CHINA AS A GLOBAL ARBITRATION PLAYER?

RECENT DEVELOPMENTS OF CHINESE ARBITRATION SYSTEM AND DIRECTIONS FOR FURTHER CHANGES

Monika Prusinowska*

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Abstract

The impressive magnitude of cross-border transactions in the world dictates the continuous work on providing the corresponding efficient dispute resolution mechanisms. International commercial arbitration, although not free from problems, has proved to be the preferred model for such scenarios. In response to the needs of arbitration users, the leading jurisdictions and arbitration institutions regularly update their rules of the game.

Chinese arbitration system also develops continuously. Despite fierce competition, especially in the Asia region, China is never willing to give up its share. A number of improvements have been introduced to Chinese arbitration system recently. This article describes them, but also points to some important flaws of the system that are very likely to impact the image of China as an ideal place to arbitrate, and offers a few recommendations on how this image can be boosted and how China can come closer to the center of the stage of international commercial arbitration.

I. INTRODUCTION

Arbitration has for long been a preferred choice for cross-border disputes resolution.[1] It has been so for a number of reasons. One of them is the existence of the New York Convention on the Recognition and Enforcement of the Foreign Arbitral Awards ("New York Convention"), which significantly streamlines the effective execution of foreign arbitral awards.[2] The New York Convention has currently 156 contracting state parties, which shows the great chance of its application in the context of cross-border arbitration. So far, there has been no comparable treaty dealing with the enforcement of state court judgements. Another reason for arbitration preference is that arbitration is a neutral method where the parties can shape the proceeding to resolve a dispute according to their specific needs.

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[1] *See,* for example: The School of International Arbitration Queen Mary, University of London, *International Arbitration: Corporate Attitudes and Practices* (2008); The School of International Arbitration, Queen Mary University of London*, 2013 International Arbitration Survey: Corporate choices in International Arbitration - Industry perspectives* (2013); The School of International Arbitration, Queen Mary, University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015).

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 Jun 1958, effective from 7 Jun 1959.

The popularity of arbitration in the cross-border dispute context has induced competition between various arbitration institutions and jurisdictions, both of which try to attract more cases and clients. As a consequence, internationalization has become one of the important patterns of arbitration. For example, Switzerland is one of the leaders in the international commercial arbitration race, where German is primarily spoken (with French, Italian and Romansh in some areas). Recently, the Swiss Supreme Court has considered English as a possible language for the proceeding of setting aside arbitral awards.[3]

Nor is China being passive in developing and internationalizing its arbitration system, which is primarily built on Arbitration Law of the People's Republic of China ("China's Arbitration Law") from 1994.[4] While the development of arbitration in mainland China over the last years is undeniable, there is still substantial room for improvement and the existing deficiencies are very likely to have negatively impacted the perception of China as a place to arbitrate.[5]

This article first discusses the competitive environment in the area of cross-border dispute resolution. Next, it moves to the analysis of the recent developments of Chinese arbitration systems and the significance of the developments. Subsequently, it concentrates on some of the existing limitations of the Chinese system, which, in view of the author, significantly hinder the image of China as a place to arbitrate, especially when comparing the situation to the leading arbitration jurisdictions in the same region Hong Kong and Singapore. This article also seeks to offer some suggestions on the direction of changes China should take in order to boost its image in the highly competitive field of international commercial arbitration.

II. COMPETITIVE NATURE OF CROSS-BORDER DISPUTE RESOLUTION

Recently, competition in cross-border dispute resolution takes place not only between specific jurisdictions and arbitration institutions, but also among the various methods themselves. By way of example, some international commercial courts have been created and they seek to get their share. For instance, with the purpose of further boosting Singapore's position as a leading dispute resolution

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[3] Sebastiano Nessi, *Introducing English as a Possible Language in Setting-Aside Proceedings before the Swiss Supreme Court: a Good Idea?*, Practical Law: Arbitration Blog, (20 Feb 2017) (accessed 27 Feb 2017).

[4] Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China], promulgated on 31 Aug 1994, effective from 1 Sep 1995.

[5] For example, The School of International Arbitration, Queen Mary, University of London*, 2010 International Arbitration Survey: Choices in International Arbitration,* p.2, 17 (2010). *See also* Song, Nicholas, *China: Arbitration In China: Progress And Challenges*, *available at* http://www.mondaq.com/x/233922/Arbitration+Dispute+Resolution/Arbitration+In+China+Progress+And+Challenges (lasted visited Feb. 27 2017).

center and offering the parties the opportunity to have their disputes settled by a panel of experienced, commercial judges from Singapore and abroad, the Singapore International Commercial Court ("SICC") was launched at the beginning of 2015.[6] Interestingly, as to the reasons for choosing the SICC, the SICC refers to the problems that frequently emerge in international arbitration, such as over-formalization, increasing costs of arbitration and the general absence of appeal mechanism. Yet, at the same time, the SICC declares to be a companion, rather than a competitor, to the well-established arbitration system of Singapore. Similar developments already took place earlier in Dubai and Qatar, which created the Dubai International Financial Centre Courts[7] and Qatar International Court respectively.[8]

Focusing specifically on international commercial arbitration environment, a few jurisdictions, perceived generally as very friendly toward arbitration, have established their leading position as arbitration seats. Among them are UK, France, Hong Kong, Singapore and Switzerland.[9] Additionally, Singapore and Hong Kong have been perceived as the most dynamically improving seats.[10] Quite conversely, in the eye of users of international commercial arbitration, China seems to rather lag behind the leaders of the race and is not among the top choices. China, together with Russia, has been perceived as fairly unfriendly toward arbitration.[11]

The attractiveness of Hong Kong and Singapore (and thus, arguably, the limited attractiveness of China) lies, among others, in their arbitration-friendly arbitration laws based on the Model Law on International Commercial Arbitration prepared by the United Nations Commission on International Trade Law ("UNCITRAL Model Law"),[12] the equally friendly approach of the local courts toward arbitration and also the presence of the world leading arbitration institutions.[13] Furthermore, both Hong Kong and Singapore have regularly followed closely the international trends in arbitration. For

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[6] *See* the official website of the Singapore International Commercial Court: http://www.sicc.gov.sg/About.aspx?id=21 (lasted visited Feb. 27 2017).

[7] *See* the official website of the Dubai International Financial Centre Courts: http://difccourts.ae (lasted visited Feb. 27 2017).

[8] *See* the official website of the Qatar International Court: http://www.qicdrc.com.qa/ (lasted visited Feb. 27 2017).

[9] The School of International Arbitration, Queen Mary, University of London, *supra* note 1, at 11–12.

[10] The School of International Arbitration, Queen Mary, University of London, *supra* note 1, at 15–16.

[11] The School of International Arbitration, Queen Mary, University of London, *supra* note 2–17.

[12] Hong Kong's arbitration law (both domestic and international) - Hong Kong Arbitration Ordinance (Chapter 609) from 1 Jun 2011 (with the changes as of 2013) - is based on the 2006 version of the UNCITRAL Model Law. Singapore's international arbitration law – Singapore International Arbitration Act (Chapter 143A) (revised edition as of 2002, incorporating amendments as of 1 the Jun 2012) - is based on the 1985 version of the UNCITRAL Model Law.

[13] The School of International Arbitration, Queen Mary, University of London, *supra* note 1, at 9–14.

example, both jurisdictions permit the actions of emergency arbitrator, who decides on interim measures, such as property preservation, before the arbitral tribunal is constituted. Moreover, both Hong Kong and Singapore have recently taken steps to permit the increasingly popular use of third party funding in international arbitration, which allows alternative ways to fund claims in arbitration proceeding.[14] Similarly, the Hong Kong and Singaporean arbitration institutions keep innovating and experimenting with their arbitration rules. Notably, the Singapore International Arbitration Centre ("SIAC"), in its arbitration rules revised in 2016, introduced a few interesting changes, including the pioneering early dismissal of claims and defenses which are manifestly unmeritorious or manifestly beyond the scope of arbitrators' jurisdiction right at the outset of arbitration.[15]

III. CURRENT DEVELOPMENTS OF CHINESE ARBITRATION SYSTEM

Over the last years, China has been actively working on improving its dispute resolution mechanisms. One of the key drivers for the recent progress is the grand economic initiative of the One Belt One Road ("OBOR") announced by President Xi in 2013.[16] The OBOR initiative seeks to further explore business opportunities between China and a number of countries along the planned Belt and Road trails. The increasing volume of cross-border business transactions inevitably leads to the increasing number of potential disputes between the parties from different countries. Therefore, offering a reliable and efficient environment for resolving these potential disputes is of key importance.

China has always put the development of its local courts as top priority.[17] It also recently created the specialized courts, such as intellectual property courts in its major business centers (Beijing, Shanghai and Guangzhou). Moreover, the further exploration of

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[14] Jhangiani, Sapna and Coldwell, Rupert, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top?,* Kluwer Arbitration Blog, 30 Nov 2016, *available at* http://kluwerarbitrationblog.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/ (lasted visited Feb. 27 2017); Mackojc, Jonathan, *10 Hot Topics for International Arbitration in 2017*, Kluwer Arbitration Blog, 18 Feb 2017, available at: http://kluwerarbitrationblog.com/2017/02/18/booked/ (lasted visited Feb. 27 2017).
As of today, Third Party Funding is rather a grey area in China.

[15] *See* art. 29 of the 2016 SIAC Rules.

[16] *See* Ministry of Foreign Affairs and Ministry of Commerce of the PRC, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road Issued by the National Development and Reform Commission*, *available at* http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (lasted visited Feb. 27 2017) (2015).

[17] *See*, for example, SPC, *White Paper of the SPC from 2016 Dedicated to the Issue of Judicial Reform of the Chinese Courts, available at* http://english.court.gov.cn/2016-03/03/content_23724636.htm (lasted visited Feb. 27 2017) (2016).

various ADR methods has been encouraged by the Chinese government.[18] Over 20 years, since the enactment of China's Arbitration Law, the need for its comprehensive revision has long been argued. Despite the absence of such revision, the alternative ways of reforming the system and pushing it in a more arbitration-friendly direction have developed. These alternative ways are discussed below.

Arbitration, as a method of resolving disputes rising from cross-border transactions under the OBOR initiative, deserves special attention due to the fact that vast majority of the countries along the designated Belt and Road trail are signatories to the New York Convention, which streamlines the enforcement of the potential OBOR arbitral awards, whereas only a handful of the OBOR countries have agreements pertaining to the juridical assistance signed with China, which should be translated to potential difficulties in enforcing the courts' decisions.[19] This opportunity has been already sensed by many, notably including Wuhan Arbitration Commission, which decided to establish One Belt One Road Arbitration Court as a special arbitration court dedicated to resolving OBOR disputes.[20]

A. Ways of Reforming the Chinese Arbitration System

There has been much criticism against the deficiencies of China's Arbitration Law coming from both China and abroad.[21] However, there has been no comprehensive revision thereof yet. As a consequence, some alternative channels developed which gradually reform the system. Among them are guidance offered by the Chinese Supreme People's Court (hereinafter, "SPC"),[22] pilot programs in Shanghai Free Trade Zone and efforts by leading arbitration commissions in China.

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[18] *See* The SPC's Opinion on Further Deepening the Reform of the Diversified Dispute Resolution Mechanisms, Fa [2016] No. 14, published on 29 Jun 2016.

[19] Zhu Shuying, *Domestic Arbitration Solution for Looming Obor Disputes*, China Business Law Journal (30 Sep 2016), available at: https://www.vantageasia.com/domestic-arbitration-solution-for-looming-obor-disputes/ (lasted visited Feb. 27 2017) (2016).

[20] China Go Abroad, *China Establishes "One Belt, One Road" Arbitration Court*, China Go Abroad, available at: http://www.chinagoabroad.com/en/article/21685 (lasted visited Feb. 27 2017) (2016).

[21] *See*, for example, Tao Jingzhou, *Salient Issues in Arbitration in China*, AMER. UNIV. INTERNATIONAL L. REV., 4 VOL. 27, 807–830 (2012); Wang Shengchang, *China Arbitration Law v UNCITRAL Model Law,* 9 INTERNATIONAL ARBITRATION L. REV., 1–7 (2006); FAN KUN, ARBITRATION IN CHINA: PRACTICE, LEGAL OBSTACLES, AND REFORMS, 19 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN*,* 25–40 (2008); Cohen, Jerome A., *Settling International Business Disputes with China: Then and Now,* 47 CORNELL INTERNATIONAL L. J., 555–68 (2014).

[22] Art. 127 of the Chinese Constitution: "The Chinese Supreme People's Court is the highest judicial authority in China. It supervises the judicial work of lower level courts via the appeal procedures, review of cases and issuing various documents of authoritative character."

The SPC has played a crucial role in the development of Chinese arbitration system. It has regularly offered valuable guidance on interpreting and applying China's Arbitration Law and other rules relevant to arbitration in various forms, such as judicial interpretations, opinions and replies. [23] These have been especially useful considering the modesty of China's Arbitration Law and also, not seldom, the obsolete character of its provisions. Examples of such guidance by the SPC include its judicial interpretation in 2006 on the Arbitration Law, addressing, among others, some of the important question pertaining to the validity of arbitration agreement[24] and the SPC's opinion in 2016 regarding legal protection for development of the free trade zones ("FTZ Opinion").[25]

Another way of introducing new solutions is through pilot programs in Shanghai Free Trade Zone ("Shanghai FTZ"). The free trade zones ("FTZ"), and especially the Shanghai FTZ, are occasionally used as the test centers for some legal innovations, which can be subsequently extended to the whole country. For example, this was exactly the case of Shanghai FTZ, where the first offices of foreign arbitration institutions were opened in mainland China. This particular step, as well as the details of the recent FTZ Opinion, is discussed in more details below.

Furthermore, Chinese leading arbitration institutions have not been passive in trying to induce changes and further development of the system. In particular, the China International Economic and Trade Arbitration Commission ("CIETAC") and the Beijing Arbitration Commission ("BAC") have taken the lead and have tried to channel the reforms through their regularly updated institutional rules. Some of their efforts are introduced in the following parts of this article.

B. Specific Developments of Chinese Arbitration System Introduced Recently

1. Offshore arbitration institutions opening offices in mainland China

One of the most remarkable changes in the domain of Chinese arbitration witnessed recently was the opening of the offices by

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[23] *See* YUEN *ET AL.*, CHINESE ARBITRATION LAW, 60–62 (2015).

[24] *See* Guanyu Shiyong Zhonghua Renmin Gongheguo Zhongcai Fa Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释) [the Interpretation of the SPC concerning Some Issues on Application of the Arbitration Law of the People's Republic of China], Fa Shi [2006] No. 7, promulgated on 23 Aug 2006, effective from 9 Aug 2006.

[25] The Opinion of the SPC on the Provision of Judicial Safeguards for the Construction of Free Trade Zones, Fa [2016] No. 30 promulgated on and effective from 30 Dec 2016.

foreign arbitration institutions in the Shanghai FTZ. It was to some extent a ground-breaking move, since until then, none of the foreign arbitration institutions had its office in mainland China. The first step was made at the end of 2015 by the Hong Kong International Arbitration Centre ("HKIAC") and was then followed by the Singapore International Arbitration Centre ("SIAC") and the International Court of Arbitration at the International Chamber of Commerce ("ICC"). However, one needs to notice that all of these institutions were established in the form of representative offices. Under Chinese law, representative offices has the capacity to conduct only a limited number of activities and should not generate profits.[27]Accordingly, all of the three new offices declared their scope of activities in mainland China as working and cooperating with the local authorities, institutions and community in order to promote the best practices of international arbitration, as well as promotion activities. Thus, the administration of the cases is still in the charge of their respective main offices.

Although this move should be generally welcomed, it does not bring enough clarity to the long discussed issue whether a "ICC in Shanghai" model is generally permitted in mainland China. The answer to the question was partially given by the SPC in the Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L. Longlide case ("Longlide case").[28] Such "ICC arbitration in Shanghai" clause existed in the Longlide dispute and the SPC declared that the arbitration agreement itself was valid. Yet, the SPC failed to address the nature and the enforcement framework for the potential award in such cases.

Therefore, the status of foreign institutions as to providing administration services in China-seated arbitration is, at best, not fully clear. This is due to the fact that, as of today, Chinese law neither officially endorses, nor prohibits the administration of arbitration in mainland China by foreign arbitration institutions.[29] Comparing China's situation to Hong Kong and Singapore, both Hong Kong and Singapore-seated arbitration can be (and in practice quite often is) conducted under the auspices of foreign arbitration institutions, especially the ICC. This allows for greater choice given to the parties. It is advisable, that in the future China allows the full

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[27] Art. 13 and 14 of the Regulations on Administration of Registration of Resident Offices of Foreign Enterprises; Decree of the State Council of the People's Republic of China No. 584, promulgated on 10 Nov 2010, effective from 1 Mar 2011.

[28] Reply of the Supreme People's Court to the Request for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L.

[29] TaoJingzhou, *Challenges and Trends of Arbitration in China*, New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series 12, 84–85 (2005).

operations of foreign arbitration institutions within China. This will not only significantly widen the choice offered to the parties, but also can be generally beneficial to the whole arbitration system in China. The competition between local and foreign institutions, although at the beginning is likely to reduce the caseload of the local institutions, in a longer run would quite possibly result in further improvements made by them in order to satisfy the expectations of arbitration users.

2. Interpretation of a "foreign element"

Another important change witnessed lately pertains to how a "foreign element" should be understood in the context of Chinese arbitration. This is relevant since under Chinese law, there are somewhat distinctive regimes for "domestic" and "foreign-related" arbitration, which contains a so-called "foreign element". A case involves a "foreign element" if: (1) at least one of the parties to the dispute is a foreign citizen, a foreign legal person, or other organization or individual without nationality; (2) the habitual residence of a party or parties is located outside of the PRC; (3) the subject matter of the dispute is located outside of the PRC; (4) the legal facts prompting, changing or terminating the civil relation take place outside the PRC; or (5) there exist any other circumstances that can be determined as foreign-related civil relations.[30]

The distinctiveness of the regimes can be observed in a few instances, with the most important one for the sake of this discussion being the prohibition of arbitrating a domestic dispute by tribunals seated outside of China and/or administering such a case by foreign arbitration institutions. Here, it needs to be added that the division is very important from the perspective of foreign investors in China, who often invest through incorporating a foreign-invested enterprise ("FIE") in China. Either this in practice means incorporating a wholly foreign-owned enterprises ("WFOE") or a Sino-foreign joint venture company ("JV")—formed typically when the Chinese law requires the cooperation with the Chinese partner in particular sectors. [31] Regardless of the level of financing and controlling of the entity by foreigners, under Chinese law, such FIEs are recognized as domestic companies. Therefore, generally, the involvement of such companies registered in China, when disputes arise, will not

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[30] Art.1 of the Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyong Fa Ruogan Wenti de Jieshi Yi (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释（一）) [SPC Interpretation on Several Issues Concerning the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations (I)], Fa Shi [2012] No. 24 promulgated on 28 Dec 2012, effective from 7 Jan 2013. Further reconfirmed by the Art. 522 of the SPC Interpretation on Civil Procedural Law from 2015.

[31] The restrictions are imposed by the Guidance Catalogue for Foreign Investment Industries Released, most recent version in force from 10 April 2015.

automatically contain a "foreign element". Such a view was traditionally supported by local courts. Even in 2014, the SPC endorsed such reasoning by stating that the involvement of the WFOE alone will not constitute a foreign element. [32]

Notably, however, interpretation as to what may constitute a "foreign element" has progressed recently. After the important Shanghai Golden Landmark Co. Ltd v. Siemens International Trade case ("Golden Landmark case") involving two FTZ Shanghai-based WFOEs, the application of special supervision of customs in the FTZ, and the SIAC arbitration agreement, in which the Shanghai court exercised the discretion to find a "foreign element" in the category of "other circumstances" as provided by Article 1(5) of the SPC's interpretation in 2012, the FTZ Opinion was issued by the SPC. The FTZ Opinion echoes the decision of the court in the Golden Landmark case. Article 9(1) of the FTZ Opinion stipulates that an agreement entered into by two WFOEs registered in the FTZ to submit commercial disputes to arbitration seated outside mainland China is valid and the state courts should not invalidate it solely on the ground that there is no foreign-related element. Moreover, Article 9(2) provides that the court should overrule objections to the enforcement of an award rendered by arbitration seated outside of mainland China merely on the ground that there was no foreign element in cases where (a) at least one of the parties is an FIE registered in the FTZ; (b) the parties agreed to arbitrate outside of mainland China; and (c) the party resisting enforcement was either a claimant initiating such proceeding or a respondent participating in arbitration without raising the objections toward the validity of arbitration agreement until the phase of enforcement.

The improvement made by the court in the Golden Landmark case and subsequently confirmed by the FTZ Opinion has generally a pro-arbitration character. However, the limited reach of it needs to be noticed. It applies only to cases involving FTZ incorporated entities, whereas, on a practical note, there has been a considerable number of WFOEs and JVs registered beyond the FTZs. It seems that the only in the situation, where all of the parties to the dispute are the WFOEs registered in the Shanghai FTZ, the dispute can be safely taken to be arbitrated outside of China and/or by a foreign arbitration institution.

In general, in order to choose among various arbitration institutions and arbitration seats, it is important for China to consider lifting the limitations on the side of foreign parties doing business in China in the form of China-registered FIEs. Interestingly, the Draft

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[32] *See* the Beijing Chaolaixinsheng Sports and Leisure v. Beijing Suowangzhixin Investment Consulting case, where the court refused to enforce the Korean Commercial Arbitration Board's arbitral award in the dispute involving the WFOE registered in Beijing and owned by the Korean investor.

of Foreign Investment Law, released in 2015, already suggested broadening the scope as to what should be construed as a "foreign investor" and according to this draft and the "actual control" standard, a WFOE should be recognized as a "foreign investor".[33]

3. Opening the door for *ad hoc* arbitration in mainland China?

The third recent development also results from the FTZ Opinion. Article 9(3) of the FTZ Opinion can be read as opening the door for *ad hoc* arbitration in mainland China, something that is still not formally recognized. Article 16 of the China's Arbitration Law stipulates that parties to an arbitration agreement need to designate an arbitration commission. Article 18 provides for the chance to remedy a clause without any designation, but in case the parties fail to do so, the agreement should be deemed invalid.

Interestingly, Article 9(3) of the FTZ Opinion provides that the companies registered in the FTZ may validly enter into a kind of *ad hoc* arbitration agreement on the condition that the agreement provides for (1) a specified location in mainland China, (2) specified rules of arbitration and (3) specified arbitrators.

This innovation, however, has some limitations and it only applies to cases wherein all of the parties are companies registered in the FTZ. Furthermore, it lacks guidance as to, for example, how arbitrators should be designated in an agreement. Does it require the parties to name specific arbitrators or will, for example, a list of arbitrators suffice? Due to the existing uncertainties, a careful approach toward this innovation is recommended.

IV. SELECTED SHORTCOMINGS CONTINUOUSLY IMPACTING CHINA'S IMAGE AS AN IDEAL PLACE TO ARBITRATE AND PROPOSED DIRECTION OF CHANGES

As argued above, although all of the developments deserve due attention and, in general, merit positive recognition, their reach seems quite limited. More importantly, there still exist some significant flaws of Chinese arbitration system and they deserve serious attention. The urgency of addressing these shortcomings results mainly from the fact that China's atypical solutions often conflict with the basic principles of international commercial arbitration, such as party autonomy.

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[33] *See* for example White & Case, *China's New Proposed Foreign Investment Law— What to Expect* (21 Apr 2–15), *available at* http://www.lexology.com/library/detail.aspx?g=3654a42f-f879-4416-8fd9-e4ad1701f9c1 (accessed 27 Feb 2017).

A. Limited power of arbitrators vs. involvement of state courts

One of the characteristics of Chinese arbitration lies in somewhat unusual allocation of powers between arbitral tribunal, state courts, and arbitration commission, especially when it is compared with commonly accepted international standards. The difference could be generally characterized as limiting the power of arbitral tribunals for the benefit of powers co-shared between state courts and arbitration commissions in China. A few selected irregularities in this area are discussed below.

1. Allocation of powers to decide the objections to jurisdiction

The first of anomalies pertains to the limited power of arbitrators in determining their own competence to decide a particular dispute. The commonly accepted principle of "competence-competence", which gives arbitrators the power to address the question of their jurisdiction to hear the case, [34] has not yet been fully recognized in China. Consequently, in cases where, despite the existence of an arbitration agreement, one of the parties initially contests the validity of arbitration agreement before the Chinese court—the state court will be given the power to decide whether the arbitration agreement is valid and thus, whether the arbitration should take place at all.[35] Furthermore, in cases where disputes over jurisdiction are concerned, even if such disputes occur during an already initiated arbitration proceeding, it is, according to Chinese law, arbitration commissions, instead of arbitrators, that are to resolve the issue.

The Chinese solutions have been widely criticized for a number of reasons.[36] One of the key problems is that it limits the contractual character of arbitration and party autonomy, whereas in practice, especially in the context of cross-border transactions, the choice of arbitration is often made for the purpose of excluding "more than necessary" involvement of state courts. Furthermore, the power given to the court, like the power to suspend arbitration proceedings, paired with a rather unclear time limit within which the court should decide whether to resume such proceedings, can result in some lawyers using it as a delay tactic by raising objections to the validity of the arbitration agreement.[37] In addition, the role of arbitration

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[34] For example, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2ND EDITION), 1048 (2014).

[35] Art. 20 of the China's Arbitration Law.

[36] *See* for example Zhu Weidong, *Determining the Validity of Arbitration Agreements in China: Towards a New Approach*, 6 ASIAN INTERNATIONAL ARBITRATION J. 51 (2010); Gu Weixia, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 91–118 (2012).

[37] As to the suspension of the proceeding: Art. 3 of the Supreme People's Court's Reply on Several Questions Regarding the Determination of the Validity of Arbitration Agreements (Fa Shi No 27 of 1998); promulgated on 26 Oct 1998, effective from 5 Nov 1998. As to the time limits, the China's

commission should be understood rather as an administrator and not as a decision-maker in the arbitration proceeding. Chinese solutions can be also problematic, since the priority of arbitration commissions over tribunal can potentially lead to contradictory findings and decisions between the two and/or influencing subsequent decisions made by the tribunal. Finally, it is not clear which individual(s) will specifically settle the objection in cases where "arbitration commission" is designated to do that.

On the contrary, both Hong Kong and Singapore fully recognize the principle of competence-competence, by which arbitrators are in a prior position to decide the question pertaining to their competence to resolve the dispute. In general, arbitral tribunal decides the jurisdictional issue either as a preliminary question or in an award on the merits of the case. However, it is noteworthy that even under competence-competence principle, the power of final decision on jurisdictional objection is still reserved to state courts. This is because under the UNCITRAL Model Law, on which both Hong Kong and Singapore base their arbitration laws, either in the proceeding of setting aside or in objecting recognition and enforcement of an arbitral award, the party against whom the award is invoked can bring the issue of jurisdiction to the competent state court for a final determination. Additionally, in the case where the decision on jurisdiction is made by arbitrators as a preliminary question and the tribunal decides it has jurisdiction, the unsatisfied party has the right to request the state court to decide the matter, which decision cannot be subsequently appealed, although during the time the court is making the decision in this regard, arbitration can proceed. Such practice has been followed by both Hong Kong and Singapore since 2012. [38]

China's leading arbitration commissions have tried to remedy this atypical allocation of competence provided by China's Arbitration Law. For example, the CIETAC and the BAC included in their arbitration rules a possibility of delegating the competence to decide the jurisdictional questions from arbitration commissions to

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Arbitration Law does not provide any time limit for the courts to make their decision and it is also difficult to navigate any other source addressing the issue. Additionally, the time limits within the Prior Reporting System - the mechanism aimed at the protection of arbitration agreements (and award) containing foreign elements - are also not fully clear. *See also* CLARISSE VONWUNSCHHEIM, ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN CHINA, 53 (2012); Peter Yuen *et al.*, *supra* note 23, 380.

[38] Art. 16, 34 and 36 of the 1985 and 2006 versions of the UNCITRAL Model Law and Crockett, Antony Crockett, Mills, Daniel, *A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings,* Kluwer Arbitration Blog (8 Nov 2016), *available at* http://kluwerarbitrationblog.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/ (lasted visited Feb. 27 2017).

arbitrators.[39] Yet the adjustment introduced by the commissions is not free from problems. For example, the conditions for such delegation have not been defined. This is most likely an intentional omission reflecting the careful approach of the commissions, who are well aware of restrictions of China's Arbitration Law..

The full recognition of the principle of competence-competence in China has been already extensively argued for by numerous scholars and practitioners.[40] The full acknowledgment of the principle will not only postpone the involvement of the state courts to a later stage and reduce the incentive to use the recourse to courts as a delay tactic, but will bring more transparency to the whole proceeding and as a consequence, boost China's image as an ideal place to arbitrate.

2. Allocation of powers to decide on interim measures

Another situation, where the powers are uncommonly distributed between arbitral tribunal and state courts in China, refers to the authority to decide on interim measures (here, property preservation and evidence preservation) in aid of arbitration. In general, the goal of interim measures is to protect the parties' rights and interests pending the final resolution of the dispute. Some degree of collaboration between arbitration and state courts in the area of interim measures is unavoidable due to the fact that arbitration, as a private method of resolving disputes, is not equipped with coercive powers.

As of today, in China only the courts can effectively decide on interim measures because there is no legal framework for the enforcement of orders granted by arbitrators. The situation, however, is different from vast majority of leading jurisdictions, including Hong Kong and Singapore. It is argued that arbitral tribunal is usually in the best position to decide on interim measures, since not rarely such decision necessitates some review of the merits of the case and it is the arbitral tribunal—the adjudicating authority—who is most familiar with those merits.[41] Besides, the application of interim measures ordered by arbitrators potentially eliminates the use of the application as a dilatory tactic. It also allows more flexibility in designing particular measures suitable for particular case. Finally, some argue that the power of tribunal to decide on interim measures is necessary for the overall fairness and efficiency of the proceeding.[42] In Hong Kong and Singapore, both state courts and

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[39] Most recently: Art. 6 of the 2015 CIETAC Rules and Art. 6(4) of the 2015 BAC Rules.
[40] *See* for example Zhu Weidong, *supra* note 35, 51(2010); Gu Weixia, *supra* note 35, 91–118.
[41] Born, *supra* note 33, at 2433–34.
[42] Born, *supra* note 33, at 2425–26.

arbitral tribunals have the power to decide on interim measures,[43] which gives the parties the opportunity to choose which they find to be the more efficient solution in a particular case. Furthermore, both Hong Kong and Singapore recognize and support the actions taken by the emergency arbitrator, who is appointed to efficiently decide on interim measures even before the tribunal is constituted.

Leading arbitration institutions in China have tried to follow the global trends. The arbitration rules of the CIETAC and the BAC not only grant the arbitral tribunal the power to decide on interim measures, but also provide the emergency arbitrator mechanism.[44] Yet again, because the ultimate successful enforcement of interim measures often requires the assistance of state courts, the arbitration rules' arrangements do not really seem to match the reality in China. Still, the voice of scholars and practitioners supporting the readiness of China to share the power of courts with arbitrators as to interim measures can be well heard.[45] It needs to be emphasized that only acknowledging the arbitrators' power to order interim measures is not sufficient, unless such measures are endorsed by state courts. Such concern needs to be reflected in future reform.

3. State court's assistance in evidence taking

As alluded to above, arbitration is not equipped with coercive power, but such power is needed when particular evidence is important to the proceeding.[46] In China, currently, there is no state court's assistance regime for collection of evidence in arbitration. A Chinese court will not compel the witness to appear at the arbitration hearing nor will it order the other party to produce a particular document that can be adversarial to this party. However, the courts in Hong Kong as well as in Singapore will offer such assistance to the arbitration.[47]

This has been deemed as another deficiency of the Chinese arbitration system and should be modified.[48] Interestingly, the recently introduced CIETAC Guidelines on Evidence[49] allow the parties to request the tribunal to order the other party to produce

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[43] Art. 9 and 17 of the 1983 and 2006 versions of the UNCITRAL Model Law.

[44] Art. 23(2)(3) of the 2015 CIETAC Rules, 62(1) and 63 of the 2015 BAC Rules.

[45] Zhao Xiuwen & Lisa Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy,* 31 UNIV. OF DAYTON L. REV. (2005–2006); Cao Lijun, *Interim Measures of Protection in the Context of Arbitration in China*, 8 INTERNATIONAL ARBITRATION L. REV. 103–09 (2005).

[46] This relates to the situations beyond the preservation of evidence, where in order to get the evidence preserved, the requesting party needs to establish the evidence would be lost or difficult to obtain in the future if the measure would not be granted.

[47] Art. 27 of the 1985 and 2016 versions of the UNCITRAL Model Law.

[48] For example, Sun Wei and Willems, Melanie, Arbitration in China, p. 258–59 (2015).

[49] CIETAC Guidelines on Evidence, effective as of 1 Mar 2015, *available at* http://cn.cietac.org/rules/Guidelines%20on%20Evidence_e.pdf (last visited Feb. 27, 2017).

specific documents. However, with the recent framework, similar to the case of interim measures, the efficiency is partial and is limited to drawing the arbitral tribunal's negative inference on request of parties, when the witness does not appear before the tribunal or the other party refuses to produce a requested document.

V. CONCLUSIONS

China has been continuously working on improving its arbitration environment and presenting itself as an emerging international arbitration center. However, although the changes introduced recently should be welcomed, the solutions seem to be rather incomplete. Some of the key innovations discussed above have a limited effect and target primarily the FIEs established in the FTZ. Also, further actions and necessary clarifications are needed, pertaining to, for example, *ad hoc* arbitrations seated in mainland China, and arbitrations seated in China but administered by foreign arbitration institutions.

Furthermore, in order to be a global player, China needs to adopt more internationally recognized arbitration principles. The involvement of the courts in the arbitration proceeding in China is in some areas is excessive, whereas in others not enough. Importantly, the atypical allocation of the powers happens at the very expense of the arbitral tribunal. Therefore, a reasonable rebalancing is important in order to bring China closer to the internationally recognized standards. The comprehensive revision of China's Arbitration Law may integrate the whole system including the international principles and is hoped to take place in the near future. However, at this very moment, reliance on the passable solutions now being implemented seem to be a more realistic scenario and should be utilized.