

Table of Contents

<i>Foreword</i>	v
Gabrielle Kaufmann-Kohler	
<i>Preface</i>	vii
<i>Acknowledgements</i>	ix
<i>List of Abbreviations</i>	xxiii
<i>Table of Cases</i>	xxv
<i>Table of Legislation</i>	xxxiii
Introduction	1
1 Overview of the Chinese Legal Framework and Arbitration System	9
1.1 Chinese Judicial Organisation	10
1.2 Legal Framework	12
1.2.1 Public Sources	12
A. National Sources	12
B. International Sources	14
a. International Conventions	14
b. Bilateral Investment Treaties (BITs)	15
1.2.2 Private Sources	16
1.3 Historical Development of Arbitration Legislation in China	17
1.3.1 Prior to the Enactment of the Arbitration Law	17
A. Domestic Arbitration	17
B. Foreign-related Arbitration	18
1.3.2 After the Implementation of the Arbitration Law	20
1.4 Types of Arbitration in China	21
1.4.1 Classification of Arbitration in the Arbitration Law and Civil Procedure Law	21
1.4.2 Lack of Recognition of the Concept of Legal Seat	23
1.4.3 Dual System in the Current Legal Regime	25
A. Domestic Arbitration may not be Seated Outside China	26
B. Chinese Substantive Law Applies in Domestic Arbitration	26
C. Domestic Arbitration is Subject to Substantive Review by the Courts	26

	D. Report System Applies Only to Foreign-related Arbitration	27
2	Arbitration Agreement	29
	2.1 The Principle of Severability of the Arbitration Agreement	29
	2.1.1 Transnational Standards	30
	2.1.2 Law and Practice in China	31
	A. Application of the Autonomy of the Arbitration Agreement with a Limited Scope	31
	B. Misapplication of the Principle of Severability	33
	2.2 The Substantive Requirements for the Validity of the Arbitration Agreement	34
	2.2.1 Transnational Standards	35
	2.2.2 Law and Practice in China	37
	A. Strict Interpretation of Defective Arbitration Clauses	38
	B. Exclusion of Ad Hoc Arbitration	40
	a. Enforcement of Foreign Ad Hoc Awards in China	42
	b. Legal Obstacles to the Recognition of Ad Hoc Arbitration in China	44
	C. Unclear Status of Foreign Arbitration Institutions	44
	a. Practical Difficulties	45
	(i) <i>Whether a Clause Selecting the ICC Rules without Specifying the ICC Court as the Arbitral Institution is Valid</i>	45
	(ii) <i>Whether the Designation of the ICC Court as the Arbitration Institution Satisfies the Requirement of Article 16 of the Arbitration Law</i>	46
	b. Inconsistent Court Decisions	47
	c. Legal Obstacles	50
	(i) <i>Lack of Recognition of the Concept of Seat</i>	50
	(ii) <i>Policy Consideration</i>	51
3	Arbitral Tribunal	53
	3.1 Arbitral Jurisdiction	53
	3.1.1 Transnational Standards	54
	A. The Principle of Competence-competence	54
	B. The Court's Review of the Arbitral Tribunal's Jurisdictional Decision	54

3.1.2	Chinese Practice	56
	A. Arbitration Institution v Arbitral Tribunal	57
	B. Court v Arbitration Institution	59
3.2	Constitution of the Arbitral Tribunal	61
3.2.1	Transnational Standards	61
	A. The Appointment Mechanism	62
	B. Independence, Impartiality and Availability of Arbitrators	62
3.2.2	Chinese Practice	64
	A. The Appointment Mechanism	64
	a. Strict Statutory Qualification of Arbitrators	64
	b. Compulsory Panel System	65
	B. Independence and Impartiality of Arbitrators	67
4	Recognition and Enforcement of Arbitral Awards	71
4.1	Transnational Standards	72
4.1.1	Recognition and Enforcement of Arbitral Awards	72
	A. Grounds which Must be Raised by the Party Resisting Recognition or Enforcement	74
	a. Incapacity or Invalid Arbitration Agreement (Article V(1)(a) of the New York Convention)	74
	b. No Proper Notice of Appointment of Arbitrator or of the Proceedings; Lack of Due Process (Article V(1)(b) of the New York Convention)	74
	c. Ultra Vires (Article V(1)(c) of the New York Convention)	74
	d. Composition of Tribunal or Procedure not in Accordance with Arbitration Agreement or the Relevant Law (Article V(1)(d) of the New York Convention)	75
	e. Award not Binding, Suspended, or Set Aside (Article V(1)(e) of the New York Convention)	76
	(i) <i>Award not Binding</i>	76
	(ii) <i>Award is Set Aside</i>	77
	(iii) <i>Award is Suspended</i>	78
	B. Grounds which can be Raised by the Courts on their Own Motion	79
	a. Arbitrability (Article V(2)(a) of the New York Convention)	79

b. Public Policy (Article V(2)(b) of the New York Convention)	80
4.1.2 Setting Aside of Arbitral Awards	81
4.2 Chinese Practice	82
4.2.1 The Legal Regime	83
A. Legal Framework	83
a. Setting Aside of Arbitral Awards	83
(i) <i>Domestic Awards</i>	83
(ii) <i>Foreign-related Awards</i>	84
b. Recognition and Enforcement of Arbitral Awards	84
(i) <i>Domestic Awards</i>	84
(ii) <i>Foreign-related Awards</i>	85
(iii) <i>Foreign Awards</i>	85
B. Unique Features of the Legislation	87
a. Substantive Review for Domestic Awards	87
b. No Discretion for the Court to Decide upon Enforcement	88
c. Report System for Foreign-related and Foreign Awards	88
d. Dual Supervision Mechanism	90
4.2.2 Statistical Assessment of the Enforcement Record	91
4.2.3 Case Analysis	95
A. Setting Aside/Recognition and Enforcement of Foreign-related Awards	95
a. Lack of a Valid Arbitration Agreement (Article 274(1)(1) of the Civil Procedure Law)	95
b. Violation of Due Process (Article 274(1)(2) of the Civil Procedure Law)	96
c. Irregularities in the Composition of the Arbitral Tribunal or in the Arbitral Procedure Pursuant to the Rules of Arbitration (Article 274(1)(3) of the Civil Procedure Law)	97
d. The Matters Decided in the Award Exceed the Scope of the Arbitration Agreement or the Authority of the Arbitration Institution (Article 274(1)(4) of the Civil Procedure Law)	99
e. Social and Public Interest (Article 274(2) of the Civil Procedure Law)	100
B. Recognition and Enforcement of Foreign Awards	101

a.	Incapacity or Invalid Arbitration Agreement (Article V(1)(a) of the New York Convention)	101
b.	No Proper Notice of Appointment of Arbitrator or of the Proceedings; Lack of Due Process (Article V(1)(b) of the New York Convention)	105
c.	Ultra Vires (Article V(1)(c) of the New York Convention)	106
d.	Composition of Tribunal or Procedure not in Accordance with Arbitration Agreement or the Relevant Law (Article V(1)(d) of the New York Convention)	107
e.	Award not Binding, Suspended, or Set Aside (Article V(1)(e) of the New York Convention)	109
f.	Arbitrability (Article V(2)(a) of the New York Convention)	110
g.	Public Policy (Article V(2)(b) of the New York Convention)	110
C.	Further Observations Arising From the Case Analysis	112
a.	Inconsistent Decisions	112
b.	Local Protectionism	113
c.	Problems of Delays	113
5	The Practice of Arbitration Institutions	114
5.1	Legislative Background of the Establishment of Arbitration Institutions in China	114
5.2	Comparison between the CIETAC and the ICC Court	117
5.2.1	Establishment, Nature, and Development	118
A.	The ICC Court	118
B.	The CIETAC	119
a.	Founding Period (1956–1966)	121
b.	Adjustment Period (1967–1979)	121
c.	Growth Period (1980–1988)	121
d.	Acceleration Period (1989–1994)	122
e.	Expansion Period (1995–present)	122
5.2.2	Structure and Personnel Management	123
A.	The ICC Court	123
B.	The CIETAC	124
5.2.3	Financial Management	125
A.	The ICC Court	125
B.	The CIETAC	125

5.2.4	Relationship between the Arbitration Institution and Arbitrators	127
A.	Institution's General Role in Case Management	127
a.	The ICC Court	127
b.	The CIETAC	128
B.	Allocation of Fees	129
a.	The ICC Court	129
b.	The CIETAC	130
C.	Scrutiny of Arbitral Awards	131
a.	The ICC Court	131
b.	The CIETAC	132
5.3	Status of Local Arbitration Institutions in China	133
5.3.1	The Establishment: Government Support	134
5.3.2	The Government's Interference Continues After the Establishment	134
6	The Combination of Mediation with Arbitration	137
6.1	The Theoretical Debates on the Arbitrators' Role in Settlement Facilitation	138
6.1.1	Supporters of Arb-Med	139
A.	Mission of Arbitrators to Resolve the Dispute in the Most Efficient Way	139
B.	Free Will and Voluntariness of the Parties	140
C.	Efficiency of Dispute Resolution	141
6.1.2	Opponents of Arb-Med	142
A.	Mission of Arbitrators to Render a Binding Decision	143
B.	Due Process and Natural Justice	143
C.	Impartiality of Arbitrators	143
6.2	Comparative Study of the Law and Practice of Arb-Med	144
6.2.1	National Laws	144
A.	Civil Law Jurisdictions	144
B.	Common Law Jurisdictions	146
6.2.2	Institutional Rules	148
6.2.3	Actual Arbitration Practice: Some Empirical Studies	151
A.	Two Surveys of Arbitration and Mediation Practitioners (1994, 2004)	151
B.	Corporate Attitudes and Practices about International Arbitration (2008)	152

C.	A Survey of Arbitration and Settlement in International Commercial Disputes in Asia (2006–2007)	153
D.	Summary of the Empirical Findings	154
6.3	The Chinese Experience of Combining Mediation with Arbitration	155
6.3.1	Mediation in General	155
A.	Historical Development	155
B.	Contemporary Practice	159
a.	People’s Mediation	159
b.	Administrative Mediation	160
c.	Institutional Mediation	161
d.	Mediation within Litigation Proceedings	162
6.3.2	Mediation within Arbitration Proceedings	163
A.	Historical Development	163
B.	Contemporary Practice	164
a.	Who Raises the Idea of Mediation during the Arbitration Proceedings, the Parties or the Arbitral Tribunal?	165
b.	When do Arbitrators make the Mediation Proposal?	166
c.	How do Arbitrators Facilitate Settlement?	166
(i)	<i>Facilitative or Evaluative</i>	166
(ii)	<i>Meeting the Parties Separately or Caucusing</i>	166
(iii)	<i>Giving Opinions on the Merits</i>	167
(iv)	<i>Proposing a Settlement Formula</i>	167
d.	Chinese Approaches to the Concerns of Arb-Med	168
7	Chinese Characteristics in Arbitration Law and Practice	170
7.1	Deficiencies in the Legislation	171
7.2	Inconsistencies in the Implementation of the Law	173
7.3	Administrative Intervention	173
7.4	Conceptual Differences	174
7.4.1	The Western Concept of Consensual Arbitration – Bottom-up	175
7.4.2	The Chinese Notion of Arbitration – Top-down	179
7.5	The Emphasis on Amicable Resolution of Disputes	180
8	Traditional Legal Culture and Its Influence on Contemporary Arbitration Practice	181

8.1	The Emphasis on Rituals	185
8.1.1	<i>Li v Fa</i>	186
8.1.2	Codification Centered on Criminal Offences and R Rigidity of Written Law	189
8.1.3	Implementation of Law: <i>Qing</i> mixed with <i>Fa</i>	190
8.2	The Emphasis on Relational Network	192
8.3	The Emphasis on Harmony and Conflict Avoidance	194
8.3.1	Philosophical Influence	194
8.3.2	Practice to Suppress Litigation	196
	A. Suppression of Litigation by Local Magistrates	196
	B. Limitation on Individual's Right to Sue within Local Groups	199
8.4	Commercial History and Dispute Resolution	200
8.4.1	Agrarian Economy and Lack of Commercial Laws	201
8.4.2	Resolution of Commercial Disputes	203
	A. Government-organised Marketplaces	203
	B. Guilds (<i>hanghui</i>) and <i>Landsmannschaften</i> (<i>huiguan</i>)	204
	C. Transplantation of Arbitration in China	207
8.5	Analysis of Historical Links to Modern Practice	208
8.5.1	Flexibility in Implementation of the Law and the Emphasis on Equity – The Historical Emphasis on Rituals	209
8.5.2	The Conceptual Differences in Arbitration – The Historical Emphasis on Relational Network	210
8.5.3	The Emphasis on Amicable Resolution – The Historical Legal Culture of Avoidance of Litigation	211
9	The Modernisation of Law and Cultural Influences on Arbitration Practice	213
9.1	The Role of Law in Modern China	216
9.1.1	The Instrumental Notion of Law	217
9.1.2	The Remarkable Burst of Legislative Efforts and the Lack of an Integrated Legal System	218
9.1.3	The Implementation of Law: <i>heqing</i> , <i>heli</i> , <i>hefa</i>	220
9.2	The Role of the Individual in Modern China	220
9.3	The Cultural Aversion to Formal Dispute Resolution	221
9.3.1	The Impact of Communist Ideology	221
9.3.2	The Relational Mode of Association	222
9.4	The Development of Commercial Law in the Economic Transition	223

9.4.1	Centralised Planned Economy and Internal Resolution	223
9.4.2	Development of Commercial Law in the Transition to the Market Economy	224
	A. Legislative Efforts to Establish Recognition and Authorisation of ‘Private Rights’ Legally	224
	B. Continued State Control and the Struggle for Authority among Central, Provincial and Local Government	225
9.5	Explanation of Contemporary Arbitral Practice From Cultural and Historical Perspectives	226
9.5.1	Tolerance of Uncertainty and the Notion of <i>Biantong</i> – The Sustained Tolerance of Uncertainty	227
9.5.2	The Lack of Party Autonomy and Administrative Features of Arbitration – The Collectivist Society	228
9.5.3	The Wide Use of Mediation – The Cultural Preference for Amicable Resolution	229
10	Conclusion	232
10.1	Adaptations of Chinese Law and Practice Towards Transnational Standards	233
10.1.1	Legislative Reforms	234
10.1.2	Institutional Reforms	235
	A. Reforms of the Financial System	235
	B. Reforms of the Management System	236
	a. Management of Arbitrators	236
	(i) <i>Hiring of Arbitrators</i>	236
	(ii) <i>Independence of Arbitrators</i>	237
	(iii) <i>Training and Assessment of Arbitrators</i>	237
	(iv) <i>Arbitrators’ Remuneration</i>	237
	b. Management of its Personnel	237
	c. Information Network Management System	238
	C. Innovations in Arbitration Service	238
	a. Partial Settlement	238
	b. Confirmation Arbitration	238
10.1.3	Chinese Adaptations to Arb-Med	239
10.2	The Influence of Chinese Legal Culture on the Practice of Arbitration Worldwide	241

<i>Bibliography</i>	247
Books	247
Theses	252
Articles	253
Conference Papers	270
Official and Historical Documents	271
Appendix 1: Arbitration Law of the People's Republic of China (1995)	273
Appendix 2: Interpretation of the SPC on Certain Issues Relating to Application of the Arbitration Law of the People's Republic of China (2006)	287
Appendix 3: Relevant Provisions of the Civil Procedure Law (2012 Amendment)	293
<i>Index</i>	295