

China-Related Contracts: What to Consider When Agreeing on CIETAC Arbitration

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I. Introduction

China's¹⁾ economy is booming – and, as the western world is actively participating in this growth, so is the number of disputes between Chinese and non-Chinese parties. The European Union, after its last rounds of enlargement, has become China's most important trade partner. In 2007, Austrian exports to China reached an all-time high of 1.64 billion EUR, with 2008 forecasts predicting new record levels. The persistently strong Sino-German trade ties have made Germany number six among China's trade partners in the world, and number one within the EU.

However, so far treaties on reciprocal enforcement of court decisions with China are rare; for example, neither Austria nor Germany has such a treaty. In addition, proceedings before Chinese national courts are, whilst improving, still prone to inept adjudication²⁾ and improper influence. Since 22 April 1987, the effective date of China's accession to the New York Convention,³⁾ these issues as well as other legal restrictions,⁴⁾ can – almost entirely⁵⁾ – be circumvented by agreeing

¹⁾ For the purpose of this article China is defined as mainland China, excluding the Special Administrative Regions of Hong Kong and Macau as well as Taiwan.

²⁾ The standard for access to the judicial profession was not raised to university graduate level before 2004. Back then, only 51.6% of China's judges met this standard (Zhu Jingwen, Chinese Legal Culture 19 (2008) (unpublished manuscript, on file with Renmin University of China Law School and the author)).

³⁾ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (henceforth: "New York Convention"); by the end of September 2008, there were 142 parties to the New York Convention (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). China made use of the commercial reservation and the reciprocity reservation.

⁴⁾ For example, according to Article 244 Chinese Civil Procedure Law (henceforth: "Civil Procedure Law"; unofficial English translation *available at* <http://www.lawinfochina.com/law/display.asp?id=6459&keyword=>) lawsuits filed in disputes arising from Chinese-foreign equity joint venture contracts are under the exclusive jurisdiction of Chinese courts. However, this does not prohibit parties to exclude the courts' jurisdiction by way of an arbitration agreement.

⁵⁾ However, with regard to some issues, such as interim measures of protection,

on arbitration as the applicable dispute resolution method. It is therefore not surprising that arbitration clauses form a vital part of almost all China-related commercial contracts. What might be surprising, however, is how likely it is that the place of arbitration will (have to) be in China and that the arbitration institution chosen by the parties will be the China International Economic and Trade Arbitration Commission (CIETAC).

After introductory comments on the main reasons for the frequency of a place of arbitration in China and of CIETAC arbitration in China-related commercial contracts,⁶⁾ this article analyses the most important particularities of Chinese arbitration law and of the current CIETAC Rules⁷⁾ relevant to the drafting of CIETAC arbitration clauses. For further guidance, a model arbitration clause is provided that takes these particularities into account. To complete the picture, further distinctive features of the Chinese arbitration system and CIETAC arbitration are highlighted. Lastly, final remarks try to sketch possible future legislative and institutional developments.

II. Why arbitration in China and why CIETAC?

With regard to the place of arbitration, first of all, Chinese parties will usually use a great deal of their bargaining power to push for arbitration in China. In addition, and more importantly, there are also considerable legal constraints: A place of arbitration outside China may only be agreed upon with regard to disputes that can clearly be categorized as “foreign-related”.⁸⁾ This, however, is not as easy and not as often the case as one might think. A dispute will be considered to be foreign-related only if (i) at least one of the parties is “foreign” (whereby China-incorporated subsidiaries of foreign entities – even if wholly foreign-owned – are considered to be domestic), (ii) the subject matter of the contract is situated outside China or (iii) there are legal facts as to the establishment, modification or termination of the civil legal relationship between the parties, which occurred outside China.⁹⁾ As the latter two elements are open to differing interpretations, it is

enforcement of an award in China and setting aside of a Chinese award, the competence of Chinese courts cannot be excluded (on these issues *see infra* Part V).

⁶⁾ This article deals with issues relevant for arbitration clauses in commercial contracts only.

⁷⁾ CIETAC Arbitration Rules 2005 (henceforth: “CIETAC Rules”; English version available at <http://www.cietac.org/rules/rules.pdf>).

⁸⁾ This is due to Article 128 Chinese Contract Law, Article 20 (7) of Draft Regulations circulated by the Supreme People’s Court in 2003 (unofficial English translation at ICCA Congress Series No. 12, at 112, 115–116 (Albert J. van den Berg ed., 2005)) and an Official Guidance issued by the Supreme People’s Court in 2004 (*see, e.g.*, Peter Yuen, *Arbitration Clauses in a Chinese Context*, 24 J. Int’l Arb. 581, 584 n. 4 (2007); Graeme Johnston, *Bridging the Gap Between Western and Chinese Arbitration Systems – A Practical Introduction for Businesses*, 24 J. Int’l Arb. 565, 566 n. 4 (2007)).

⁹⁾ *See* Article 304 Supreme People’s Court’s Several Opinions on the Application of the

usually unsafe to rely on them when drafting arbitration clauses. Furthermore, due to legal and practical reasons, foreign entities will regularly be required to conduct their China business via their Chinese subsidiaries so that the first element cannot be relied on either.¹⁰⁾ Thus, foreign enterprises will frequently be faced with the necessity to agree on a place of arbitration within China.

As soon as it is clear that the place of arbitration will (have to) be in China, the choice of under whose authority the proceedings should be conducted becomes very limited too. The main reason for this lies in (the interpretation of) Article 16 (3) Chinese Arbitration Law.¹¹⁾ Article 16 (3) requires an arbitration agreement to contain “*the arbitration commission chosen*”; otherwise the arbitration agreement is invalid.¹²⁾ This results in the following two major restrictions: Firstly, parties cannot provide for ad hoc arbitration as Article 16 (3) Arbitration Law is commonly understood to exclude ad hoc proceedings for China by requesting parties to agree on institutional arbitration only.¹³⁾ Secondly, parties should not agree on a foreign arbitration institution as it is still unclear whether foreign institutions are also considered as “arbitration commissions” in the meaning of Article 16 (3) Arbitration Law. Although some authors advocate a broad interpretation of the statutory term “arbitration commission”,¹⁴⁾ Article 10 Arbitration Law, which governs the establishment of arbitration commissions, seems to support a narrow understanding by only referring to arbitration commissions to be established in China.¹⁵⁾ Unfortunately, the Supreme People’s Court has not yet provided any clarification on this issue. Therefore, as long as this uncertainty remains, parties are well advised to avoid any risk by agreeing on a Chinese arbitration institution where Chinese law determines the validity of the arbitration agreement.

Civil Procedure Law, 14 July 1992, Fa Fa [1992] No. 22; Article 178 Supreme People’s Court’s Several Opinions on the Implementation of General Principles of the Civil Law, 26 January 1988, Fa Banfa [1988] No. 6. See generally Johnston, *supra* note 8, at 567–568; Peter Malanczuk, *Domestic and Foreign-Related Arbitration*, in *Arbitration in China: A Practical Guide*, margin numbers 5-05–5-11 (Daniel R. Fung & Wang Sheng Chang eds., 2004).

¹⁰⁾ Tactics, such as to include a foreign investor as (sleeping) party into the contract between its Chinese subsidiary and the other Chinese party, does not allow a clear categorization as foreign-related either (see Johnston, *supra* note 8, at 567 n. 6; Peter Thorp, *The PRC Arbitration Law: Problems and Prospects for Amendment*, 24 J. Int’l Arb. 607, 615 (2007)).

¹¹⁾ Henceforth: “Arbitration Law”; unofficial English translation at: <http://www.lawinfochina.com/law/display.asp?db=1&id=710&keyword=>.

¹²⁾ Article 18 Arbitration Law; see discussion *infra* Part III.D.3.

¹³⁾ See, e.g., Kang Ming, *Ad Hoc Arbitration in China*, 2003 Int. A.L.R. 199, 200; Wang Sheng Chang, *Is it Possible for ICC International Court of Arbitration to Hold Arbitration in Mainland China?*, in *Resolving Disputes Through Arbitration in Mainland China* 52, 54 (2003); Sabine Stricker-Kellerer & Michael J. Moser, *Schiedsordnung der CIETAC*, in *Institutionelle Schiedsgerichtsbarkeit* 447, 452, at margin number 18 (Rolf A. Schütze ed., 2006).

¹⁴⁾ E.g., Wang, *supra* note 13, at 54.

¹⁵⁾ See, Thorp, *supra* note 10, at 609–610; Tao Jingzhou & Clarisse von Wunscheim, *Article 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 Arb. Int. 309, 311 (2007).

China is home to a large number of arbitration institutions. At the end of 2007, there existed 185 Chinese arbitration commissions.¹⁶⁾ This number consists of 183 so-called “local” arbitration commissions¹⁷⁾ as well as CIETAC and its sister organization CMAC, the China Maritime Arbitration Commission, which are both by virtue of Article 66 Arbitration Law categorized as foreign-related arbitration commissions. For several years now, all of these are equally permitted to administer foreign-related disputes.¹⁸⁾ However, CIETAC is still most likely to be the parties’ first choice. There are many reasons for this: Firstly, CIETAC is, due to its monopoly over foreign-related arbitration from 1956 until 1996, by far the most experienced institution in handling cases with non-Chinese elements and is, therefore, generally considered to be the most important arbitration institution in China.¹⁹⁾ Its vast case load²⁰⁾ makes CIETAC even one of the busiest arbitration institutions in the world. Secondly, although local arbitration commissions are by virtue of Article 14 Arbitration Law “*independent of any administrative organ*”, they are still set up and financed by local governments,²¹⁾ and are, therefore, more exposed to undue political influence.²²⁾ By contrast, CIETAC was established by and functionally belongs to a national body, the China Council for the Promotion of International Trade (CCPIT). Furthermore, CIETAC has, in addition to its Beijing headquarter, sub-commissions in Shenzhen and Shanghai,²³⁾ which both administer cases too, as well as 21 liaison offices in different regions and for specific business sectors.²⁴⁾ All this, together with its resources, makes CIETAC the arbitration commission most likely to be chosen for foreign-related arbitration in China.²⁵⁾

¹⁶⁾ Michael J. Moser & Yu Jianlong, *CIETAC and its Work – An Interview with Vice Chairman Yu Jianlong*, 24 J. Int’l Arb. 555, 556 (2007).

¹⁷⁾ Cf. Article 10 Arbitration Law.

¹⁸⁾ See Article 3, Circular of the General Office of the State Council Concerning Several Issues to be Clarified in order to Thoroughly Implement the Arbitration Law of the PRC, 8 June 1996, Guo Ban Fa [1996] No. 22.

¹⁹⁾ See, e.g., Stricker-Kellerer & Moser, *supra* note 13, at 452 margin number 17.

²⁰⁾ In 2007 CIETAC accepted 1188 cases. In 2006 CIETAC accepted 981 cases, of which 442 cases were foreign-related (international) and 539 “domestic” (whereby the majority of the latter were cases involving a foreign-invested entity). Between 1995 and 2005 the annual caseload was between 633 and 979 new cases. (For comparison, the ICC received 599 requests for arbitration in 2007 and 593 in 2006).

²¹⁾ Article 10 Arbitration Law; see Stricker-Kellerer & Moser, *supra* note 13, at 450 margin number 9; see generally Gu Weixia & Xianchu Zhang, *The China Style “Commission-Oriented” Competence on Arbitral Jurisdiction: Analysis of Chinese Adaptation into Globalisation*, 9 Int. A.L.R. 185, 192–195 (2006).

²²⁾ Local arbitration commissions may also be more easily affected by (local) political or administrative changes. See, e.g., Kang, *supra* note 13, at 201 (mentioning as an example the closing down of the Wanxian Arbitration Commission).

²³⁾ See Article 2 (7) CIETAC Rules.

²⁴⁾ These liaison offices act as information centers only and do not administer cases.

²⁵⁾ However, some practitioners seem to start recognizing the Beijing Arbitration Commission (BAC) as an acceptable alternative (see, e.g., Tao & von Wunschheim, *supra* note

III. What to Consider When Drafting a CIETAC Arbitration Clause

A. Place of Arbitration²⁶⁾ and Place of Hearing

Article 31 (2) CIETAC Rules provides that where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of CIETAC or one of its Sub-Commissions, depending on where the case is administered. However, if the parties did not agree on where the case should be arbitrated, the claimant has the right to choose between CIETAC in Beijing or one of its Sub-Commissions.²⁷⁾ To avoid “forum shopping”, the arbitration agreement should, therefore, at least contain an express choice of the responsible (Sub-)Commission.²⁸⁾ Furthermore, if the parties wish to have another place of arbitration than the domicile of the administering (Sub-)Commission, they should also specify this in their arbitration agreement.

For a non-Chinese party the express choice of a place of arbitration, be it directly or indirectly via agreeing on the administering (Sub-)Commission, is of particular importance: Insisting on another place than where the Chinese party is domiciled decreases the Chinese party’s home advantage by depriving it of its local networks.

Like many other international arbitration rules,²⁹⁾ the CIETAC Rules distinguish between the place of arbitration and the place of the oral hearing.³⁰⁾ According to Article 32 (1) CIETAC Rules, the parties are also free to determine the place of the oral hearing. If they do not do so, hearings will take place at the administering (Sub-)Commission or, if the arbitral tribunal considers it necessary and the Secretary-General of the administering (Sub-)Commission approves,³¹⁾ at any other place.³²⁾

15, at 325; Herbert Smith, *Dispute Resolution and Governing Law in China-Related Commercial Contracts 4* (2008), available at http://www.herbertsmith.com/NR/rdonlyres/96488242-5048-4E47-99B4-A58E173DF0B5/0/final_lowres2.pdf.

²⁶⁾ As this article aims to provide an overview on the peculiarities of the Chinese arbitration system, the following elaborations and the recommended arbitration clause are based on the assumption that the place of arbitration shall (or has to) be in China. As to why this is in cases administered by a Chinese arbitration commission also the better option *see* discussion *infra* Part III.A.

²⁷⁾ *See* Article 2 (8) CIETAC Rules.

²⁸⁾ For further discussions on why to agree on the administering (Sub-)Commission *see infra* Part III.D.3. and III.L.

²⁹⁾ *See, e.g.*, Article 14 ICC Rules; Article 2 Vienna Rules; Article 21 DIS Rules; Article 16 Swiss Rules.

³⁰⁾ *See* Articles 31, 32 and 69 (3) CIETAC Rules.

³¹⁾ In practice, CIETAC usually grants its permission only upon approval of the parties (Lutz Kniprath, *Die Schiedsgerichtsbarkeit der Chinese International Economic and Trade Arbitration Commission (CIETAC)* 114 (2004)).

³²⁾ Article 32 (2) CIETAC Rules. This provision interpreted literally could lead to the

Although this article deals with arbitration in China only, it is worth mentioning that on the basis of the current CIETAC Rules the parties are also able to agree on a place of arbitration outside of China.³³⁾ So far, CIETAC proceedings have already been held in Hong Kong,³⁴⁾ which in this context is regarded as being outside of China.³⁵⁾ However, here again the restriction comes into play that a place of arbitration outside China may only be agreed upon with regard to “foreign-related” disputes.³⁶⁾ Furthermore, to agree on arbitration administered by a Chinese arbitration commission at a place outside of China runs the risk that the award could be challenged not only in the country of the place of arbitration but also in China. This is due to Article 58 Arbitration Law, which provides that the competent court for setting aside procedures is “*the Intermediate People’s Court at the place where the arbitration commission resides*.”³⁷⁾ In case of CIETAC this would be – regardless of the place of arbitration – either Beijing, Shanghai or Shenzhen. In addition, classification issues when enforcing awards of Chinese arbitration commissions in China that have been rendered abroad (in particular when rendered in Hong Kong) may arise.³⁸⁾ It is thus currently not recommended to agree on CIETAC Arbitration with a place of arbitration outside of China.

B. The Law Governing the Arbitration Agreement

Also under Chinese law, the place of arbitration determines the law governing the arbitration agreement, as long as there is no express choice of law overriding that principle. This has been recently confirmed by the Supreme People’s Court in a Judicial Interpretation³⁹⁾ by stating that for the determination of the validity of a foreign-related arbitration agreement (i) the “*applicable law agreed by* quite absurd result that, if the parties agree on a place of arbitration different from the domicile of CIETAC or one of its Sub-Commissions, but fail to expressly state that this place should also serve as the place of the oral hearing, the hearing would take place at the administering (Sub-)Commission. Although it could be argued that an express choice of the place of arbitration should also be understood as a choice of the place of the oral hearing, it is recommended to specify this in the arbitration agreement.

³³⁾ See, e.g., Wang Sheng Chang & Lijun Cao, *Towards a Higher Degree of Party Autonomy and Transparency: The CIETAC Introduces its 2005 New Rules*, 8 Int. A.L.R. 117, 118 (2005); Michael J. Moser & Peter Yuen, *The New CIETAC Arbitration Rules*, 21 Arb. Int. 391, 398 (2005).

³⁴⁾ Moser & Yu, *supra* note 16, at 561. In February 2008, CIETAC also concluded a cooperation agreement with the Hong Kong International Arbitration Centre (HKIAC) on the basis of which CIETAC arbitrations may be conducted at the HKIAC premises in Hong Kong (and *vice versa*).

³⁵⁾ Johnston, *supra* note 8, at 568.

³⁶⁾ See *supra* Part II.

³⁷⁾ Zhao Xiuwen, *On the Seat of International Arbitration and Its Determination*, 2 Front. Law China 634, 644–645 (2007).

³⁸⁾ See Howard Yinghao Yang, *CIETAC Arbitration Clauses Revisited*, 10 Int. A.L.R. 117, 121 (2007).

³⁹⁾ On the nature of Judicial Interpretations see generally Jian Zhou, *Arbitration Agree-*

the parties” shall apply, (ii) absent such agreement the laws of the place of arbitration and (iii) where neither the applicable law nor the place of arbitration has been agreed upon (or the agreed place of arbitration is unclear) the *lex fori*.⁴⁰⁾

In this context, some authors argue that the wording “*applicable law agreed by the parties*” in Article 16 Interpretation 2006/7 could also refer to a choice of law concerning the underlying substantive contract (as opposed to a choice of law concerning the arbitration clause only).⁴¹⁾ To avoid any uncertainties, parties may wish to explicitly specify the governing law of the arbitration agreement, as soon as it is clear that the place of arbitration and the substantive law of the contract will not “belong” to the same jurisdiction.⁴²⁾

However, whether Chinese courts would in fact permit the choice of a foreign law governing an agreement to arbitrate in China (and if so, to what extent Chinese arbitration law would nonetheless apply) remains unclear.⁴³⁾ Therefore, even if a foreign law should be chosen, the parties to such an arbitration agreement are well advised to still comply with all the peculiarities of the Chinese legal system that could affect the validity of an arbitration agreement.⁴⁴⁾

C. Form Requirements

By stating that “[t]he term ‘arbitration agreement’ shall mean either an arbitral clause in a contract or any arbitration agreement in other written form concluded before or after the dispute arises”, Article 16 Arbitration Law makes clear that an arbitration agreement needs to be in writing. Pursuant to the Supreme People’s Court, arbitration agreements in “other written form” include agreements in a letter or an electronic message (including telegram, telex, facsimile, electronic data interchange and e-mail).⁴⁵⁾

ments in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration, 23 J. Int’l Arb. 145, 151–154 (2006); Kniprath, *supra* note 31, at 28–31.

⁴⁰⁾ Article 16 Supreme People’s Court’s Judicial Interpretation on Several Issues Concerning the Application of the P.R.C. Arbitration Law, 8 September 2006, Fa Shi [2006] No. 7 (henceforth: “Interpretation 2006/7”; unofficial English translation at: Lillian Lian & Stewart Shackleton, *China: The Supreme People’s Court’s New Interpretation on the Application of PRC Arbitration Law*, 9 Int. A.L.R. 167, 169–171 (2006)).

⁴¹⁾ See, e.g., Yuen, *supra* note 8, at 585–586. However, the majority sees here a clear reference to an express choice of law concerning the arbitration clause: see, e.g., Tao & von Wunscheim, *supra* note 15, at 321–322; Thorp, *supra* note 10, at 617; Yang, *supra* note 38, at 120.

⁴²⁾ For suggestions on the wording of such governing law clauses see Yang, *supra* note 38, at 120.

⁴³⁾ Cf. Yuen, *supra* note 8, at 586. But see Yang, *supra* note 38, at 120 (assuming that a CIETAC arbitration clause providing for arbitration in China could be governed by a foreign law).

⁴⁴⁾ For the purpose of this article it is assumed that Chinese law governs the arbitration agreement.

⁴⁵⁾ Article 1 Interpretation 2006/7; see also Article 5 (3) CIETAC Rules. This is in line with international practice (cf. Article 7 (I)(4) UNCITRAL Model Law).

D. Content Requirements

The Chinese Arbitration Law specifies in its Article 16 the three elements that a valid arbitration agreement or clause must contain:

- An expression of intention to submit a(ny) dispute(s) to arbitration;
- A description of the matters subject to arbitration;
- A designated arbitration commission.

1. Intention to Arbitrate

This first requirement is satisfied as soon as it is sufficiently clear that the parties want to use arbitration instead of court litigation for resolving their disputes. Although this requirement is in line with international practice, Chinese courts are somewhat stricter in its interpretation by deeming invalid arbitration agreements that confer an option on the parties to later choose between arbitration and court litigation.⁴⁶⁾ Therefore, references to court litigation should be avoided or should explicitly limit the courts' competences to secondary aspects such as interim measures.

2. Matters Subject to Arbitration

To comply with the second requirement, an arbitration agreement should be phrased as broadly as possible so that its scope will cover all possible kinds of disputes and controversies between the parties. Although the Supreme People's Court⁴⁷⁾ and Chinese case law⁴⁸⁾ suggest that in this context Chinese courts tend

⁴⁶⁾ According to Article 7 Interpretation 2006/7, such an arbitration agreement may only be deemed valid if the defendant does not object to arbitration before the first arbitral hearing.

⁴⁷⁾ Article 2 Interpretation 2006/7 states: "*In the event that the matters for arbitration are contractual disputes, any disputes arising from the execution, validity, modification, assignment, performance, breach, interpretation or rescission of the contract may be regarded as matters for arbitration.*" However, this still leaves open (i) whether the list of issues covered by the term "contractual disputes" is complete (would it, thus, be necessary to explicitly mention questions regarding the existence and the termination of the contract?), (ii) what actual wording should be used in order to submit all these issues to arbitration (e.g., would already the phrase "under this contract" suffice?) and (iii) how to cover also non-contractual claims. With regard to the last issue the Supreme People's Court has recently clarified that the phrase "out of or in connection with this contract" covers also tort claims (see Friven Yeoh & Yu Fu, *The People's Courts and Arbitration – A Snapshot of Recent Judicial Attitudes on Arbitrability and Enforcement*, 24 J. Int. Arb. 635, 638 (2007)).

⁴⁸⁾ Cf., e.g., *Wu Han Zhong Yuan Science and Education Co. Ltd. v. Hong Kong Long Hai Co. Ltd.*, China Int'l Com. Arb. Y.B. 1999, at 84 (Hu Bei High People's Court, 1 February 1999) (holding that an arbitration clause contained in an initial joint venture agreement binds also the transferee, who signed a new joint venture agreement that neither contained an arbitration clause nor referred to the arbitration clause contained in the initial agreement). However, in this context it is worth mentioning that Chinese law does not follow a common law precedent system.

to follow the international trend of seeking to give effect to arbitration agreements wherever possible, this still remains crucial in order to avoid unpleasant surprises.⁴⁹⁾

3. Arbitration Commission

As pointed out above, Article 16 (3) Arbitration Law requires the parties to clearly designate an arbitration commission in their arbitration agreement. If they fail to do so and a respective supplementary agreement cannot be reached, the arbitration agreement is, by virtue of Article 18 Arbitration Law, invalid.⁵⁰⁾

Thus, for example, the following arbitration clause was held to be invalid: “*ICC Rules, Shanghai shall apply.*”⁵¹⁾ Indeed, in international practice usually arbitration clauses only name the chosen arbitration rules. In recognition of this, the Supreme People’s Court via Article 4 of its Interpretation 2006/7 tried to lessen the effects of Article 16 (3) by declaring valid agreements that only stipulate the arbitration rules, as long as the arbitration institution can be ascertained pursuant to the chosen rules. As Article 4 (3) CIETAC Rules provides that “[w]here the parties agree to refer their disputes to arbitration under these Rules without providing the name of an arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by the CIETAC”, Article 4 Interpretation 2006/7 saves the validity of CIETAC arbitration clauses equally short as the example above. However, to fail to designate the arbitration commission would mean to also miss the opportunity to determine the administrating (Sub-)Commission. This again would result due to Article 2 (8) CIETAC Rules in the right for the claimant to pick the (Sub-)Commission of his choice when filing the claim. Therefore, to name the arbitration commission and thereby specifying the administrating (Sub-)Commission avoids races to the more desirable (Sub-)Commission. Furthermore, previous CIETAC cases have shown that the designation of the administrating (Sub-)Commission is also important for eliminating the risk of two related cases being heard at two different (Sub-)Commissions.⁵²⁾

⁴⁹⁾ For example in connection with those issues not sufficiently clarified by Interpretation 2006/7 (see *supra* note 47).

⁵⁰⁾ For details on the interpretation of Article 18 Arbitration Law and its interrelation with Article 16 Arbitration Law see Tao & von Wunschheim, *supra* note 15, at 311–312.

⁵¹⁾ Supreme People’s Court’s Reply Letter to the Higher People’s Court of Jiangsu Province re Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd., 8 July 2004, available at <http://www.lawinfochina.com/law/displayModeTwo.asp?id=5017&keyword=>; see generally Tao & von Wunschheim, *supra* note 15, at 320–321; Marcel Barth & Graeme Johnston, *Vereinbarung einer Schiedskommission als Wirksamkeitsvoraussetzung der Schiedsklausel – Zur Nichtanerkennung eines chinesischen ICC-Schiedsspruchs in Deutschland*, 2007 SchiedsVZ 300, 300–301.

⁵²⁾ For details on CIETAC cases where an omission to specify the administrating (Sub-)Commission (or where the designation of two different (Sub-)Commissions in two related contracts) lead to two simultaneous arbitration proceedings with differing results see Yang, *supra* note 38, at 118–119.

As regards the wording of the designation of the administrating (Sub-)Commission, this should be phrased as exactly as possible. Due to the large number of Chinese arbitration commissions and their often quite similar names there is a real danger for arbitration clauses to fail. In particular, the wording should not leave any room for confusion between CIETAC's headquarter in Beijing or its Sub-Commissions in Shanghai or Shenzhen, and the Beijing Arbitration Commission, the Shanghai Arbitration Commission or the Shenzhen Arbitration Commission, which are all local arbitration institutions separate from CIETAC. In borderline cases, Article 6 Interpretation 2006/7 requires a supplementary agreement between the parties.

Due to Article 5 Interpretation 2006/7, the parties should also refrain from mentioning more than one arbitration institution in their arbitration agreement, as absent a later joint selection of one institution, the arbitration agreement will be deemed invalid. Thus, also agreements allowing the claimant to choose the appropriate arbitration commission among several explicitly mentioned institutions would be invalid under Chinese law.⁵³⁾

E. Arbitration Rules

According to Article 4 (2) CIETAC Rules, the parties are deemed to have agreed to arbitrate in accordance with these Rules whenever they have provided for arbitration by CIETAC. Thus, as long as the parties specify CIETAC as the designated arbitration commission, an explicit choice of rules is not necessary.

Since May 2003, CIETAC also offers to arbitrate disputes arising from financial transactions in accordance with special rules.⁵⁴⁾ However, these rules, the so called CIETAC Financial Disputes Rules, would only apply if expressly agreed upon by the parties.⁵⁵⁾ In case the parties do agree to arbitrate in accordance with the CIETAC Financial Disputes Rules, but a subsequent dispute does not fall within the scope of these rules, the general CIETAC Rules will apply.⁵⁶⁾

According to Article 4 (2) CIETAC Rules, the parties may also agree to modify the CIETAC Rules or even agree on the application of arbitration rules of other institutions. CIETAC has already administered proceedings under the ICC Rules and the UNCITRAL Rules.⁵⁷⁾ However, the desirability of such choices should be

⁵³⁾ See Tao & von Wunschheim, *supra* note 15, at 319.

⁵⁴⁾ CIETAC Financial Disputes Arbitration Rules, current version effective as of 1 May 2005 and amended on 1 May 2008 (henceforth: "CIETAC Financial Disputes Rules"; English version at: http://www.cietac.org.cn/english/rules/rules_2.htm; on the 2008 amendment see <http://www.cietac.org.cn/english/news/news23.htm>).

⁵⁵⁾ Article 3 CIETAC Financial Disputes Rules.

⁵⁶⁾ Article 4 (4) CIETAC Rules. For CIETAC's definition of the term "financial transactions" see Article 2 (2) CIETAC Financial Disputes Rules.

⁵⁷⁾ See, e.g., Denis Brock & Kathryn Sanger, *The Arbitration Agreement and Arbitrators, in Arbitration in China: A Practical Guide* margin numbers 8–34 (Daniel R. Fung & Wang Sheng Chang eds., 2004).

carefully considered as problems due to inconsistencies with CIETAC's rules and practices as well as Chinese law may arise.⁵⁸⁾ Addressing such potential problems, Article 4 (2) CIETAC Rules allows respective party agreements to prevail only where they are not "*inoperative*" or not "*in conflict with a mandatory provision of the law of the place of arbitration*". It is therefore advisable to verify the operability of any major modification (or any different set of rules) with CIETAC in advance, as this question will be most probably answered by interpretation of the CIETAC Rules – a right reserved to CIETAC.⁵⁹⁾

F. Arbitrators

A CIETAC tribunal will usually consist of three arbitrators, unless otherwise agreed by the parties.⁶⁰⁾ Only in those cases where the Summery Procedure applies,⁶¹⁾ will a sole arbitrator hear the case.⁶²⁾

Generally, only persons listed in CIETAC's Panel of Arbitrators⁶³⁾ can be appointed as arbitrators. The current Panel, effective as of 1 May 2008, consists of 797 Chinese arbitrators and 275 arbitrators of foreign nationality (including arbitrators from Hong Kong, Macau and Taiwan). CIETAC renews its Panel every three years.⁶⁴⁾

However, since 2005 the CIETAC Rules also permit the appointment of arbitrators not listed in the Panel if explicitly agreed upon by the parties.⁶⁵⁾ In addition, an appointment based on such party agreement needs to be confirmed by the Chairman of CIETAC "*in accordance with the law*".⁶⁶⁾ Thus, the arbitrator in ques-

⁵⁸⁾ Special thought should be given to the institutional machinery embedded in other arbitration rules, in particular to the system of appointing and confirming arbitrators and the scrutiny of awards. See also Clarisse von Wunschheim & Fan Kun, *Arbitrating in China: The Rules of the Game – Practical Recommendations concerning Arbitration in China*, 26 ASA Bulletin 35, 45 (2008) (not recommending to opt for a different set of institutional arbitration rules when arbitrating in China).

⁵⁹⁾ See Article 70 (2) CIETAC Rules.

⁶⁰⁾ Article 20 (2) CIETAC Rules.

⁶¹⁾ See *infra* Part III.M.

⁶²⁾ See Article 52 CIETAC Rules.

⁶³⁾ Article 13 Arbitration Law requires each arbitration commission to draw up its own panel of arbitrators according to different professions. This is commonly understood to create a compulsory panel system for China (see, e.g., von Wunschheim & Kun, *supra* note 58, at 40).

⁶⁴⁾ See Articles III-V CIETAC Stipulations for the Appointment of Arbitrators, 1 September 2000, available at <http://www.cietac.org/english/arbitrators/arbitrators.htm>.

⁶⁵⁾ Article 21 (2) CIETAC Rules. In case such party agreement should also encompass default appointments by CIETAC, this should be expressly specified (Lutz Kniprath, *Neue Schiedsordnung der Chinese International Economic and Trade Arbitration Commission*, 2005 SchiedsVZ 197, 203–204).

⁶⁶⁾ Article 21 (2) CIETAC Rules. For comparison, also the ICC Rules (Article 9), the DIS Rules (Article 17) and the Swiss Rules (Article 5) require a confirmation of arbitrators by

tion will – at least – have to fulfill the requirements stipulated in Article 13 Arbitration Law,⁶⁷⁾ in case he is a Chinese national, or in Article 67 Arbitration Law,⁶⁸⁾ in case he is a foreign national.⁶⁹⁾

In case of a multipartite tribunal, the parties shall each appoint one arbitrator or entrust the Chairman of CIETAC to make such an appointment – otherwise the arbitrator will be appointed by the Chairman of CIETAC.⁷⁰⁾ The presiding arbitrator shall be jointly appointed by the parties or appointed by the Chairman of CIETAC upon the parties' joint authorization.⁷¹⁾ To support the parties in reaching an agreement on the sole or presiding arbitrator, CIETAC introduced a new appointing mechanism into their 2005 rules, whereby both parties are encouraged to submit a "*list of recommended candidates*".⁷²⁾ An agreement providing that a third party should appoint the sole or presiding arbitrator – even if subject to confirmation by the Chairman of CIETAC – is problematic because of Article 31 Arbitration Law, and any appointment based on such an agreement would be open to subsequent challenge.⁷³⁾

Another peculiarity is that CIETAC's own employees can be – and regularly were – appointed as arbitrators.⁷⁴⁾ Recently, CIETAC has restricted this possibility so that staff members may no longer sit as party-appointed arbitrators and may only be appointed by the Chairman of CIETAC for small claims.⁷⁵⁾ However, if a party wishes to exclude this possibility entirely, this should be explicitly provided for in the arbitration agreement.

Unlike several other major international arbitration rules,⁷⁶⁾ the CIETAC Rules do not address the issue of the arbitrator's nationality. In this context it has

the arbitration institution (whereas, e.g., the Vienna Rules do not do so). However, by contrast to CIETAC, in these institutions, boards with a broad membership (not just internal staff) (ultimately) control appointments. See generally, Weixia Gu, *The China-Style Closed Panel System in Arbitral Tribunal Formation – Analysis of Chinese Adaptation to Globalization*, 25 J. Int'l Arb. 121 (2008) (providing a very critical analysis arguing that the parties' freedom and the protection of party interests in tribunal formation is, whilst improving, still not satisfactory).

⁶⁷⁾ According to Article 13 Arbitration Law, an arbitrator shall be fair and just and shall have at least eight years of work experience in arbitration or as a lawyer or as a judge or shall be engaged in legal research and teaching of law with a senior academic title.

⁶⁸⁾ Article 67 Arbitration Law states: "*Members of a foreign-related arbitration commission may appoint arbitrators from among foreign nationals with specialized knowledge in law, economy and trade, science and technology.*"

⁶⁹⁾ Wang & Cao, *supra* note 33, at 118–119.

⁷⁰⁾ Article 22 (1) CIETAC Rules.

⁷¹⁾ Article 22 (2) CIETAC Rules.

⁷²⁾ For details see Article 22 (3) CIETAC Rules.

⁷³⁾ See Johnston, *supra* note 8, at 571.

⁷⁴⁾ See, e.g., Venus V. Wong, *CIETAC Arbitration Rules*, in *Praxishandbuch Schiedsgerichtsbarkeit* 497, 505, at margin number 27 (Hellwig Torggler ed., 2007); Gu, *supra* note 66, at 140–141.

⁷⁵⁾ Moser & Yu, *supra* note 16, at 563.

⁷⁶⁾ See, e.g., Article 6 (4) UNCITRAL Rules; Article 9 (5) ICC Rules, Article 6 (1) LCIA Rules.

been criticized that CIETAC frequently appoints Chinese nationals as sole or presiding arbitrators also in foreign-related disputes.⁷⁷⁾ Although a (predominantly) Chinese tribunal should not necessarily in itself be a disadvantage for a foreign party, communication and cultural and legal understanding could cause issues. Considering the leading role of presiding arbitrators,⁷⁸⁾ foreign parties will in most cases feel more comfortable with a person of neutral nationality in this position. To deal with these concerns, parties can agree in the arbitration clause that the sole or presiding arbitrator shall not have the same nationality as any of the parties or exclude the nationalities of concern specifically.⁷⁹⁾ CIETAC respects and follows such party agreements in the appointing process.⁸⁰⁾ However, parties who consider agreeing on a restriction of acceptable nationalities should also bear in mind that foreign nationals may be less familiar with the specifics of Chinese law and local customs and might therefore be a less suitable choice.⁸¹⁾

Furthermore, for domestic disputes usually only Chinese arbitrators will be appointed.⁸²⁾ However, in practice CIETAC permits foreign arbitrators to be appointed also where one party to a domestic dispute is a foreign-invested Chinese legal entity.⁸³⁾

Another important issue in the context of the nationality of arbitrators is the remuneration. The average fees for CIETAC arbitrators are significantly lower than the international market rate. To prevent foreign arbitrators from refusing an appointment due to insufficient remuneration,⁸⁴⁾ an informal arrangement exists

⁷⁷⁾ E.g., Jerome A. Cohen, *Time to Fix China's Arbitration*, Far E. Econ. Rev., January 2005, <http://www.feer.com/essays/2005/january/time-to-fix-chinas-arbitration>.

⁷⁸⁾ For example, where a multipartite tribunal cannot reach a majority, the award will be rendered in accordance with the presiding arbitrator's opinion (Article 53 Arbitration Law, Article 43 (5) CIETAC Rules).

⁷⁹⁾ Usually, it will be better to exclude the nationalities of concern by specifically mentioning each of them in order to avoid discussions about whether the nationality of a party is determined according to its seat(s), place of incorporation or the nationality of its direct or ultimate owner(s).

⁸⁰⁾ So the author's own experience; see also, e.g., Moser & Yu, *supra* note 16, at 560.

⁸¹⁾ Cf. Wang Sheng Chang, *CIETAC's Perspective on Arbitration and Conciliation Concerning China*, in ICCA Congress Series No. 12 (Albert J. van den Berg ed., 2005), 27, 38 (arguing that this is why also foreign parties frequently appoint Chinese nationals). However, there is an increasing number of foreign arbitrators (also on CIETAC's Panel of Arbitrators), who are experts in Chinese law and are practicing law in China since years, so that the pool of suitable arbitrators should not be restricted too much by excluding Chinese nationals as sole or presiding arbitrators.

⁸²⁾ This is due to Article 67 Arbitration Law (see *supra* note 68) that only allows foreign-related arbitration commissions to appoint foreign arbitrators. Since the distinction between foreign-related and domestic arbitration commissions has been blurred (see *supra* note 18), this restriction is interpreted to apply to foreign-related disputes (see Kniprath, *supra* note 65, at 204).

⁸³⁾ See CIETAC, *Instructions on the Application of the Panels of Arbitrators*, in Panel of Arbitrators (2005). Although the current Panel of Arbitrators booklet does not contain a respective assertion, it is assumed that this – widely applauded – practice will continue.

⁸⁴⁾ Cf., e.g., Moser & Yu, *supra* note 16, at 560; Thorp, *supra* note 10, at 611 (both stat-

whereby arbitrators of foreign nationality or arbitrators of Chinese nationality, who do not reside in China, may be paid an additional remuneration in the form of a fixed fee or a cap negotiated through CIETAC (or directly between the appointing party or parties and the arbitrator).⁸⁵) As CIETAC is seeking the parties' consent to negotiated remunerations, some authors argue that this arrangement would allow parties to refuse a presiding (or sole) arbitrator on the basis of his proposed fees where in fact a party's true objection could be the arbitrator's identity.⁸⁶) However, as long as Chinese nationals are excluded from being appointed as sole or presiding arbitrator, this issue does not usually create any problem since the overall fees are likely to remain lower than for other institutional arbitrations. Moreover, the additional remuneration is negotiated on the basis of the specifics of the case and will therefore not vary much, if at all, for different foreign arbitrators.

G. Language

Article 67 (1) CIETAC Rules provides that, unless otherwise agreed, Chinese (Mandarin) shall be the official language of the arbitral proceedings.⁸⁷) Therefore, it is important for foreign parties to include a respective choice of language into the arbitration agreement, if they prefer another language.⁸⁸)

In practice, the only other language agreed on is English.⁸⁹) Although CIETAC meanwhile published its rules also in French, German, Japanese, Korean, Portuguese and Spanish, any foreign language other than English would limit the pool of suitable arbitrators considerably, even if the parties agree on the admissibility of arbitrators from outside CIETAC's "Panel of Arbitrators". In fact, foreign parties frequently experience strong objections against English as the language of arbitration, so it follows that any other foreign language will hardly ever be an option.

ing that low fees lead to a limited number of foreign arbitrators actually available to serve as arbitrators in CIETAC arbitration).

⁸⁵) Johnston, *supra* note 8, at 572–573; *see also* Moser & Yu, *supra* note 16, at 559.

⁸⁶) Johnston, *supra* note 8, at 573 n. 36 and 578 n. 52 (recommending to consider inserting into the arbitration clause a provision authorizing CIETAC to fix the presiding (or sole) arbitrator's remuneration in accordance with international standards without the parties' consent).

⁸⁷) By contrast, most international arbitration rules leave the determination of the language absent party agreement to the arbitral tribunal (*see* Article 17 UNCITRAL Rules; Article 16 ICC Rules; Article 20 (2) Vienna Rules; Article 22 (1) DIS Rules; Article 17 Swiss Rules).

⁸⁸) However, despite an explicit agreement on the language of arbitration, the arbitral tribunal as well as the Secretariat may request the parties to submit corresponding versions of documents and evidence in Chinese or in other languages (Article 67 (3) CIETAC Rules).

⁸⁹) However, such cases amount to not more than 5% of all new cases of CIETAC per year (Wong, *supra* note 74, at 510 margin number 45).

This reluctance of Chinese parties to agreeing on arbitrating disputes in a foreign language (together with the fact that contracts and related documents are usually prepared in Chinese and English) is why foreign parties sometimes agree on bilingual arbitration. However, bilingual arbitration will almost always be more expensive and slower than arbitration conducted in a single language and should therefore be avoided. Nonetheless, whenever enforcement actions in China are likely, it still might be useful to consider providing that any award should be rendered in both Chinese and English (with the Chinese version to prevail).⁹⁰⁾

H. Amicable Settlements and Conciliation⁹¹⁾

The amicable settlement of disputes has a history of more than 2000 years in China. It is therefore not surprising that conciliation is very popular in China, and that Chinese arbitration law and arbitration rules are exceptionally flexible in the combination of conciliation and arbitration.⁹²⁾

When a dispute arises, Chinese parties will usually expect more efforts with regard to amicable solutions than is common in international practice. This is also one of the reasons why conciliation or escalation clauses are a frequent part of arbitration clauses in China-related contracts. However, whether to agree to a compulsory pre-arbitral settlement or conciliation period should be carefully considered. Generally speaking, any settlement will need efforts from both sides and such clauses will seldom bring about sincere negotiations that would not have occurred otherwise. If agreeing to an obligatory negotiation period, only a relatively short timeframe should be accepted. For China-related contracts the safer option will be to avoid such clauses because the current Arbitration Law does not provide for interim measures before the initiation of arbitral proceedings.⁹³⁾ Therefore, compulsory negotiation periods could allow the other party to use this time to transfer or otherwise divest itself of its property or eliminate crucial evidence before a notice of arbitration can be served.

After arbitral proceedings have been initiated, parties may request a conciliation procedure at any time until the issuance of the award. Neither Article 51 Arbi-

⁹⁰⁾ See Brock & Sanger, *supra* note 57, at margin numbers 8–39 (emphasizing that an award written in Chinese (or at least translated under the supervision of the tribunal) will be a better basis for Chinese courts than a later translation produced by an independent translator).

⁹¹⁾ In China, the term “conciliation” is used interchangeably with “mediation”.

⁹²⁾ Cf. Article 51 Arbitration Law; Article 40 CIETAC Rules. See generally Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. Int'l Arb. 623 (2007); Kniprath, *supra* note 31, at 17–22, 170–175. For comparison, the UNCITRAL Rules, ICC Rules, DIS Rules and Swiss Rules do not contain any provision on conciliation. By contrast, the Vienna Rules do by definition also contain a set of Conciliation Rules but limit the combination of conciliation and arbitration by prohibiting the appointment of a conciliator as an arbitrator in subsequent arbitration proceedings (Article 5).

⁹³⁾ See *infra* Part V.D.

tration Law nor Article 40 CIETAC Rules imposes any limitation on the timing. The only requirement is the parties' agreement to the conciliation at all stages of the process. As soon as one party requests a termination of the conciliation, or if the arbitral tribunal believes that further efforts to conciliate will be futile, the tribunal has to terminate the conciliation and continue the arbitration proceedings.⁹⁴⁾ Thereby, not only do both parties have equal control over the length of conciliation procedures, but also the arbitral tribunal can protect the arbitration from any undue delay and disruption. How to conduct the conciliation is, unless otherwise agreed by the parties, entirely up to the arbitrators. According to Article 40 (3) CIETAC Rules, "[t]he arbitral tribunal may conciliate the case in the manner it considers appropriate". Thus, all possible forms of conciliation, from caucusing with individual parties and discussions involving all parties to private negotiations between the parties themselves, are possible. The main advantage of such flexible conciliation procedures lies in the increased chance of obtaining an enforceable settlement. Regardless of whether a settlement is reached through conciliation by the arbitral tribunal or by the parties themselves, after a settlement the arbitral tribunal is empowered to and "*will close the case and render an arbitral award in accordance with the terms of the settlement agreement*".⁹⁵⁾ Thereby the settlement becomes enforceable as an award in the meaning of the New York Convention.⁹⁶⁾

However, the main concerns occur when conciliation does not succeed. According to Article 40 (7) CIETAC Rules and fully in line with the Chinese way of combining arbitration and conciliation, "[w]here conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award". Many have argued that conciliators who have failed in settling a dispute will inevitably be biased when resuming their work as arbitrators. Indeed many jurisdictions take a more restrictive approach towards neutrals returning to deliberate as arbitrators and require the parties' prior agreement.⁹⁷⁾ However, for parties who are concerned about prejudicing the arbitration there are a number of protective measures available such as designating only a part of the arbitral tribunal to conduct the conciliation (either the presiding arbitrator or only both party-appointed ar-

⁹⁴⁾ Article 40 (4) CIETAC Rules.

⁹⁵⁾ Article 40 (5) and (6) CIETAC Rules. Of course there is also the possibility to withdraw the claims (see Article 41 CIETAC Rules). This option is commonly exercised where a settlement does not need to be made enforceable. When the settlement has not been complied with, the decision on whether the same claim might serve as basis for a new arbitration case is discretionary and lies with CIETAC (Article 41 (3) CIETAC Rules).

⁹⁶⁾ The CIETAC Rules also allow settlements reached before the initiation of arbitral proceedings to be "transformed" into an enforceable CIETAC award as long as the underlying dispute was covered by an arbitration agreement (see Article 40 (1) CIETAC Rules). For a similar provision in the Vienna Rules see Article 4 Conciliation Rules.

⁹⁷⁾ See Harpole, *supra* note 92, at 628 (referring, *inter alia*, to Australia, Hong Kong SAR, Singapore and India). For a respective prohibition in the Vienna Rules see *supra* note 92.

bitrators), or engaging independent conciliators.⁹⁸⁾ Of course such measures could be already agreed upon in the arbitration agreement.⁹⁹⁾

Further concerns are connected to the sharing of information and positions with the other party in the course of the conciliation. Here, Article 40 (8) CIETAC Rules imposes safeguards by providing that “*any opinion, view, statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings*.”¹⁰⁰⁾

To sum up, the highly flexible approach of the Arbitration Law and the CIETAC Rules towards the combination of conciliation and arbitration carry certain risks which one might not be able to fully exclude even when applying additional safeguarding measures. Parties who feel especially concerned about these risks might want to restrict the arbitral tribunal’s power to conciliate already in their arbitration agreement. However, the statistics show that the Chinese way of “arb-med” is successful. In CIETAC Arbitration, some efforts to conciliate are made in about 80% of all cases and about 30% of all cases are settled via conciliation.¹⁰¹⁾

I. Evidence

Neither the Arbitration Law nor the CIETAC Rules contain detailed rules of evidence. In particular, they do not provide for discovery¹⁰²⁾ or the appointment of expert witnesses by the parties themselves.

With regard to expert witnesses, Article 38 CIETAC Rules only grants the arbitral tribunal the right to consult an expert. Thus, whether parties will be able to call their own experts depends on the approval of the arbitral tribunal.¹⁰³⁾ Fur-

⁹⁸⁾ See Harpole, *supra* note 92, at 628–630 (providing an overview of possible safeguarding measures and discussing the pros and cons of arbitrators acting as conciliators).

⁹⁹⁾ Another possibility would be to agree on protective measures when starting the conciliation. Cf. *id.*, at 625 (recommending to conclude a written agreement where a formal decision to suspend the arbitration is sought).

¹⁰⁰⁾ Michael J. Moser and Peter Yuen recommend to widen this duty of confidentiality so that “(i) the scope of the prohibition covers not only the use of the information in subsequent ‘arbitral or judicial/non-judicial processes’ but also for any other purposes, unless they can be obtained independently by the party seeking to produce them in the subsequent arbitration, and (ii) the subject matter will cover ... also any written documents, statement or communications which are disclosed in the conciliation” (Moser & Yuen, *supra* note 33, at 402).

¹⁰¹⁾ Moser & Yu, *supra* note 16, at 561. Trappe reports about several cases where conciliation even lead to the respondent accepting liability for the entire amount claimed (Johannes Trappe, *Zur Schiedsgerichtsbarkeit der CIETAC*, 2006 *SchiedsVZ* 258, 265).

¹⁰²⁾ See generally Bryant Y. F. Yang & Diane C. Dai, *Tipping the Scale to Bring a Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 *Pac. Rim L. & Pol’y J.* 41 (2008).

¹⁰³⁾ This is contrary to international practice. For comparison see Article 27 (4)

thermore, even with court appointed experts the arbitral tribunal retains the control over whether an expert will attend a hearing, explain his report and have to answer questions by the parties.¹⁰⁴) In addition, neither the Arbitration Law nor the CIETAC Rules provide for the possibility to challenge experts.¹⁰⁵) Moreover, also with regard to witnesses of fact, cross-examination is much less customary than elsewhere.¹⁰⁶)

In the context of evidence disclosure, the strongest provision can be found in Article 38 (2) CIETAC Rules, which states that “[t]he arbitral tribunal has the power to request the parties to deliver or produce to the expert or appraiser any relevant materials, documents, or property and goods for checking, inspection and/or appraisal. The parties shall be obliged to comply.” However, this provision neither grants the opposing parties any real power to compel evidence disclosure, nor does it grant the tribunal a right to directly obtain evidence from the parties. Furthermore, Article 37 CIETAC Rules, the provision actually dealing with direct investigative powers of the tribunal, is too vague: “[t]he arbitral tribunal may, on its own initiative, undertake investigations and collect evidence as it considers necessary.” Although parties will often comply with disclosure requests in order to keep the arbitral tribunal from drawing adverse inferences and although parties can use means of evidence preservation to actually compel evidence disclosure,¹⁰⁷) especially parties from a common law background might wish¹⁰⁸) to include detailed evidence disclosure rules in the arbitration agreement.

Indeed, CIETAC panels tend to follow an inquisitorial approach, mirroring China’s background as a civil law country. However, since 2005 the CIETAC Rules expressly provide that “[u]nless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach when examining the case, having regard to the circumstances of the case”¹⁰⁹) This clearly indicates that CIETAC is willing to allow the greater use of discovery procedures, cross-examination and other procedural common law devices.¹¹⁰) Furthermore, this allows the conclusion that also other issues, like those mentioned above with regard to expert wit-

UNCITRAL Rules, Article 20 (3) ICC Rules; Article 27 (3) DIS Rules; Article 27 (4) Swiss Rules. Although the Vienna Rules do not mention party appointed experts (*cf.* Article 20 (5) Vienna Rules), the Austrian Arbitration Act 2006 does in Article 601 (4).

¹⁰⁴) See Article 38 (3) CIETAC Rules. This is, of course, as well contrary to international practice (*cf.* Article 27 (4) UNCITRAL Rules, Article 20 (4) ICC Rules, Article 27 (3) DIS Rules, Article 27 (4) Swiss Rules).

¹⁰⁵) For comparison, the Vienna Rules expressly provide for a challenge of experts (Article 21) whereas the ICC Rules (Article 20 (4)) and the Swiss Rules (Article 27 (1)) require the tribunal to consult the parties before appointing an expert.

¹⁰⁶) See Johnston, *supra* note 8, at 574.

¹⁰⁷) See Yang & Dai, *supra* note 102, at 55–57.

¹⁰⁸) But see Brock & Sanger, *supra* note 57, at margin numbers 8–111 (warning that the desirability of discovery should be carefully considered and referring for a negative example to the interests of a service provider).

¹⁰⁹) Article 29 (3) CIETAC Rules.

¹¹⁰) Thorp, *supra* note 10, at 619. See generally Wang & Cao, *supra* note 33, at 120.

nesses, could be dealt with by respective party agreements.¹¹¹⁾ Here, a solution acceptable to both common law and civil law parties could be to provide in the arbitration agreement that the IBA Rules on the Taking of Evidence¹¹²⁾ shall apply.¹¹³⁾

J. Record of Hearing

Article 35 CIETAC Rules provides that “[d]uring the oral hearing, the arbitral tribunal may arrange a stenographic and/or audio-visual record. The arbitral tribunal may, when it considers it necessary, take minutes stating the main points of the oral hearing and request the parties [...] to sign and/or affix their seals to the minutes”. Although this provision, contrary to the special provision for domestic cases¹¹⁴⁾ and to international practice,¹¹⁵⁾ does not impose any obligation on the arbitral tribunal, oral hearings are in most cases recorded. All hearings taking place in one of the CIETAC locations are video-taped and usually the responsible case administrator will take minutes. Stenographic records are the exception.

However, neither for domestic nor for foreign-related cases do the Rules require that the record shall be distributed to the parties. Article 35 CIETAC Rules merely states that the “record of the oral hearing shall be available for the use and reference of the arbitral tribunal”. This leads, as applied by CIETAC, at least in foreign-related cases, to the parties effectively being barred from obtaining a copy of the record of the hearing, which directly contradicts international practice.¹¹⁶⁾

If parties want to make sure that a written record of a hearing is made and that they will receive a copy of it, they should agree on this in their arbitration agreement. Here, for example, it would be sufficient to provide that Article 64 CIETAC Rules shall apply in arbitration proceedings between the parties and that each party shall receive a copy of the record.

¹¹¹⁾ Cf. also Brock & Sanger, *supra* note 57, at margin numbers 8–106 (referring to a statement made by the Secretary-General of CIETAC in 2002 that it might be possible to extend the effect of the CIETAC Rules dealing with expert evidence to give the parties the right to cross-examine experts called by either party).

¹¹²⁾ IBA Rules on the Taking of Evidence in International Commercial Arbitration, adopted 1 June 1999.

¹¹³⁾ But see Johnston, *supra* note 8, at 578 n. 54 (stating that “to date this has not been tested and it is conceivable that specific provisions of those rules might be held to be contrary to PRC law or public policy”); see generally Yang & Dai, *supra* note 102, at 69–71.

¹¹⁴⁾ Article 64 CIETAC Rules provides that “[t]he arbitral tribunal shall make a brief written record of the oral hearing” and lays down details for signing and the correction of the minutes.

¹¹⁵⁾ Cf. Articles 82 and 83 UNCITRAL Notes on Organizing Arbitral Proceedings; Article 20 (4) Vienna Rules; Article 29 DIS Rules.

¹¹⁶⁾ The distribution of a copy of the record to the parties is something so inherent in international practice that only a few arbitration rules explicitly refer to this duty (see, e.g., Article 29 DIS Rules). It is indeed surprising that so far this particularity of CIETAC’s practice has not been criticized more often (cf. Wong, *supra* note 74, at 509 margin number 43).

K. Confidentiality

Unless otherwise agreed by the parties and approved by the arbitral tribunal, the hearings shall be held *in camera*.¹¹⁷⁾ For cases held *in camera*, Article 33 (2) CIETAC Rules provides that “*the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and appraisers appointed by the arbitral tribunal and the relevant staff-members of the Secretariat of the CIETAC shall not disclose to any outsiders any substantive or procedural matters of the case*”. However, the wording of this provision does not go as far as prohibiting the disclosure of the fact that proceedings are pending or that an award has been rendered.¹¹⁸⁾ Thus, parties may wish to extend the scope of confidentiality in their arbitration agreement accordingly.

L. Multi-Party Disputes

One of the major issues in multi-party arbitrations, the fair appointment of arbitrators, is already dealt with directly by the CIETAC Rules. Article 24 (1) provides that “[w]here there are two or more Claimants and/or Respondents in an arbitration case, the Claimant side and/or the Respondent side each shall, through consultation, jointly appoint or jointly entrust the Chairman of the CIETAC to appoint one arbitrator from the CIETAC’s Panel of Arbitrators”.¹¹⁹⁾ If the parties are not able to jointly appoint or jointly entrust the Chairman of CIETAC to appoint an arbitrator, the Chairman of CIETAC will appoint the arbitrator.¹²⁰⁾ This is in line with international practice.¹²¹⁾

However, while multi-party disputes always present an additional challenge in arbitration, CIETAC procedures have been proven to be particularly prone to problems where one dispute might lead to two (or more) separate claims. This is due to CIETAC’s organizational structure. When the arbitration agreement does not specify the administering (Sub-)Commission, further claims can be initiated at different (Sub-)Commissions, which makes a joinder of separate arbitration proceedings even more unlikely.¹²²⁾ Thus, also with regard to potential multi-

¹¹⁷⁾ Article 33 (1) CIETAC Rules.

¹¹⁸⁾ Stricker-Kellerer & Moser, *supra* note 13, at 473. For a broader confidentiality provision see, e.g., Article 39 HKIAC Rules. However, many other international arbitration rules contain only confidentiality provisions similar to Article 33 (2) CIETAC Rules (see, e.g., Article 43 Swiss Rules; Article 30 LCIA Rules).

¹¹⁹⁾ As soon as the parties have agreed that also arbitrators from outside CIETAC’s Panel of Arbitrators may be appointed, such agreement prevails also over the last words of Article 24 (1) CIETAC Rules.

¹²⁰⁾ Article 24 (2) CIETAC Rules.

¹²¹⁾ See, e.g., Article 10 ICC Rules; Article 15 (7) Vienna Rules; Article 13 (2) DIS Rules; Article 8 (2) Swiss Rules. This, however, of course with the limitation already pointed out *supra* note 66.

¹²²⁾ See *supra* note 52.

party disputes the designation of the administrating (Sub-)Commission is essential. The same is true for situations where several related agreements are concluded. In the latter case, however, not only is the designation itself important, but even more so the choice of the same (Sub-)Commission in all related agreements.¹²³⁾ Furthermore, as is generally the case in arbitration, a joinder of related proceedings will usually only be possible where the parties have already made specific provisions for a consolidation in their arbitration agreement.¹²⁴⁾

M. Fast Track Rules

Like more and more international arbitration institutions,¹²⁵⁾ CIETAC also provides fast track arbitration rules. However, in the case of CIETAC, these rules are not a separate set of rules that need to be agreed upon specifically,¹²⁶⁾ but rather they are applicable to any case where the amount in dispute does not exceed RMB 500,000, unless otherwise agreed by the parties.¹²⁷⁾ The main differences between CIETAC's so-called "Summary Procedure" and proceedings under the general provision of the CIETAC Rules are the shorter time limits for the submissions of the parties¹²⁸⁾ and the rendering of the award,¹²⁹⁾ that a sole arbitrator will hear the case¹³⁰⁾ and that, "*unless otherwise truly necessary*", only one oral hearing (if any) will take place.¹³¹⁾

Although a swift resolution of disputes is of course desirable, too tight timeframes might raise issues of due process and equality. Furthermore, some disputes are not at all suitable for fast track procedures, such as for example multi-party disputes.¹³²⁾ Moreover, some parties might simply prefer to have their dispute arbitrated by three arbitrators. In light of these issues, and taking into ac-

¹²³⁾ This of course in addition to choosing the same arbitration rules, the same place of arbitration and the same governing law.

¹²⁴⁾ See, e.g., Yuen, *supra* note 8, at 590; Yang, *supra* note 38, at 119 (both providing also sample clauses).

¹²⁵⁾ E.g., AAA, DIS, FCCC, JCAA, LMAA, OCC.

¹²⁶⁾ For comparison, out of the arbitration institutions mentioned *supra* note 125 only the JCCA provides rules of a similar structure.

¹²⁷⁾ Article 50 (1) CIETAC Rules. Where no amount of money is claimed or where the amount in dispute is not clear, CIETAC will determine whether or not to apply the Summary Procedure by considering factors such as the complexity of the case and the interests involved (Article 50 (2) CIETAC Rules).

¹²⁸⁾ Article 53 CIETAC Rules.

¹²⁹⁾ According to Article 56 CIETAC Rules, the award shall be rendered within three months from the date on which the tribunal is formed (this is three months shorter than in general proceedings and one month shorter than in domestic proceedings; see *infra* Part V.B).

¹³⁰⁾ Article 52 CIETAC Rules.

¹³¹⁾ Article 55 (2) CIETAC Rules.

¹³²⁾ That is why some international arbitration rules exclude the applicability of their fast track rules for multi-party proceedings (see, e.g., Article XXII *Chambre Arbitrale Maritime de Paris* Rules).

count that CIETAC proceedings are already relatively fast compared to proceedings of other international arbitration institutions,¹³³⁾ the parties might wish to consider excluding the application of the Summary Procedure in advance or wish to provide that only disputes relating to certain issues should be resolved under CIETAC's fast track rules (or in some other way tailor these provisions to their needs).

IV. Model Clause

CIETAC recommends the use of the following arbitration clause:¹³⁴⁾

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

CIETAC itself points out that the parties may wish to also provide in their arbitration agreement *“the place of arbitration and/or hearing, the language of arbitration, the number of arbitrators, the nationality of arbitrators, the method of selection of arbitrators, the applicable law of the contract and/or the application of general procedure or summary procedure”*.¹³⁵⁾

In light of the above discussions it is recommended to use the following arbitration clause (optional parts of the clause are displayed in *italics*, alternative options are listed in [square brackets] and remarks that have to be replaced by a specific choice are made in {curly brackets}):

1. Any dispute, controversy or claim arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be submitted to the China International Economic and Trade Arbitration Commission (CIETAC) [Beijing/Shanghai Sub-Commission/South China Sub-Commission]¹³⁶⁾ for arbitration which shall be conducted in accordance with the CIETAC Arbitration Rules¹³⁷⁾ in effect at the time of applying for arbitration. The arbitral award is final and binding upon the parties.

¹³³⁾ See *infra* Part V.B.

¹³⁴⁾ http://www.cietac.org.cn/english/introduction/intro_1.htm#5.

¹³⁵⁾ *Id.*

¹³⁶⁾ As pointed out above at various instances (see, e.g., *supra* Parts III.A., III.D.3. and III.L.), in addition to the arbitration commission also the administrating (Sub-)Commission should be designated.

¹³⁷⁾ For financial transactions the use of the CIETAC Financial Disputes Rules should be considered (see *supra* Part III.E.).

2. The place of arbitration shall be [Beijing/Shanghai/Shenzhen/ {other place in China},¹³⁸⁾ *where also the oral hearings shall be held*].¹³⁹⁾

3. The language of the arbitration shall be [English/English and Chinese].¹⁴⁰⁾

4. The tribunal shall consist of [one/three] arbitrator(s). *The arbitrator(s) appointed by the parties as well as an(y) arbitrator appointed by CIETAC¹⁴¹⁾ need not be member(s) of the "Panel of Arbitrators" issued by CIETAC. The [sole/presiding] arbitrator shall not be (and shall never in his or her lifetime have been) a national of {names of the relevant countries of the parties and third persons having an interest in the result of the case}.¹⁴²⁾*

This arbitration clause deals only with the issues most vital for the proper functioning of subsequent arbitration proceedings between Chinese and foreign parties. As pointed out above in Part III, the parties might want to consider including also provisions on the following issues:

- Excluding CIETAC employees from being appointed as arbitrators;¹⁴³⁾
- Governing law of the arbitration clause;¹⁴⁴⁾
- Fixing of fees for foreign arbitrators;¹⁴⁵⁾
- Additional language for the arbitral award;¹⁴⁶⁾
- Pre-arbitral conciliation or negotiations;¹⁴⁷⁾
- Protective measures and/or restrictions concerning conciliation;¹⁴⁸⁾
- Scope of confidentiality in conciliation procedures¹⁴⁹⁾ as well as in general;¹⁵⁰⁾
- Evidence disclosure and witness procedures;¹⁵¹⁾
- Record of the oral hearing and its distribution to the parties;¹⁵²⁾
- Joinder of separate arbitration proceedings;¹⁵³⁾

¹³⁸⁾ Currently, it cannot be recommended to hold CIETAC arbitration outside China (*see supra* Part III.A.).

¹³⁹⁾ As soon as the place of arbitration is not the same as the domicile of the administering (Sub-)Commission, the place of the oral hearing should be specified too (*see supra* note 32).

¹⁴⁰⁾ *See supra* Part III.G.

¹⁴¹⁾ *See supra* note 65.

¹⁴²⁾ *See supra* note 79.

¹⁴³⁾ On this and on CIETAC's recently restricted practice of appointing staff members as arbitrators *see supra* Part III.F.

¹⁴⁴⁾ *See supra* Part III.B.

¹⁴⁵⁾ *See supra* note 86.

¹⁴⁶⁾ *See supra* note 90.

¹⁴⁷⁾ *See supra* Part III.H.

¹⁴⁸⁾ *See supra* Part III.H.

¹⁴⁹⁾ *See supra* note 100.

¹⁵⁰⁾ *See supra* Part III.K.

¹⁵¹⁾ *See supra* Part III.I.

¹⁵²⁾ *See supra* Part III.J.

¹⁵³⁾ *See supra* Part III.L.

- Application of CIETAC's Summary Procedure.¹⁵⁴⁾

V. Other Distinctive Features

The previous chapters dealt with particularities of the Chinese arbitration system and CIETAC arbitration that should, or for the sake of the validity of the arbitration agreement even must, be taken into account in the drafting process. Chinese arbitration law has, of course, also other distinctive features that might surprise foreign parties. Being mandatory in nature, these features are the unavoidable consequences of the place of arbitration being in China. Furthermore, there are some additional characteristics of CIETAC arbitration which cannot or need not be changed by party agreement but are also worth knowing before concluding a CIETAC arbitration clause. The following chapter will give a short overview of the most important of these other features.

A. Who Decides on the Validity of an Arbitration Agreement?

Chinese arbitration law does not recognize the principle of *Kompetenz-Kompetenz*. Article 20 Arbitration Law provides that where a party is in doubt about the validity of an arbitration agreement “a request can be made to the arbitration commission for a decision or to the people's court for a ruling. If one party requests the arbitration commission for a decision while the other party requests the people's court for a ruling, the people's court shall pass a ruling.” Thus, it is the Chinese courts or the arbitration commission, and not the arbitral tribunal, that may decide on the validity of an arbitration agreement. This split between the jurisdiction on the merits, exercised by the arbitral tribunal, and the jurisdiction on the arbitral competence, allocated by virtue of Article 20 Arbitration Law to the arbitration commission or the courts, is unique in international arbitration¹⁵⁵⁾ and has been widely criticized.¹⁵⁶⁾ On top of increased institutional control and stronger court supervision, the main criticism centers around the potential for procedural delays and possible inconsistencies between the findings of the arbitration commission or the court and the arbitral tribunal.¹⁵⁷⁾ Such delays and inconsistencies are particularly likely where the validity of the arbitration agreement (also) depends on factual issues.

As the first arbitration institution in China, CIETAC has tried to limit the problems created by Article 20 Arbitration Law. In addition to stating that “[t]he

¹⁵⁴⁾ See *supra* Part III.M.

¹⁵⁵⁾ Gu & Zhang, *supra* note 21, at 188 n. 34 (quoting Wang Sheng Chang).

¹⁵⁶⁾ See, e.g., *id.*, at 187 n. 25; Thorp, *supra* note 10, at 616; Kniprath, *supra* note 31, at 95–98.

¹⁵⁷⁾ See generally Gu & Zhang, *supra* note 21, at 187–189.

CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case” the current CIETAC Rules provide that “[t]he CIETAC may, if necessary, delegate such power to the arbitral tribunal.”¹⁵⁸) However, it remains to be seen whether a tribunal’s decision based on such a delegation will be recognized as binding by the Chinese courts.¹⁵⁹) Indeed, a tribunal’s decision that establishes its own jurisdiction may be held to infringe Article 20 Arbitration Law.

Further efforts to increase consistency have been made by the Supreme People’s Court. The Interpretation 2006/7 clarifies that after a decision on the validity of the arbitration agreement has been made by the arbitration commission, any application to a Chinese court to confirm the validity of the arbitration agreement or to set aside the decision of the arbitration commission shall be rejected by the court.¹⁶⁰) Moreover, a so called “reporting system” – similar to the ones in setting aside and enforcement proceedings¹⁶¹) – has been implemented according to which a Chinese court may hold an arbitration agreement invalid only after approval by the Supreme People’s Court.¹⁶²)

B. Additional Remarks on CIETAC Procedures

CIETAC proceedings are relatively quick compared with proceedings administered by other international arbitration institutions.¹⁶³) The CIETAC Rules contain stringent time-limits for the appointment of arbitrators and for the submissions of the parties,¹⁶⁴) and they do not require the drawing up of terms of reference or the like. Hearings of not more than one or two days are typical. Furthermore, Article 42 (1) CIETAC Rules prescribes that the arbitral tribunal shall render its award within six months from the date on which the arbitral tribunal is formed.¹⁶⁵) Although these time-limits are extendable, CIETAC proceedings on average do not last longer than a year.¹⁶⁶)

¹⁵⁸) Article 6 (1) CIETAC Rules. Article 6 (2) CIETAC Rules goes on to specify that CIETAC may make a decision in favor of assuming jurisdiction over a dispute if *prima facie* evidence so suggests, and may make a new decision should later evidence found by the arbitral tribunal be inconsistent with the previous finding.

¹⁵⁹) See, e.g., Thorp, *supra* note 10, at 616; Gu & Zhang, *supra* note 21, at 197.

¹⁶⁰) Article 13 (2) Interpretation 2006/7.

¹⁶¹) See discussions *infra* Part V.E. and F.

¹⁶²) Article 1 Supreme People’s Court’s Notice on Several Questions Concerning the People’s Courts’ Handling with the Issues in Relation to Foreign-Related Arbitration and Foreign Arbitration, 28 August 1995, Fa Fa [1995] No. 18.

¹⁶³) Johnston, *supra* note 8, at 575.

¹⁶⁴) For domestic disputes Article 62 CIETAC Rules lays down even shorter time-limits.

¹⁶⁵) For domestic disputes Article 65 (1) CIETAC Rules requires awards to be rendered even within four months.

¹⁶⁶) Cf. Trappe, *supra* note 101, at 265.

Similar to ICC proceedings, an award is officially scrutinized by CIETAC before it is issued.¹⁶⁷⁾ In this regard Article 45 CIETAC Rules provides that “[t]he CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal’s independence in rendering the award is not affected”.¹⁶⁸⁾

C. Costs

The CIETAC Rules contain two fee scales, one for foreign-related and one for domestic disputes, whereby the fees for domestic disputes are lower. The fees, consisting of a registration fee and a handling fee, have to be paid in their entirety by the claimant when filing for arbitration.¹⁶⁹⁾ Generally, the fees also include the arbitrators’ fees.¹⁷⁰⁾ However, especially where foreign arbitrators are involved, an additional remuneration might have to be agreed upon.¹⁷¹⁾ On top of these fees, CIETAC may collect costs and expenses, such as arbitrators’ travel and accommodation expenses and costs and expenses of experts and interpreters.¹⁷²⁾ As long as hearings are held at one of CIETAC’s (Sub-)Commissions, CIETAC provides a hearing room free of charge.

Generally speaking, CIETAC fees are comparably low. However, as soon as the amount in dispute does exceed a certain higher threshold CIETAC arbitration will become more expensive than proceedings at other arbitration institutions. So, for example, where a case involves an amount of EUR 1,000,000,¹⁷³⁾ CIETAC will charge approximately EUR 22,500 in fees, whereas the ICC will charge between approximately EUR 15,000 and EUR 114,000 depending on whether one or three arbitrators are involved, the complexity of the case, and the time spent resolving

¹⁶⁷⁾ However, by contrast to the ICC, awards are scrutinized by CIETAC staff and not by a board with a broader membership.

¹⁶⁸⁾ As the previous CIETAC Rules did provide for reminders with regard to the *form* of the arbitral award only (Article 56 (2) CIETAC Rules 2000), this is understood to allow both, reminders of issues of form and substance (Wang & Cao, *supra* note 33, at 121).

¹⁶⁹⁾ Article 10 (3) CIETAC Rules. By contrast and generally speaking, most international arbitration rules distinguish between registration fee and deposit of costs of the arbitration but require the claimant only to pay the registration fee on its own (Article 30 (1) and (2) ICC Rules; Article 33 (1) and 34 (2) Vienna Rules; Article 3 (3)(h) and 41 (1) Swiss Rules). However, as these rules also provide that the claimant will have to pay the respondent’s share of the second amount if remaining unpaid (*see* Article 30 (3) ICC Rules; Article 34 (4) Vienna Rules; Article 41 (4) Swiss Rules), in practice these regimes often have the same result as provided for in the CIETAC Rules from the outset but make way for considerable delays. (Similar to the CIETAC Rules, Article 7 (1) DIS Rules also requires the claimant to pay both amounts in advance).

¹⁷⁰⁾ *Cf.* Article 69 (1) CIETAC Rules.

¹⁷¹⁾ *See supra* Part III.F.

¹⁷²⁾ Article 69 (1) CIETAC Rules.

¹⁷³⁾ This corresponds approximately to the average amount in dispute in CIETAC proceedings. *See* Moser & Yu, *supra* note 16, at 560 (stating RMB 9,380,000 as average value of a claim).

the dispute etc. However, were a case involves an amount of EUR 500,000,000, CIETAC will charge approximately EUR 2,570,000, whereas the ICC will charge between approximately EUR 220,000 and EUR 2,060,000 at the maximum.

Generally, the winning party will have to compensate the losing party for its costs.¹⁷⁴⁾ This will usually cover also the winning party's attorney fees and other expenses incurred in pursuing the case, as long as they are "reasonable". In deciding whether the winning party's expenses are reasonable, the arbitral tribunal "[...] shall consider such factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc."¹⁷⁵⁾

In case the parties settle the case or withdraw their claims, CIETAC refunds 70% of the fees if it is before the appointment of the arbitral tribunal, or 50% of the fees if it is before a hearing has taken place.¹⁷⁶⁾ As soon as a hearing has been held, CIETAC does not refund any fees to the parties.

D. Interim Measures of Protection

Contrary to international standards,¹⁷⁷⁾ the Arbitration Law does not grant the arbitral tribunal the power to order interim measures of protection. Instead, the parties have to submit their applications for interim measures to the arbitration commission which then has to forward such application to the competent Chinese Court.¹⁷⁸⁾ This structure has two main disadvantages: Firstly, the decision whether to grant interim measures will have to be made by a judge who does not have previous knowledge of the case. This is said to result in caution and reluctance among Chinese courts to order interim measures in the context of arbitration.¹⁷⁹⁾ Secondly, the rather unnecessary "postman function" of the arbitration commission can cause additional delays;¹⁸⁰⁾ neither the Arbitration Law nor the CIETAC Rules contain any time limits for the forwarding of such applications to the courts. All this is of course unsatisfactory. However, as the relevant provisions of the Arbitration Law are considered mandatory, it is not possible for the parties

¹⁷⁴⁾ Cf. Article 46 CIETAC Rules. Although this provision does not explicitly state that, this common principle is reflected in Article 46 (2) CIETAC Rules with regard to the compensation of expenses and thus is generally followed in CIETAC proceedings.

¹⁷⁵⁾ Article 46 (2) CIETAC Rules. The restriction, formerly contained in Article 59 CIETAC Rules 2000, that the amount of such compensation shall not in any case exceed 10% of the total amount awarded has been abolished.

¹⁷⁶⁾ This was confirmed by Vice-Chairman Yu Jianlong in a meeting with a delegation of US arbitration experts held at CIETAC in Beijing on 15 April 2008.

¹⁷⁷⁾ Cf., e.g., Article 17 UNCITRAL Model Law.

¹⁷⁸⁾ Cf. Articles 28, 46 and 68 Arbitration Law.

¹⁷⁹⁾ See Li Jing, *Preservation of Evidence in China's International Commercial Arbitration: Several Considerations*, 10 VJ 145, 153–154 (2006).

¹⁸⁰⁾ See Thorp, *supra* note 10, at 612–613 (emphasizing that it can often take up to a week or more to have such applications delivered).

to circumvent this regime by agreeing to vest the power to grant interim measures in the arbitral tribunal.¹⁸¹⁾

Another inadequacy of the Arbitration Law is that it does not provide for pre-arbitral interim measures. This together with the fact that applications for interim measures have to be submitted to the arbitration commission seems to suggest that interim measures of protection will only be available after the commencement of arbitral proceedings. Although there have already been signs by some courts that they are willing to permit pre-arbitral interim measures,¹⁸²⁾ the extent of such willingness remains uncertain as long as there is no clarification by the legislature or the Supreme People's Court.

With regard to the substance of interim measures, the Arbitration Law and the CIETAC Rules provide for two different kinds of interim measures of protection only: the preservation of evidence and the preservation of property.¹⁸³⁾ This is understood to leave no scope for other categories of interim measures in the context of arbitration.¹⁸⁴⁾

E. Setting Aside of an Award

With regard to the possibility of setting aside of an award, again the distinction between domestic and foreign-related¹⁸⁵⁾ arbitration becomes crucial. Generally speaking, the courts' review of foreign-related awards is limited to procedural irregularities, whereas domestic awards may also be reviewed on substantive grounds.

For foreign-related awards Article 258 (1) Civil Procedure Law¹⁸⁶⁾ provides (in summary) the following grounds for setting aside: (1) there is no written arbitration agreement, (2) the respondent was not notified of the appointment of the arbitrator(s) or of the proceedings or could not present his case due to reasons for which he was not responsible, (3) the formation of the arbitral tribunal or the arbitral procedure failed to comply with the applicable arbitration rules, or (4) the matters decided in the award fall outside the scope of the arbitration agreement¹⁸⁷⁾ or the authority of the arbitration institution. These grounds reflect the

¹⁸¹⁾ Cf. Li, *supra* note 179, at 151–153.

¹⁸²⁾ See Thorp, *supra* note 10, at 613 (referring to informal statements by representatives of courts from Beijing, Shanghai and Shenzhen).

¹⁸³⁾ See Articles 28, 46 and 68 Arbitration Law; Articles 17 and 18 CIETAC Rules.

¹⁸⁴⁾ See Johnston, *supra* note 8, at 576.

¹⁸⁵⁾ See *supra* Part II.

¹⁸⁶⁾ Article 70 Arbitration Law refers still to Article 260 (1) Civil Procedure Law. However, an amendment of the Civil Procedure Law in 2007 has changed the numbering of the articles so that the provisions formerly contained in Article 260 (1) are now to find in Article 258 (1) Civil Procedure Law.

¹⁸⁷⁾ For such cases Article 19 Interpretation 2006/7 provides that where the part which falls outside the scope of the arbitration agreement is separable from the other parts of the award, the court shall set aside only the part falling outside the scope.

limited grounds for resisting enforcement set out in Article V New York Convention.¹⁸⁸⁾

For domestic awards Article 58 (1) Arbitration Law lists (in summary) the following grounds as reasons for challenge: (1) there is no arbitration agreement, (2) the matters decided in the award fall outside the scope of the arbitration agreement or the authority of the arbitration institution, (3) the formation of the arbitral tribunal or the arbitral procedure violated the statutory procedures,¹⁸⁹⁾ (4) the evidence on which the award is based was forged, (5) the other party withheld evidence affecting the impartiality of the arbitration, or (6) the arbitrator(s) have accepted bribes, resorted to deception for personal gains or made an award that perverted the law. In addition, the court may set aside the award on the grounds of violation of public interest.

As recently clarified by Article 17 Interpretation 2006/7, Article 258 Civil Procedure Law and Article 58 Arbitration Law contain exhaustive lists of grounds for challenge. An application for setting aside of an award has to be filed within six months after the receipt of the award¹⁹⁰⁾ and the competent court needs to render its decision within two months of the receipt of the application.¹⁹¹⁾ For the assessment of the case, the courts may, where necessary, request explanations from the relevant arbitration institution and obtain their files.¹⁹²⁾

In order to avoid local protectionism and to enhance the quality and coherence of decisions setting aside arbitral awards, the Supreme People's Court implemented a so called "reporting system".¹⁹³⁾ According to this system, an award may only be set aside after approval of the respective decision by the Supreme People's Court. In detail, a court that wishes to set aside an award has to report its preliminary decision to the competent Higher People's Court within 30 days of receiving the application, and a Higher People's Court that agrees to set aside the award has to report to the Supreme People's Court within 15 days. However, unfortunately the reporting system does not apply to decisions setting aside a domestic award.

According to Article 61 Arbitration Law with regard to domestic awards the court may also order a re-arbitration, whereby Article 21 Interpretation 2006/7 clarifies and limits the grounds for such re-arbitration to forged evidence (ground (4) above) and withheld evidence affecting the impartiality of the arbitration

¹⁸⁸⁾ William Godwin, *Challenging Awards in China-Sited Arbitrations*, 10 Int. A.L.R. 160, 161 (2007).

¹⁸⁹⁾ According to Article 20 Interpretation 2006/7, not only an infringement of the Arbitration Law but also an infringement of the agreed arbitration rules falls within the scope of this provision.

¹⁹⁰⁾ Article 59 Arbitration Law.

¹⁹¹⁾ Article 60 Arbitration Law.

¹⁹²⁾ Article 30 Interpretation 2006/7. This provision equally applies to enforcement proceedings.

¹⁹³⁾ Supreme People's Court Notice Regarding Issues of the Setting Aside of Foreign-Related Arbitration Awards by the People's Courts, 23 April 1998, Fa Fa [1998] No. 40.

(ground (5) above).¹⁹⁴) Also a re-arbitration award may be challenged according to Article 58 Arbitration Law within six months.¹⁹⁵)

However, the Supreme People's Court has also clarified that no decision to set aside or not to set aside, be it a decision dealing with a foreign-related award or a domestic award, is subject to appeal or retrial.¹⁹⁶)

F. Enforcement of an Award

On top of challenging an award by applying for it to be set aside, parties may apply for refusal to enforce an award. However, re-litigation within the enforcement procedure of previously unsuccessful challenges to an award is not permissible.¹⁹⁷) With regard to the actual grounds available for a refusal to an enforcement, again the categorization of the award as domestic or foreign-related¹⁹⁸) is decisive.

For foreign-related awards the same grounds apply as for the setting aside of foreign-related awards.¹⁹⁹) In addition, the enforcement may be refused by the court if the enforcement would violate social and public interests.²⁰⁰)

For domestic awards the grounds for refusal of enforcement are again broader. Here, Article 213 Civil Procedure Law determines (in summary) the following reasons:²⁰¹) (1) there is no written arbitration agreement, (2) the matters decided in the award fall outside the scope of the arbitration agreement or the authority of the arbitration institution, (3) the formation of the arbitral tribunal or the arbitral procedure violated the statutory procedures, (4) the main evidence ascertaining the facts is insufficient, (5) the law was clearly applied incorrectly, or (6) the arbitrator(s) have accepted bribes, resorted to deception for personal gains or made an award that perverted the law. Thus, the grounds for refusal of enforcement for domestic awards are even broader than the ones for setting aside a domestic award; they include the insufficiency of evidence and errors of law. This is almost equivalent to an appeal.²⁰²) In addition, also here the enforcement may be refused if the court finds that the enforcement would violate social and public interests.

¹⁹⁴) Godwin, *supra* note 188, at 162.

¹⁹⁵) Article 23 Interpretation 2006/7.

¹⁹⁶) Mark Lin, *Supreme People's Court Rules on PRC Arbitration Issues*, 24 J. Int'l Arb. 597, 604 (2007). The same is true with regard to decisions to enforce or not to enforce an award.

¹⁹⁷) Article 26 Interpretation 2006/7.

¹⁹⁸) *See supra* Part II.

¹⁹⁹) Article 71 Arbitration Law and Article 258 (1) Civil Procedure Law.

²⁰⁰) Article 258 (2) Civil Procedure Law. For related case law *see, e.g.*, Benjamin O. Kostrzewa, *China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?* 15 Pac. Rim L. & Pol'y J. 519, 533–534 (2006); Yeoh & Fu, *supra* note 47, at 644–647.

²⁰¹) Again the reference in the relevant provision of the Arbitration Law (here: Article 63 Arbitration Law) is not up to date due to the recent amendment of the Civil Procedure Law.

²⁰²) Thorp, *supra* note 10, at 620.

The time-limit for filing a request for enforcement of an arbitral award is two years.²⁰³⁾ This time limit is not suspended by setting aside procedures and, therefore, a winning party should apply for enforcement even after receipt of an application for the setting aside of the award.²⁰⁴⁾

Similar to the case of setting aside of foreign-related arbitral awards, the enforcement of a foreign-related award (as well as a New York Convention award) may only be refused upon approval of the Supreme People's Court.²⁰⁵⁾ Recent statistics show the success of the reporting system in enforcement matters: Between 2000 and 2006, out of several thousand arbitral awards enforced in China, the Supreme People's Court had to deal with only 26 cases of non-enforcement, of which the awards of only ten cases were eventually denied enforcement.²⁰⁶⁾

However, in contrast to the reporting system for setting aside of awards, in the case of a refusal of enforcement there are no rules governing within what time the Higher People's Court has to decide on a lower court's decision to refuse enforcement and how soon it would have to report to the Supreme People's Court in case it wants to follow the lower court's decision. This can result in considerable delays.²⁰⁷⁾ Furthermore, the reporting system, as in the other cases, applies only to foreign-related awards. Last but not least: A common reason for the failure of enforcement procedures continues to be the difficulties in the actual recovery of the awarded amounts, which is mainly due to the lack of assets of the losing parties²⁰⁸⁾ and the courts' systemic problems of political influence that limit their ability to seize assets.²⁰⁹⁾

VI. Final Remarks & Outlook

Since China's accession to the New York Convention, any well advised non-Chinese party will insist on an arbitration clause in a China-related commercial contract. In trying to provide a *vade mecum* for the drafting of such clauses, this article has described the most important characteristics of CIETAC arbitration and highlighted the main pitfalls and unusual particularities of Chinese arbitration law, as well as illustrated how these are mirrored in the arbitration rules of CIETAC and its practice.

CIETAC, being at the forefront of further developing arbitration in China, has already shown efforts to lessen the negative effects of the Chinese Arbitration

²⁰³⁾ Article 215 Civil Procedure Law.

²⁰⁴⁾ Lin, *supra* note 196, at 602.

²⁰⁵⁾ Article 2 Supreme People's Court's Notice on Several Questions Concerning the People's Courts' Handling with the Issues in Relation to Foreign-Related Arbitration and Foreign Arbitration, 28 August 1995, Fa Fa [1995] No. 18.

²⁰⁶⁾ Moser & Yu, *supra* note 16, at 562.

²⁰⁷⁾ Thorp, *supra* note 10, at 621.

²⁰⁸⁾ Von Wunschheim & Kun, *supra* note 58, at 47.

²⁰⁹⁾ See, e.g., Kostrzewa, *supra* note 200, at 535-538.

Law in several instances. The notable 2005 amendments to its Rules have greatly enhanced party autonomy and in many ways adapted its proceedings to international practice.²¹⁰⁾ Moreover, recent statements by CIETAC's Vice Chairman Yu Jianlong give rise to expectations for further improvements of CIETAC's practice. Possible improvements currently considered are said to include ending the practice of appointing CIETAC staff members as arbitrators (in addition to the above mentioned restrictions recently made)²¹¹⁾ and a reform of CIETAC's fee system.²¹²⁾ With regard to the latter, Vice Chairman Yu Jianlong confirmed his belief in adjusting the fee schedule to international standards so that foreign arbitrators could be more involved²¹³⁾ and announced that the fee rates for cases involving very high amounts will be changed in due course.²¹⁴⁾ Whereas these changes could be carried out irrespective of any legislative amendments and some of the other remaining particularities of CIETAC arbitration can be circumvented by respective party agreements, further compliance with international standards would mostly depend on a thorough reform of the Arbitration Law.

China's current Arbitration Law follows a protective approach. Agreements providing for ad hoc arbitration are considered to be invalid. Several tasks, which in other jurisdictions lie in the competence of the arbitral tribunal, are in China allocated to the arbitration commission or the courts. In addition, foreign arbitration institutions are practically excluded from administering proceedings in China. Thus, it is not surprising that there have been ample calls for reform.²¹⁵⁾ Although it is still unclear when the Chinese Arbitration Law will be amended, a revision process has been (or at least was) already initiated²¹⁶⁾ and it is hoped that the Chinese legislature will take up several of the points raised by practitioners and scholars in the last years. However, it is expected that at least the main statutory restrictions to party autonomy are likely to remain. Although there have been some positive signs from both the legislature and the courts for considering per-

²¹⁰⁾ See, e.g., Moser & Yuen, *supra* note 33, at 403 (concluding that the new rules represent a "great leap forward" and "a marked improvement" over the previous rules); Kostrzewa, *supra* note 200, at 525 (concluding that the new rules have largely cured the problems previously associated with CIETAC's arbitration rules). See also Kniprath, *supra* note 65; David E. Wagoner, *A Breath of Fresh Air in Chinese Dispute Resolution*, 24 ASA Bulletin 26 (2006).

²¹¹⁾ See *supra* Part III.F.

²¹²⁾ Moser & Yu, *supra* note 16, at 563.

²¹³⁾ *Id.*, at 559.

²¹⁴⁾ *Id.*, at 561.

²¹⁵⁾ See, e.g., Thorp, *supra* note 10; Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. Dayton L. Rev. 421 (2006); Wang Sheng Chang & Sarah E. Hilmer, *China Arbitration Law v UNCITRAL Model Law*, 9 Int. A.L.R. 1 (2006); Kong Yuan, *Revision of China's 1994 Arbitration Act – Some Suggestions from A Judicialization Perspective*, 22 J. Int'l Arb. 323 (2005); Song Lianbin, Zhao Jian & Li Hong, *Approaches to the Revision of the 1994 Arbitration Act of the People's Republic of China*, 20 J. Int'l Arb. 169 (2003).

²¹⁶⁾ See Thorp, *supra* note 10, at 622 (stating that "the reform of the Arbitration Law has slipped down the agenda somewhat").

mitting ad hoc arbitration,²¹⁷) it seems that for the near future China is “*not ready for such a dramatic change*”.²¹⁸) Similarly, the questions around the validity of designating foreign arbitration institutions are also not expected to be clarified soon.²¹⁹)

Thus, even after possible amendments to the Arbitration Law, drafting arbitration clauses for China-related contracts will continue to require special attention and additional provisions in order to avoid unwanted surprises and to protect the interests of the parties.

²¹⁷) See Kang, *supra* note 13, at 202 (quoting Hu Kangsheng, Vice Director of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress); Johannes Trappe, *Praktische Erfahrungen mit chinesischer Schiedsgerichtsbarkeit*, 2004 SchiedsVZ 142, 145–146 (quoting Xiao Yang, President of the Supreme People’s Court).

²¹⁸) Thorp, *supra* note 10, at 618.

²¹⁹) See, e.g., *id.*, at 610.

