western Australia and Africa, particularly in the mining sector. Sydney and Perth are thus the two major centres for international arbitration, where there are more international arbitration practitioners than any other cities of Australia.

Canada

Canada’s history is rather different from that of Australia. Canada became a "place" – one that would ultimately become a country – when three founding nations, the English, the French, and the Native peoples, came together in a spirit of compromise. They needed to find ways to live together in peace in order to survive the harsh weather from the north and the pressure to be governed from the south by the Americans. Much later, in 1867, not very long before the county of Italy was created out of its many parts, so too did four of the Canadian colonies join together in a "confederation" to become a country.

Today, Canada has ten provinces and three territories. Legislative power is divided between the provinces and the federal government so that most of the matters relating to private law are within the authority of the provinces and many of the matters relating to public law, such as criminal law, are within the authority of the federal government. Each of the provinces has a superior court administered by the province, but presided over by judges from the province who

are appointed and remunerated by the federal government. These courts have plenary and inherent jurisdiction. Appeals in commercial matters can be made from the courts of appeal in each of the provinces to the Supreme Court of Canada, but only with permission of the Supreme Court. As a result, the courts of appeal of the nine common law provinces frequently rely upon precedents from one another.

Like Australia, Canada also has a Federal Court, but Canada's Federal Court has a limited statutory jurisdiction relating to matters of maritime law, immigration law, intellectual property law and aboriginal law. This court also hears claims against the Federal Government and applications for judicial review of decisions by federal administrative tribunals. Thus, the provincial superior courts have the primary responsibility for commercial matters and there are virtually no jurisdictional conflicts between them and the Federal Court of Canada.

Unlike Australia, Canada has one province that is not a common law jurisdiction. The substantive law of Quebec is civil law jurisdiction that developed from its history as a French colony. In 1866, the year before Confederation, Quebec adopted the *Civil Code of Lower Canada* and in 1994, this Civil Code was replaced by the *Civil Code of Quebec*. Although Quebec's substantive law is based on civilian traditions, its procedural law has many features based on the common law. For example, the civil justice system is an adversary system with cases being developed through the principle of party prosecution and presented before judges who are not career judges, but are appointed from the senior ranks of the legal profession. Accordingly, Quebec has a hybrid legal system, and Canada is a bi-jural country.

Just as Canada's common law provinces rely on precedents from one another, so too do the appellate courts regularly draw from a wide variety of sources, both legal and academic, from across the country and beyond in order to develop new areas of the law. This open and outward-looking approach to the law may, in part, be a product of the fact that we have long been a highly multicultural country in which immigration has long played a significant role in our growth and development. One measure of the rich diversity of a population is the number of groups of more than 10,000 who identify themselves as having a distinct cultural origin from another country. Toronto has more such groups than any other city in the world, supporting its claim to be the most multicultural city in the world.

Canada's distinctive legal system, operating within a highly diverse and multicultural population, has a legal profession that is also extremely unusual. For more than half a century, until very recently, access to the legal profession has been extremely limited. This is because the only readily feasible way to obtain a license to practise law in Canada was to graduate from a Canadian law school, and the number of Canadian law schools and places available in them changed very little from the 1950's until today. As a result, over the years, the competition to gain admission to law schools became steadily more intense, and those who gained admission to the profession were increasingly among the most talented and motivated of their generation.

This ever more capable and hard-working legal profession, comprising an ever smaller proportion of the population, meant that the legal services they provided continued to increase in quality as they decreased in availability. Two things happened as a result. First, a supply of informal legal services provided by non-lawyers began to emerge. Ultimately, this resulted in a decision by the regulatory body governing the legal profession to regulate paralegals as well so as to protect the public and to maintain the integrity of the profession.[6] Second, offshore law

[6] Ontario became the first jurisdiction in North America to regulate paralegals by the *Access to Justice Act*, SO 2001, c 21 amending the *Law Society Act*, RSO 1990, c L-8.

schools began to emerge. These law schools, most of which are located in Australia and England, offer courses on Canadian law (that would otherwise be required for the onerous conversion process for foreign qualified lawyers) to Canadians who could not gain access to Canadian law schools but wish to practise law in Canada. All in all, the restrictions on access to the legal profession in Canada are changing just as the legal profession itself is evolving and adapting to a globalised world of legal services.

With such a highly capable legal community operating in a country of such rich cultural diversity, it may come as no surprise that Canadians are disproportionately recognised as active members of the international arbitration community, and that there is strong growth in interest and participation in international arbitration in the Canadian legal community. Over the past two decades what was once a small group of specialists, located mostly in Montreal, has become an active and growing community spread across the major Canadian commercial centres – Toronto, Calgary and Vancouver.

3. Legislative Framework for Arbitration

In Australia, there are separate constitutional responsibilities for the Commonwealth Parliament and the state parliaments. International arbitration is the responsibility of the Commonwealth Parliament because it involves the carrying into force of the external affairs power under the Australian Constitution.[7]

The *International Arbitration Act 1974* is indeed a federal statute that has force throughout the whole of Australia. Australia, along with Canada, was one of the very first countries to enact the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**").[8] The *International Arbitration Act 1974* annexes the Model Law,[9] and adopts the Model Law as having "the force of law in Australia".[10] This is often called the "vanilla approach" to the adoption of the Model Law, which is in distinction to other Model Law countries such as Malaysia, India and New Zealand. These jurisdictions have enacted their own provisions and it is not always easy to find out how they differ from the Model Law. Whereas in Australia, the Model Law is simply an annexure to the legislation, and the divergences from the Model Law are clearly specified. For example, the Australian legislation does not adopt the contentious provisions in the Model Law dealing with interim relief relating to ex parte applications.[11]

An arbitration that is "international" is defined in the legislation, and in fact by the Model Law, to be arbitrations that involve a range of international characteristics.[12] This includes arbitrations between parties from different nationalities, arbitrations involving contracts governed by laws that are not the laws of Australia, and arbitrations that involve transactions which are to be performed outside Australia. The domestic legislations deal with any arbitration that is not international as defined by the legislation.

Domestic arbitration in Australia is the responsibility of the state parliaments. Legislative cooperation between the Australian states is rather rare because each of the parliaments have a

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[7] *Australian Constitution*, s 51(xxix).

adopted the Model Law in 1986. See UNCITRAL, *Status - UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

[9] *International Arbitration Act 1974* (Cth), Schedule 2.

[10] *International Arbitration Act 1974* (Cth), s 16.

[11] *International Arbitration Act 1974* (Cth), s 18B. See also Model Law, Chapter IVA.

[12] *International Arbitration Act 1974* (Cth), Schedule 2, Art 1(3).

view that they can do it better than the others, and each of the lawyers living in each of the states think they know they can do things better than the lawyers in the other states. As a result, the tension between the state laws is often quite significant. Rather unusually however, in the context of domestic arbitration there has been a history of uniform legislation between the states. For many years, the domestic arbitration legislations in Australia were based on the English arbitration legislation. Significantly, almost all of the Australian states and territories have now adopted domestic arbitration legislation based on the Model Law as amended in 2006.[13]

It is worth noting that, in relation to the domestic arbitration laws, there had been a long tradition of judicial review of arbitrator's decisions, primarily based on the English model of review. For this reason, when adopting the Model Law for domestic arbitration, there were concerns surrounding the level of judicial review to be made available to parties. Ultimately, judicial review was made available on an opt-in basis,[14] which has proved to be the death knell of judicial review as parties seldom opt into judicial review. It thus follows that the position in Australia regarding judicial review, both domestically and internationally, is the practically the same as the Model Law.

In Canada, the provincial legislative authority over matters of private law is not superseded by that of the federal government when it enters into an international treaty.[15] As a result, treaties in areas of private law, such as the New York Convention must be implemented through legislation in each of the provinces. Having said that, Canada was not only one of the first jurisdictions to adopt the Model Law, it was *the* first jurisdiction.[16]

The ten Canadian provinces followed soon afterwards. The nine common law provinces each have an International Commercial Arbitration Act,[17] with some implementing provisions and a schedule that attaches the Model Law. Any features customising the provisions of the Model Law can easily be identified in the provisions of these implementing statutes. Quebec, like a number of other civil law jurisdictions, has not adopted the Model Law verbatim but, instead, has incorporated the substance of the Model Law in Book X of its *Civil Code*[18] and in its *Code of Civil Procedure*.[19]

Perhaps because reforms to legislative initiatives of this sort must be accomplished on a province-by-province basis, Canada has not yet adopted the 2006 revisions to the Model Law. Nevertheless, the Uniform Law Conference of Canada Working Group on Arbitration Legislation International Commercial Arbitration, has just completed its Final Report on new

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[13] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2012* (WA).

[14] See, eg, *Commercial Arbitration Act 2010* (NSW), s 34A.

[15] *Attorney-General of Canada v. Ontario Attorney-General of Ontario Attorney-General of Ontario (Labour Conventions)* (Ontario, Canada), [1937] A.C. 326 (P.C.)

[16] See, above n 8.

[17] *International Commercial Arbitration Act*, RSBC, 1996, c 233 (British Columbia); *International Commercial Arbitration Act*, RSA, 2000, c 1-5 (Alberta); *International Commercial Arbitration* Act, SS, 1988, c I-10.2 (Saskatchewan); *International Commercial Arbitration Act*, CCSM, c C-151 (Manitoba*); International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario); *International Commercial Arbitration Act*, SNB, 1986, c I-12.2 (New Brunswick); *International Commercial Arbitration Act*, RSNS, 1989, c 234 (Nova Scotia); *International Commercial Arbitration Act*, 1988, c I-5 (Prince Edward Island); *International Commercial Arbitration Act*, RSN, 1990, c I-15 (Newfoundland and Labrador). Also the territories: *International Commercial Arbitration Act*, RSNWT, 1988, c I-6 (Northwest Territories, and Nunavut under the Nunavut Act (SC 1993 c 28, s 29)); *International Commercial Arbitration Act*, RSY, 2002, c 123 (Yukon Territory).

[18] *Civil Code of Quebec*, SQ, 1991, c 64, Articles 2638-2643, 3121, 3133, 3148 and 3168.

[19] *Code of Civil Procedure*, RSQ, c C-25 (as am), Articles 940-952.

uniform legislation following extensive consultation on possible reforms.[20] Canadians may soon have new uniform legislation on international commercial arbitration.

4. Party Autonomy

Party autonomy is central feature found in the Model Law, and in particular, enshrined in Article 19. As previously mentioned, the Australian international arbitration legislation attaches the Model Law, with additional provisions clearly specified in the legislation. Some of these additions are reflective of the party autonomy concept, as they are provided for on an opt-in or opt-out basis. For example, provisions in relation to court assistance in obtaining evidence are provided for on an opt-out basis.[21] Similarly, parties may opt-out of provisions relating to the power of arbitral tribunals to award interest and costs,[22] which are provisions not provided for by the Model Law.

On the other hand, there is a sophisticated confidentiality regime contained in the Australian international arbitration legislation, which parties can opt into.[23] Interestingly for domestic arbitrations in Australia, the confidentiality provisions are provided for on an opt-out basis.[24] Confidentiality thus applies on an opt-out basis in domestic arbitrations, but on an opt-in basis in international arbitrations. Contrary to the often heated debate surrounding confidentiality in the international arbitral community, for some users of international arbitration, confidentiality is not of paramount importance. The fact that the Australian legislation adopted confidentiality on an opt-in basis in the international context is reflective of these varying attitudes.

In Canada, taking Ontario's *International Commercial Arbitration Act* as an example, you will find that the party autonomy that is encouraged by Article 19 of the Model Law has been expanded upon in various ways. Recognising that there are, in any event, very few ways in which the parties are prevented from adapting the Model Law to suit their own needs, the legislation in Canada explicitly endorses a number of adaptations that may be desirable. For example, the Act provides that parties may ask their arbitrator(s) to mediate their dispute at any stage of the arbitration and, with their agreement, the arbitrator(s) are not, as a result, precluded from subsequently returning to their roles as arbitrators.[25] In addition, the parties may decide for themselves what procedure should be adopted following the replacement of an arbitrator, such as whether the matter should begin afresh, or whether it may continue from where it left off.[26] Further, the Act provides that the parties may agree, at any stage of the arbitration, to remove an arbitrator.[27] Finally, the Act contains provisions that explicitly endorse court-facilitated consolidation of arbitrations, where this is desired by the parties.[28]

Interestingly, in the consultations concerning possible revisions to the Model Law, having considered a wide range of possible refinements to the 2006 Model Law, the drafters of the

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[20] Uniform Law Conference of Canada Working Group On Arbitration Legislation International Commercial Arbitration, *Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation*, <www.ulcc.ca>.
[21] *International Arbitration Act 1974* (Cth), ss 22(2), 23, 23A, 23J
[22] *International Arbitration Act 1974* (Cth), ss 22(2), 25-27.
[23] *International Arbitration Act 1974* (Cth), ss 22(3), 23C-G.
[24] See, eg, *Commercial Arbitration Act 2010* (NSW), s 27E.
[25] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 3.
[26] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 4(1).
[27] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 4(2).
[28] *International Commercial Arbitration Act*, RSO, 1990, c. I-9 (Ontario), s 7.

Report in virtually every case recommended that uniformity be maintained.[29] While it is true that many of these areas of customisation are addressed in the rules of a number of arbitral institutions, or may be addressed by the arbitration agreement of the parties, some of them such as confidentiality were thought by some as worth inclusion in the national arbitral law, if only to indicate the importance placed on them in Canada.

5. Leading Institutions and Organisations

There are a number of arbitral institutions and organisations in Australia, including the Australian Centre for International Commercial Arbitration (ACICA). ACICA is an arbitral institution with its own modern set of arbitration rules, taking a "light touch" approach to administering arbitrations. There have been a significant number of cases under the ACICA Rules, not nearly as many as Singapore and Hong Kong, but an increasing number. ACICA does not of itself have physical facilities, as the physical facilities for international arbitration in Sydney are provided by the Australian International Disputes Centre (AIDC). The AIDC is a physical arbitration hearing centre, similar to the International Dispute Resolution Centre (IDRC) in London, which facilitates arbitrations of any institution to be heard. It provides what is often called "concierge arbitration", where if parties are seeking to hold an arbitration in Sydney, the AIDC will assist with hearing rooms, provision of transcript facilities, hotel accommodation, document handling, storage facilities, restaurant bookings, and so on.

Another organisation in Australia that is closely aligned with both ACICA and AIDC is the Institute of Arbitrators and Mediators Australia (IAMA), which deals with domestic arbitration and domestic mediation. There is also a very active branch of the Chartered Institute of Arbitrators (CIArb) in Australia. All of these ADR organisations in Australia have a very close cooperation, which, instead of competing against each other, seek to play to their individual strengths and support. For example, CIArb, the premier international accreditation and training body, conducts most of the training for other institutions except for mediation training, which is conducted by AIDC. The offices of all the organisations are in the same place at the AIDC, with a number of shared administrative personnel. In this way, the somewhat negative effect of competitive behaviour is eliminated and the institutions and organisations in Australia work together in the interests of domestic and international ADR.

The Canadian international arbitration community does not have, as the focal point of its energy and activities, arbitral institutions. Rather, it is the various professional organisations, such as the Canadian National Committee of the ICC (ICC Canada) that are the active forces in promoting the understanding of international arbitration and interest in its use among commercial parties and legal practitioners.

ICC Canada developed from a small closed panel of arbitrators at the end of the 1990s based mainly in Montreal and Toronto to a much larger diverse and open group that spans the country. In addition to ICC Canada, a group of 10 Toronto arbitrators, called The Arbitration Roundtable of Toronto (ART), which was soon complemented by a counterpart in Western Canada known as the Western Canadian Arbitration Roundtable (WCART), have been so successful in promoting arbitration that they have since given way to much larger organisations known as the

[29] Uniform Law Conference of Canada Working Group On Arbitration Legislation International Commercial Arbitration, *Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation*, <www.ulcc.ca>.

Toronto Commercial Arbitration Society (TCAS) and the Western Canadian Commercial Arbitration Society (WCCAS).
Mention should also be made of a very impressive group for the promotion of arbitration among younger lawyers known as the Young Canadian Arbitration Practitioners (YCAP) who also regularly hold conferences and other events for discussing recent developments and promoting the understanding of international arbitration.
It should be acknowledged that there are some small Canadian organisations for the administration of arbitration, such as the Canadian Commercial Arbitration Centre (CCAC), the Pacific Centre for Dispute Resolution, and the Alternative Dispute Resolution Institute of Canada (ADRIC), which manages domestic arbitrations. More recently, though, has been the emergence of specialised arbitration "chambers", perhaps the most prominent of which is Arbitration Place in Toronto. These centres provide not only office facilities for their members, but also world-class hearing facilities for those who wish to hold their arbitrations in Canada. These services include hearing rooms, transcript production, simultaneous interpretation, tribunal secretarial support, concierge facilities for accommodations and meals in Toronto. They also include support for ad hoc arbitrations, which are very common in domestic commercial matters in Canada, such as service as an appointing authority and financial management.
Centres such as this are making Toronto an increasingly attractive alternative for hearings to New York for matters where parties are located on opposite sides of North America, or where one party is overseas and prefers to come to Canada rather than the United States and the American party regards Canada as "just next door".

6. Institutional Rules

In Australia, ACICA has a set of modern arbitration rules, in which one will find everything including emergency arbitrator provisions and expedited rules. Interestingly, ACICA is the default appointing authority as prescribed under the Australian legislation.[30] The default appointing authority is crucial where the parties have not provided a mechanism for appointing an arbitrator, for example by failing to nominate a set of institutional rules, and the Model Law requires the local legislation to appoint a responsible authority for appointing the arbitrator. Having ACICA as the appointing authority is similar to the position in Singapore and Hong Kong, but interestingly not in India or New Zealand, or indeed in London where the default position requires an application to a court. The courts are not always in the best position to perform these appointing functions. In contrast, ACICA has a very transparent method of appointment of arbitrators both under its rules and the act, with a supervisory committee consisting of a number of representatives of senior commercial organisations and senior members of the judiciary.
Canada is in a similar situation in that there are no prominent local rules or administering bodies for international arbitrations, but instead Canadian parties and practitioners welcome and support arbitrations conducted in accordance with a range of well-established institutions and in cooperation with those institutions. Accordingly, for example, Arbitration Place has established formal affiliations with the ICC and the LCIA; and many arbitrations between Canadian and American parties are held in Canada according the rules of the International Centre for Dispute Resolution (ICDR), which is the international arm of the AAA.

[30] *International Arbitration Act 1974* (Cth), s 18; *International Arbitration Regulations 2011* (Cth).

7. National Courts

So far as national courts are concerned, the Model Law establishes jurisdiction for the courts to deal with a limited range of matters. In Australia, both the state Supreme Courts and the Australian Federal Court are granted jurisdiction. Parties may choose the court in which they make the applications, as available in the Model Law, such as for supporting an arbitration, seeking to remove an arbitrator, or for a limited review of an award. Particularly in Victoria, New South Wales, and in the Federal Court, there are appointed specialist arbitration judges who hear all of the arbitration matters brought before the courts.

In addition, ACICA has established a judicial liaison committee, where all of the judges in all of the jurisdictions in Australia who deal with international arbitration meet regularly to discuss issues of international arbitration. The committee has established a network, which has allowed the members to contact colleagues in other jurisdictions if they need advice on a particular issue. This has developed expertise amongst that courts in Australia that deal with international arbitration. In addition, there have been a series of judgments in Australia, including from the High Court of Australia, the highest appellant court, that are strongly supportive of international arbitration.

In Canada there are no specialist judges for judicial proceedings relating to arbitration but there are a number of judges who are very experienced in the field and the courts are frequently willing to hear interveners from the international arbitration community on important questions of law. Indeed, Canadian courts, under the leadership of the Supreme Court of Canada, have a very strong tradition and continuing commitment to supporting arbitration by refraining from inappropriate interference in arbitral proceedings, and by giving appropriate deference to arbitral agreements and arbitral decisions. On a number of occasions in recent years, the Supreme Court of Canada has made important pronouncements on the need to respect party autonomy in the selection of arbitration as a means of dispute resolution in international commercial dealings. These pronouncements have been in the areas of arbitrability, competence, competence, the enforcement of arbitral awards, to mention just a few.

8. Procedural Distinctions

The divide between civil law procedure and common law procedure has been dealt with many years ago by the *IBA Rules on the Taking of Evidence in International Arbitration*.[31] In most jurisdictions, the way in which arbitrations are conducted usually differ from the way in which court proceedings would be conducted. There is nevertheless a difference in the way in which counsel from a particular jurisdiction deal with arbitrations compared to counsel from another. For example, one might find an English bar approach to arbitrations in London, which will be different in significant respects to the way in which lawyers from Geneva, Milan or Rome might deal with these matters.

In Australia there is an emerging practice in the way in which international arbitrations are conducted that is clearly distinct from the way in which court proceedings are conducted domestically. Because of the "coming home" of arbitration lawyers from around the world to

[31] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>.

practice in Australia, local Australian counsel have brought with them an internationalisation of procedures. I have found that arbitration proceedings in Australia are less inclined to be under the local court procedure influence, as compared to Singapore or Hong Kong where local counsel are yet to leave their domestic procedural baggage at the door. That being said, this is an evolving process that should be observed on a case-by-case basis, and one ought to resist the temptation of drawing overall conclusions.

With respect to the rights of representation in international arbitration in Australia, the Australian legislation includes a specific provision, as an addition to the Model Law, which entitles the parties in international arbitration to be represented by whoever they wish, notwithstanding any bar rules to the contrary.[32] There is therefore no question regarding party representation in Australia, compared to say the United States. In addition, there have been some discussion in Australia regarding the possibility of giving rights of appearance to foreign practitioners in court in respect of international arbitration matters, rather than local counsel.

In Canada there is also a clear distinction between domestic arbitration and domestic litigation in the sense that the parties are much more likely to take initiative to customise and tailor their procedures in arbitration. However, it is probably fair to describe this as a continuum between domestic arbitration and international arbitration in the following way. At one end of the spectrum, in some domestic arbitrations, retired judges who have been popular and well respected among commercial lawyers conduct matters in ways that are very similar to litigation. Counsel are satisfied merely to have their choice of judge and a schedule for the determination of the matter that suits the needs of their client.

Similarly popular has been the availability of arbitration in lieu of a review of a trial decision by an appellate court, particularly in matters that are highly technical. The judges in the superior courts in Canada are of a very high quality, but they are generalists and must be prepared, to a certain extent, to hear cases of all sorts – criminal law, family law, etc. – in addition to commercial matters. Under these circumstances, parties may well respect the courts, but still prefer to choose their decision maker or their tribunal of three decision makers and to be able to set their own timetable.

Having said that, counsel in domestic arbitrations are becoming increasingly aware of the flexibility and the benefits of practices that are typically found in international arbitration, such as those based on the *IBA Rules for the Taking of Evidence*, and they are adopting many of them in their ongoing efforts to streamline proceedings and make them more efficient and more effective. Recent trends are away from arbitration that is like "litigation only sitting down" to something that much more closely resembles international arbitration. This may be contrasted with the challenges faced by the international arbitration community in the United States that struggles against strong local traditions, such as those based on extensive discovery and hearings designed for juries.

In Canada, this range of practice in arbitration makes for a healthy competition between litigation and arbitration in which each is well respected. All in all, the expectations of the business community for the quality of dispute resolution is steadily increasing.

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[32] *International Arbitration Act 1974* (Cth), s 29

9. Efficiency

The issue of efficiency in international arbitration is an issue that is truly international. The influence of the seats and places of arbitration is limited because it is the international rules, with the assistance of the institutions, that dictate how arbitrations are conducted.

Domestically, Australia has had the same issues as England, and domestic arbitration has been lacking in terms of efficiency. It has also failed to keep up with the efficiency of the commercial courts. For example, a large commercial dispute in the Federal Court of Australia can be finished within ten months from start to finish. This can be an issue in Australia where many judges specialise in commercial cases, giving parties no reason to choose domestic arbitration over the courts.

As the experience in England will show, despite the shortcomings in the domestic arbitrations, London is a thriving centre for international commercial arbitration. International arbitrations in London are completely different to the domestic arbitrations that happen there. Likewise, so far as international arbitration is concerned, cases that are run by Australian arbitrators or by Australian counsel are no less efficient than those that are run elsewhere. The next challenge for Australian arbitrators from the domestic context is to learn more from the international procedures in order to be good international arbitrators.

A very similar situation can be seen in Canada. Certainly in international arbitration there is a very advanced and sophisticated approach to streamlining and customising the procedure. Compared to the United States, arbitral proceedings in Canada can be more efficient, as there is no major tradition of extensive discovery in international arbitration in Canada.

In terms of the domestic approach in Canada, there is a healthy competition between the commercial courts and arbitration. Courts themselves seek to be more efficient and flexible to be in competition with domestic arbitration, and vice versa. Also, the judges in the national courts are of very high quality. However, they are generalists that need to hear cases on various areas of law. Because it is not possible to select a judge, parties will often seek to choose their own path by opting to arbitrate. Arbitration in this sense is attractive as the parties can choose the tribunal and set their own timetable.

10. Conclusion

On closing, we wish simply to say that we hope this discussion has encouraged you to reflect on the capacity of newer seats to compete with the more traditional seats. In the case of Toronto and of Sydney, we see an increasing pattern of parties recognising the choice available between New York and Toronto and between Singapore and Sydney as seats for arbitration. We wonder whether that might also be true among the traditional seats in Europe and the newer seats emerging as popular alternatives. While the traditional seats will probably continue for some time to maintain their attractiveness, we hope that the colloquium has helped to provoke further discussion of the many reasons why parties may wish to choose other places for their arbitration, what is involved in developing the local legal system, and the local capacity of arbitrators and of counsel to promote this trend.