



International Arbitration in China

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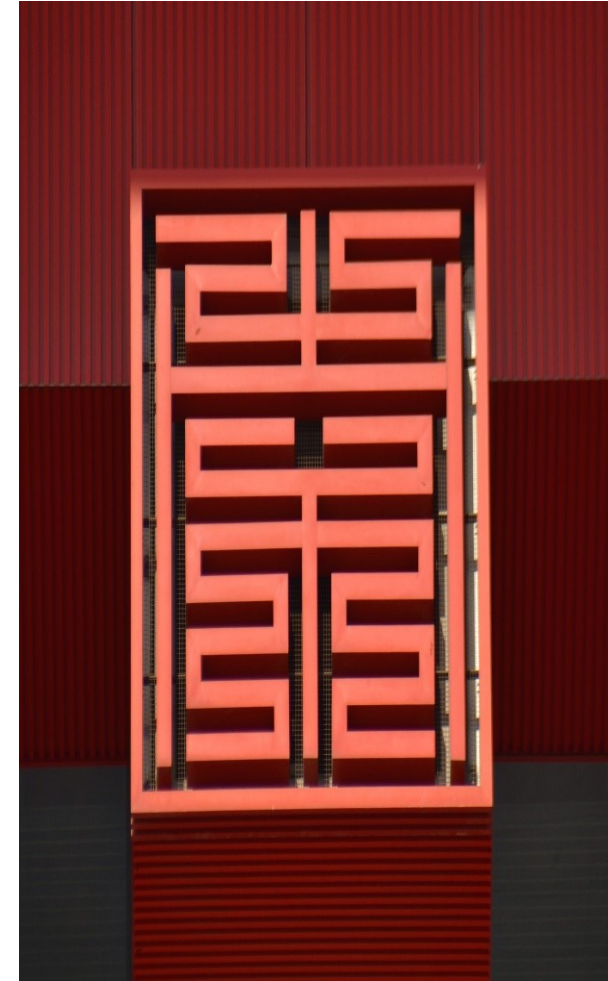
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Purpose of this presentation



This presentation shall provide information on the solution of disputes between foreign companies (including their subsidiaries in China) and Chinese companies. In particular, it deals with the following questions:

- What is arbitration and why use it to solve disputes (compared with litigation and mediation)?
- Is arbitration relevant in China business?
- Which are the most important arbitration institutions in China business?
- How to draft an arbitration agreement?
- Do you get a fair and just arbitral award in China?
- How can you enforce an arbitral award in China?
- Outlook: What does the future hold for arbitration in China?





Case

German company **A** and Chinese company **B** signed a contract („**Contract**“) under which A sold to B a machine for the production of car brakes. The sales price was 10 million EUR. However, shortly after B put the machine into operation it turns out that the car brakes manufactured with the machine are of bad quality and cannot be sold to automobile manufacturers. As a result, B incurs a loss of profit of 20 million EUR. B requests from A:

- to take back the machine
- to return the purchase price of 10 million EUR
- to compensate the losses of 20 million EUR.

A rejects these claims and blames B that the car brakes are of bad quality because of the incorrect operation of the machine by B' s personnel.



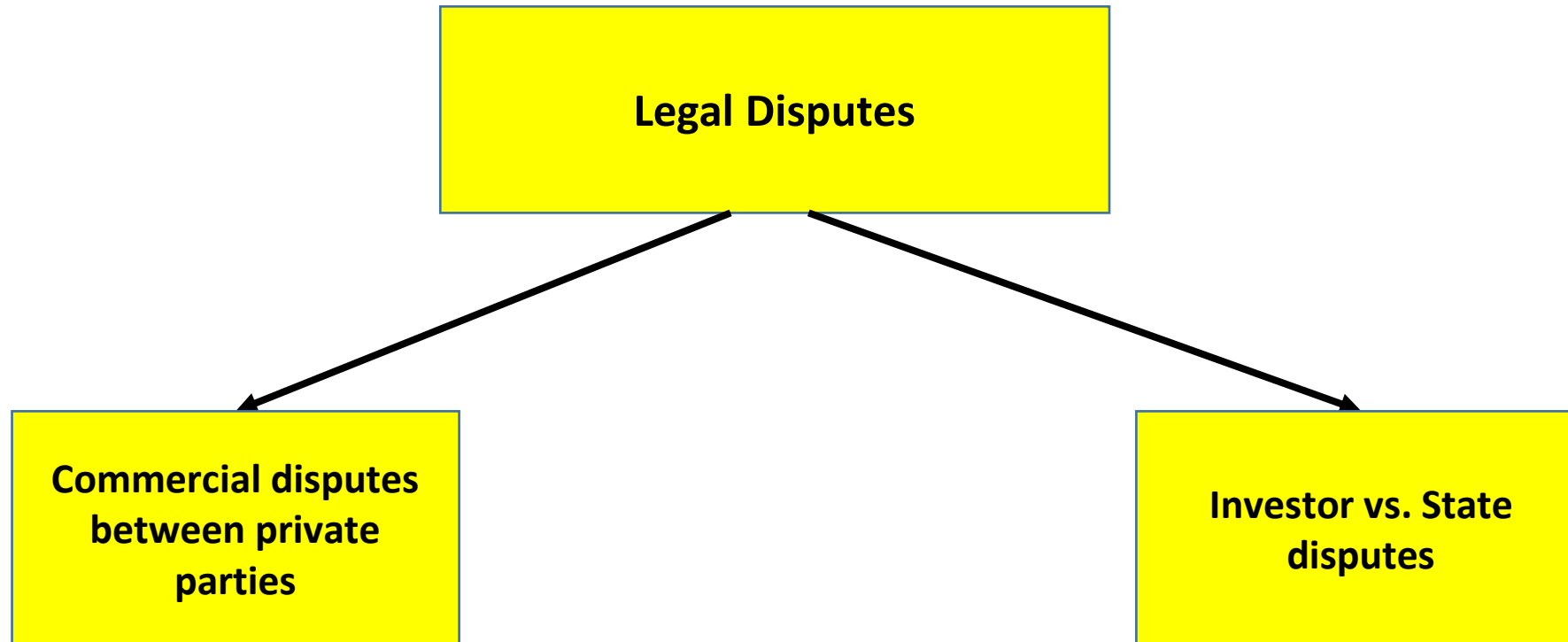
Case

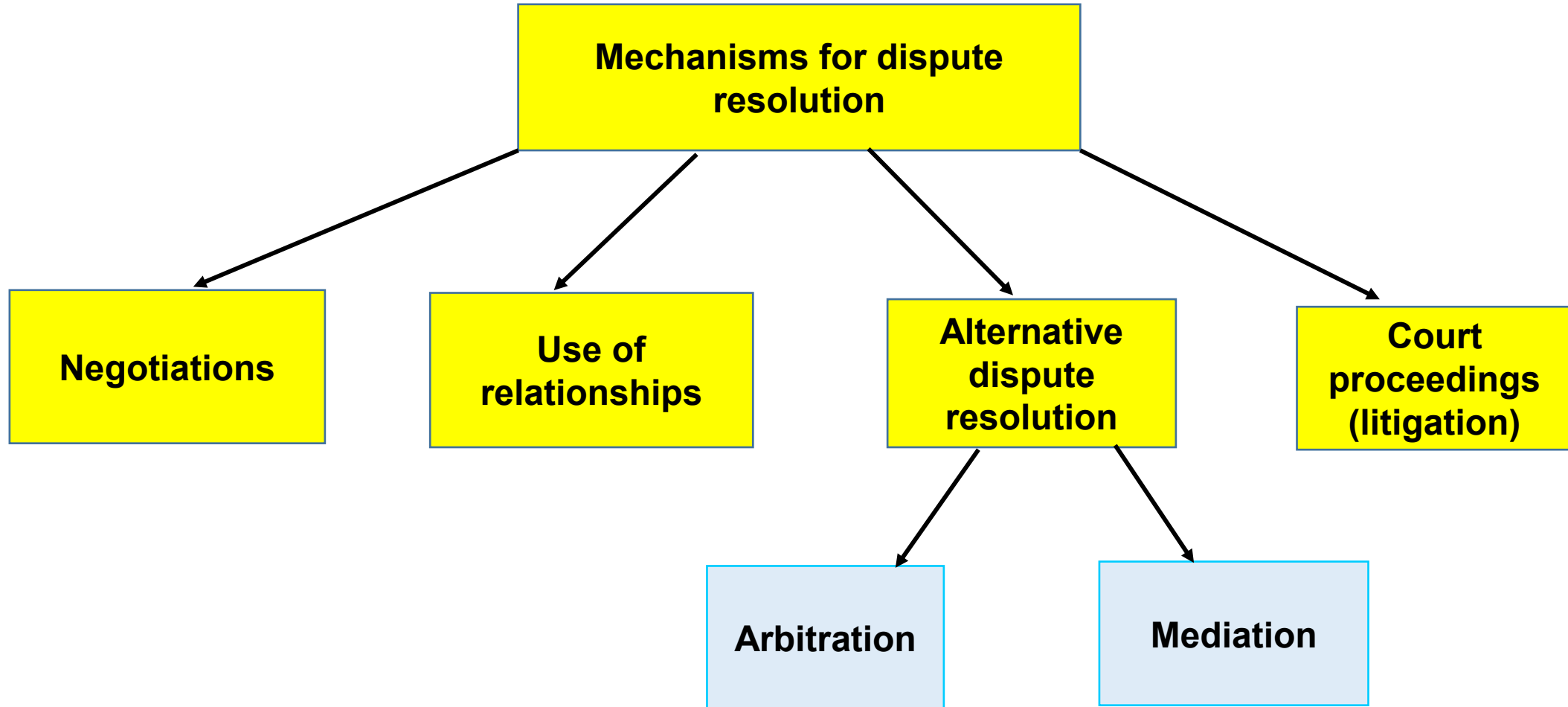
The Contract provides:

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



Note important **distinction** for purposes of this presentation:







Arbitration vs. litigation: What are the main differences?

Litigation

- is a legal process in which claimant(s) submit(s) a dispute with respondent(s) to a **court**
- which carries out a **formal proceeding**
- in **public** and
- renders a **judgment**
- which normally **can be appealed**

vs

Arbitration



is a legal process agreed between parties in which a dispute is submitted to one or more **arbitrator(s) chosen by the parties**



who carry/-ies out a proceeding **less formal** compared to litigation



in **private** and



render(s) an **arbitral award**



which normally **cannot be appealed**



Advantages of commercial arbitration vs. litigation in courts

- ❑ Determination by parties **which arbitration institution** shall decide the dispute
- ❑ **Choice of arbitrators** with particular capabilities or characteristics (e.g. command of specific language or expertise in specific technical and legal areas)
- ❑ Choice of **language** of proceedings
- ❑ **Neutrality** / less risk of local protectionism
- ❑ **Confidentiality** of proceedings because they are not public
- ❑ **Finality** of award, i.e. no appeal (even though this might also be a risk)
- ❑ **Enforcement** of foreign arbitral award still often easier than enforcement of foreign court judgment



Arbitration vs. mediation: What are the main differences?

- ❑ Both, arbitration and mediation are alternative dispute resolutions solving disputes without involving State courts (i.e. **without litigation in court**)

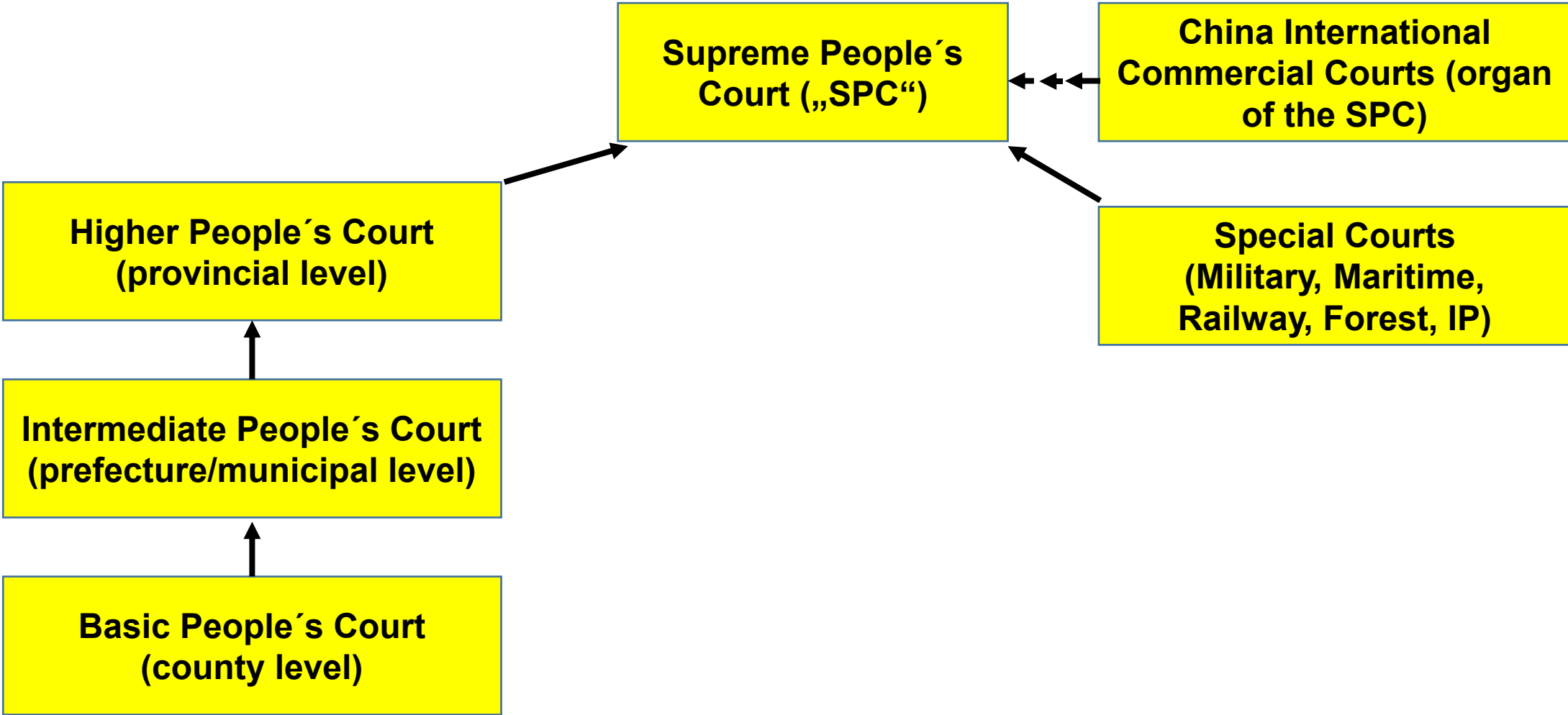
- ❑ **Arbitration**
 - a process agreed between parties in which a dispute is submitted to one or more arbitrators
 - arbitrator(s) issue(s) a **final and binding award**

- ❑ **Mediation**
 - a process agreed between parties in which an independent third person (the mediator) assists the parties to solve a dispute
 - if successful, mediation results in a **settlement agreement** between the parties; mediator does not render a decision/award
 - non-binding process which can be **terminated by either party at any time**

- ❑ In summary, arbitration is closer to a court proceeding because arbitrator(s) act similar to (a) judge(s) and render(s) a binding award whereas mediation is much more voluntary



Background: Chinese court system (basic overview)





Structure of statutory regulations for international commercial arbitration in China (1)

□ **Multinational rules**

- **UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”)**, adopted in 1985 and last amended in 2006. Serves as a pattern which can be completely or partially used by individual States for the drafting of their national Arbitration Laws.
- **UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)**, adopted in 1958. Requires relevant courts of each member State to recognize and enforce arbitration awards made in another member State. Almost all countries in world are members. China is a member State since 1987.
- **UN Convention of International Settlement Agreements resulting from Mediation (“Singapore Mediation Convention”)**, signed on August 7, 2019. Requires relevant courts of each member State to enforce settlement agreements resulting from mediation proceedings in another member State. China has signed but not yet ratified this Convention.



Structure of statutory regulations for international commercial arbitration in China (2)

□ **National rules**

- **Arbitration Law**, first adopted on August 31, 1994, last revised on September 1, 2017 (effective January 1, 2018) (“**AL**”). **Draft revised and substantially modernized AL** (“**Draft 2021 AL**”) was published for public consultation on July 30, 2021, but final revised law must **still be promulgated**; currently promulgation is not high on the legislation agenda of the National People’s Congress. If promulgated as drafted, it would significantly align the AL with the UNCITRAL Model Law and international arbitration practice.
- Arbitration related regulations in the **Civil Procedure Law**, last revised on December 24, 2021 (effective January 1, 2022)(“**CPL**”).
- A number of **Interpretations, Opinions, Provisions and Replies of the SPC** (SPC is not only the highest court but has simultaneously quasi-legislative functions. It generally adopts an arbitration friendly attitude).

□ **Rules of arbitration institutions**

- Arbitration Rules of individual **arbitration institutions which administer** the arbitration proceedings regarding individual disputes concerning contracts in which the respective institution has been agreed by the contractual parties for solution of their disputes resulting from the respective contract.



Note the difference: Institutional vs. ad hoc arbitration

Institutional: Arbitration proceedings administered by an arbitration institution

vs.

Ad hoc: Arbitration proceedings not administered by an arbitration institution under rules to be determined by the parties



A competitive landscape: Important arbitration institutions in international China business

In Mainland China (among about 260 arbitration commissions)

China International Economic and Trade Arbitration Commission (CIETAC)

Shanghai International Arbitration Center (SHIAC)

Beijing Arbitration Commission (BAC)

Shenzhen Court of International Arbitration (SCIA)

Outside Mainland China

Hongkong International Arbitration Centre

CIETAC Hong Kong Arbitration Centre

Singapore International Arbitration Centre

International Chamber of Commerce (ICC)



Market access for **foreign** arbitration institutions in Mainland China

- ❑ In the past foreign arbitration institutions were not permitted to administer arbitration proceedings within China because they could not obtain the registration with the competent Chinese judicial authorities required by Art. 10 AL.
- ❑ However, as an experiment, since the end of 2019 foreign arbitration institutions are permitted to establish offices in the **Lingang** New Area of the China (Shanghai) Pilot Free Trade Zone which may administer international civil, trade, maritime and investment disputes. A State Council policy paper published in September 2020 contains a similar permission for designated area in **Beijing**. The **Draft 2021 AL** extends this permission to the **whole of China and as regards “foreign-related arbitration business”**. It is unlikely that foreign arbitration institutions will set up offices before passing of the revised AL including such permission.

German arbitration institutions relevant for China business

- ❑ German Arbitration Institute (DIS)
- ❑ Chinese European Arbitration Centre (CEAC)



Arbitration: Constantly increasing relevance in practice

Example: CIETAC case number statistics

Year	Domestic disputes	Foreign-related disputes	Total	Total value in dispute (billion RMB)
2006	559	442	981	0,92
2009	923	559	1482	1,73
2014	1223	387	1610	3,78
2019	2716	617	3333	12,20
2020	2.876	739	3615	11,21
2021	3435	636	4071	12,32

Source: Statistics and Annual Work Reports on CIETAC Website



Arbitration: Constantly increased relevance in practice

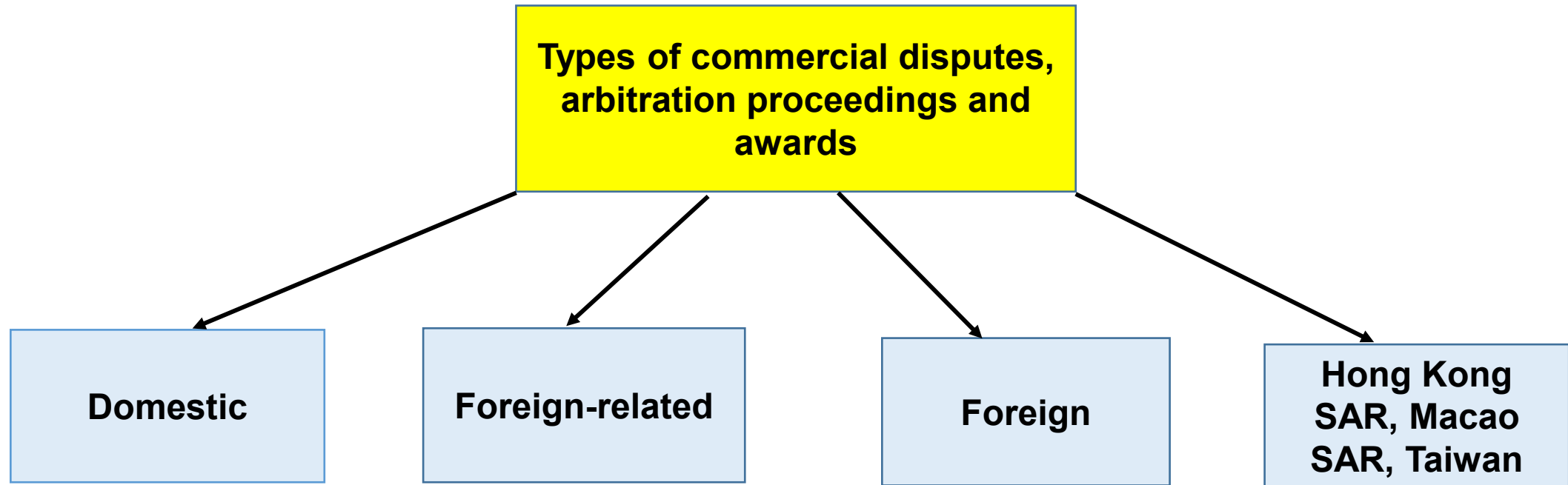
- ❑ Numbers of arbitration cases accepted by Chinese arbitration institutions:
 - **2017:** about **239.360** in total¹⁾
 - **2018:** about **540.000** in total²⁾
 - **2021** (decrease due to COVID): about **415,889** in total³⁾

- ❑ Exploding number of local arbitration institutions (about 270) raises questions as to qualification of their personnel/arbitrators and quality of awards. Consequence: Be diligent in selecting a Chinese arbitration institution.

1) Source: http://www.ccpit.org/Contents/Channel_4131/2018/0919/1063752/content_1063752.htm

2) Source: Ning Fei, Wang Cheng Shang, Jing Liu, International Arbitration 2020/China, Global Legal Insights

3) Source: Global Times, Sept. 5, 2022, <https://www.globaltimes.cn/page/202209/1274636.shtml>





Important Distinction: **domestic** / **foreign-related** / **foreign disputes**

- ❑ **Domestic disputes:** disputes inside China with no foreign element.
- ❑ **Foreign-related disputes:** disputes with a foreign element. A civil relation is “foreign-related” if it has one of the following elements:
 - one or both parties is/are
 - foreign citizen(s),
 - foreign legal person(s) or organization(s) or
 - stateless person(s); or
 - one or both parties has/have its/their habitual residence outside China, or
 - the subject matter of the case/dispute is partly or completely located outside China, or
 - the act establishing, changing or terminating civil rights and obligations occurs outside China, or
 - other circumstances making the legal relationship “foreign-related”

(Art. 522 of *SPC Interpretation Concerning Application of Civil Procedure Law* dated January 30, 2015)
- ❑ **Foreign disputes:** disputes outside China.



Distinction: **domestic** / **foreign-related** / **foreign** arbitral proceedings/awards

□ Why is the distinction important?

- **Domestic disputes** must be decided by arbitration institutions **seated in China**. Awards are **domestic awards**.

Foreign-related disputes

- can be arbitrated by arbitration institutions **seated in China**. Result: the award is a **foreign-related award rendered in China**;
- but can **also** be arbitrated by foreign arbitration institutions **seated outside China**. Result: award is a **foreign award**.
- The rules for **setting aside** and for **enforcement** of an arbitral award by Chinese courts are different depending on the nature of the award (domestic/foreign-related/foreign).
- Certain new benefits contained in the **Draft 2021 AL** are only granted to foreign-related disputes. Examples: **Ad hoc** arbitration in China and administration of cases by offices of **foreign arbitration institutions** will only be permitted if the relevant disputes are foreign-related.



Special case: Disputes between WFOEs in FTZs can be arbitrated outside China

- ❑ **Foreign Invested Enterprises (FIE)** are **domestic** Chinese legal persons. Accordingly, disputes between FIEs or between FIEs and Non-foreign invested Chinese companies generally are “domestic” disputes to be arbitrated in China.
- ❑ However, note *SPC Opinion on Providing Judicial Safeguards to the Construction of Free Trade Zones* (December 30, 2016 (“**SPC FTZ Opinion 2016**”)): If both parties to a contract are wholly foreign owned enterprises (“**WFOE**”) registered in a **Pilot Free Trade Zone** in China, a contract between them is considered “**foreign-related**”. Therefore, related disputes **can be submitted to arbitration by an arbitration institute seated outside China**.

This confirms a similar ruling made by a Shanghai court in 2015 in the so-called **Golden Landmark** case (*Siemens International Trading (Shanghai) Co., Ltd. vs Shanghai Golden Landmark Co., Ltd.*): Since Claimant and Respondent were **both WFOEs** registered in the **Shanghai FTZ**, the court considered their contract “foreign-related” and an award in favour of the Claimant rendered **in Singapore** by a foreign arbitration institute (the Singapore International Arbitration Centre) was held valid and enforceable against the Respondent in China.



Which subject matters can be arbitrated (arbitrability)?

- ❑ **Arbitrable** according to *AL*:
 - contractual disputes and
 - other disputes over property rights and interests between citizens, legal persons and other organizations of equal status

- ❑ **Not arbitrable** according to *Art. 3 AL*:
 - disputes related to marriage, adoption of children, guardianship of minors, inheritance
 - administrative disputes that must be decided by administrative bodies as prescribed by law

- ❑ **Not arbitrable** according to a SPC decision (*Shell vs. Huili*) rendered in August 2019:
 - private antimonopoly (= antitrust) disputes which must be decided by courts (reason: antimonopoly law is public law and related disputes are not contractual disputes between persons of equal status)

- ❑ **Labour disputes** only arbitrable by special labour arbitration commissions under special regulations (*Art. 77 AL*)

- ❑ **IP** disputes can be arbitrated if there is an arbitration agreement (e.g. in a license contract) the scope of which covers the matter in dispute.



Requirements as to arbitration agreements/clauses

- ❑ *Art. 16 AL* is very strict as to the requirements an arbitration agreement must fulfil. It must
 - be in **written** form
 - express the **intention to arbitrate**
 - set out the **subject matters** to be arbitrated
 - **name the arbitration commission** which shall administer the arbitration

- ❑ ***Draft 2021 AL*** is much less strict and more arbitration friendly: an arbitration agreement/closure will be deemed valid as long as it is in writing and contains an **intention to arbitrate**.

Not designating an arbitration commission in the arbitration agreement/closure will no longer make it invalid. If arbitration agreement is **unclear** as to the **arbitration institution**,

- arbitration institution can be determined by the agreed **arbitration rules**
- and if no arbitration rules are agreed, the parties may **supplement** the agreement
- and if the parties fail to reach a supplementary agreement, the arbitration may be commenced before the arbitration institution of the parties' **common domicile**; if the parties have different domiciles, the arbitration institution situated outside the parties' domiciles that **first registers** the case shall administer the case.



Requirements as to arbitration agreements/clauses

- ❑ **Separability**: validity of an arbitration agreement / clause shall be judged independent from the contract (Art. 19 AL).
- ❑ **Competence for review of validity** of an arbitration agreement/clause (Art. 20 AL) (so-called **competence-competence**):
 - either the arbitration commission chosen by the parties or the competent People's Court
 - if one party submits validity issue to arbitration commission and the other party to the People's Court, decision shall be made by People's Court. I.e.: **Court decision prevails**. Risk: submission to court delays arbitral proceedings.
- ❑ **Draft 2021 AL**: Challenges as to the validity of arbitration agreement/clause and as to a tribunal's jurisdiction shall **first be decided by the arbitral tribunal itself**. Only after being decided by tribunal the decision can be reviewed by competent court. Court decision can be appealed. Review by court will not suspend the arbitration proceedings.



Requirements as to arbitration agreements/clauses

- According to Article 17 *AL* an **arbitration agreement** shall be declared **null and void** in any of the following circumstances:
 - the disputes concerned are **non-arbitrable** under the *AL*;
 - the arbitration agreement was signed by a party or parties suffering under an **incapacity** or limited capacity for civil conduct; or
 - a party was **forced** to sign the arbitration agreement



Requirements as to arbitration agreements/clauses

□ **Ad hoc** arbitration

- Ad hoc arbitration in which the parties and the arbitrators independently determine the procedure without the involvement of an institutional arbitral commission. Internationally recognized based on the principle of party autonomy.

In China **not permitted for domestic and foreign-related disputes**. Reason: Art. 16 AL requires an arbitration commission which shall administer the arbitration to be mentioned in arbitration clause/agreement. Very **limited exception**: *SPC FTZ Opinion 2016* permits ad hoc arbitration for disputes between companies registered in **Pilot Free Trade Zones**. Legally questionable because not complying with wording of Art. 16 AL (“pushing the boundary” – approach).

- **Foreign** arbitral awards rendered in an ad hoc arbitration proceeding in a jurisdiction which permits ad hoc arbitration can be recognized and enforced in China (Article 545 SPC Interpretations on Application of Civil Procedure Law).
- **Draft 2021 AL**: Permission of ad hoc arbitration for **foreign-related disputes**.



Overview: Main procedural steps in standard arbitration cases

- ❑ Request for Arbitration
- ❑ Statement of Defense and (if applicable) Counterclaims
- ❑ Constitution of Arbitral Tribunal
- ❑ Hearing (unless parties agree that tribunal may decide based on written submissions only)
- ❑ Arbitral Award
- ❑ Fulfilment or enforcement of Arbitral Award



Interim measures

- ❑ Available measures under *CPL and AL*: **Preservation of property** (e.g. freezing of bank accounts, sealing of assets such as machines etc.) or **evidence**.
- ❑ **Precondition**: Risk that without interim measure the enforcement of a future award will be impossible or difficult or evidence may be destroyed or lost.
- ❑ Art. 28, 46, 68 *AL*, Art. 272 *CPL*: No arbitration commission or tribunal has the right to issue or enforce measures to preserve property or evidence. Instead, applications by the Parties have generally **to be transferred** by the arbitration commission to the **People's Court** at the place of domicile of the person against whom application is made or where the property or evidence in question is located and the People's Court decides whether to grant interim measures.
- ❑ **Before** the arbitration is started by submission of the application for arbitration, Parties may also directly apply for interim measures at courts (Art. 101 *CPL*).
- ❑ Normally, the People's Court will ask the party requesting the interim measure to provide **security**.



Interim measures

- ❑ Important revisions in **Draft 2021 AL**:
 - Not only courts but **also arbitral tribunals** can grant interim measures (parties can choose). Courts shall enforce interim measures granted by arbitral tribunals.
 - More available measures: not only **preservation of property** or **evidence** but also injunctions requesting or prohibiting a certain **conduct**.



Interim measures

- ❑ Generally **no interim measures** in China are available if the arbitration is **seated outside China**.
- ❑ **Important exception:** Interim measures **in Mainland China** available when arbitral proceedings are seated in **Hong Kong**.
 - **Statutory basis: Arrangement** Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (dated April 2, 2019).
 - Arbitral proceedings must be administered by an arbitration **institution enlisted** on a list to be provided by the Hong Kong government to the PRC Supreme People's Court (i.e. *Arrangement* will not apply to ad hoc arbitration).
 - **After** the arbitral institution in Hong Kong has accepted the case, a party's application for interim measures must be forwarded by the arbitral institution to competent People's Court. **Prior** to acceptance a party may directly apply to the People's Court but the People's Court shall discharge the interim measure if it has not received a letter from the arbitration institution in Hong Kong certifying its acceptance of the arbitration case within **30 days** after the interim measure is taken.
- ❑ **Consequence:** Availability of interim measures in the PRC enhances attractiveness of listed Hong Kong arbitration institutions compared to arbitration institutions within and outside the PRC.
- ❑ Since 2022: Similar Arrangement with **Macau**.



Emergency arbitrator

- ❑ A number of Arbitration Rules (e.g. those of CIETAC and the Beijing Arbitration Commission) provide for an **emergency arbitrator** who can, **prior to the formation of the arbitral tribunal**, order emergency interim measures by decision or award.
- ❑ However, **enforcement by Chinese courts** of emergency measures issued by an emergency arbitrator is **doubtful** because *CPL* and *AL* currently **reserve** the right to issue **interim measures to the courts** and do not contain an exception for measures issued by emergency arbitrators.
- ❑ Therefore, emergency arbitration administered by an arbitration institution in China currently seems only useful if the interim measures granted by an emergency arbitrator are to be **enforced abroad or in the Hong Kong SAR**. This happened in the **first emergency arbitration case** in China (2018): an Emergency Arbitrator decided under the Arbitration Rules of the Beijing Arbitration Commission that two respondents were prohibited to dispose of assets in Hong Kong so as to prevent damage to claimants who had a reasonable chance to eventually win the arbitration case. The Hong Kong High Court permitted to enforce the decision in Hong Kong.



Representation and language of proceedings

- ❑ Under Chinese law, **foreign lawyers** in China are prohibited to present comments or opinions on Chinese law in arbitration proceedings. In practice: If Chinese law is the law applicable on the contract in dispute, representation of foreign companies by Chinese lawyers, often in cooperation with foreign lawyers.
- ❑ **Language**: Can be chosen by the parties (generally in the arbitration agreement / clause). Without particular choice: Chinese. Use of interpreter during hearing possible.



Arbitral Tribunal and choice of arbitrators

- ❑ Arbitral Tribunal shall be composed of either **one or three arbitrator(s)**.
- ❑ In case of three arbitrators: Each party appoints one arbitrator and the presiding arbitrator is either jointly appointed by parties or, if they fail to do so, by chairman of the arbitration commission administering the proceedings.
- ❑ Major arbitration commissions such as CIETAC, SHIAC and BAC maintain a **panel of arbitrators** (including **foreign** arbitrators) from which parties may chose arbitrators. However, also arbitrators from **outside** the panel may be chosen subject to confirmation by chairman of the arbitration commission.
- ❑ Arbitrators can be **challenged** if there are reasons giving doubt regarding their impartiality and independency (e.g. relationship to a party or to case in dispute).



Measures to increase efficiency of proceedings (1)

□ **Consolidation of multiple contracts or multiple parties arbitrations**

- **Example:** Seller and Buyer conclude 4 individual sales contracts under which the Seller sells to the Buyer copy machines. Seller claims that Buyer did not pay the full purchase price under sales contracts 1 and 2. Buyer, in turn, claims that Seller did not deliver the number of copy machines agreed under sales contracts 3 and 4.
- Consolidation is regulated differently in rules of different arbitration institutions. E.g., **Art. 19 CIETAC Arbitration Rules** permits, upon request of one party, to consolidate several arbitrations even without the consent of each other party if e.g. the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature.



Measures to increase efficiency of proceedings (2)

□ Joinder of third party

- Example Art. 31 *SHIAC Arbitration Rules*: (i) Parties to an existing arbitration may jointly ask a third party to join an arbitration with its consent or (ii) a third party may ask to join an existing arbitration with consent of Claimant and Respondent.
- CIETAC does not require such consent but only that there is prima facie evidence that the arbitration agreement binds the additional party (Art. 18 *CIETAC Arbitration Rules*).

□ Summary proceedings

- Summary proceedings heard by a **sole arbitrator** tribunal and applying **shorter deadlines** (e.g. rendering of award within 3 months upon formation of tribunal) shall apply where the **amount of dispute is low** (up to 5 Mio. RMB at CIETAC, 1 Mio. RMB at SHIAC).



Burden of proof and evidence

- Art. 43 *AL* and arbitration rules of various arbitration institutions:
 - **Each party bears burden of proof** and shall produce evidence for facts on which its claims/defense rely. This does, however, not mean that they have to submit evidence negatively impacting their case. There is **no disclosure obligation**.
 - Note, however: also arbitral tribunal has the right to collect evidence even though Chinese **arbitral tribunals are generally reluctant to do so and have no power to enforce collection**. In addition, arbitral tribunal cannot order third parties to disclose evidence or to appear as witness even though it might involve experts for purposes of consultation.



Ways to terminate arbitral proceedings

- ❑ **Arbitral award**
- ❑ **Withdrawal** of claim / counterclaim
- ❑ **Settlement agreement** reached either between the parties themselves or through conciliation by arbitral tribunal. In this case, parties
 - may either ask arbitral tribunal to render arbitral award or conciliation statement (having the same legal effect as an award) based on the settlement agreement, or
 - withdraw the application for arbitration and, if applicable, the counterclaim.



Arbitral awards: Do you get a fair treatment?

- ❑ In case of a three arbitrators tribunal, awards can be made by **majority decision**. If no majority can be reached, the opinion of the presiding arbitrator is decisive.

- ❑ Decision **criteria**:
 - SHIAC: award shall be fair and reasonable and be based on facts and statutory law.
 - CIETAC: award shall be fair and reasonable and be based on facts, terms of contract, statutory law and international practice.

Note: Importance of “**fairness**” and not only of statutory law.

- ❑ **Draft** award to be submitted by tribunal to arbitration commission for **scrutiny** without impacting the independence of the arbitral tribunal.

- ❑ **Corrections** by tribunal of clerical, typographical, calculation or similar errors possible upon application by a party or upon tribunal’s own initiative.



How can you challenge an arbitral award in China?

- ❑ The key principle of arbitration that mere **legal incorrectness is no reason for challenging an arbitral award** also applies in China. Accordingly, appeal to a People's Court just because (in the opinion of a party) the decision made by the arbitral tribunal is legally wrong is **not possible** (Art. 9 AL).

- ❑ However, for limited reasons (mainly procedural mistakes during the arbitral proceedings) the party against whom the award was made can apply to the court to **set aside the award** or the court can **refuse enforcement** of the award.

- ❑ Sometimes the “challenge” may be **factual**:
 - lack of financial means or
 - local protectionism by Chinese local courts



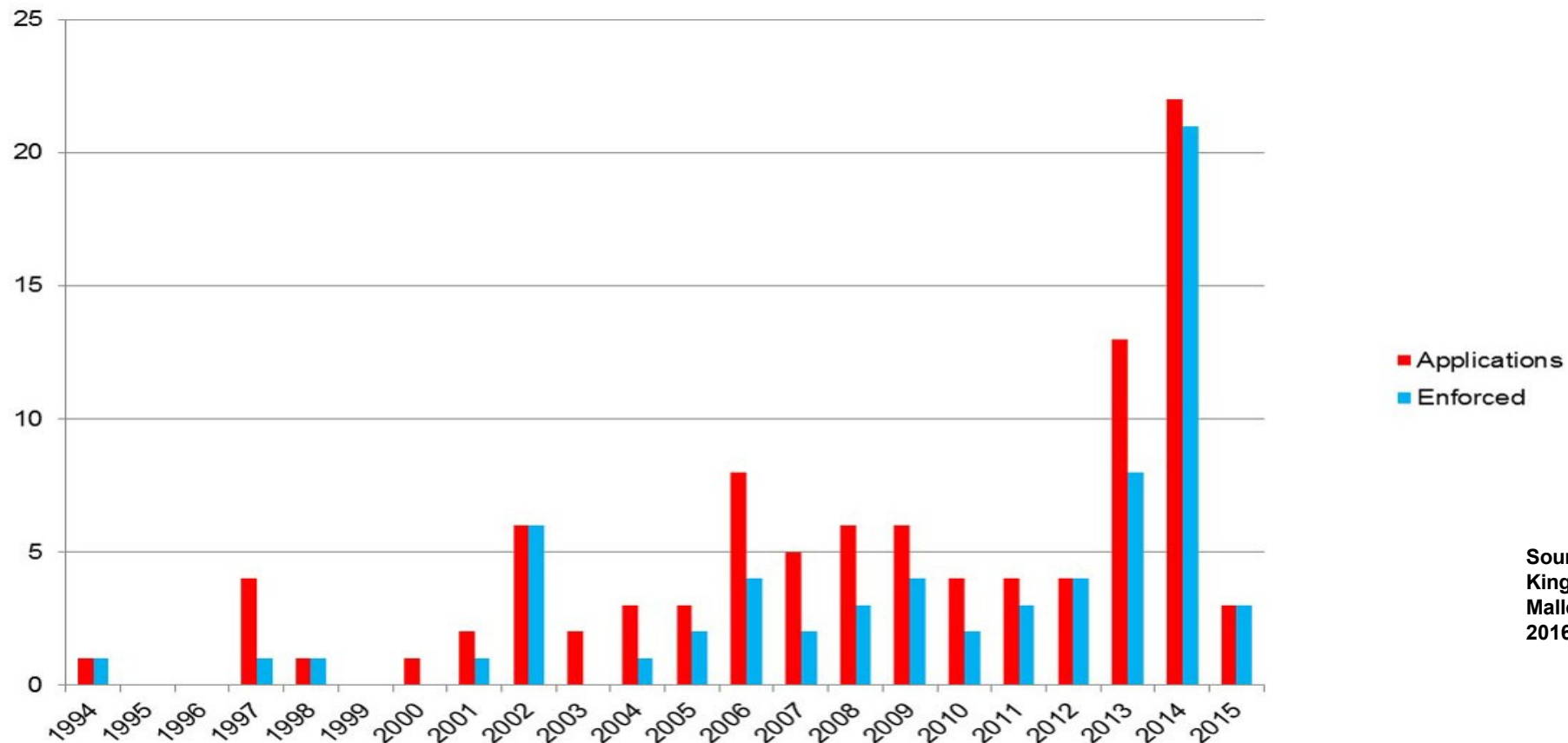
Foreign arbitral awards: **Setting aside** and **Enforcement**

- ❑ There is **no legal basis** that a PRC court may **set aside** a foreign arbitral award.
- ❑ Enforcement of **foreign arbitral awards** based on *NY Convention* (which has been incorporated into Chinese law by Art. 283 *CPL*).
- ❑ **Reasons for non-enforcement** of foreign arbitral awards listed in Art. V *NY Convention* are limited and include:
 - **incapacity** of a party or invalidity of the arbitration agreement
 - **violation of due process**: party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case
 - the arbitral tribunal **exceeded its authority**
 - the arbitral tribunal was not properly constituted or there were other **procedural irregularities**
 - the award has not yet become binding or has been set aside or suspended
 - matter in dispute is **not arbitrable** in the country of enforcement
 - recognition or enforcement of the award would be contrary to the **public policy** of that country.



How high is the risk of non-enforcement of **foreign** arbitral awards?

Review by King & Wood Mallesons of 98 applications to recognize and enforce foreign arbitral awards handled by Chinese courts from 1994 to 2015



Source: Newsletter
King & Wood
Mallesons, Sept. 15,
2016



□ Result of review

- Constant increase of applications for enforcement
- **Long term tendency:** Rate of court decisions permitting enforcement increased over the years
- Main **reasons** for non-enforcement decisions:
 - Mainly **procedural** reasons such as lack of valid arbitration agreement or failure to form arbitral tribunal or to conduct arbitral procedures in accordance with agreement between parties or applicable procedural law
 - Refusal to enforce because of violation of **public policy** only in 1 case



Domestic and foreign-related awards: Setting aside and Enforcement

- Most of the grounds for setting aside or for non-enforcement of **domestic** and **foreign-related awards** made by arbitral tribunals at arbitration institution seated in China are similar to those contained in the UNCITRAL Model Law.

- Note: Standards for examining by a People's Court whether an award shall be set aside or shall not be enforced are not fully identical as regards domestic and foreign-related awards:
 - Examination of **domestic awards** can include a review of the **merits** (substance) because setting aside and non-enforcement is possible (i) if award is based on fabricated evidence or (ii) if prevailing party concealed evidence and thereby affected an impartial award.
 - By contrast, the setting aside and non-enforcement review of **foreign-related** (similar to the review of foreign) awards focusses on mistakes regarding **procedure** and form only.



Domestic and foreign-related awards: Setting aside and Enforcement

□ Draft 2021 AL:

- **Unification** of grounds for setting aside and non-enforcement of domestic and foreign-related awards.
- **Removal** of previous grounds permitting a substantive setting aside and enforcement review.
- Introduction of a **new setting aside ground**: award may be set aside if the award was obtained through fraudulent means such as malicious collusion and falsifying evidence.
- **Sole reason for non-enforcement**: Award violates social public interest (ordre public).



Enforcement of arbitral awards – **Prior Reporting System**

- ❑ **Aim:** Secure the proper fulfilment and enforcement of arbitral awards.
- ❑ If Intermediate People's Court in charge of enforcement intends to refuse enforcement of arbitral award or to set aside an arbitral award it shall report and request approval from the Higher People's Court. If Higher People's Court agrees to refusal intended by Intermediate People's Court, it must further report for approval to the SPC.
- ❑ Originally, based on two SPC Notices of 1995/1998, the prior reporting system only applied to **foreign** and **foreign-related** arbitral awards.
- ❑ The SPC (by a Notice issued December 26, 2017, Fa Shi [2017] No. 21) extended this prior reporting system to **domestic** arbitral awards. However, Higher People's Court *only* needs to report to SPC for approval
 - if the case involves parties from different provinces; or,
 - if the award shall not be enforced or shall be annulled due to “violation of public interest”.



Arbitral awards made in Hong Kong, Macau, Taiwan: **Enforcement**

- Enforcement based on
 - bilateral *Arrangements* with **Hong Kong** and **Macau** regarding the recognition and enforcement of arbitral awards
 - *SPC Provisions on the Recognition and Enforcement of Arbitral Awards* made in **Taiwan** region (effective 1 July 2015)



Comparison: How are foreign court judgments and mediation settlements enforced?

- ❑ Successful enforcement of **foreign court judgments** in China still difficult to predict:
 - The **multilateral** *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* will come into force on Sept. 1, 2023 but China has not yet ratified this Convention (though it participated in its negotiations).
 - Only few **bilateral** treaties/arrangements such as those signed in 2018/2019 with Singapore and Hong Kong SAR in 2018/2019.
 - Only few foreign court judgments enforced in China based on **reciprocity** (i.e. based on the argument that a Chinese court judgment would also be enforced in the respective foreign country). Though there is a tendency in China to facilitate enforcement of foreign court judgments based on reciprocity, risks of non-enforcement are much higher than risks of non-enforcement of foreign arbitral awards. As to **Germany**, note that in 2021 the Saarbrücken Regional Court refused to enforce a Chinese court judgment because it held that currently it is still uncertain whether judgments made by German courts would be enforced in China.

- ❑ Also enforcement of **foreign mediation settlements** in China is still uncertain: *UN Convention of International Settlement Agreements resulting from Mediation* (“**Singapore Mediation Convention**”) was signed by China on August 7, 2019 but has not yet been ratified.



Costs and costs decision

□ Types of cost

- **Procedural** cost of arbitration institution: fees/expenses for administration of arbitration, arbitrators, witnesses/experts appointed by tribunal, translations, recordal of hearings
- Costs incurred by **parties**: in particular attorney's fees, fees for experts and witnesses involved by parties

□ *Measures for Collection of Arbitration Fees by Arbitration Commissions (1995)* contain principle that losing party shall bear the arbitration fees. In practice, **cost regulations in the arbitration rules** of arbitration commission handling the case are decisive.

□ **Claimant has to advance** the full arbitration fee when applying for arbitration, the **Respondent** the arbitration fee for any counterclaim (see e.g. CIETAC and SHIAC Arbitration Rules).



Costs and costs decision

□ **Procedural** fees:

- A number of Chinese arbitration commissions charge
 - (i) a **registration fee** plus
 - (ii) an **administration fee** calculated according to amount in dispute (ad valorem)

Fees of the **arbitrators** are disbursed from the administration fee. This practice has been criticized because it was often not transparent which part of the administration fees was actually used to pay the arbitrators.

- Responding to this criticism, the **Beijing Arbitration Commission** on September 1, 2019 changed its Fee Schedule and now distinguishes Administration Fees and Arbitrator Fees (both calculated based on the amount in dispute).

Example:

Amount in dispute:	between 5 and 10 mio. RMB
Arbitrator fee:	55,000 + 0.50% of the sum over 5 mio. RMB
Administration fee:	23,500 + 0.45% of the sum over 5 mio. RMB

In addition, it is explicitly permitted that arbitrator fees are calculated based on **hourly rates** (reason: prominent (and expensive) arbitrators would otherwise not be willing to be appointed in BAC proceedings).



Costs and costs decision (based on CIETAC/SHIAC Arbitration Rules)

- ❑ **Parties'** costs: Losing party shall compensate “reasonably incurred” costs of winning party.
- ❑ **Note:** In practice, arbitral tribunal will only decide on costs upon explicit request by a party.
- ❑ **Criteria for allocation between winning and losing party:**
 - outcome of dispute
 - complexity of case
 - workload of winning party and its representatives
 - amount in dispute, etc.



Miscellaneous

- ❑ **Confidentiality** (Art. 40 *AL*): Commercial arbitration proceedings shall not be conducted in public. Parties may (theoretically) agree on public hearing unless the case involves State secrets.

- ❑ **Duration**: Time limits to render award according to CIETAC and SHIAC Rules:
 - Foreign- and HK/MC/TW-related cases: 6 months upon constitution of tribunal
 - Domestic cases: 4 months upon constitution of tribunal
 - Extensions may be granted upon justified reasons



International arbitration in COVID times

- ❑ Increased use of **electronic means** in the conduct of arbitration proceedings.
E.g.:
 - Electronic document management: Online submission and serving of documents (e.g. application for arbitration, statement of defense, evidence)
 - Virtual hearings and case conferences

- ❑ Many international arbitration institutions (including e.g. CIETAC and BAC) have issued **specific rules** to provide guidance on measures to mitigate COVID effects on arbitration proceedings.



Very important: Be careful in drafting **arbitration clauses**

- ❑ Use correct **name** of arbitration institution which shall administer the arbitration
- ❑ Determine the **language** of arbitration
 - from a foreign perspective: not Chinese
 - bilingual proceedings permitted in international cases but can be cumbersome
- ❑ Determine **number of arbitrators**
 - agree on an uneven number
 - normally 3, one selected by either party and one presiding arbitrator
 - but consider (for cost reasons) just 1 for smaller disputes below certain threshold



Very important: Be careful in drafting **arbitration clauses**

- ❑ Permit choice of arbitrators from **outside arbitrators list** of the respective arbitration commission.
- ❑ Determine **qualifications** of the arbitrators and/or the presiding arbitrator (e.g. not being nationals of parties' countries of registration, specific industry experience). However, be careful not to raise unrealistic demands which could make the choice of arbitrators too difficult.
- ❑ Determine place/venue of **oral hearings**.
- ❑ Seat of arbitration (if in future the concept of „**seat** of arbitration“ is introduced in a revised AL).



Very important: Be careful in drafting **arbitration clauses**

□ **Multi-tiered dispute resolution clauses:**

- E.g. first negotiation and/or mediation and arbitration only in case of no solution of the dispute.
- Note: determine clear and reasonable time limits within which the dispute shall be solved by negotiation / mediation so that it is clear as of which point in time arbitration can be commenced.



Investor / State disputes

- ❑ **New tendency:** claims of foreign investors against Chinese government organisations regarding treatment of their investment in China.
- ❑ Based on **bilateral investment treaties („BIT“)** between China and other States (such as Switzerland and Germany).
- ❑ Often conducted under the arbitration rules of the International Centre for Settlement of Investment Disputes (**ICSID**), an arbitration institution being part of the World Bank, or under the Arbitration Rules of the United Nations Commission of International Trade Law (**UNCITRAL** Arbitration Rules).
- ❑ China has participated also **as respondent** in ICSID proceedings which indicates China's acceptance (and not refusal) of such proceedings.



Investor / State disputes

❑ Investor/State arbitration rules issued by Chinese arbitration institutions

- As response to China's Belt and Road Initiative, at the end of 2016 the Shenzhen Court of International Arbitration (SCIA) amended its Arbitration Rules by stating that it would accept investor/state disputes and administer them under the UNCITRAL Arbitration Rules.
- Effective October 1, 2017, CIETAC and in 2019, BAC issued own International Investment Arbitration Rules for solution of disputes between investors and States.
- Currently still little practical impact of these rules, in particular because they are not explicitly agreed as arbitration rules under BITs concluded by China (even though parties could agree to use them in ad hoc arbitration).



Thank you for your attention!

Any questions?