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Memorandum to: Our Clients and Friends

Foreign-Related Arbitration: An Overview from PRC Law Perspective

Arbitration is an important dispute resolution mechanism just like litigation. In arbitration, the parties submit the underlying dispute for arbitration to the arbitration institution or tribunal set forth in the relevant arbitration agreement. The arbitral award is binding on both parties and can be enforced compulsorily. With China's rise as a hot destination for foreign investments, foreign investors become increasingly concerned about how to deal with disputes arising from their onshore investments.[1] Featured by enormous autonomy and international popularity, arbitration has emerged as a major way for resolution of international commercial disputes.

This memo is designed to elaborate from the PRC legal perspective the basic issues of common concerns to foreign investors looking to settle their international commercial disputes through arbitration (i.e., why to choose arbitration, how to arbitrate and how to enforce effective arbitral awards).[2]

1. Why to Choose Arbitration

International commercial disputes can be resolved through, among others, negotiation, mediation, arbitration and litigation, among which settlement through arbitration or litigation is backed by the coercive force of government. As compared to other methods of dispute resolution, arbitration is more widely adopted in the resolution of international commercial disputes due to its following advantages.

- Enormous Autonomy

In arbitration, the parties generally are able to decide, at their discretion and based on their specific situation, the mode, language, procedures and place of the arbitration, arbitration institution, arbitration rules, composition of

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[1] For the purpose of this memo only, unless specifically indicate, "China" or the "PRC" shall exclude Hong Kong SAR, Macao SAR and Taiwan.

[2] Arbitrations addressed in this Memo mainly refers to foreign-related arbitrations under PRC law, i.e. (i) at least one of the parties to the arbitration is a foreign party; (ii) the disputed subject is located outside of China; or (iii) the fact creating, altering or eliminating the legal relationship between the parties happens outside of China.

arbitration tribunal, applicable law and etc. In litigation, however, the parties generally are at a passive position in the legal proceedings and their autonomy is therefore significantly limited.

- Greater Enforceability

The PRC recognition and enforcement of any arbitral award or court judgment rendered in a foreign jurisdiction is generally subject to the international convention or bilateral treaty entered into by the relevant countries. The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)* (the "New York Convention") provides a legal basis for the recognition and enforcement of foreign arbitral awards, whereas no internationally accepted convention is currently available governing the recognition and enforcement of foreign court judgments. Thus, with respect to the same dispute, the recognition and enforcement of a foreign court judgment is far more difficult than that for a foreign arbitral award.

- Heightened Fairness

In arbitration, the parties can appoint arbitrators of their own choice, who are usually experts in the relevant industry and are able to conduct in-depth analysis on the underlying dispute (complicated ones in particular). In contrast, judges in litigation proceedings are appointed by the relevant courts and the disparity of professional level among judges (especially in developing countries) may give rise to doubt over the fairness of judgments so rendered.

- Stronger Neutrality

In arbitration, the parties may submit an international commercial dispute to an arbitration institution located in a third party country, which can address the distrust held by one party towards the judicial system of its counterpart, so that the underlying dispute could be adjudicated by a relatively independent and neutral organ without any concern for conflicts of interest.

- Enhanced Confidentiality

Most litigation cases are held in public session, while arbitration is generally conducted on a confidential basis. Given the large amount of confidential information usually involved in foreign investments, the parties are therefore inclined to choose arbitration to settle any investment dispute.

Nevertheless, arbitration also has some inherent deficiencies. For example, the arbitration tribunal normally does not have the right to involve the participation of any third party in the arbitration proceedings, which may potentially complicate the adjudication of cases, especially if some other cases have a close tie with the underlying dispute. Furthermore, the arbitration tribunal may have to apply to the competent court for taking any compulsory measures (e.g., preservation of property and evidence) since it has no right to do so on its own initiative, which may increase the risk for transfer of property or destruction of evidence by the parties.

2. How to Resolve Foreign-Related Commercial Disputes through Arbitration

When it comes to the resolution of foreign-related commercial disputes through arbitration, the first and foremost thing is to enter into an effective arbitration agreement favorable to the contracting parties. The arbitration agreement plays a crucial and indispensable role in the initiation, procedures

and result of arbitration. The parties can set forth in the arbitration agreement almost all procedural matters they have mutually agreed, including, among others, the mode, language, procedures and place of the arbitration, arbitration institution, arbitration rules, composition of arbitration tribunal and applicable law. A valid and well drafted arbitration agreement also ensures the designated arbitration tribunal's jurisdiction over the underlying dispute and the effective enforcement of the arbitral award so rendered.

1. Effectiveness of Arbitration Agreement

A valid arbitration agreement serves as the very basis for the acceptance of application for arbitration by the relevant arbitration institution or arbitration tribunal, the requisite components of which are as follows: (i) definite subject matter for arbitration; (ii) expression of the intention for arbitration; (iii) no involvement of any unarbitrable matters (e.g., personal rights, marital or family matters, or public interest); and (iv) clearly designated arbitration institution or arbitration rules. Moreover, the arbitration agreement should be made in writing by parties with full civil capacity. In addition to the foregoing, the *PRC Arbitration Law* also requires the arbitration institution to be clearly provided in an arbitration agreement.

Once any potential dispute has been written into a valid arbitration agreement for resolution through arbitration, the relevant parities should not bring a lawsuit before any court in respect of such dispute nor should any court have jurisdiction over such dispute. Attention needs to be paid to the following matters as to the validity of an arbitration agreement:

(1) Governing Law of Arbitration Agreement

Since the arbitration agreement is considered independent from the underlying contract, the applicable law provided in the underlying contract generally will not govern the validity of the arbitration agreement. According to relevant PRC judicial interpretations, the law governing the validity of an arbitration agreement should be determined in the following order of priority: (i) the governing law of the arbitration agreement as specifically agreed by the parties; (ii) the law of the arbitration place; or (iii) the law of the place where the court having jurisdiction over the underlying case is located. In practice, since the parties rarely specify the law governing the validity of arbitration agreements, the law of the arbitration place is therefore often used to determine the validity of arbitration agreements.

(2) Form of Arbitration Agreement

An arbitration agreement may be a separate agreement or specific arbitration provisions contained in the underlying contract, which should generally in writing. In practice, however, in the absence of any written arbitration agreement, the jurisdiction of arbitration may be duly established if a party applies for arbitration and the other party responds to the proceedings accordingly (e.g., appointment of arbitrators and participation in arbitration).

(3) Objection to the Validity of Arbitration Agreement

Under PRC law, the parties who raise any objection to the validity of an arbitration agreement may apply to the relevant arbitration institution or intermediate people's court for invalidation thereof, so as to effectively rule out the arbitration institution's jurisdiction over the underlying dispute. Such objection should however be put forward prior to the first hearing of the arbitration tribunal. Otherwise, the court may not accept such objection

application.

Please note that, in China, the ruling to invalidate an arbitration agreement with respect to a foreign-related arbitration by the competent court (i.e., the competent intermediate people's court) must be approved by the PRC supreme people's court in advance.

2. Modes of Arbitration: *Ad Hoc* Arbitration and Institutional Arbitration

Ad hoc arbitration refers to arbitration conducted by an arbitration tribunal which is assembled for a specific case and dissolves immediately following the close of such case. The parties can select at their option the arbitration rules for ad hoc arbitration and the UNCITRAL Arbitration Rules are most commonly seen in practice.

Unlike ad hoc arbitration, institutional arbitration is performed and managed by a standing arbitration institution specialized in arbitration with its own arbitration rules and panel of arbitrators. Many such arbitration institutions also allow the revision of arbitration rules and appointment of arbitrators not listed in the panel of arbitrators.

Ad hoc arbitration, despite its higher degree of autonomy, may be severely prolonged if the parties cannot agree upon the arbitration rules, largely due to the absence of a managerial organ. Therefore, institutional arbitration is more popular in practice for its ability to strike a better balance between the autonomy of the parties and the controllability of proceedings. Attention needs to be given to the following matters when it comes to the selection of the mode of arbitration.

(1) PRC Law Does Not Recognize Ad Hoc Arbitration

PRC law conditions the validity of an arbitration agreement on the selection of a specific arbitration institution and denies the effectiveness of ad hoc arbitration. Hence, the parties intending to choose ad hoc arbitration should not specify that the PRC law is the governing law of the arbitration agreement (the underlying commercial contract can be governed by PRC law however), nor should any place in China be designated as the arbitration place.

(2) Special Circumstances Where No Arbitration Institution Is Clearly Specified

As mentioned above, since a pre-agreed arbitration institution is a condition precedent to the effectiveness of an arbitration agreement under PRC law, any arbitration agreement will be deemed null and void in China if it is silent on the arbitration institution or stipulate more than one arbitration institution, except where a specific arbitration institution can be inferred from the arbitration agreement. Such exceptions include:

- Where an arbitration agreement is silent on the arbitration institution, but stipulates applicable arbitration rules, from which a specific arbitration institution can be inferred. For example, the arbitration rules of China International Economic and Trade Arbitration Commission (the "CIETAC Rules") provide that, "if the parties agree to conduct arbitration under CIETAC Rules but fail to designate any arbitration institution, it shall be deemed that they have agreed to submit the dispute to this arbitration commission for arbitration".

- Where an arbitration agreement fails to specify the name of an arbitration

institution but sets out the place of arbitration where only one arbitration institution is located, such arbitration institution should be deemed as duly designated;

- Where an arbitration agreement provides two arbitration institutions or more and the specific circumstances under which each institution may apply have been set out in the arbitration agreement. For example, the parties agree that the arbitration initiated by a party should be performed by the arbitration institution designated by such party.

3. Formation of Arbitration Tribunal

The arbitration tribunal should be established in accordance with the arbitration agreement, either in the form of a sole arbitrator or a three-member panel (where a presiding arbitrator is required). In the case of a panel, the parties may each appoint one arbitrator, and the presiding arbitrator should be appointed subject to the mutual agreement of the parties or the other two arbitrators, or, failing such agreement, by the arbitration institution or any other designated entity (in the case of ad hoc arbitration). The appointment of the sole arbitrator follows the same practice with the presiding arbitrator. The parties need to focus on the following matters when forming an arbitration tribunal:

(1) Appointment Criteria of Arbitrators

It is advisable for the parties to choose arbitrators who: (i) have professional background, and knowledge of PRC laws in the case of China related commercial disputes; and (ii) is qualified to conduct arbitration under the place of arbitration. Among the various qualification requirements in different jurisdictions, independence is a common prerequisite. On top of that, PRC law requires arbitrators to possess legal, economic and other relevant background or expertise.

(2) Withdrawal of Arbitrators

An arbitrator should withdraw if his/her independence is in question, the triggers of which are set out in relevant laws in different jurisdictions. The *PRC Arbitration Law* requires an arbitrator to withdraw if he/she (i) is a party, or a close relative of a party or a party's representative; (ii) has interest in the underlying case; (iii) has any other relation with a party or a party's representative which may adversely affect the fairness of the arbitration proceedings; or (iv) meets in private a party or a party's representative, or accept gifts or invitation given by a party or a party's representative.

Once any of the aforesaid scenarios arises, the relevant arbitrator should withdraw voluntarily or upon the request of a party. In the latter case, the requesting party needs to bear the burden of proof and the withdrawal is subject to the final decision of the relevant arbitration institution or its chairman. Moreover, such request should be brought up prior to the first hearing, or, if the reason for withdrawal becomes known after the first hearing, the end of the last hearing of the tribunal.

4. Selection of Arbitration Place/Arbitration Institution: Domestic Arbitration and Foreign Arbitration

The provisions on arbitration place are considered to be of great importance in an arbitration agreement, which bear significant legal implication. The law of the arbitration place generally governs the validity of the arbitration agreement

and the arbitration procedures unless the parties agree otherwise. Besides, the arbitration place also has a bearing on whether an arbitral award may be duly recognized and enforced in a foreign jurisdiction. The parties may generally agree upon the arbitration place at their discretion, or, without such agreement, it may be deemed that the location of the arbitration institution is the arbitration place, or the arbitration tribunal may determine a place according to the actual situation of the case. The parties should pay attention to the following issues when choosing the arbitration place:

(1) Arbitration Place and Hearing Place

The arbitration place and the hearing place are not the same legal concept though in practice the arbitration place is often the place where the hearing actually takes place. As mentioned above, the arbitration place bears legal significance, as the law of the arbitration place generally governs the validity of the arbitration agreement and the arbitration procedures. In addition, an arbitral award is usually deemed to be rendered in the arbitration place, which is important to the recognition and enforcement of arbitral awards. The hearing place, however, is the place where the arbitration tribunal conducts the hearing actually, which barely has any legal implication. As a matter of practice, the arbitration tribunal generally may decide the hearing place at a place other than the arbitration place as is necessary for the arbitration proceedings.

(2) Domestic Arbitration and Foreign Arbitration

(i) Criteria for Classification of Foreign Arbitration and Domestic Arbitration

Foreign-related arbitrations are generally classified into two categories: domestic arbitration and foreign arbitration according to whether the arbitration place is located within the home country or not. The PRC law is not clear about the criteria to differentiate domestic arbitration and foreign arbitration while in practice the home country of the arbitration place or the country where the arbitration institution is located is often used as criteria. For example, an arbitral award rendered in China by the International Court of Arbitration of International Chamber of Commerce (ICC) may be deemed by the Chinese court as foreign arbitration. Therefore, for the avoidance of any unnecessary dispute, the investors are suggested to specify a foreign arbitration place in the relevant arbitration agreement if a foreign arbitration institution is selected, and vise versa.

(ii) Comparison between Domestic Arbitration and Foreign Arbitration

In practice, foreign investors usually tend to choose foreign arbitration conducted by an internationally recognized arbitration institution. In addition to the unfamiliarity with PRC law, the reasons for foreign investors' favor of foreign arbitration may be as follows:

- the award of domestic arbitration may be partial to the Chinese parties;
- the arbitration rules of domestic arbitration institutions are not flexible enough and the parties have relatively limited autonomy;
- the management system of domestic arbitration institutions is relatively backward;
- the legal system for domestic arbitration is not well established, e.g., there is no ad hoc arbitration.

China International Economic and Trade Commission ("CIETAC") is the

primary arbitration institution in China that deals with the settlement of international commercial disputes and its currently effective arbitration rules are the 2005 version of CIETAC Rules. As compared with the previous rules, the existing rules are formulated with reference to the ICC arbitration rules and other advanced arbitration systems in the world, with efforts on such aspects as to respect the autonomy of the parties and to strengthen the neutrality of the arbitration tribunal. For example, the existing rules allow the parties, among other, to revise the CIETAC Rules or apply other arbitration rules, to appoint arbitrators not listed in the panel of arbitrators (subject to confirmation of CIETAC chairman), and to choose an arbitration place and/or hearing place outside the PRC. According to the relevant report, there is a fairly fast increase in both the number and value of international commercial disputes accepted by CIETAC during the recent years. Though most foreign investors tend to prefer international arbitration, domestic arbitration has the following advantages over foreign arbitration:

- may apply to the court for the preservation of evidence and property located within the PRC, whereas a foreign arbitration tribunal may not request a PRC court to assist with the preservation of evidence and property;

- it takes relatively shorter time to effect the enforcement as the enforcement of arbitral awards does not need to be based on international treaties, bilateral treaties or the principle of reciprocity,*(please see Part III below for details of the differences between the enforcement of domestic arbitration and foreign arbitration*);

- the fees related to domestic arbitration are relatively low.

In view of the above, when choosing the arbitration place or arbitration institution, the investors need to consider the legal system at the place of arbitration and the place of enforcement (including the arbitration rules of the relevant arbitration institution) as well as the actual condition of the dispute (e.g., whether PRC enforcement is required and whether the preservation of property/evidence located within the PRC is involved). In addition, if the investors select foreign arbitration and the award needs to be enforced in China, the arbitration place should be a contracting party to the New York Convention or such places as Hong Kong or Macao, so as to facilitate the smooth enforcement of the arbitral award.

(3) Comparison of Major Arbitration Institutions and Arbitration Rules

The following table sets out a brief introduction and comparison of major international arbitration institutions and their arbitration rules:

Arbitration Institution/Rules	**Features**
China International Economic and Trade Arbitration Commission (CIETAC) and its arbitration rules	● particularly suitable for PRC-related disputes, headquartered in Beijing, China, with branches in Shanghai and Shenzhen; ● the arbitration rules are gradually in line with advanced international rules after several rounds of revisions; is developing into a major international commercial arbitration center; ● the parties have relatively limited autonomy of will, e.g., the appointment of any arbitrator outside the panel of arbitrators is subject to CIETAC chairman's approval; the presiding arbitrator is generally assumed by a PRC citizen; may be partial to a PRC party

Arbitration Institution/Rules	Features
Hong Kong International Arbitration Center (HKIAC) and its arbitration rules	● located at Hong Kong, with fairly close relation with the PRC, particularly suitable for PRC-related disputes; ● a leading emerging arbitration institution in Asia, with fairly flexible arbitration rules and relatively mature management system
the International Court of Arbitration of International Chamber of Commerce (ICC) and its arbitration rules	● the most influential arbitration institution in the world, suitable for all kinds of international commercial disputes, headquartered in Paris, France, with various branches throughout the world; ● mature arbitration rules and management system
the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and its arbitration rules	● enormous neutrality due to the neutral position of Sweden; known for settlement of disputes involving the Far East and China, headquartered in Stockholm, Sweden; ● mature arbitration rules and management system
American Arbitration Association (AAA) its international arbitration rules	● a major international commercial arbitration institution in the US; mainly for settlement of disputes between a US party and a non-US party, headquartered in New York, US, with branches in several other states; ● may be partial to a party who is a US citizen/entity
the London Court of International Arbitration (LCIA) and its arbitration rules	● the oldest arbitration institution in the world, headquartered in London, UK; ● may be partial to a party who is a UK citizen/entity
Singapore International Arbitration Center (SIAC) and its arbitration rules	● known for settlement of disputes related to construction, shipping, banking and insurance; ● an emerging international commercial arbitration institution, with fairly flexible arbitration rules and relatively mature management system
United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules)	● no standing arbitration institution, arbitration time quite uncertain; ● arbitration rules very flexible, often used for ad hoc arbitration
International Centre for Settlement of Investment Disputes (ICSID)	● established according to the *1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, an independent institution under the World Bank, headquartered in Washington, US; ● settlement of investment disputes between member states (governments) and nationals of other states via mediation or arbitration; ● dispute resolution mechanism is different from the general international commercial arbitration with respect to the scope of application, procedures, enforcement, and etc.; ICSID is not applicable to the most cases that may be settled through international commercial arbitration; considering currently there are few investment disputes between foreign investors and the PRC government, let alone any arbitration in this connection, ICSID will not be introduced herein in detail

3. Cancellation and Enforcement of Arbitral Awards for Foreign-Related Arbitrations

An arbitral award is final and will be binding upon the parties once the award is rendered. The parties shall perform their obligations under the arbitral award; otherwise the opposing party may apply to the relevant court for enforcement. If a party objects to the arbitral award, the party may, under certain specified circumstances, apply to the competent court to cancel the arbitral award, or raise an objection and request the court not to enforce such arbitral award when the opposing party applies for enforcement.

1. Cancellation of Arbitral Awards

Generally speaking, the court of a relevant country may only cancel an arbitral award made within its own country. Any arbitral award rendered by a foreign arbitration institution may generally be cancelled by a count located at the arbitration place.

According to applicable PRC laws and regulations, the parties may request the relevant court to conduct judicial review on any domestic arbitral award to which they have objection. The court may refuse the objection application, cancel the arbitral award, or request the arbitration tribunal to re-arbitrate, as the case may be, after its review of the case. The court will focus on the procedural issues during its review while the substantive issues of the arbitration are generally not subject to court review.

2. Enforcement of Arbitral Awards

Most countries have different regulations and requirements for the recognition and enforcement of domestic awards and foreign awards. The enforcement of domestic awards is based on the domestic law of a country, with relatively simple procedures; whereas the enforcement of foreign awards is generally more complicated, which is based on the international treaties to which both the country of arbitration and the country of enforcement are parties, the bilateral treaties entered into by the two countries, or the principle of reciprocity, among which the New York Convention is the most important.[3] The following table sets out the main basis for the PRC/foreign enforcement of domestic/foreign award:

Type of Award	**Basis for Enforcement**
PRC enforcement of domestic award	the *PRC Civil Procedural Law*, the *PRC Arbitration Law* and other PRC laws
PRC enforcement of foreign award	the New York Convention and other international treaties, bilateral treaties or the principle of reciprocity
foreign enforcement of foreign award	foreign laws
foreign enforcement of domestic award	foreign laws, mainly the New York Convention, bilateral treaties or the principle of reciprocity

With respect to PRC enforcement of domestic awards and foreign awards, the relevant PRC courts will initiate the recognition and/or enforcement procedures according to the application of the parties and the relevant enforcement basis. If an application for enforcement is made according to the New York Convention, the following two conditions should generally be met, (i) the

[3] According to the information published on the UNCITRAL website, there are currently 144 member states of the New York Convention. China became a member of the New York Convention in 1987. Most foreign awards recognized and enforced in the PRC are based on the New York Convention.

subject matter should be arising out of contractual or non-contractual commercial legal relationship (including investment disputes, but excluding disputes between an investor and the host government); and (ii) such arbitral award should be rendered in a country that is a contracting party to the New York Convention. The PRC court, however, will generally only review the procedural issues, rather than substantive issues, whether it is a domestic arbitral award or a foreign arbitral award, and make a decision whether to recognize and/or enforce.

Arbitral awards rendered in Hong Kong or Macau will not be deemed as domestic awards as Hong Kong and Macau are not in the same jurisdiction as China, and the enforcement thereof will be based on the *Arrangement of Mutual Enforcement of Arbitral Awards between China and Hong Kong* and the *Arrangement of Mutual Recognition and Enforcement of Arbitral Awards between China and Hong Kong*, respectively, which arrangements are based on the New York Convention, with the procedures, time limit and fees similar to those for foreign arbitration. Arbitral awards made by an arbitration institution in Taiwan will be enforced according to the *Regulation of the Supreme People's Court on the Recognition of Civil Judgment in Taiwan by the People's Court*, which is however mainly focused on court judgments and its application to the enforcement of arbitral awards is unclear.

On foreign-related arbitrations, the following table sets out a brief introduction and comparison with respect to the cancellation of domestic awards (including request for re-arbitration under certain circumstances), the PRC enforcement of domestic awards and foreign awards and other related issues under PRC law:

Items for Comparison	**Cancellation of Domestic Arbitral Awards by the People's Court**	**Enforcement or Refusal of Enforcement of Domestic and Foreign Arbitral Awards by the People's Court**	
		Domestic Awards	**Foreign Awards**
Legal Basis	the *PRC Civil Procedural Law*, the *PRC Arbitration Law* and other PRC laws		the New York Convention, bilateral treaties or the principle of reciprocity
Applicant	any party	application for recognition and enforcement: the prevailing party	
Court Accepting Application	the intermediate people's court capable of accepting foreign-related commercial cases at the place where the arbitration institution is located	the intermediate people's court capable of accepting foreign-related commercial cases at the place where the party against which the enforcement is invoked resides or where the properties are located	
Circumstances for Cancellation or Refusal of Enforcement	mainly for procedural issues (*the refusal of recognition and enforcement of foreign arbitral awards are based on the New York Convention*)		
	➢ *issues the parities need to prove:*		
	● there was no arbitration provisions in the underlying contract or no arbitration agreement was reached in writing afterwards; ● the party against which the award is invoked was not given notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case for reasons not attributable to that party; ● the composition of the arbitration tribunal or the arbitration procedures	● the parties were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; ● the party against which 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 its case;	

Items for Comparison	Cancellation of Domestic Arbitral Awards by the People's Court	Enforcement or Refusal of Enforcement of Domestic and Foreign Arbitral Awards by the People's Court	
		Domestic Awards	**Foreign Awards**
	were not in accordance with the arbitration rules; ● the award deals with a dispute not contemplated in the arbitration agreement or the arbitration institution has no right to arbitrate		● the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on maters submitted to arbitration may be recognized and enforced; ● the composition of the arbitration tribunal or the arbitration procedure s was not in accordance with the arbitration agreement, or, failing such agreement, the law of the arbitration place; ● the award has not yet become binding upon the parties, or has been cancelled or suspended
	➢ *issues subject to court review:*		
	N/A	the enforcement of the award would be contrary to the pubic policy	● the dispute is not capable of settlement by arbitration under the PRC law; ● the recognition or enforcement of the award would be contrary to the public policy of the PRC
Time Limit for Application	within six (6) months after receipt of the arbitral award	within two (2) years after expiration of the time limit specified in the arbitral award	
Time Limit for Court Review	● make a ruling within two (2) months after acceptance of application; ● if it decides to cancel awards or request re-arbitration, report to the higher level court within thirty (30) days after acceptance of application; if the higher-level court agrees to such decision, then	initiate Enforcement within six (6) months after receipt of application for enforcement; otherwise, the applicant may apply to the higher level court for enforcement	● make a ruling within two (2) month after acceptance of application and complete enforcement within six (6) month after ruling except for specific circumstances;[4] ● report to the supreme people's court within two (2) months after acceptance of application according to relevant regulations in the case of refusal of recognition and enforcement

[4] In practice, the recognition and enforcement of foreign arbitral awards may take longer than the above-mentioned time limit. It may take more than one year to recognize a foreign award, and the time required for enforcement is even more unpredictable.

Items for Comparison	Cancellation of Domestic Arbitral Awards by the People's Court	Enforcement or Refusal of Enforcement of Domestic and Foreign Arbitral Awards by the People's Court	
		Domestic Awards	Foreign Awards
	report to the supreme peoples' court within fifteen (15) days		
Application Fee	RMB400 for each case	• if there is no enforceable amount or price, RMB50 to RMB500 shall be paid for each case • if the enforceable amount or price is not more than RMB10,000, RMB50 shall be paid for each case; for the part of more than RMB10,000 up to RMB500,000, the fee shall be paid at the rate of 1.5%; for the part of more than RMB500,000 up to RMB5,000,000, the fee shall be paid at the rate of 1%; for the part of more than RMB5,000,000 up to RMB10,000,000, the fee shall be paid at the rate of 0.5%; for the part of more than RMB10,000,000, the fee shall be paid at the rate of 0.1%	
Reporting Procedure for Cancellation or Refusal of Enforcement	the court accepting application shall submit the relevant ruling to the supreme people's court via the competent higher people's court and may, after approval, cancel, request re-arbitration, refuse to enforce or refuse to recognize and enforce		
Legal Consequences for Cancellation or Refusal of Enforcement	the arbitral award will become null and void, the parties may enter into another arbitration agreement and apply for arbitration or directly bring a lawsuit before the court	the Parties may enter into another arbitration agreement and apply for arbitration or directly bring a lawsuit before the court	the arbitral award remains in force; the parties may apply for recognition and enforcement to other courts

* * *

The above is a brief introduction and analysis of the relevant PRC laws and regulations and practice on the settlement of international commercial disputes through arbitration. Given the PRC practice varies quite a lot in different localities in China, if there is any discrepancy between this memo and any future rules, interpretations, circulars or policies to be issued by the PRC government authorities, such government issuance shall prevail. This memo is for your general reference purpose only and shall not be relied as any formal PRC legal opinion in any respect.

If you have any questions, please fell free to contact us at inquiry@hanyilaw.com.

外商投资相关争议的解决方式 — 涉外商事仲裁

仲裁，是一种与诉讼相并列的争议解决方式。在仲裁中，当事人依据所达成的仲裁协议，将相关争议提交至约定的仲裁机构或仲裁庭评断是非，并由其作出裁决。仲裁裁决对双方都具有约束力，并能被赋予强制执行力。随着外国投资者在中国[1]的投资项目日益增多，如何解决投资过程中涉及的争议成为投资者日益关心的问题。仲裁因其高度的自治性、广泛的国际性等特点，已经逐渐发展成为解决国际商事纠纷的主要途径。

本文主要从中国法律的视角，对外国投资者在通过仲裁解决国际商事纠纷方面所普遍关心的基本问题（即为何选择仲裁、如何进行仲裁以及如何在中国执行已生效的仲裁裁决）进行介绍。[2]

1. 为何选择仲裁

解决国际商事纠纷的途径包括协商、调解、仲裁、诉讼等方式。其中仲裁和诉讼是两种被国家强制力所支持的争议解决途径。相比较而言，由于具有下列优势，仲裁更加广泛地用于解决国际商事纠纷:

- 高度的自治性

仲裁的方式、语言、程序、地点、仲裁机构、仲裁规则、仲裁庭组成、适用法律等事项基本上可由当事人根据实际情况自行约定，而诉讼程序的进行则由法院根据国家法律决定，当事人被动地参与到诉讼程序中，其自治性受到很大程度的限制。

- 较高的可执行性

一项仲裁裁定或法院判决如需在境内获得承认和执行，一般需依赖于两国参加的国际公约或订立的双边条约。1958 年《承认及执行外国仲裁裁决公约》（“《纽约公约》”）为一国承认和执行外国仲裁裁决提供了广泛的条约基础，而目前还没有被广泛认可的国际条约规制外国法院判决在境外的承认和执行。因此，对于同一争议的当事人来说，法院判决获得境外执行的难度比仲裁裁决获得境外执行的难度要大得多。

- 较高的权威性

鉴于当事人可在仲裁程序中自主选择仲裁员，其所选择的仲裁员往往是争议所涉及的行业中的专家，因此能够对案件（尤其是复杂案件）进行深入分析。

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[1] 仅为本备忘录之目的，除特别注明外，“中国”不包括香港特别行政区、澳门特别行政区及台湾地区。

[2] 本备忘录中介绍的仲裁均为中国法律项下所指的涉外仲裁,即仲裁涉及的纠纷一般存在如下情况：当事人为境外自然人或实体、争议标的在中国境外或产生、变更或消灭民事权利义务关系的法律事实发生在外国等。

而相对而言，诉讼程序的法官由法院指定，法官的个人水平存在较大差异（特别在发展中国家），从而可能影响判决的公正性。

- 较强的中立性

在国际商事纠纷中，争议各方往往对对方的司法体系存在一定程度的不信任，而仲裁允许当事人选择交易各方之外的第三国仲裁机构或仲裁庭对案件作出裁决，往往能够平衡各方在争议中的利益冲突，为争议各方提供一个相对中立的争议解决平台。

- 高度的保密性

一般情况下，诉讼是以公开方式审理的，而仲裁则一般以非公开方式进行。鉴于外商投资经常涉及大量商业秘密，当事人也会因此而倾向于以仲裁方式解决投资争议。

尽管如此，在一些情况下，仲裁也存在一定的不足。例如一般情况下仲裁庭无权将与案件相关的第三方加入到案件审理中，如果争议案件与其他案件紧密联系，则可能使案件审理复杂化；另外，仲裁庭无权直接采取强制措施（诸如财产保全、证据保全等措施），该等程序可能需依赖于仲裁地的法院进行，因此可能加大当事方转移财产或销毁证据的风险。

2. 如何利用仲裁解决涉外商事纠纷

利用仲裁解决涉外商事纠纷的基础和核心是订立一个有效、对己方有利的仲裁协议。仲裁协议对仲裁的启动、程序及结果都起到举足轻重的作用。当事人可通过仲裁协议约定仲裁的几乎所有程序性事项，包括仲裁的方式、语言、程序、地点、仲裁机构、仲裁规则、仲裁庭组成及适用法律等。同时，仲裁协议的效力和内容也直接影响仲裁庭对案件的管辖权以及仲裁裁决是否能得到有效执行。

1. 仲裁协议生效要件

有效的仲裁协议是仲裁机构或仲裁庭受理争议案件的依据。一项有效的仲裁协议一般应具备如下要件：(i) 明确的争议事项；(ii) 将争议事项提交仲裁的明确意思表示；(iii) 仲裁事项的可仲裁性，一般不应涉及身份、婚姻、家庭关系、公共利益等事项；及(iv) 明确的仲裁机构或仲裁规则。另外，仲裁协议需以书面形式作出，且协议主体应具备完全民事行为能力。中国《仲裁法》除上述要求外，还要求仲裁协议对仲裁机构作出明确约定。

任何一项已约定提交仲裁的争议事项，当事人不得向法院提起诉讼，法院也无权管辖该等争议。对于仲裁协议的效力问题，实践中应注意以下事项：

(1) 判断仲裁协议效力所依据的法律

仲裁协议被视为独立于主合同，因此，当事人在合同中约定的适于解决合同争议的准据法，一般不能用来确定仲裁协议的效力。依据中国相关司法解释，判断仲裁协议效力所依据的法律应按以下顺序确定：(i)当事人针对仲裁协议效力特别约定的法律；(ii)仲裁地法律；或(iii)法院地法律。实践中当事人一般不会约定管辖仲裁协议效力的法律，因此仲裁地法律往往作为判断仲裁协议效力的依据。

(2) 仲裁协议的形式

一般而言，仲裁协议均需以书面形式达成。该等协议可以是独立协议的形式，也可以是某商事合同中的仲裁条款。但实践中，尽管当事方未做出明确书面仲裁协议，如一方发出仲裁请求后，另一方积极配合仲裁事项（如指定仲裁员、参加仲裁等）的，也可能被认为接受仲裁管辖。

(3) 对仲裁协议效力提出异议

依据中国法律，如当事人对仲裁协议效力有异议，可要求仲裁机构或相关中级人民法院确认仲裁协议无效，从而排除仲裁庭就争议事项的管辖权，但上述异议应在仲裁庭首次开庭前提出，否则法院将不予受理。

需注意的是，在中国，基层法院（应为诉讼地的中级人民法院）对涉外仲裁协议的无效裁定必须事先报至最高人民法院批准。

2. 仲裁方式选择：临时仲裁和机构仲裁

临时仲裁是指不通过常设仲裁机构而直接由仲裁员组成的仲裁庭进行的仲裁，仲裁庭在处理完毕争议案件后即行解散。当事人可自行约定临时仲裁的仲裁规则，实践中最常见的为《联合国国际贸易法委员会仲裁规则》。

与临时仲裁相反，机构仲裁由常设的、专门从事仲裁的仲裁机构进行管理。仲裁机构往往配备专门的仲裁规则及仲裁员名册，但很多仲裁机构允许当事人修改仲裁规则并在仲裁员名册之外选择其他仲裁员。

临时仲裁能够实现更高的自治性，但因缺乏管理机构，仲裁程序往往因当事方无法达成一致而严重拖延。而机构仲裁因其较能较好地平衡当事人自治性和程序的可控性，在实践中更为常见。关于仲裁方式的选择，实践中需注意如下事项：

(1) 中国法律不承认临时仲裁

中国法律将选定仲裁机构作为仲裁协议生效的一项必要条件，而不承认临时仲裁的效力。据此，拟将争议提交临时仲裁的当事人不应约定由中国法律管辖仲裁协议（但可由中国法律管辖商事合同本身），也应避免约定中

国境内作为仲裁地点。

(2) 仲裁机构约定不明的特殊情况

如前所述，中国法律将选定仲裁机构作为仲裁协议生效的一项必要条件，因此一般情况下，未在仲裁协议中约定仲裁机构或约定多个仲裁机构的，仲裁协定将被中国法律认定为无效，但能够从仲裁协议的相关条款中推定出明确的仲裁机构的情况除外，一般包括:

- 虽未约定仲裁机构，但约定了仲裁规则，且按该仲裁规则，可推定仲裁机构的。如《中国国际经济贸易仲裁委员会仲裁规则》（“CIETAC规则”）中规定，“凡当事人约定按照本规则进行仲裁但未约定仲裁机构的，均视为同意将争议提交本仲裁委员会仲裁”

- 虽未明确仲裁机构名称，但约定由某地的仲裁机构仲裁且该地仅有一个仲裁机构的，该仲裁机构为约定的仲裁机构

- 虽约定了两个以上的仲裁机构，但可以从协议中明确看出何种情况下由哪个仲裁机构仲裁。例如一些仲裁协议约定一方当事人提起仲裁的由某一仲裁机构管辖，另一方当事人提起的仲裁由另一个仲裁机构管辖，该等协议下的仲裁机构明确，不会导致仲裁协议无效。

3. 仲裁庭的选择

仲裁庭直接审理案件并作出裁决，因此仲裁庭的选择极为重要。仲裁庭的组成依据当事方的仲裁协议确定，一般由一位或三位仲裁员组成，后者需设首席仲裁员。一般情况下，当事人可各自指定三人仲裁庭中一位仲裁员，但就独任仲裁员或首席仲裁员，则需由当事人或非首席仲裁员协商一致，或在不能达成一致时由仲裁机构或指定机构（临时仲裁的情况下）予以指定。当事人在选择仲裁庭时需重点关注如下事项:

(1) 仲裁员的选择标准

一般情况下，当事人选择具体仲裁员时，需重点关注如下情况：(i) 具备一定专业背景，尤其在与中国相关的商事争议中，需关注拟选择的仲裁员是否对中国法律有一定认识；及(ii) 满足仲裁地法律对仲裁员的任职资格要求。各国法律对仲裁员的任职资格可能存在不同要求，但独立性是各国法律的共同要求。除此之外，中国法律还要求仲裁员拥有一定的法律、经济等专业背景。

(2) 仲裁员回避制度

仲裁员违反独立性要求的，应予以回避。各国法律一般都会对仲裁员的回避事由做出列举。根据中国《仲裁法》，仲裁员有下列情形之一的，应予

回避：(i) 当事人自身或者当事人、代理人的近亲属；(ii) 与本案有利害关系；(iii) 与本案当事人、代理人有其他关系，可能影响公正仲裁的；或(iv) 私自会见当事人、代理人、或者接受当事人、代理人的请客送礼的。

存在上述情况的，仲裁员应自行回避，当事人也可要求其回避。当事人申请回避的，一般应对回避事由进行举证，并最终由仲裁机构或其主席做出决定。当事人申请回避一般应在一定期限内提出。中国《仲裁法》规定应在首次开庭前或最后一次开庭终结前（若首次开庭结束后方得知回避事由的）提出。

4. 仲裁地/仲裁机构选择：国内仲裁和国外仲裁

仲裁地条款是仲裁协议中最重要的内容之一，具有重要的法律意义。一般情况下，除非当事人另有约定，仲裁地法律是决定仲裁协议效力和仲裁程序的准据法，同时，仲裁地也关系到仲裁裁决是否能在他国得到承认和执行。仲裁地一般可由当事人自由约定，如当事人未作约定的，则可能默认为仲裁机构所在地或由仲裁庭根据案件具体情况酌情决定。在选择仲裁地时，当事人需注意：

(1) 仲裁地与开庭地点

尽管在实践中，仲裁地往往就是实际的开庭地点，但法律上的仲裁地与开庭地并不是同一个概念。如前所述，仲裁地具有重要的法律意义，仲裁地法律一般是决定仲裁协议效力和仲裁程序的准据法，同时也往往决定仲裁裁决的国籍，关系到仲裁裁决的承认和执行；而开庭地是仲裁庭为审理案件方便实际审理案件所在地，几乎不具有法律意义。一般情况下，仲裁庭可根据案件审理必要，决定仲裁地之外的其他地址作为开庭地点。

(2) 国内仲裁和国外仲裁

(i) 国外仲裁和国内仲裁的判断标准

国际上通常根据仲裁地是否在本国境内将有关涉外商事纠纷的仲裁区分为国内仲裁和国外仲裁。但中国法律对国内仲裁和国外仲裁的区分标准规定得并不明确。现实案例中存在以仲裁地所在国作为标准的，也有以仲裁机构的国别属性作为标准的。例如，依照约定由国际商会仲裁院（ICC）在中国境内进行仲裁的裁决结果，可能被中国法院认定为国外仲裁。因此，建议投资者在达成仲裁协议时如果选择中国境外仲裁机构仲裁则应将仲裁地也定在中国境外，反之亦然，以避免不必要的纠纷。

(ii) 国外仲裁与国内仲裁的比较

实践中，外国投资者较倾向于选择国际知名的国外仲裁机构在中国境外进行仲裁。除了对中国法律不熟悉的原因之外，外国投资者倾向于国外仲裁的原因可能主要在于：

- 国内仲裁的裁决可能偏向于中国当事方;
- 国内仲裁机构的仲裁规则不够灵活，当事人的自治权较为有限;
- 国内仲裁机构的管理模式相对落后;
- 中国仲裁法律制度不够健全，如不允许临时仲裁等。

中国境内解决国际商事纠纷的主要仲裁机构为中国国际经济贸易仲裁委员会（CIETAC），其现行仲裁规则为 2005 年修订版的《CIETAC 规则》。与此前的规则相比，现行规则参考 ICC 仲裁规则等国际上较先进的仲裁制度，在尊重当事人意思自治、加强仲裁庭中立性等方面做出了努力。比如现行规则允许当事人修改《CIETAC 规则》或适用其他仲裁规则、选择仲裁员名单之外的其他仲裁员（但需要 CIETAC 主任确认），以及约定中国境外的仲裁地和开庭地点等。根据相关报道，近年来 CIETAC 受理的国际商事纠纷数量和标的金额均出现较快增长。尽管大多数投资人目前还较倾向于国外仲裁，但与国外仲裁相比，中国境内仲裁存在如下优势:

- 能够申请法院就中国境内的证据和财产进行保全，而国外仲裁庭无权要求中国法院协助进行证据和财产保全
- 裁决执行无需以国际条约、双边条约或互惠原则为前提，且执行时间相对较短（国内仲裁和国外仲裁在执行上的区别详细参见本备忘录第三部分）
- 与仲裁相关的费用相对较低

有鉴于此，投资人在选择仲裁地或具体的仲裁机构时，需综合考虑仲裁地和执行地的法制状况（包括相关仲裁机构的仲裁规则）及拟提交仲裁的争议事项的具体情况（诸如是否需在中国执行、是否涉及中国境内的财产/证据保全等），选择合适的仲裁地/仲裁机构。另外，如投资者拟选择境外仲裁，且最终仲裁裁决需在中国境内执行，应注意所选择的仲裁地应位于《纽约公约》缔约国之内，或者香港、澳门等地，以确保仲裁裁决能够得到顺利执行。

(3) 主要仲裁机构及仲裁规则比较

以下表格中，我们对目前国际上一些主要的仲裁机构及其适用的仲裁规则进行了简要比较和介绍，供投资人参考:

仲裁机构/规则	**特点**
中国国际经济贸易仲裁委员会（CIETAC）及其仲裁规则	● 尤其适合与中国相关的争议，总部位于中国北京，在上海、深圳设有分会; ● 仲裁规则经历几次修改后与国际上先进的仲裁规则逐步接轨，正在发展为世界主要的国际商事仲裁中心之一; ● 当事人自治性仍受到一定程度的限制，例如选择仲裁员名册之外的仲裁员需 CIETAC 主任确认; 仲裁首席仲裁员一般由中国人担任，可能偏向中国当事方
香港国际仲裁中心（HKIAC）及其机构仲裁规则	● 位于中国香港，与内地关系较为密切，尤其适合与中国相关的争议; ● 亚洲领先的新兴仲裁机构，较为灵活的仲裁规则和相对成熟的

仲裁机构/规则	特点
	管理体系
国际商会仲裁院（ICC）及其仲裁规则	● 国际上最具影响力的仲裁机构，适合于各种国际商事纠纷，总部设于法国巴黎，在世界各地拥有多个分支机构; ● 成熟的仲裁规则和管理体系
瑞典斯德哥尔摩商会仲裁院（SCC）及其仲裁规则	● 因其国家的中立地位，拥有较强的中立性，以解决涉及远东、中国的争议而著称，总部位于瑞典斯德哥尔摩; ● 成熟的仲裁规则和管理体系
美国仲裁协会（AAA）及其国际仲裁规则	● 为美国主要的国际商事仲裁机构，受理的多为美国当事人与外国当事人之间的争议，总部设在美国纽约，在美国一些州设有分部; ● 如当事人一方为美国公民/实体，可能偏向该当事方
英国伦敦国际仲裁院（LCIA）及其仲裁规则	● 世界上最古老的仲裁机构，总部位于英国伦敦; ● 如当事人一方为英国公民/实体，可能偏向该当事方
新加坡国际仲裁中心（SIAC）及其仲裁规则	● 以解决建筑工程、航运、银行和保险方面的争议见长; ● 新兴的国际商事仲裁机构，较为灵活的仲裁规则和相对成熟的管理体系
联合国国际贸易法委员会仲裁规则（UNCITRAL Arbitration Rules）	● 无相应的常设仲裁机构进行管理，仲裁时间存在较大的不确定性; ● 规则非常灵活，常用于临时仲裁
解决投资争端国际中心（ICSID）	● 根据 1965 年《解决国家与他国国民间投资争端公约》成立，为世界银行下设的独立性机构，总部设在美国华盛顿; ● 通过调解或仲裁的方式，解决成员国国家（政府）与他国国民之间因国际投资而产生的争议; ● ICSID 争议解决机制与一般的国际商事仲裁在适用对象、程序、执行等诸多方面存在不同，本备忘录中提及的适用于国际商事仲裁的一般情况可能并不适用于该机制；鉴于目前实践中有关外国投资者与中国政府的投资争议极为罕见，进入仲裁阶段的更是寥寥甚或没有，我们在此不作详细介绍

3. 涉外仲裁裁决的撤销和执行

仲裁实行一裁终局制度，裁决一经作出，即对当事人发生效力。当事人应自觉履行仲裁裁决中的义务，否则对方当事人有权向相关法院申请强制执行。但如果一方当事人对仲裁裁决存在异议，在满足一定条件的前提下可向相关法院申请撤销仲裁裁决，或者在对方当事人申请执行时提出异议要求不予执行。

1. 仲裁裁决的撤销

一般而言，一国法院仅有权对该国境内作出的国内裁决行使撤销权。由境外仲裁机构作出的裁决，一般应请求仲裁地的法院撤销该等仲裁裁决。

根据中国法律，当事人对国内裁决存在异议的，可在裁决作出后，要求相关法院进行司法审查。法院在审查后可根据具体情况驳回异议申请、撤销仲裁裁决或要求仲裁庭重新仲裁。法院的审查重点在于仲裁的程序性事项，一般情况下，不会对仲裁的实质性事项做出审查。

2. 仲裁裁决的执行

大多数国家对该国的国内裁决和国外裁决的承认和执行做出不同的规定和要求。国内裁决的执行依据为该等国家的境内法律，程序相对简单；而国外裁决的执行则相对复杂，需依赖于仲裁国籍国与法院地国共同参加的国际条约、两国签署的双边条约或互惠原则，其中尤以《纽约公约》最为重要。[3]我们在下表中列出了国内/外裁决在中国境内/外执行的主要依据：

裁决种类	**执行依据**
国内裁决在中国执行	以《民事诉讼法》、《仲裁法》为中心的中国法律
国外裁决在中国执行	以《纽约公约》为中心的国际条约、双边条约或互惠原则
国外裁决在国外执行	外国法律
国内裁决在国外执行	外国法律，一般也主要依据《纽约公约》、双边条约、互惠原则

就需在中国境内执行的国内裁决和国外裁决，中国法院将根据当事人的申请及各自的执行依据，启动承认及/或执行的程序。其中，如果依据《纽约公约》向中国相关法院申请执行的，一般需满足如下两项前提：(i) 争议事项需为契约性和非契约性商事法律关系所引起的争议（包括投资争议，但不包括投资者与东道国政府之间的争端）；以及(ii) 该等仲裁裁决需在《纽约公约》的其他缔约国领土内做出。但不论国内裁决还是国外裁决，中国法院一般仅针对程序性事项（而不是实质性事项）做出审查，并决定是否予以承认及/或执行。

由于香港和澳门的法制环境不同于中国大陆地区，因此在香港、澳门做出的仲裁裁决并不按照国内裁决对待，其执行依据分别为最高人民法院《关于内地与香港特别行政区相互执行仲裁裁决的安排》和《关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排》。该等安排主要以《纽约公约》为蓝本，其程序、时间和费用与外国裁决基本类似。对台湾地区仲裁机构做出的仲裁裁决，则按照《最高人民法院关于人民法院认可台湾地区有关法院民事判决的规定》办理，但该规定主要是针对台湾地区法院的判决，对仲裁裁决的执行规定得不甚明确。

在以下表格中，我们对中国法律项下国内仲裁裁决的撤销（包括一定情况下要求仲裁庭重新仲裁）、国内仲裁裁决和国外仲裁裁决在中国境内的执行等问题进行了简要介绍和比较，供阁下参考：

比较项目	**国内仲裁裁决被人民法院撤销**	**国内和国外仲裁裁决被人民法院执行或裁定不予执行**	
		国内裁决	**国外裁决**
法律依据	以《民事诉讼法》、《仲裁法》为中心的中国法律		《纽约公约》、双边条约或互惠原则
申请人	任何当事人	申请承认和执行：胜诉方	
受理申请的法院	仲裁机构所在地有权受理涉外商事案件的中级人民法院	被申请人住所地或财产所在地有权受理涉外商事案件的中级人民法院	
可被撤销	主要针对程序性事项（*其中拒绝承认和执行国外裁决部分以《纽约公约》为例*）		

[3] 根据联合国贸易法委员会网上公布的信息，截至目前，《纽约公约》已对 144 个国家生效；中国于 1987 年加入该公约，并于同年经立法机关批准生效。目前在中国获得承认和执行的外国裁决绝大多数以《纽约公约》为基础。

比较项目	国内仲裁裁决被人民法院撤销	国内和国外仲裁裁决被人民法院执行或裁定不予执行	
		国内裁决	**国外裁决**
或不予执行的情况	➢ *需要当事人举证的事项:*		
	● 当事人在合同中没有订立仲裁条款或者事后没有达成书面仲裁协议的; ● 被申请人没有得到指定仲裁员或者进行仲裁程序的通知，或者由于其他不属于被申请人负责的原因未能陈述意见的; ● 仲裁庭的组成或者仲裁的程序与仲裁规则不符的; ● 裁决的事项不属于仲裁协议的范围或者仲裁机构无权仲裁的。		● 仲裁协议当事人依据对其适用的法律为无行为能力者，或仲裁协议依当事人约定的准据法或裁决地法律（如未约定准据法）为无效; ● 被申请人未接到指派仲裁员或进行仲裁程序的适当通知，或者因其他原因未能陈述意见的; ● 裁决事项并非交付仲裁的事项或超出仲裁协议，或裁决载有交付仲裁范围以外事项的决定的（但交付仲裁事项的决定可与未交付仲裁的事项划分时，裁决中关于交付仲裁事项的决定部分应予以承认和执行); ● 仲裁庭的组成或者仲裁庭程序与仲裁协议或仲裁地法律（如仲裁协议未作约定）不符; ● 裁决对当事人尚无约束力、被撤销或者停止执行的。
	➢ *法院主动审查的事项:*		
	无	执行该裁决违背社会公共利益的	● 依中国法律，争议事项系不能以仲裁解决者; ● 承认或执行裁决有违中国社会公共利益。
提出时效	收到裁决书之日起六个月内提出	仲裁裁决规定的履行期间最后一日起二年内提出	
法院审查时限	● 受理申请之日起两个月内做出裁定; ● 决定撤销裁决或要求重新仲裁的，应在受理申请后三十日内报上级法院，该上级法院如同意其意见，应在十五日内报最高法院	收到申请执行书之日起六个月执行;否则，申请执行人可以向上一级法院申请执行	● 受理申请之日起两个月内做出裁定; 如无特殊情况，应在裁定后六个月内执行完毕;[4] ● 决定不予承认和执行的，须按有关规定在受理申请之日起两个月内上报最高人民法院
申请费	RMB400 元/件	● 没有执行金额或者价额的，每件交纳50元至500元 ● 执行金额或者价额不超过1万元的，每件交纳50元；超过1万元至50万元的部分，按照1.5％交纳；超过50万元至500万元的部分，按照1％交纳；超过500万元至1,000万元的部分，按照0.5％交纳；超过1,000万元的部分，按照0.1％交纳。	
撤销或不予执行的报告程序	受理法院应当通过所属高级人民法院向最高人民法院提交相关裁定。待其批准后，方可裁定撤销、要求仲裁庭重新裁决、不予执行或拒绝承认和执行		
撤销或不予执行的法律后果	仲裁裁决失去效力；当事人可进一步达成的仲裁协议申请仲裁，或直接向法院提起诉讼	当事人可就争议事项根据进一步达成的仲裁协议申请仲裁，或直接向法院提起诉讼	仲裁裁决不失去效力；不影响当事人向其他法院申请承认和执行

[4] 实践中承认和执行外国裁决的时间往往超过上述时限。仅就承认国外裁决而言，就有可能需花费 1 年以上的时间，而执行所需的时间则更难预测。

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以上是我们对以仲裁方式解决外商投资中国企业相关争议方面的法律规制和实践的概括性介绍和分析，希望对阁下有所帮助。由于中国各地的实践和具体操作不尽相同，如果本备忘录内容与相关司法部门另行颁布的任何规章、解释或政策有不一致之处，应以有关司法部门颁布的规定为准。本备忘录仅供阁下用作一般性参考，并不能视为我们就相关事项出具的任何正式法律意见。

如阁下对于本备忘录所述之内容有任何疑问，敬请随时与敝所联系(inquiry@hanyilaw.com)。

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