



November 2012

China

HOW TO INVEST IN CHINA: CHINESE JUDICIAL SYSTEM

(A) JUDICIAL SYSTEM

The Chinese Judicial System is formed by People's Courts, which judicial organs exercising judicial power on behalf of the states. In accordance with the Chinese Constitution and Organic Law of the People's Courts, the country applies a «four level and two instance of trials» court system.

The judicial authority of the People's Republic of China is exercised by the following people's courts:

- a) The People's Supreme Court, which is the highest authority;
- b) The People's Superior Courts;
- c) The People's Intermediate Courts;
- d) The People's District Courts, the first instance courts of the Chinese justice system.

In addition to the four different degrees that include the common Chinese judicial system, there are the so-called special courts that deal with specific matters, such as the military, maritime and railway matters.

Within each court, there are usually several divisions, such as civil, economic, criminal, administrative and enforcement divisions. All cases have the right to a second trial and the decision issued pursuant to the second analysis is considered final and not subject to appeal.

However, the parties to litigation may challenge the final decision or the effective decision through the trial supervision procedure, which is subject to approval and acceptance by the President and judicial committee of the superior court, notwithstanding this exceptional procedure does not suspend the enforcement of the effective judgment that is challenged.

Both the Constitution and the Court's Organic Law establish that the People's Courts shall exercise the state judicial power independently, free from interference from any organizations or individuals.

The collegiality of the Courts is seen as fundamental and identifying for their independence, since only the courts have judicial power and authority not the individuals; this leads to the possibility of having other court members, notably presidents and division chiefs, to legitimately review and suggest changes in draft judgments prepared by collegial panels.

(B) ARBITRATION

Arbitration is regarded as a common and very important form of dispute resolution in China, especially in relation to trade disputes and related investments. The Arbitration Act of the People's Republic of China was adopted on 31st August 1994, by the People's National Congress, China's legislative body, entering into force and applicable from 1st September 1995 and slightly revised on 27th August 2009 (CAA 2009). The CAA 2009 applies to arbitration cases involving national or international issues. This law includes modern concepts and current information on arbitration and describes the basic principles by which arbitration is governed in China.

ARBITRATION AUTHORITIES

(1) Board of Arbitration

The board of arbitration is the authority to be appointed by the parties of the arbitration agreement. If no board of arbitration is appointed in the agreement, the two parties shall make a complementary agreement to choose one; if the two parties fail to reach a complementary agreement, the arbitration agreement will be invalid.



(2) China International Economic and Trade Arbitration Commission (“CIETAC”)

It is considered the most important body in permanent operation. Since 2000, the CIETAC is also known as the Court of Arbitration of the International Chamber of Commerce of China. The headquarters of CIETAC are currently located in Beijing, and there are two sub commissions in the cities of Shanghai and Shenzhen, called respectively CIETAC (Shanghai Subcommittee) and CIETAC (Subcommittee of South China). To promote and encourage arbitration, the CIETAC set up 19 affiliated offices in various localities with specific business departments in order to sustain, in the best possible way, those who seek to resort to arbitration.

Matters that can be the subject of an arbitration award by the CIETAC are not limited to commercial disputes or merely based on the origin of the parties involved. Matters arising from economic and commercial transactions, contractual or non-contractual, may also be submitted to arbitration. These subject matters may include (i) international disputes per se, or which involve international relations, (ii) disputes originated from the Special Administrative Regions of Hong Kong, Macau or from Taiwan, and (iii) internal disputes.

ARBITRATION AGREEMENT

A valid Arbitration Agreement is the basis of arbitration. It is a pre-requisite that the Arbitration Board accepts cases brought to its analysis and disregards the jurisdiction of the courts.

Notwithstanding, even after the arbitration agreement has been signed by the parties, courts may intervene if and when:

- a) the arbitration agreement is considered invalid or its validity has expired; and/or
- b) if a party resolves to take the dispute to the analysis of the State Courts and the other party agrees.

CIETAC provides a Model Arbitration Clause (quote):

“Any dispute arising from or in connection with this Contract shall be submitted to the 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.”

EFFECTS OF THE AWARD

The final Arbitration Award issued is immediately effective upon on the parties, without the possibility of appeal. Notwithstanding, the unsatisfied party has the right to seek review before the judicial courts, that may rule on the invalidity of the Arbitration Award upon verification and the existence of evidence that one of the conditions foreseen in the Arbitration Law has occurred, such as the disregard for the regulations and directives in force and the consequent (proven) violation of these regulations, among others.

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

China is a signatory country to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“1958 New York Convention”) since 22nd April 1987, and its accession to the Convention is subject to trade restrictions and reciprocity.

Due to the applicability of that Convention, it is possible for parties of certain juridical relationships to recognize and enforce Arbitral Awards which are issued in the State where the debtor has assets, provided that such State is also a signatory country to the New York Convention. According to the UN Committee on the International Trade Law (UNCITRAL), so far 144 countries are signatories to the Convention. For further details, please check the website of UNCITRAL at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

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