

CHINA – MAINLAND

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS ⁺

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Arbitration is a commonly used dispute resolution mechanism for Sino-foreign disputes in China. It is a key characteristic of the Chinese arbitration regime that PRC law draws a distinction between "foreign-related" disputes (broadly, where one or more party is domiciled or habitually resides outside mainland China, or where the subject matter of the dispute is outside mainland China) and purely domestic disputes (where all parties and other elements of the dispute are based in mainland China). This critical distinction affects many aspects of the arbitration. The regime for foreign-related disputes is considerably more flexible.

Key places of arbitration in the jurisdiction	The principal institution of relevance to non-Chinese parties is the China International Economic and Trade Arbitration Commission (CIETAC), headquartered in Beijing and with sub-commissions in Shanghai, Shenzhen, Chongqing, Tianjin, Hangzhou, Wuhan and Fuzhou within mainland China, as well as an arbitration centre in Hong Kong.
Civil law / Common law environment?	PRC law largely adopts features from the civil law tradition. Precedents have no binding authority on future cases and are only of referential value.
Confidentiality of arbitrations?	PRC Arbitration Law provides that arbitration proceedings are confidential unless the parties agree otherwise.
Requirement to retain (local) counsel?	The parties can be represented by counsel, agents or themselves. The Ministry of Justice also allows foreign law firms to represent clients in arbitration cases conducted in China and/or governed by PRC law. However, only locally qualified and licensed lawyers may express official "opinions" on PRC law during an arbitration in mainland China.
Ability to present party employee witness testimony?	φ
Ability to hold meetings and/or hearings outside of the seat?	The place of hearing is regulated by the rules of the arbitral institutions. Generally, parties are able to hold hearings outside of the seat by agreement or when so directed by the tribunal.
Availability of interest as a remedy?	In practice, arbitral tribunals seated in China usually award simple or compound interest, calculated from the date due until the date of full payment.
Ability to claim for reasonable costs incurred for the arbitration?	In arbitrations seated in mainland China, the losing party is generally ordered to compensate the winning party for the reasonable costs incurred in the arbitration. There are no express statutory limits on the amount of costs that a tribunal can order the losing party to reimburse.
Restrictions regarding contingency fee arrangements and/or third-party funding?	PRC lawyers are allowed to enter into success fee arrangements or pure contingency fee arrangements, or a combination of both with their clients. Where contingency fees are allowed, such fees are not permitted to exceed 30% of the amount in dispute. Third party funding in arbitration is not prohibited in mainland China.

Party to the New York Convention?	In 1987, China became a party to the New York Convention subject to the reciprocity and commercial reservations.
Other key points to note	φ
WJP Civil Justice score (2017-2018)	0.50, though this is believed to be not very objective due to unfamiliarity with the jurisdiction or largely due to perceived bias.

ARBITRATION PRACTITIONER SUMMARY

China has not adopted the UNCITRAL Model Law ("Model Law"). Although certain key elements of the Model Law have influenced Chinese domestic legislation, many aspects of arbitration seated in China diverge from the Model Law. For example, tribunals seated in mainland China are not empowered by law to order interim measures. China does not apply the doctrine of competence-competence; the power to decide a tribunal's jurisdiction lies with arbitral institutions and the competent courts, rather than the tribunal itself.

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Date of arbitration law?	The PRC Arbitration Law has been in force since 1995. An amendment concerning the qualifications of the arbitrators is effective from 1 January 2018.
UNCITRAL Model Law? If so, any key changes thereto?	China has not adopted the UNCITRAL Model Law. Although certain key elements from the Model Law can be seen to have influenced Chinese domestic legislation, PRC Arbitration Law and legal practice differs in a number of ways from jurisdictions that have adopted the Model Law.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	<p>There are 4 levels of courts of general jurisdiction: Basic (at local level), Intermediate (at city level or equivalent), Higher (at provincial level) and the Supreme People's Court in Beijing. There are also a number of courts of specialist jurisdiction (e.g. maritime courts and intellectual property courts).</p> <p>For arbitration involving foreign elements (e.g., where one party is not Chinese, or the subject matter of the dispute is located outside mainland China), applications related to setting aside the award, and validity of an arbitration agreement shall be subject to intermediate people's courts. For maritime or maritime trade disputes, cases concerning the validity of an arbitration agreement are subject to the jurisdiction of a maritime court. For recognition and enforcement of foreign awards under the New York Convention, the intermediate court where the award debtor is domiciled or has enforceable assets shall have jurisdiction. Generally, a special division of the court is set up to hear arbitration related matters together with other commercial cases.</p>
Availability of <i>ex parte</i> pre-arbitration interim measures?	Pre-arbitration interim measures are available in aid of domestic arbitration and foreign-related Chinese arbitrations administered by arbitration commissions established in mainland China. They are not available in support of an arbitration seated outside mainland China.

<p>Courts' attitude towards the competence-competence principle?</p>	<p>PRC Arbitration Law does not recognise the principle of competence-competence. Instead, the power to determine the tribunal's jurisdiction is vested in the relevant arbitral institution and the competent courts. In practice, a Chinese arbitral institution may delegate to arbitral tribunals to rule on their own jurisdiction. However, when one party has applied to the court to rule on the validity of the arbitration agreement (including the jurisdiction of the tribunal), and the other party requests the arbitral institution to decide the same issue, the court takes precedence over the arbitral institution. (Where the objection is first raised with the arbitral institution and a decision has been made, the court will not accept a later application to challenge the tribunal's jurisdiction).</p>
<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>For foreign awards, in general there is no additional ground for non-enforcement in China than those specified in New York Convention. However, the Chinese courts may refuse to recognise or enforce an award for reasons such as expiry of the limitation period for enforcement (2 years) under PRC law.</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Chinese courts will generally refuse to recognise or enforce an arbitral award that has been annulled at its seat.</p>
<p>Other key points to note?</p>	<p>∅</p>

JURISDICTION DETAILED ANALYSIS

1. Legal framework

1.1 Is PRC Arbitration Law Based on the UNCITRAL Model Law?

China has not adopted the UNCITRAL Model Law ("Model Law"). However, certain key elements from the Model Law can be seen to have influenced Chinese domestic legislation. For example, arbitration depends on a valid arbitration agreement between the parties, the parties exclude the jurisdiction of the Chinese courts by concluding an arbitration agreement, and an arbitral award is final and binding on the parties to the arbitration.

The main differences between the Model Law and the PRC Arbitration Law include the following:

- *Ad hoc* arbitration is permitted under the Model Law, while it is not permitted for arbitrations seated in mainland China under the PRC Arbitration Law.¹
- The Model Law adopts the doctrine of *competence-competence*, under which arbitrators have power to rule on their own jurisdiction. The PRC Arbitration Law gives this power to arbitral institutions and the competent courts,² although in practice some institutions will delegate the power to the tribunal.
- Under the Model Law, the tribunal may grant interim measures at the request of a party. Under the PRC Arbitration Law, arbitral tribunals do not have the power to grant or implement interim measures. A party seeking interim measures may apply to the relevant arbitral institution, which will forward the party's application to the competent court for determination;³
- Under the Model Law, a court may set aside, or refuse enforcement of, an arbitral award on the basis of serious procedural irregularities. In purely domestic arbitrations, PRC laws provide limited grounds relating to evidence in addition to procedural irregularities, upon which the courts may refuse to enforce arbitral awards.⁴ Any decision not to enforce a foreign-related award rendered by a domestic arbitration institution (known in mainland China as an "arbitral commission")⁵ must be based on certain jurisdictional issues, or on serious procedural defects.⁶ In its Interpretation of the PRC Arbitration Law, China's Supreme People's Court ("SPC") has sought to limit the scope for parties to rely on trifling procedural defects as a basis for challenging awards.⁷

¹ Arbitration Law of the People's Republic of China ("PRC Arbitration Law") does not expressly prohibit *ad hoc* arbitration. However the prohibition can be inferred from Article 16, which requires that an arbitration agreement shall contain the designated arbitration institution. In December 2016, the SPC indicated that "ad hoc" arbitration should be made available for companies registered in China's Pilot Free trade Zone. However, it remains to be seen how *ad hoc* arbitration will be received by the Chinese courts. Nevertheless, awards rendered outside mainland China in *ad hoc* arbitration are enforceable in mainland China.

² According to Article 20 of PRC Arbitration Law, if a party challenges the validity of the arbitration agreement, it may request the arbitral institution to make a decision or apply to the court for a ruling. If one party requests the arbitral institution to make a decision and the other party applies to the court for a ruling, the people's court shall give a ruling.

³ Article 28 of PRC Arbitration Law. Following amendments to the Civil Procedure Law in 2012 in relation to injunctive measures, it should also be possible for parties to apply directly with the court.

⁴ Article 58 of PRC Arbitration Law and Article 21 of Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China ("SPC Interpretation of Arbitration Law").

⁵ An arbitration commission is an arbitration institution established according to the requirements set out in PRC Arbitration Law and registered with the administrative Departments of Justice at provincial level in mainland China.

⁶ Article 70 of PRC Arbitration Law and Article 274 of Civil Procedure Law of the People's Republic of China (2017) ("PRC Civil Procedure Law").

⁷ Article 20 of SPC Interpretation of Arbitration Law.

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1.2 When the Arbitration Law was last revised?

The PRC Arbitration Law was promulgated in 1994 and came into force in 1995.

To date, the PRC Arbitration Law has not been subject to any significant update or amendment. However, in September 2017 China passed amendments to a number of laws relating to the professional qualifications required of judges, prosecutors, lawyers, notaries and civil servants.⁸

As it relates to the PRC Arbitration Law, the amendment concerns the qualifications of arbitrators, and is effective from January 1st, 2018. In addition to the existing requirement of at least eight years' experience in the field of arbitration an arbitrator is required to pass the unified national examination for legal professional qualifications and to obtain a legal professional qualification. Alternatively, an arbitrator must have served as a judge for at least eight years (and retired from the bench). The other alternative qualification requirements remain the same.⁹

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the governing law of the arbitration agreement?

Under PRC law, there is no provision allowing parties to choose the governing law of a domestic contract. It is therefore generally understood that an arbitration agreement with no foreign element must be governed by PRC law.

However, parties may agree on the law applicable to a foreign-related arbitration agreement (*e.g.*, where one or more of the parties is not Chinese, or is habitually resident outside mainland China). In this regard, the SPC has clarified that the parties' agreement on governing law of the main contract should not be considered as their agreement on the governing law of the arbitration agreement.¹⁰

In the absence of party agreement, the law of the domicile of the arbitration commission or the law of the place of arbitration shall apply.¹¹ If the domicile of the arbitration commission differs from the place of arbitration, it is unclear which law prevails. If the parties do not stipulate an arbitral commission, or the place of arbitration is unclear, the Chinese courts may apply PRC laws to determine the validity of arbitration agreement.¹²

⁸ Article 6 of Decision of the Standing Committee of the National People's Congress on Amending Eight Laws including the Judges Law of the People's Republic of China.

⁹ Under Article 13 of the PRC Arbitration law, alternative qualification requirements include (1) having worked as a lawyer for at least eight years, or (2) having been engaged in legal research or legal education, and in possession of a senior professional title; or (3) having acquired the knowledge of law and engaged in the professional work in the field of economy and trade, and acquired a senior professional title or reached an equivalent professional level.

¹⁰ Reply of the Supreme People's Court on Confirmation of the Validity of Arbitration Agreement dated 9 March 2006, and Article 13 of Provisions of the Supreme People's Court on Several Issues Concerning Trial of Cases Involving Judicial Review of Arbitration.

¹¹ Article 18 of Law of the People's Republic of China on Application of Laws to Foreign-related Civil Relations, effective 1 April 2011 and Article 16 of SPC Interpretation of Arbitration Law.

¹² Article 14 of Judicial Interpretation of the Supreme People's Court on the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (I), effective 7 January 2013.

2.2 Is the arbitration agreement considered to be independent from the rest of the content in which it is set forth?

Under PRC law, an arbitration agreement exists independently of the contract that contains it. The amendment, rescission, termination or invalidity of main contract does not affect the validity of the arbitration agreement.¹³

If the parties have agreed when the contract is concluded to refer disputes to arbitration, failure of the formation of the contract shall not affect the validity of the arbitration agreement. If a contract does not come into effect, or is repealed after its formation, the validity of the arbitration agreement would also be determined independently.¹⁴

2.3 What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing and must adequately identify the subject matter.

An arbitration agreement should contain the following particulars:¹⁵

- (1) an expression of intent to apply for arbitration;
- (2) the matters to be referred to arbitration; and
- (3) a designated arbitration commission.

In 2006, the SPC clarified that the requirement for a written arbitration agreement should be interpreted broadly, so as to encompass, for example, an exchange of emails.¹⁶

A more important restriction is that arbitrations involving no foreign element must be arbitrated in mainland China by a Chinese arbitral institution.¹⁷ Only foreign-related arbitrations may, in the eyes of Chinese courts, be arbitrated elsewhere. Failure to comply may result in the award being unenforceable in mainland China.

2.4 To what extent is a third party to the contract containing the arbitration agreement is bound by said arbitration agreement?

Generally, a third party is not bound by the arbitration agreement in the contract. However, there are a number of exceptions:

- (1) Transfer of credits or debts: the arbitration agreement over such rights or obligations shall be binding upon the transferee, unless the parties agree otherwise, or the transferee explicitly objects to or is unaware of the existence of a separate arbitration agreement when the credits or debts are transferred.¹⁸
- (2) Merger or split of an entity: the arbitration agreement shall be binding upon the successors to the party's rights and obligations, unless the parties agree otherwise when entering into the arbitration agreement.¹⁹

¹³ Article 19 of PRC Arbitration Law.

¹⁴ Article 10 SPC Interpretation of Arbitration Law.

¹⁵ Article 16 of PRC Arbitration Law.

¹⁶ Article 1 of SPC Interpretation of Arbitration Law.

¹⁷ Where the arbitration is seated in mainland China, the administering commission must be Chinese (Article 11 of PRC Arbitration Law). Non-Chinese arbitral institutions, for instance, ICC, HKIAC or SCC, are not permitted to administer arbitrations seated in mainland China.

¹⁸ Article 9 of SPC Interpretation of Arbitration Law.

¹⁹ Article 8 of SPC Interpretation of Arbitration Law.

- (3) Death of a party: the agreement shall be binding upon the heir to the party's rights and obligations in respect of arbitrable matters, unless the parties agree otherwise when entering into the arbitration agreement.²⁰

2.5 Are there restrictions to arbitrability?

Both contractual disputes and tortious disputes are arbitrable in mainland China.²¹

The following disputes are not permitted to be resolved via arbitration:²²

- (1) Disputes over marriage, adoption, guardianship, fostering and inheritance; and
- (2) Administrative disputes falling within the jurisdiction of the relevant administrative authorities.

Disputes concerning the validity of registered trademarks and patents are non-arbitrable.²³ However, disputes over copyrights may be resolved by arbitration.²⁴

Disputes between administrative authorities and business operators regarding the enforcement of anti-monopoly law are non-arbitrable.²⁵ Although PRC laws do not have express provisions concerning arbitrability of disputes between business operators regarding monopoly agreements,²⁶ in practice PRC courts tend to deny the jurisdiction of the arbitral tribunal.

3. Intervention of domestic courts

3.1 Will the court stay litigation if there is a valid arbitration agreement covering the dispute?

A valid arbitration agreement may exclude the court's jurisdiction over the same issue. If one party has instituted an action in a court without declaring the existence of the arbitration agreement and, after the court has accepted the case, the other party submits the valid arbitration agreement prior to the first hearing. The court is required to dismiss the case.²⁷

However if, prior to the first hearing, the other party has not raised an objection to the court's jurisdiction to hear the case, that party shall be deemed to have renounced the arbitration agreement and the court will continue with the case.²⁸

3.2 How do courts treat injunctions made by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no legal basis for a PRC court to stay its proceedings in response to an arbitral tribunal's order that purports to bind that court. In practice, such orders can be made only by tribunals sitting outside mainland China (as Chinese tribunals have no power to order interim relief), and they are likely to be disregarded by the courts.

²⁰ Article 8 of SPC Interpretation of Arbitration Law.

²¹ Article 2 of PRC Arbitration Law.

²² Article 3 of PRC Arbitration Law.

²³ Articles 2 and 45 of Trademark Law of the People's Republic of China.

Articles 45 and 46 of Patent Law of the People's Republic of China.

²⁴ Article 55 of Copyright Law of the People's Republic of China.

²⁵ Article 3 of PRC Arbitration Law.

²⁶ Article 50 of Anti-Monopoly Law of the People's Republic of China.

²⁷ Article 26 of PRC Arbitration Law.

²⁸ Article 26 of PRC Arbitration Law.

3.3 Will the courts intervene in arbitrations seated outside of the jurisdiction?

There is no provision in PRC law empowering the courts to render interim measures in aid of arbitration seated outside of the jurisdiction. PRC courts do not accept applications for interim relief in aid of arbitrations seated outside mainland China. The only exception is that the mainland Chinese courts may grant interim measures in support of a foreign maritime dispute under the Law of Maritime Special Proceedings.²⁹

Orders for interim relief in support of foreign arbitrations, whether granted by a foreign court or an arbitral tribunal, are not enforceable in China. Under the New York Convention, PRC courts are under an obligation to enforce foreign awards only. Unless the order is made in the form of a partial award, it will not be enforced in China.

In general, PRC courts will not intervene in arbitrations seated outside of mainland China. However, where an arbitration agreement is China-related (e.g., in a purely domestic contract that refers disputes to arbitration outside mainland China), one party may apply to a PRC court to rule that such arbitration clause is invalid. The court's decision is likely to impact on the overseas arbitration as well as on any attempt to enforce the award in China.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

Pursuant to the PRC Arbitration Law, parties may be represented by legal counsel or agents, or be self-represented.³⁰

Foreign or international law firms are allowed to be counsel of record to participate in Chinese arbitration proceedings. However, foreign or international counsel are restricted from arguing Chinese law issues.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Despite of the requirements of being "fair and honest", Chinese law does not impose a mandatory disclosure obligation on arbitrators.³¹ In the following circumstances, the arbitrator must withdraw, and the parties also have the right to challenge the arbitrator before the arbitration commission:³²

- (1) The arbitrator is a party in the case or a close relative of a party or its agent in the case;
- (2) The arbitrator has a personal interest in the case;
- (3) The arbitrator has other relationship with a party or its agent which may affect the impartiality of arbitration; or
- (4) The arbitrator has privately met with a party or its agent, or accepted a gift or entertainment from a party or its agent.

In practice, such challenges are usually handled by the arbitration commissions rather than the courts. Under the CIETAC Rules 2015, arbitrators are required to sign a declaration that discloses any facts or circumstances

²⁹ Article 21(2) of Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China provides that: "*Where a foreign court has already accepted a related maritime case or the relevant dispute has already been submitted for arbitration, but the involved property is within the People's Republic of China, if a party applies for maritime claim preservation with the maritime court of the place where the property is located, the maritime court shall accept the application.*".

³⁰ Article 29 of PRC Arbitration Law.

³¹ Article 13 of PRC Arbitration Law.

³² Article 34 of PRC Arbitration Law.

likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.³³ Although the CIETAC Rules 2015 do not expressly provide any consequence for failure to disclose, in practice, parties might be able to challenge the arbitrators on that ground.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

Under PRC law, the courts are not allowed to intervene in the nomination of arbitrators. Arbitrators are nominated by parties or appointed by the chairman of the arbitration commissions.³⁴ Since *ad hoc* arbitration is currently not permitted in mainland China, the Chinese courts will not involve themselves in, or assist with, the nomination of arbitrators.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?

The power to grant interim measures in respect of a dispute that is subject to arbitration is reserved to the Chinese courts. With respect to foreign-related arbitration, the court competent to hear applications for interim measures is the Intermediate People's Court at the place of the respondent's domicile or where relevant assets or evidence is located.³⁵

Usually, an application for asset or evidence preservation measures is made on an *ex parte* basis. In practice, the court usually decides the application on paper without hearing the respondent's arguments. The rationale is that, once a respondent is put on notice of the application, the risk of destroying evidence or dissipating assets increases. The respondent has a right to apply for a review of the ruling made against it.

In a complex situation, a court may invite a respondent to respond to the application and may hold hearings to hear the parties' arguments in support of their respective positions. This is often the case in evidence preservation and asset preservation applications.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

PRC Arbitration Law stipulates that arbitration proceedings are confidential, unless the parties agree otherwise.³⁶

4.5.2 Does it regulate the length of arbitration proceedings?

There is no provision in the PRC Arbitration Law limiting the length of arbitration proceedings. This issue is normally dealt with by the relevant arbitration rules. In practice, Chinese arbitral commissions readily grant extensions to arbitral tribunals. Consent of the parties to such extensions is not required.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The place of a hearing is generally regulated by the rules of the arbitral institutions. Unless otherwise agreed by the parties, the default place of hearing is the place of the arbitration commission which administers the case. The tribunal does have the power to decide to hold the hearing at a different place, though it is seldom exercised.

³³ Article 31-32 of China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules ("CIETAC Rules 2015"). Available at: <http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en>.

³⁴ Articles 31 and 32 of PRC Arbitration Law.

³⁵ Articles 100 to 103 of PRC Civil Procedure Law (2017) and Article 28 of PRC Arbitration Law.

³⁶ Article 40 of PRC Arbitration Law.

4.5.4 Does it allow for arbitrators to issue interim measures?

In mainland China, the power to grant interim measures (such as injunctive relief or orders for asset and evidence preservation) in arbitration is reserved to the courts. The PRC Arbitration Law does not grant tribunals seated in mainland China any power to order interim measures. However, arguably these tribunals can issue interim orders of a type other than those expressly reserved for the courts.

The procedure for seeking interim relief differs where the application is made prior to initiating the arbitration proceedings or concurrently with the commencement of arbitration, and where it is made after proceedings have commenced. Once arbitration proceedings have commenced, the party seeking interim measures must submit the application to the relevant arbitration commission, which will forward the party's application to the competent people's court.³⁷ Before commencement of the arbitration, a party may apply to the competent court for property preservation or other preservative measures.³⁸ For arbitration seated in mainland China, the party may also request the court to grant pre-arbitration interim measures through an arbitration commission under the rules of a number of Chinese arbitration commissions.³⁹ If this issue arises in practice, it is important to seek legal advice on the specific circumstances of the case.

Even though the PRC Arbitration Law does not confer the power of granting interim relief to arbitral tribunals, some Chinese arbitration commission rules nevertheless provide that arbitral tribunals may order interim relief upon agreement of the parties.⁴⁰ Where the place of arbitration is mainland China, a tribunal's order made pursuant to such rules depends on the parties' voluntary compliance and will not be enforced by a PRC court. However, such an order may be enforced in a jurisdiction outside of mainland China, such as Hong Kong or Singapore.

Some arbitration commissions' rules have introduced emergency arbitrator procedures which allow emergency interim relief in support of arbitration, before the tribunal is formally constituted. These include the CIETAC Rules 2015,⁴¹ Beijing Arbitration Commission Arbitration Rules⁴² and the China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre).⁴³ The above rules specify that emergency arbitrator procedures apply only to arbitrations seated outside mainland China (including Hong Kong or Macau arbitrations) administered by the respective arbitral institutions.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The PRC Arbitration Law does not provide detailed rules in relation to arbitrators' rights to admit or exclude evidence. The PRC Arbitration Law states that parties shall provide evidence to support their own arguments, and the arbitral tribunal may collect evidence of its own volition if it considers necessary.⁴⁴ However, it is widely understood and practiced that the arbitrators do have the rights to admit or exclude evidence as they see fit.⁴⁵ Unlike courts, the tribunal has no authority to compel a third party to disclose any document.

³⁷ Articles 28 and 46 of PRC Arbitration Law.

³⁸ Article 101 of PRC Civil and Procedural law (2017).

³⁹ Article 16 of BAC Rules ; Article 19 of The China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission. Available at: http://www.shiac.org/upload_files/file/2016/20160228221941_9298.pdf.

⁴⁰ See, for example, Article 23(3) of CIETAC Rules 2015.

⁴¹ Article 23(2), Article 77(2) and Appendix III of CIETAC Rules 2015.

⁴² Article 63 of Beijing Arbitration Commission Arbitration Rules. Available at: http://www.bjac.org.cn/english/page/zc/guize_en.html.

⁴³ Article 21 of The China (Shanghai) Pilot Free Trade Zone Arbitration Rules of Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre).

⁴⁴ Article 43 of PRC Arbitration Law.

⁴⁵ In civil cases, Chinese judges have discretion to admit or reject evidence as they see fit having regard to the relevant rules of evidence. Arbitrators by analogy should also have similar discretion in admitting or rejecting evidence.

4.5.6 Does it make it mandatory to hold a hearing?

The default position is that arbitration shall be conducted by means of oral hearings.⁴⁶ If the claimant fails to appear before the arbitration tribunal without justified reasons after receiving written notice to appear, or leaves the hearing prior to its conclusion without the permission of the arbitration tribunal, it may be deemed to have withdrawn its application for arbitration. If the respondent is absent from the oral hearings, a default award may be made.⁴⁷

A hearing is not mandatory if the parties agree to arbitrate disputes without oral hearings. In that circumstance, the arbitral tribunal may render an award on the basis of the written submissions and other materials submitted by the parties during the proceedings.⁴⁸

4.5.7 Does it prescribe principles governing the awarding of interest?

The PRC Arbitration Law is silent on whether arbitrators may award interest in arbitration. In practice, arbitral tribunals seated in China usually award simple or compound interest, calculated from the date due until the date of full payment.

According to the PRC Civil Procedure Law, if a party fails to fulfil its payment obligations within the time limit specified in the judgment, ruling or "*any other enforceable legal instrument*", the party is obliged to pay double interest on the belated payment for the period of deferred performance.⁴⁹ In 2014, the SPC clarified that interest for a late payment should be calculated according to the method stated in the award, plus additional interest at the rate of 0.0175% per day.⁵⁰

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

This principle is set out in the Measures on Arbitration Fees to be Charged by Arbitration Commissions⁵¹ (the "**1995 Measures**"), which relate to "arbitration fees", *i.e.*, fees collected by an arbitration commission and used to pay the arbitrators and for the administration of the case. Article 9 of the 1995 Measures states that: "*The arbitration fees shall, in principle, be borne by the losing party*". In arbitrations seated in China, the losing party is generally ordered to compensate the winning party for its reasonable costs of the arbitration.

There are no express limits in PRC law or in Chinese arbitration rules on the amount of costs that a tribunal can order an unsuccessful party to reimburse. Awards in respect of lawyers' fees depend heavily on the individual tribunal's discretion as to whether the costs are reasonable in the eyes of the tribunal.

Where a party is only partially successful, Article 9 of the 1995 Measures (in respect of arbitration fees payable to arbitration commission and the arbitral tribunal) provides that: "*the arbitration tribunal shall determine the proportion of arbitration fees to be borne by each party according to the liability of each party.*"

Under some of the leading Chinese arbitration commissions' rules, the arbitral tribunal has discretion to decide the cost allocation between the parties. The factors that the arbitral tribunal is required to take into consideration include the outcome and complexity of the case, the workload of the successful party and/or its representatives and the amount in dispute.

⁴⁶ Article 39 of PRC Arbitration Law.

⁴⁷ Article 42 of PRC Arbitration Law.

⁴⁸ Article 39 of PRC Arbitration Law.

⁴⁹ Article 253 of PRC Civil Procedure Law 2017.

⁵⁰ Article 1 of Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law to the Calculation of the Interest Accrued on Debts for the Period of Delay in Performance during Enforcement Proceedings.

⁵¹ Measures on Arbitration Fees to be Charged by Arbitration Commissions, Promulgated by the State Council on July 28, 1995.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

An arbitrator will become subject to civil or criminal liability, and the arbitral institution should remove his or her name from the register of arbitrators, in the following circumstances:⁵²

- (1) The arbitrators have privately met with a party or agent or accepted an invitation to entertainment or gift from a party or its agent, and the circumstance is serious;
- (2) The arbitrators have embezzled funds, accepted bribes, committed malpractice for personal benefit or perverted the law when deciding cases.

PRC law does not provide more details on this topic. There are a number of published cases in this regard, but they are not binding as precedent.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

An arbitrator who deliberately renders an award in violation of the law and against the facts may be charged with criminal liability of up to seven years imprisonment under the PRC Criminal Law.⁵³ Other participants may be subject to criminal liability if they refuse to satisfy an award and the circumstances are serious.⁵⁴

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Under the PRC Arbitration Law, an award is required to specify the claims, the facts, the reasons for the decision, the results of the award, the allocation of arbitration fees and the date of the award. However, the facts and the reasons for the decision can be omitted if the parties so agree.⁵⁵ For example, under the BAC Rules 2015, the facts and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.⁵⁶

5.2 Can parties waive the right to seek the annulment of the award?

The PRC Arbitration Law is silent on whether any of the grounds for setting aside the award are subject to waiver by party agreement. Since the right to seek the setting aside of an award or to resist its enforcement are provided by law, in practice it is unlikely that the Chinese courts would consider that parties can waive their statutory rights by agreement.

The SPC Interpretation of Arbitration Law indicates that failure by a party to object to the validity of an arbitration agreement during arbitration proceedings would be considered a waiver of its right to raise such objection to set aside or resist enforcement of the award after the award is made.⁵⁷

⁵² Article 38 of PRC Arbitration Law

⁵³ Article 399 of Criminal Law of the People's Republic of China

⁵⁴ Article 1 and Article 2 of Interpretations of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Criminal Cases of Refusing to Satisfy Judgments or Rulings

⁵⁵ Article 54 of PRC Arbitration Law

⁵⁶ Article 48 of BAC Rules 2015

⁵⁷ Article 27 of SPC Interpretation of Arbitration Law.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

For arbitration administered by an arbitration commission in China, the arbitral award must be signed by the tribunal members and sealed by the arbitration commission.⁵⁸

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

The arbitral award is final and binding. Neither party can bring a lawsuit before a court or commence another arbitration at an arbitration commission over the same dispute.⁵⁹

The parties can only apply to the competent court to set aside or refuse to enforce an arbitral award. The ruling of a court to set aside or to refuse enforcement of an arbitral award cannot be appealed.⁶⁰

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Arbitration awards rendered by Chinese arbitration commissions out of proceedings seated in mainland China are enforceable as domestic judgments, subject to limited grounds for non-enforcement. Foreign arbitration awards (which are rendered in arbitration seated outside of mainland China) are enforceable in mainland China under the New York Convention.

The general procedures for the recognition and enforcement of foreign awards are as follows:

(1) The competent court is the court where the party against whom enforcement is sought is domiciled or where the enforceable property is located;⁶¹

(2) The party seeking enforcement should submit a written enforcement application, the duly authenticated original award or a certified copy thereof, the original arbitration agreement or a certified copy thereof, proof of the applicant's identity and a valid power of attorney.⁶² A Chinese translation must be provided for any documents specified above that are not in Chinese;

(3) The time limit for submitting a recognition and enforcement application is two years, commencing from the last day of the performance period specified in the arbitral award, or the effective date of the arbitral award if the award does not specify a period for performance;⁶³

(4) Fees and expenses for enforcement are paid in deposit.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

If a party applies for enforcement of the arbitration award and the other party applies to set aside the same award, the court shall suspend the procedure of enforcement.⁶⁴

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

PRC courts make their decisions regarding whether to recognise and enforce a foreign arbitral award in accordance with the New York Convention. Article V(1)(e) of the New York Convention provides that the court

⁵⁸ Article 54 of PRC Arbitration Law.

⁵⁹ Article 9 of PRC Arbitration law.

⁶⁰ Article 154 of PRC Civil Procedure Law (2017).

⁶¹ Article 283 of PRC Civil Procedure Law (2017) and Article 3 SPC Notice regarding New York Convention.

⁶² SPC Notice regarding New York Convention.

⁶³ Article 239 of PRC Civil Procedural Law (2017).

⁶⁴ Article 64 of PRC Arbitration Law.

may refuse to enforce an arbitral award that has been set aside by the court at the seat. Under PRC law, the PRC courts shall refuse to enforce a foreign arbitral award if the award falls within the scope of Article V(1) or V(2) of the New York Convention.⁶⁵ Therefore, Chinese courts will refuse to recognise or enforce an arbitral award that has been annulled at its seat.

5.8 Are foreign awards readily enforceable in practice?

In general, enforcing foreign awards in China under the New York Convention is relatively easy. The SPC has adopted a pro-enforcement stance, although local courts may occasionally be less ready to enforce.

In 1995, the SPC introduced a special procedure (known as the "reporting system"), to reduce the scope for local protectionism that led to refusals to enforce arbitral awards. Under the reporting system, a local court must obtain the approval of its higher court, up to the SPC, before refusing to enforce a foreign (or foreign-related Chinese) arbitration award. The requirement both discourages refusals to enforce, and ensures that the SPC obtains an overview of arbitration-related court practice across the country, with a view to achieving consistency of approach. In practice, however, problems may still be encountered in seizing assets depending on the local situation. Under the PRC Civil Procedure Law, the courts now must also provide written reasons for any decision to refuse enforcement or set aside awards.⁶⁶

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Generally, there is no restriction on PRC lawyers entering into success fee arrangements (i.e. uplift to their fees in case of success), or pure contingency fee arrangements (i.e., charging their legal fees only if the client is successful), or a combination of both. Where contingency fees are allowed, such fees are not permitted to exceed 30% of the amount in dispute.⁶⁷

Third party funding in arbitration is not prohibited in mainland China.

6.2 Is there likely to be any significant reform of the arbitration law in the near future?

Ad hoc arbitration has long been impermissible under PRC Arbitration Law. However, recent judicial developments indicates that designation of an arbitration commission will not necessarily be required, if the arbitration agreement is (a) between enterprises registered in China's Pilot Free Trade Zones and (b) fulfils specific requirements as regards the place of arbitration, arbitration rules and arbitrators.⁶⁸ Subsequently, the first set of Chinese *ad hoc* arbitration rules were issued, under which arbitral institutions are empowered to determine the constitution of the arbitral tribunal, unless otherwise agreed by parties.⁶⁹ The SPC has not provided further clarification on these issues. It remains to be seen how ad hoc arbitration can be administered in mainland China, and on what grounds the courts will be allowed to intervene to assist in *ad hoc* arbitration seated in mainland China.

**The contents of this note do not constitute an opinion upon Chinese law. If you require such an opinion, please seek separate advice.*

⁶⁵ Article 4 of SPC Notice regarding New York Convention.

⁶⁶ Article 154 of PRC Civil Procedure Law (2017).

⁶⁷ Article 13 of Measures for the Administration of Lawyers' Service Charges.

⁶⁸ Article 9 of SPC's Guiding Opinions on Providing Judicial Safeguards for the Establishment of the Pilot Free Trade Zone (Chinese Text Only).

⁶⁹ Article 20 of Hengqin Pilot Free Trade Zone *Ad Hoc* Arbitration Rules (Chinese Text Only). Available at: <http://www.hengqin.gov.cn/hengqin/xxgk/201703/b11759a555bcb484f9016294a9b53edcd.shtml>.