

Construction

Contributing editors

Robert S Peckar and Michael S Zicherman



2017

GETTING THE
DEAL THROUGH

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Preface

Construction 2017

Tenth edition

Getting the Deal Through is delighted to publish the tenth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Austria, Denmark, Ireland, Japan, Norway and Singapore.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman of Peckar & Abramson, PC, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH

London
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China

Helena H C Chen and Jean Zhu

Pinsent Masons LLP

Foreign pursuit of the local market

1 If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before taking such a step?

In China, there are different regulations for foreign designers and foreign contractors who intend to set up a local operation to pursue the local market.

To establish a foreign-funded construction or construction engineering design enterprise and engage in construction or construction engineering design activities within the territory of mainland China, a foreign investor must do the following:

- obtain an approval certificate of foreign-funded enterprises issued by the administrative department of foreign trade and economic cooperation;
- file a registration with the State Administration for Industry and Commerce or the competent local administration for industry and commerce authorised thereby; and
- obtain a qualification certificate of construction enterprises or construction engineering design enterprises (as appropriate) as issued by the administrative department of construction.

A graded and classified system of administration applies to the application for the establishment of a foreign-funded construction enterprise or construction engineering design enterprise and their respective qualification as well as the examination and approval of such applications.

Licensing procedures

2 Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

A foreign designer may carry out conceptual or schematic design for Chinese projects by way of cross-border delivery without a Chinese licence. However, if the foreign designer intends to undertake further stages, such as basic design, detailed design or construction drawing design, even by way of cross-border delivery, he or she must cooperate with a Chinese local design company or institute that has the corresponding Chinese licences.

Foreign designers may establish a wholly foreign-funded construction engineering design enterprise, a sino-foreign equity joint construction engineering design enterprise or a sino-foreign contractual joint construction engineering design enterprise in accordance with the relevant laws and regulations to carry out design work within the scope of their licences.

Foreign contractors may establish a wholly foreign-funded construction enterprise, a sino-foreign equity joint construction enterprise or a sino-foreign contractual joint construction enterprise in the territory of mainland China in accordance with relevant laws and regulations to carry out construction work within the scope of their licences. Projects that a wholly foreign-funded construction enterprise may contract are limited (see question 3).

Those that undertake work without the proper licence will be subject to administrative penalties, including monetary fines, down-grading, revocation of licences and forfeit of illegal incomes, and the relevant contracts shall be null and void.

Competition

3 Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

China is a WTO member with observer status in the Government Procurement Agreement Committee and is in the process of acceding.

However, under article 15 of Rules for the Administration of Foreign-funded Construction Enterprises, a wholly foreign-funded construction enterprise is only allowed to contract for, within its scope of qualifications, the following:

- a project that is to be constructed totally with the investment or the donation of a foreign country, or both;
- a project funded by an international financial institution or granted through international bidding according to terms of loan;
- a joint construction project in which foreign investment constitutes 50 per cent or more, and a sino-foreign joint construction enterprise in which foreign investment constitutes less than 50 per cent but which cannot be independently implemented by any Chinese construction enterprise due to technical difficulties and has been approved by the administrative department of construction of the people's government of the province, autonomous region or municipality directly under the central government; and
- a construction project using Chinese investment that cannot be independently implemented by any Chinese construction enterprise due to technical difficulties and has been approved by the administrative department of construction of the people's government of the province, autonomous region or municipality directly under the central government that may be jointed contracted by Chinese and foreign construction enterprises.

Moreover, no foreign-funded construction engineering design enterprise may apply for the qualification of engineering design that involves such special industries or fields as the national security and confidentiality of China (article 2(6) of the Notice of the Ministry of Construction and the Ministry of Commerce on Issuing the Detailed Rules for the Implementation of the Provisions on the Administration of Foreign-funded Construction Engineering Design Enterprises). Without the required qualifications, the foreign-funded construction engineering design enterprise cannot perform the corresponding design work.

Bribery

4 If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

If a contractor has illegally obtained the award of a contract through bribery, the contract shall be null and void. Both the bribe-givers and bribe-takers will be prosecuted. The applicable punishment varies in accordance with the amount of the bribery, which can range from criminal monetary fines to life imprisonment and, in extreme cases, capital punishment.

No facilitation payments are allowed under Chinese law.

Reporting bribery

5 Under local law must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

To report suspicion or knowledge of bribery of government employees is not a compulsory obligation for employees of the project team members.

Political contributions

6 Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

In China, the making of political contributions is not a part of doing business and providing political contributions with the view to obtaining business is usually regarded as bribery, which will lead to criminal charges.

Other international legal considerations

7 Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

In addition to the laws and regulations on design or construction projects promulgated by the central government, the central government departments or ministries or local governments also promulgate many more specific or detailed laws, regulations, enforcement rules and guidelines, which can be very complicated and time-consuming to follow. Sometimes, the laws, regulations, enforcement rules and guidelines may conflict with each other.

Construction contracts

8 What standard form contracts are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

Standard contract

There are many standard contracts published by Chinese government authorities. In terms of construction work, the Ministry of Housing and Urban-Rural Development and the State Administration for Industry and Commerce jointly published a model construction contract (GF-2013-0201); nine government authorities, including the National Development and Reform Commission, Ministry of Finance, Ministry of Building (later reorganised as the Ministry of Housing and Urban-Rural Development), Ministry of Railway (later dissolved), Ministry of Transport, Ministry of Information Industry (later reorganised as the Ministry of Industry and Information Technology), Ministry of Water Resources, Civil Aviation Administration and State Administration of Press, Publication, Radio, Film and Television, jointly published a standard construction invitation to bid in 2007, which attaches a standard construction contract as an annex. Government authorities also publish standard construction contracts applicable to special types of work. For example, the Ministry of Transport published a standard construction invitation to bid for highway projects in 2009.

In terms of design work, the Ministry of Housing and Urban-Rural Development and State Administration for Industry and Commerce jointly published a model engineering service contract for housing construction projects and professional construction projects respectively in 2015.

Language

Chinese law does not expressly require the contracts to be in Chinese. However, if the parties have to register the contract, a Chinese version is usually required for registration purposes.

Governing law

The governing law of a contract without any foreign elements should be the law of China. Foreign elements refer to any of the following situations:

- either parties or both parties are foreign citizens, foreign legal persons or other organisations or stateless persons;
- the subject matter is located outside the territory of mainland China; or

- the legal fact that leads to the establishment, change or termination of the civil relationship happened outside the territory of mainland China.

Dispute resolution

Parties may opt for litigation or arbitration to solve the disputes. In domestic cases (cases without any foreign elements), the parties can only agree to submit their dispute to a court or an arbitration commission in mainland China and cannot agree to submit their disputes to a foreign court or a foreign arbitration institution or to arbitrate outside of the territory of mainland China; nor can they choose to arbitrate ad hoc in mainland China.

Payment methods

9 How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Cheques and electronic payment are the most popular payment methods. Cash payment is usually used for minor works. In general, there are two types of payment, namely the milestone payment and the monthly payment. The milestone payment is typically used for lump sum price contracts and the monthly payment is usually used for unit price contracts.

Contractual matrix of international projects

10 What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

Owners usually contract directly with contractors. Owners are often responsible for design but, in recent years, EPC contracts have gradually gained in popularity. In government-funded projects especially, it is also possible that the owner may contract through a construction manager.

PPP and PFI

11 Is there a formal statutory and regulatory framework for PPP and PFI contracts?

There is no PPP law or concession law of China. However, there are many PPP-related laws and regulations at central and local government levels, including Administrative Measures for Infrastructure and Public Utility Concession, which became effective on 1 June 2015. The Chinese government has been heavily promoting the use of PPP in recent years. The Ministry of Finance and the National Development and Reform Commission, a functional institution of the state council, have respectively promulgated many regulations and guidelines on PPP.

Joint ventures

12 Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Members of consortia are held jointly and severally liable for the entire contract to a third party, but members of a consortium can agree to allocate liability and responsibility amongst themselves.

Tort claims and indemnity

13 Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

The concept of indemnity as a primary obligation given by the indemnifier to the beneficiary does not exist in Chinese law. Subject to mandatory regulations, the parties may agree on a wide indemnity provision in their contract.

Article 120 of the PRC Contract Law provides that: 'if both parties breach a contract, each party shall bear its own respective liabilities.' Accordingly, if a party breaches a contract by negligence, the party's claims under the indemnity provision shall be reduced to reflect liability arising from his or her own negligence.

An indemnity provision is also subject to article 53 of the Contract Law, which provides that a party cannot exclude his or her liability for death or personal injury to the other party or for property damages to the other party caused by his or her wilful acts or gross negligence.

Liability to third parties

14 Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

Article 6(1) of the PRC Tort Law provides that one who wrongfully damages a civil right or interest of another person shall be subject to the tort liability. Thus, if a contractor damages a third party's civil right or interest, the contractor will be held responsible to the third party despite the lack of contractual privity.

In addition, where any building, structure or facility collapses, causing any harm to another person, the construction employer and contractor shall be jointly and severally liable. After making compensation, the construction employer or contractor shall be entitled to be reimbursed by other liable persons, if any exist (article 86 of the Tort Law).

Insurance

15 To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

There are various types of insurances available to contractors in China, including contractor's all risk insurance, erection all risks insurance, contractor's plant and machinery insurance, transportation insurance, project asset insurance, third-party liability insurance, etc.

Regarding the statutory limit for contractors' liability for damages, as a general rule, article 113 of the Contract Law stipulates that:

Where a party fails to perform its obligations under the contract or its performance fails to conform to the agreement and cause losses to the other party, the amount of compensation for losses shall be equivalent to the losses caused by the breach of contract, including the interest receivable after the performance of the contract, provided that it does not exceed the probable losses caused by the breach of contract that has been foreseen or ought to be foreseen when the party in breach concludes the contract.

Labour requirements

16 Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

While there is no law explicitly requiring a minimum amount of local labour to be employed on a construction project, some construction-related laws may require a minimum number of staff to be employed in order to be licensed to undertake the construction projects. For example, to obtain a class 1 building construction licence, a contractor is required to employ 300 professionally qualified staff inclusive of technical staff (including licensed project managers) and management staff. In addition, the contractor must employ or assign at least one professionally qualified project manager to building construction projects.

Local labour law

17 If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

Two types of employment contracts are commonly used in the direct hire of local labour for a construction project, as follows:

- the fixed-term employment contract (where the expiry date is agreed upon by parties concerned); and
- the project-based employment contract (where the term refers to the completion of a certain project).

Under Chinese employment laws, termination of employees' contracts is highly restrictive and an employee's contract can only be terminated upon statutory grounds. An employee's service cannot be terminated upon completion of employment (in a fixed-term contract) or completion of the project (in a project-based contract) if the employee:

- is engaged in operations exposing him or her to occupational disease hazards and has not completed a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observation;
- has been confirmed to have suffered from an occupational disease or a work-related injury sustained during employment that has caused him or her to be totally or partially disabled from work;
- has suffered from an illness or sustained a non-work-related injury and is still within the statutorily prescribed medical treatment period;
- is a female employee who is pregnant or in her confinement or nursing period; or
- has been working for the employer continuously for not less than 15 years and is less than five years away from his or her legal retirement age.

In addition, if a project requires the employee to provide services through two fixed-term employment contracts or for more than 10 years of consecutive service, the employer is required to enter into a non-fixed term employment contract with the employee if he or she requests so. The non-fixed term employment contract can only expire upon the employee reaching his or her retirement age or at the time that the employer no longer exists.

However, an employer can still unilaterally terminate an employee's contract upon certain statutory grounds, either during the above restricted periods or under a non-fixed term employment contract. For instance, the employer may dismiss an employee with immediate effect if the employee has been proven to have seriously violated the company rules and regulations.

With the employee's consent, the employment contract can be terminated with mutual agreement.

It is worth noting that in the event that the employer terminates the contract of an employee which cannot be terminated under each of the situations mentioned above or without sufficient statutory grounds or mutual consent, there is a high risk that such termination will be considered a wrongful termination. Potential remedies for wrongful termination include the following:

- reinstatement, if so requested by the employee, and to make payment for contractual salaries and benefits for the period before reinstatement is agreed or awarded by labour arbitrators or courts; or
- compensatory damages equivalent to two times the statutory severance payment to which the employee is entitled, if the employee does not request reinstatement.

Severance payments are required in almost all termination cases. The basic formula for statutory severance is one month's salary (which is capped at three times the local average salary for employment after 1 January 2008) for each year of service (generally subject to a cap of 12 months' salary). For details, see www.mohrss.gov.cn.

Labour and human rights

18 What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

The Exit-Entry Administration Law of the PRC, Interim Measures for the Participation in Social Insurance of Foreigners Employed in China, Provisions on the Employment of Foreigners in China (2011 Amendment), Interim Provisions on Labour Dispatch, the Labour Contract Law of the PRC (2012 Amendment), the Labour Law of the PRC and the Construction Law of the PRC apply to the treatment of foreign workers in mainland China.

Foreign workers must obtain a work visa before being employed in China. The employers shall enter into labour contracts or dispatched labour contracts with foreign workers. For labour contracts, the employment term shall not exceed five years. The employers shall pay foreign workers at a level not lower than the lowest local salary standard and pay the social insurance for foreign workers in accordance with the relevant regulations. Besides, foreign workers have the right to take rests, to have holidays and leave, to receive labour safety and sanitation protection, and to submit applications for settlement of labour disputes, and other labour rights stipulated by law. In particular, for construction workers, in the course of construction operation, they are entitled to propose methods to improve the operating programmes and conditions that adversely affect health and to obtain protective equipment as required for safe operation.

They are entitled to criticise, report and accuse of actions endangering vital safety and personal health. Also, construction companies shall pay employment injury insurance for workers. However, in some construction sectors, it is forbidden to use foreign workers (eg, some positions for off-shore petroleum operations).

Companies that fail to follow the laws may have fines imposed upon them. The management of a construction enterprise that gives directions in violation of regulations and forces workers to take risks in performing operations shall be prosecuted for criminal liabilities for major casualties or other serious consequences.

Close of operations

19 If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

If a foreign contractor decides to close its operation, it shall be dissolved in accordance with the applicable Chinese law depending on the forms of the company.

There is no termination payment assessed against a foreign contractor by law in China but parties to the project contract may agree to make compensatory payments if it has not fulfilled its obligations under the contract.

Payment rights

20 How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

If the owner fails to pay the price in accordance with the contract, the contractor may demand the owner to make payment within a reasonable period. Where the owner fails to pay the price at the expiry of such period, the contractor may enter into an agreement with the owner to liquidate the project or petition to the people's court to auction the project in accordance with the law, unless such project is not fit for liquidation or auction in light of its nature. The contractor will be paid from the proceeds of the liquidation or auction of the project and takes priority over secured and unsecured creditors (article 286 of the Contract Law).

In real estate development projects where the construction contract price exceeds 10 million yuan, simultaneously with the execution of the construction contract, the owner has to provide a payment guarantee to the contractor by which a guarantor guarantees the payment of the construction contract price to the contractor (articles 2 and 11 of Several Provisions on Promotion of Guarantee for Construction Contracts in Real Estate Development Projects (for Trial Implementation), effective from 6 August 2004).

Contracting with government entities

21 Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

Chinese government agencies cannot assert sovereign immunity as a defence to a contractor's claim for payment.

Statutory payment protection

22 Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Interruption or cancellation of a contract is usually dealt with by express terms in the contract. If the contract is silent on this issue, the parties will have to rely on the governing law of the contract. Article 97 of the Contract Law provides that after the termination of a contract, performance shall cease if the contract has not been performed; if the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore such party to its original state or adopt other remedial measures, and such party shall have the right to demand compensation for damages. The unpaid contractor may seek compensation against the owner pursuant to article 97 of the Contract Law.

In addition, there are special statutory protections available to contractors, as follows:

- (i) if a construction project contract is revoked but the construction project has been completed and passes the acceptance test, the contractor may request for payment of the project price with reference to

the stipulations in the contract and such request shall be upheld by the courts (article 2 of Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Dispute over Contracts on Undertaking Construction Projects); and

- (ii) the contractor may issue a notice to demand the owner to perform its obligations within a reasonable period if any of the following situations occur:
 - the owner fails to make payment in accordance with the contract;
 - the main building materials, construction components or equipment provided by the owner do not meet the compulsory standards; or
 - the owner fails to perform its assistance obligation under the contract, and the contractor is therefore prevented from carrying out construction work.

Should the owner fail to perform within such period mentioned in (ii), the contractor is entitled to petition to rescind the contract and demand for payment for the completed and qualified work and damages (articles 9 and 10 of Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Dispute over Contracts on Undertaking Construction Projects).

Force majeure and acts of God

23 Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Under Chinese law, in the case of a force majeure event, contractors are excused from performing contractual obligations in part or in whole depending on the impact of the force majeure event, unless otherwise provided by law. Force majeure is defined as any 'unforeseeable, unavoidable and insurmountable objective conditions' (article 153 of the PRC General Principles of the Civil Law and article 117(2) of the Contract Law).

Courts and tribunals

24 Are there any specialised tribunals that are dedicated to resolving construction disputes?

Court practices may differ in different parts of mainland China. For example, in Beijing, the First Civil Tribunal of the Beijing First Intermediate People's Court handles disputes arising from construction projects, lease or sales of real estate, etc. Correspondingly, the First Civil Tribunal of the Beijing Higher People's Court and the First Civil Tribunal of the Supreme People's Court will supervise construction cases and other civil cases, such as labour disputes and marriage related matters. It is noted that article 28 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC, which became effective on 4 February 2015, provides that construction disputes are subject to the people's court where the project is located.

Dispute review boards

25 Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

The dispute resolution clauses in the standard construction contract (GF-2013-0201) and standard construction invitation to bid both incorporate DRB mechanisms. Under the standard construction contract, a DRB may be a standing DRB if it is established within a certain number of days after the commencement date. It may also be an ad hoc DRB if it is established within a certain number of days after the dispute arises. The DRB's decision will become binding on the parties after the parties sign on the decision. If parties disagree and refuse to sign on the decision, they may then launch a court or an arbitration proceeding (as the case may be).

The China International Economic and Trade Arbitration Commission (CIETAC) provides dispute review board services under the CIETAC Construction Project Dispute Review Rules, which became effective on 1 January 2015. Article 37 of the CIETAC Construction Project Dispute Review Rules provides that the determination will be binding upon the parties unless any parties issue a written notice of dissatisfaction within 14 days from its receipt of the determination. If parties have reached an alternate agreement on the effect of a DRB determination, such agreement shall prevail and be followed by the parties.

The Beijing Arbitration Commission (BAC) also provides dispute board services under its Construction Dispute Board Rules. With regard to the effect of a DRB determination, article 21(1) of BAC's Construction

Dispute Board Rules is similar to article 37 of CIETAC Construction Project Dispute Review Rules. In addition, article 21(1) of BAC's Construction Dispute Board Rules particularly provides that if the parties agree that the determination shall be binding upon the date it is issued or the date the parties receive it, the parties shall comply with the determination even if any party expresses its dissatisfaction within 14 days from its receipt of the determination. The determination shall be binding upon the parties unless it is reversed by an arbitral award or a court judgment.

Mediation

26 Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

The Chinese government encourages parties to resolve disputes through mediation. The Civil Procedure Law of the PRC has a special chapter on mediation, which is conducted by the people's court. Judges sit as mediators in the mediation conducted by the people's court.

The China Council for the Promotion of International Trade (CCPIT) and China Chamber of International Commerce (CCOIC) jointly established the CCPIT/CCOIC Mediation Centre, which has more than 40 branches in China. Some arbitration institutions, such as the BAC and the Shenzhen Court of International Arbitration (SCIA) have their own mediation centres. These mediation centres have their own panels of mediators respectively.

Confidentiality in mediation

27 Are statements made in mediation confidential?

Article 107 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law provides that one party should not take the fact that the other party admits for purpose of mediation or settlement in the litigation process as the unfavourable ground against that party in the following proceedings, unless otherwise provided by law or agreed by all the parties.

Article 31 of the Mediation Rules of CCPIT/CCOIC Mediation Centre provides that: 'should the mediation fail, none of the parties may refer to proposals and suggestions submitted, proposed, admitted or put forward by the parties or mediators in the course of mediation for the purpose of reaching a settlement as the basis of their claims or defences.'

Article 25 of the Mediation Rules of the BAC Mediation Centre provides a similar confidentiality requirement.

Arbitration of private disputes

28 What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

The government entities often prefer local courts over arbitration. The standard construction contracts, however, provide that both litigation and arbitration are available options for parties. For projects between a private party and a state-owned enterprise, the state-owned enterprise usually has better bargaining power and it may or may not prefer litigation over arbitration, depending on its own experiences and knowledge of arbitration and litigation.

For projects between private parties, some parties may prefer arbitration over litigation. However, it again depends on the private party's own experiences and knowledge of arbitration and litigation.

Governing law and arbitration providers

29 If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Foreign-related and domestic arbitrations are treated differently under Chinese arbitration law. Foreign-related arbitration refers to arbitration with any of the foreign elements as described in question 8.

Note that if one of the parties is a subsidiary of a foreign company incorporated under Chinese law, the arbitration will still be considered a domestic arbitration unless there is existence of other foreign elements.

In a domestic arbitration, parties may not agree to submit their disputes to a foreign arbitration institution; may not agree to arbitrate ad hoc

within the territory of mainland China; and may not agree to a place of arbitration outside of mainland China.

In foreign-related arbitrations, parties may submit their disputes to a foreign arbitration institution. Due to geographic considerations, parties may prefer the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre or the International Chamber of Commerce (ICC) in Hong Kong over other international arbitration providers.

Dispute resolution with government entities

30 May government agencies participate in private arbitration and be bound by the arbitrators' award?

Chinese government agencies may participate in private arbitration when they enter into commercial or construction contracts with private parties. However, as mentioned above, government agencies often prefer litigation over arbitration. If the government agencies do agree to arbitrate, they usually prefer local arbitration commissions. A domestic arbitral award can be enforced by a Chinese court pursuant to the Civil Procedure Law and the Arbitration Law of the PRC. A foreign arbitral award can be enforced by a Chinese court under the New York Convention.

It should be noted that when there are no foreign-related elements, the parties cannot agree to submit their disputes to foreign arbitration institutions, such as the ICC or the International Centre for Dispute Resolution.

Arbitral award

31 Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

The grounds for refusal of enforcement of different kinds of awards are as follows:

- arbitral awards under the 1958 New York Convention (Convention award): article V of the 1958 New York Convention;
- arbitral awards of a foreign country that is not a contracting state to the 1958 New York Convention (non-Convention award): article 238 of the Civil Procedure Law, which requires that the enforcement shall be pursued under the principle of reciprocity;
- arbitral awards made in Hong Kong or Macao: the Supreme People's Court Interpretations on Recognition and Enforcement of Hong Kong arbitral awards (2000) or Macao arbitral awards (2007); and
- arbitral awards issued by a Taiwanese arbitration institution: by analogy and according to the Supreme People's Court Interpretation on Recognition of Civil Judgments Rendered in Taiwan Region (1998).

Limitation periods

32 Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

In general, the statutory limitation period for a claimant to bring a lawsuit is two years from the date when the claimant knows or should know that his or her rights have been infringed upon. However, if the claims are in relation to compensation for bodily injuries; sales of substandard goods without proper notice to that effect; delays in paying rent or refusal to pay rent; or loss of or damage to property left in the care of another person, the limitation period will be one year. The statutory limitation period for bringing an action shall be discontinued if a lawsuit is brought or if one party makes a claim for or agrees to fulfilment of obligations. A new limitation period shall be counted from the time of the discontinuance (articles 135 to 137 and 140 of General Principles of the Civil Law).

In addition, under article 15 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Statute of Limitations during the Trial of Civil Cases, if the limitation period is related to the contract price payment and the parties have agreed on the performance of such debt by instalments, the limitation period shall be computed from the date of expiry of the performance period of the final instalment.

Update and trends

PPP is still the hot topic in China this year and will probably continue in popularity in the years ahead. The Ministry of Finance officially established a PPP centre and information front regarding PPP. There is a series of regulations and guidelines related to guiding PPP practice.

Several key regulations to be noted are as follows:

- Notice of the Ministry of Finance on Issuing the Guidelines for Mode of Cooperation for Government and Social Capital (for Trial Implementation) (29 November 2014);
- Notice of the Ministry of Finance on Issues concerning the Implementation of Public-Private Partnership Demonstration Projects (30 November 2014);
- Guiding Opinions of the National Development and Reform Commission on Carrying out Public-Private-Partnership (2 December 2014);
- Notice of the Ministry of Finance on Further Efforts Relating to Model Public-Private-Partnership Projects (25 June 2015); and
- Notice of the Ministry of Finance on Guidance of Value for Money in PPP (for Trial Implementation) (18 December 2015).

Also, several major governmental departments have issued notices to guide PPP practice in specific areas, namely, as follows:

- Notice of the National Energy Administration on Adopting the PPP Mode to Promote Development in the Energy Area (31 March 2016);
- Opinions of the Ministry of Finance and the Ministry of Transport for Implementing the Promotion and Application of the PPP Mode in Toll-road Field (20 April 2015);
- Notice of the Ministry of Finance, the Ministry of Land Resources, the Ministry of Housing and Urban-Rural Development and

Other Departments on Adopting the PPP Mode to Promote the Investment, Construction and Operation Management of Public Rental Housing (21 April 2015); and

- Opinions of the Ministry of Finance and the Ministry of Environment Protection for the Promotion of the PPP Mode in the Water Pollution Control Area (9 April 2015).

Chinese PPP practice is still at the developmental stage with considerable room for maturity. There are calls for a basic PPP law to be enacted by the National People's Congress, as well as calls for amendments to existing laws and regulations to resolve many outstanding practical issues. In fact, the Ministry of Finance published the PPP Law (Draft for Comments) and the gathering of public comments, for such, was closed in early January 2016. In this PPP Law (Draft for Comments), it is required that the term for PPP shall not be less than 25 years and projects that will be included in the PPP Guidance Catalogue shall pass the assessment of Value for Money and Financial Capacity.

Another current issue of concern is VAT reform, where business tax is to be replaced with a value added tax, which is applicable in the construction industry from 1 May 2016. Before the VAT reform, the business tax rate of 3 per cent applied to construction services charged on the basis of the business turnover. After the VAT reform, the VAT rate of 11 per cent applies, charged on the basis of the difference between the output and the input. In practice, as the input may not be deducted, some construction companies may assume a heavier tax than before. Therefore, it is sensible for the construction companies to consider the tax arrangement at a project's initial stage, especially for PPP projects.

International environmental law

33 Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

China is not a signatory party to the Stockholm Declaration of 1972.

Local laws, regulations and guidelines providing for preservation of the environment and wildlife of which contractors should be aware include the following:

- Environmental Protection Law, 2014 revision, chapter 4;
- Water Pollution Prevention and Control Law 2008, chapter 3;
- Energy Construction Law, 2007 revision, chapter 3, section 3;
- Law on Prevention and Control of Environmental Pollution by Solid Wastes, 2015 amendment;
- Law on Prevention and Control of Radioactive Pollution 2003;
- Law on Appraising of Environmental Impacts 2002, chapter 3;
- Water Law, 2002 revision;
- Cleaner Production Promotion Law, 2012 amendment;
- Law on the Administration of Sea Areas 2001;
- Law on the Prevention and Control of Atmospheric Pollution, 2000 revision, chapter 2;
- Law on Prevention and Control of Pollution from Environmental Noise 1996, chapters 2 and 4;
- Law on the Protection of Wildlife, 2004 amendment;
- Marine Environment Protection Law, 2013 amendment, chapter 3;
- Regulations on the Safety Management of Radioactive Waste 2011, chapter 3;
- Administrative Regulations on the Prevention and Control of Pollution Damages to the Marine Environment by Coastal Engineering Construction Projects, 2007 amendment;
- Administrative Regulations on the Prevention and Treatment of the Pollution and Damage to the Marine Environment by Marine Engineering Construction Projects 2006;
- Regulations on the Administration of Construction Project Environmental Protection 1998;
- Regulations on Wild Plants Protection 1996;
- Regulations concerning Environmental Protection in Offshore Oil Exploration and Exploitation 2014;
- Catalogue for the Classified Administration of Environmental Impact Assessments for Construction Projects, 2015 revision;

- Catalogue for the Classified Approval of Environmental Impact Assessments for Construction Projects 1998; and
- Measures for the Management of Completion Acceptance concerning Environment Protection for Construction Projects 1998.

Local environmental responsibility

34 What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Developers and contractors have to comply with the duties and liabilities imposed by the laws and regulations mentioned in question 33. Different sanctions can be imposed, including monetary fines, imprisonment, cost of carrying out remediation and clean-up work and suspension of work

International treaties

35 Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

China has concluded many free trade agreements, investment framework agreements, investment partnership agreements and more than 140 bilateral investment treaties. These agreements usually provide for a generic definition of investment without specifically including construction contracts. The definition of 'investment' may vary from agreement to agreement. However, it is believed that the definition of investment is wide enough to cover construction and infrastructure projects.

Tax treaties

36 Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

China has a large network of double taxation treaties, which cover 101 countries as of January 2016. Ninety-seven of these treaties have come into force. In addition, China acceded to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol which became effective on 1 February 2016. Details of these can be found at: www.chinatax.gov.cn/n810341/n810770/index.html.

Currency controls**37 Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?**

Foreign exchange controls are principally administered by the State Administration of Foreign Exchange (SAFE).

Foreign exchange transactions are categorised as either current account or capital account items and each is subject to different controls, as follows:

- current account items are amounts relating to day-to-day business operations, such as interest payments or payments received or made for goods and services. Subject to submission of relevant invoices, vouchers and other proofs, banks are generally able to directly approve conversion of yuan into foreign exchange for current account payments of non-trade service items up to US\$100,000; and
- capital account items are transactions that either increase or decrease the debt or equity of an enterprise through the inflow or outflow of capital. Capital account receipts and payments are subject to SAFE registration or approval in advance. Except for certain specific transactions (such as capital contributions by a foreign invested holding company to its domestically established subsidiaries), foreign exchange cannot readily be moved between two entities within China through banks, because China prohibits circulation of foreign currency within its territory.

Removal of revenues, profits and investment**38 Are there any controls or laws that restrict removal of revenues, profits and investments from your jurisdiction?**

Foreign-invested enterprises may declare dividends on an annual basis after all taxes have been paid and previous years' losses have been made up. Also, they must first allocate 10 per cent of post-tax profits to a statutory reserve, up to the point where the reserve balance equals 50 per cent of registered capital.



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