CHINA LAW UPDATE

CHINA'S DRAFT AMENDED ARBITRATION LAW: DOES IT GO FAR ENOUGH?

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Abstract

Since China's Arbitration Law was adopted in 1994, China's arbitration law framework has been undergoing continuous reform. While the law itself has only been changed on two occasions, continuous reform has been taking place through a long list of Judicial Interpretations and other legal instruments, and recently in some widely publicized court judgments. Despite efforts to reform from the judiciary and practitioners, the Arbitration Law was outdated in a number of ways which held back the development of arbitration, and which frequently led to debates on the shortcomings of arbitration in China. In 2021, the Ministry of Justice finally published a draft with proposed amendments to the Arbitration Law. This Note analyzes the Ministry of Justice's Proposed Draft from several angles. After detailing the historical and political context in which the current arbitration law reform is taking place, this Note provides a comprehensive analysis on the most pressing amendments proposed by the Ministry of Justice. While many of the changes are seen as welcome by the arbitration community, the Note also argues that, in some ways, the Proposed Draft does not go far enough to make China's Arbitration Law sufficiently modern to fit the ambitions of an international arbitration hub.

I. INTRODUCTION

China's Arbitration Law[1] is currently undergoing review. Earlier this year, the Ministry of Justice published a draft of the envisaged amendments (the "Proposed Draft") for the public to submit comments. The changes come at a time in which China's increasing significance in the global economy has been cemented, and after its resilience was tested by a US Presidency bent on challenging the rise of China. The Proposed Draft shows that China has become increasingly willing to align its arbitration framework to international standards, after years in which patchwork interpretations and opinions issued by the Supreme People's Court of China (the "SPC") attempted to mend the Arbitration Law's increasingly outdated provisions.

This Note analyzes the proposed changes through several lenses. First, in Part II, the Note provides an historical-contextual analysis for why the changes are coming now, 26 years after the Arbitration Law was promulgated. Secondly, Part III presents and analyzes the most significant amendments proposed by

[1] *See* 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 the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995; amended Aug. 27, 2009, amended Sept. 1, 2017) [hereinafter "Arbitration Law"].

the Ministry of Justice. Part IV concludes by briefly analyzing whether the proposed changes go sufficiently far to modernize China's arbitration system.

Of course, the draft amendments to the Arbitration Law are not yet finalized at this point. It is still an ongoing legislative process which has been opened to receiving feedback from the domestic and international community. Further adjustments are highly likely, which in turn makes it likely that some of the analyses presented by the present Note may not reflect the final legislation. However, the majority of the changes that have been proposed are generally seen as positive developments among the arbitration community, while the proposal does not go far enough in some respects. To the author's knowledge, the drafting process has been assisted by some of the most prominent arbitration practitioners in China, so considerable efforts have been put into the Draft Proposal as it currently stands. Thus, it is likely that many of the suggestions made by the public have already been considered at the drafting stage and will not make it to the final text. Interested readers are therefore advised to follow the developments in this area to stay up to date on any changes.

II. HISTORICAL CONTEXT

The context of the 1995 Arbitration Law (the "Arbitration Law") was characterized by China's cautious and calculated approach to its participation in world trade and foreign involvement in commerce. While China's "Opening Up" in 1978 had humble beginnings, it signaled a new era. The promulgation of a slew of international commerce-related laws quickly followed, such as the (now-repealed) Laws on China-Foreign Equity Joint Ventures (1979),[2] on Economic Contracts Involving Foreign Interests (1985),[3] on Sino-Foreign Cooperative Enterprises (1988),[4] and the Economic Contract Law (1993).[5] In this period, China acceded to the New York Convention[6] in December 1986 and the ICSID Convention[7] in 1990, and also entered into the majority of its

[2] *See* Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa (中华人民共和国中外合资经营企业法) [Law on Chinese-Foreign Equity Joint Ventures of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Jul. 1, 1979, amended Mar. 15, 2001, amended Sept. 3, 2016, repealed).

[3] *See* Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa (中华人民共和国涉外经济合同法) [Law on Economic Contracts Involving Foreign Interests of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective Jul. 1, 1985, repealed).

[4] *See* Zhonghua Renmin Gongheguo Zhongwai Hezuo Jingying Qiye Fa (中华人民共和国中外合作经营企业法) [Law on Sino-Foreign Cooperative Enterprises of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Apr. 13, 1988, repealed).

[5] *See* Zhonghua Renmin Gongheguo Jingji Hetong Fa (中华人民共和国经济合同法) [Economic Contract Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Sept. 2, 1993, repealed).

[6] *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"), Jun. 10, 1958, 330 UNTS 3, 4 ILM 532.

[7] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159, 4 ILM 532.

bilateral investment treaties ("BITs").[8] While various arbitration-related regulations had been enacted from 1984 to 1991, the promulgation of the Arbitration Law in 1995 was a tremendous milestone. Under the old system, there were serious concerns about lack of independence,[9] party autonomy,[10] finality of arbitral awards,[11] and no acceptance of the separability doctrine.[12] Many categories of disputes were not considered arbitrable, and the arbitral institutions – or commissions[13] – that were given the permission to operate were dedicated to disputes in specific fields.[14] The Arbitration Law therefore represented a significant step forward in all these areas. Many of the pre-existing restrictions for the establishment of arbitration commissions were removed and commissions were given more freedom and flexibility.[15] A wider scope of disputes became arbitrable,[16] and the recognition of awards' finality replaced the former court-appeal mechanism against awards.[17] The Arbitration Law also contained a chapter on foreign-related arbitrations;[18] essentially abolishing the former archaic system of domestic and foreign-related arbitrations by permitting domestic institutions to handle foreign-related disputes.[19]

Since then, China has undergone tremendous socio-economic changes domestically, and China's role in the world economy has also changed significantly. While China was a major recipient of inbound foreign direct investment ('FDI') even before 1995, the amount of outbound FDI originating in China is now rapidly catching up following the "Going Abroad" initiative, with inbound FDI flows totaling $149 billion and outbound FDI flows totaling $133 billion in 2020.[20] Even excluding Hong Kong and Macau, China is by far the biggest exporter of FDI in the global economy.[21] The distribution of China's outbound investments has diversified from traditionally investing primarily in Asia, to a completely global outreach. China is also one of the

[8] 77 BITs were signed throughout the 1980s and 1990s, the majority of which were cautiously worded to reduce the potential scope of investor-state disputes by only consenting to disputes 'concerning the amount of compensation for expropriation'. The remaining 33 were signed after the 2000s.

[9] *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA (Kluwer Law International, 3rd ed. 2012)

[10] *See id.*

[11] *See id.*

[12] *See id.*, at 5.

[13] The Chinese Arbitration Law refers to arbitral institutions as "commissions", whereas the Draft Proposal uses the word "institutions". The word "institution" and "commission" is used interchangeably in this Note.

[14] *See* TAO, *supra* note 9, at 3.

[15] *See* TAO, *supra* note 9, at 5–7.

[16] *See* TAO, *supra* note 9, at 7.

[17] *See id.*

[18] *See id.*, at 11.

[19] *See id.* A distinction between domestic and foreign-related arbitration continues to exists, although to a different extent than the older one, *see infra* Parts III and IV.

[20] *See* United Nations Conference on Trade and Development, UNCTAD STAT, Data Center, https://unctadstat.unctad.org/EN/.

[21] *See id.*

largest trading partners of several of the largest economies in the world, including the European Union (the "EU")[22] and Russia.[23]

Amidst China's socio-economic and political changes, and despite the traditional utilization of conciliatory settlement mechanisms,[24] the commercial arbitration market has been booming since the Arbitration Law was promulgated. In 2020, the China International Economic and Trade Arbitration Commission ("CIETAC") accepted 3,615 cases, among which 739 were foreign-related cases.[25] The Beijing Arbitration Commission ("BAC") and Shanghai International Arbitration Center ("SHIAC") accepted 4,247 and 1,620 new cases in 2019, respectively.[26] These numbers are far ahead of the largest arbitral institutions headquartered in Asia and Europe, but still do not yet exceed the numbers of American Arbitration Association-International Centre for Dispute Resolution ("AAA-ICDR"), which accepted 9,538 new cases in 2020[27] and Judicial Arbitration and Mediation Services ("JAMS"), which accepted over 6,500 new arbitrations in 2020.[28] What uniquely differentiates China, however, is the remarkable number of arbitral institutions, with an aggregate caseload of 554,536 among its 253 institutions in 2018.[29] This makes China the country with the most arbitrations in the world by a significant

[22] See *EU27 (from 2020) Trade by SITC Product Group*, EUROPEAN COMMISSION, EUROSTAT DATA BROWSER, https://ec.europa.eu/eurostat/databrowser/view/EXT_ST_EU27_2020SITC__custom_192433/bookmark/table?lang=en&bookmarkId=91f8be98-d920-44a5-9e3a-67a8bd4cba67 (accessed Oct. 15, 2021); *Euro Area International Trade in Goods Deficit €1.5 bn*, EUROPEAN COMMISSION, EUROSTAT (Jan. 14, 2022), https://ec.europa.eu/eurostat/documents/2995521/14099851/6-14012022-AP-EN.pdf/35232b60-22e4-7b55-23d1-d53a6084d4b9.

[23] *See* Daniel Workman, *Russia's Top Trading Partners*, WORLD'S TOP EXPORTS (Feb. 19, 2016), http://www.worldstopexports.com/russias-top-import-partners..

[24] *See* Sally Lord Ellis & Laura Shea, *Foreign Commercial Dispute Settlement in the People's Republic of China*, 6 MD. J. INT'L L. 155, 157 (1981); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967); Jerome Cohen, *Settling International Business Disputes with China: Then and Now*, 47 CORNELL INT'L L. J. 555, 560 (2014).

[25] See *Mao Zhong Wei 2020 Nian Gongzuo Zongjie He 2021 Nian Gongzuo Jihua (Wenzi Ban)* (贸仲委2020年工作总结和2021年工作计划（文字版）) [*CIETAC 2020 Work Summary and 2021 Work Plan (Text Version)*], CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (Jan. 29, 2021), http://www.cietac.org/index.php?m=Article&a=show&id=17427.

[26] See *2019 Annual Report*, BEIJING ARBITRATION COMMISSION (May 20, 2020), https://www.bjac.org.cn/english/news/view?id=3718; Ma Yi, *Shanghai International Economic and Trade Arbitration Commission (SHIAC)*, GLOBAL ARBITRATION REVIEW (Apr. 23, 2021), https://globalarbitrationreview.com/survey/the-guide-regional-arbitration/2021/organization-profile/shanghai-international-economic-and-trade-arbitration-commission-shiac.

[27] See *2020 B2B Caseload Data Shows AAA-ICDR® Provided Uninterrupted ADR Services in Difficult Year*, AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (Feb. 11, 2021), https://www.adr.org/sites/default/files/document_repository/AAA-2020-B2B-Caseload-Press-Release-11Feb2021_1.pdf

[28] *See* Robert B. Davidson & Matthew Rushton, *Overview: JAMS*, *in* THE ARBITRATION REVIEW OF THE AMERICAS 2021 (Global Arbitration Review eds., 2020), https://www.jamsadr.com/files/uploads/documents/articles/davidson-rushton-gar-arbitration-review-of-the-americas-2020-08.pdf.

[29] *See* Zhang Shouzhi, *Arbitration Procedure and Practice in China: Overview*, THOMSON REUTERS PRACTICAL LAW (Aug. 1, 2022), https://uk.practicallaw.thomsonreuters.com/3-520-0163?transitionType=Default&contextData=(sc.Default)&firstPage=true.

margin. For the first time in history, a Chinese arbitral institution – CIETAC – made it to the top 5 list of the most preferred arbitral institutions globally, with 17% of the votes in the 2021 International Arbitration Survey,[30] the largest global empirical study on international arbitration. This is testament to China's increasing recognition as an international dispute settlement hub, particularly in the Asia-Pacific region. CIETAC's prominence is also confirmed by this year's publication of the "Guide to the CIETAC Arbitration Rules" in English,[31] being the first internationally oriented guidebook to the arbitration rules of a Chinese arbitral institution.

China's role in investment arbitration is also changing. Despite being one of the states with the largest number of bilateral investment treaties, for a long time China and its investors were conspicuously absent from investor-state arbitration.[32] However, in recent years China and Chinese investors have become more exposed to investor-state dispute settlement ("ISDS"). The increasing importance of ISDS is also illustrated by the introduction of the 2017 CIETAC International Investment Arbitration Rules (For Trial Implementation) and the 2019 draft International Investment Arbitration Rules from the BAC.[33] CIETAC has also established an Investment Dispute Resolution Centre, for which it will likely designate the UNCITRAL Rules for Investor-State Disputes.[34] China's Belt and Road Initiative ("BRI") should also not be ignored in respect of investments. The persistence and ambition of the BRI is testament to China's path to a global leadership role, not only economically, but also in arbitration. Some have even speculated that China may eventually develop a dispute settlement center for BRI disputes.[35]

All these factors make it clear that China's role in the realm of international arbitration is different from 1995 when the Arbitration Law was promulgated. But China has never made any material amendments to the Arbitration Law. The only amendments made, in 2009 and 2017, were merely formalistic

[30] *See* School of International Arbitration, Queen Mary University of London and White & Case LLP, 2021 INTERNATIONAL ARBITRATION SURVEY: ADAPTING ARBITRATION TO A CHANGING WORLD 9, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

[31] *See* JIANLONG YU & LIJUN CAO, A GUIDE TO THE CIETAC ARBITRATION RULES (2021).

[32] *See* Fredrik O. Lindmark, Ole K. Fauchald & Daniel Behn, *Explaining China's Absence from Investment Arbitration*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION: EMPIRICAL PERSPECTIVES 424 (Daniel Behn, Ole K. Fauchald & Malcolm Langford eds., 2022).

[33] *See* China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation), http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en; Yihua Chen, *New 2019 BAC Rules for International Investment Arbitration: A Chinese Approach to the Concerns over Investment Arbitration Regime*, KLUWER ARBITRATION BLOG (Mar. 20, 2019), http://arbitrationblog.kluwerarbitration.com/2019/03/20/new-2019-bac-rules-for-international-investment-arbitration-a-chinese-approach-to-the-concerns-over-investment-arbitration-regime.

[34] *See* Donald J. Lewis & Diana Moise, *One Belt One Road ("OBOR") Roadmaps: The Legal and Policy Frameworks, in* THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS AND POLITICS 17, 56 (Julian Chaisse & Jędrzej Górski eds., 2018).

[35] *See id.*

changes to reflect a changed reference to the Civil Procedure Law,[36] and a change relating to the reform of the new national legal profession qualification exam.[37] The changes to China's arbitration system have happened in another arena: First and foremost, through the Supreme People's Court Judicial Interpretations and/or Opinions. There are now more than 30 Interpretations and Opinions relating to arbitration.[38]

It is against this backdrop that a reform process has begun. In December 2018, the General Offices of the CPC Central Committee and State Council jointly issued Several Opinions Concerning the Improvement of the Arbitration System and Raising the Credibility of Arbitration.[39] The Opinions noted that China's arbitration system is facing a plethora of problems, including the structure of arbitration commissions, international competitiveness, and judicial assistance and review of arbitration. Because of this – and other shortcomings – the Opinions rightly note that the credibility and development of China's arbitration system are being restricted by the current system.

The time-period in which the Opinions were issued is marked by developments that have influenced the Proposed Draft of the Arbitration Law, and arguably have gone beyond the stipulations of the Arbitration Law. For instance, the 2019 Framework and Measures for the Lingang Special Area (Shanghai) represented the first policies welcoming foreign arbitral institutions to set up offices and administer foreign-related arbitrations seated in China.[40]

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[36] *See* Arbitration Law, s*upra* note 1; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Bufen Falü De Jüeding (全国人民代表大会常务委员会关于修改部分法律的决定) [Decision of the Standing Committee of the National People's Congress to Amend Parts of Laws] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009), https://www.global-regulation.com/translation/china/158792/decision-of-the-standing-committee-of-the-national-peoples-congress-to-amend-parts-of-the-law.html.

[37] *See* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Zhonghua Renmin Gongheguo Faguan Fa Deng Babu Falü De Jüeding (全国人民代表大会常务委员会关于修改《中华人民共和国法官法》等八部法律的决定) [Decision of the Standing Committee of the National People's Congress to Amend Eight Laws including the *Judges Law of the People's Republic of China*] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018), CLI.1.301230 (Chinalawinfo).

[38] *See* Wei Sun, *How the Arbitration Law of the People's Republic of China Should Be Modernized,* KLUWER ARBITRATION BLOG (Jul. 31, 2020), http://arbitrationblog.kluwerarbitration.com/2020/07/31/how-the-arbitration-law-of-the-peoples-republic-of-china-should-be-modernised.

[39] *See* Zhonggong Zhongyang Bangong Ting Guowuyuan Bangong Ting Yinfa "Guanyu Wanshan Zhongcai Zhidu Tigao Zhongcai Gongxinli De Ruogan Yijian" De Tongzhi, Zhong Ban Fa [2018] 76 Hao (中共中央办公厅、国务院办公厅印发《关于完善仲裁制度提高仲裁公信力的若干意见》的通知，中办发[2018]7号) [The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council, Notice on Issuing Several Opinions on Improving the Arbitration System and Improving the Credibility of Arbitration, Zhongbanfa [2018] No. 76] (Dec. 31, 2018), GUIYANG ZHONGCAI WEIYUANHUI (贵阳仲裁委员会) [GUIYANG ARBITRATION COMMISSION] (Nov. 1, 2019), http://www.gyac.org.cn/ArtcleDetail.aspx?ID=904.

[40] *See* Guowuyuan Guanyu Yinfa Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Lingang Xin Pianqu Zongti Fang'an De Tongzhi (国务院关于印发中国(上海)自由贸易试验区临港新片区总体方案的通知) [Notice by the State Council of Issuing the Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone] (promulgated by the St. Council, 27 July 2019, effective 27 July 2019), CLI.2.334746 (Chinalawinfo); Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Lingang Xin Pianqu Guanli Banfa (中国(上

Only months later, on December 9, 2019, the Supreme People's Court issued Opinions on Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative.[41] On August 30, 2020, the State Council also published Plans for Pilot Free Trade Zones of Beijing, Hunan, Anhui and Zhejiang,[42] and on December 28, 2020, the Beijing Municipal Bureau of Justice issued Administrative Measures for Registration of Business Offices Established by Overseas Arbitral Institutions in China (Beijing) Pilot Free Trade Zone.[43] Similar developments have also taken place for the Hainan Province's Free Trade Port.[44] Together, these steps are indicative of a will to embrace foreign institutions in China's arbitration market even before the Arbitration Law is amended. In fact, the World Intellectual Property Office ("WIPO") has already established a division of its Arbitration & Mediation Center in the Shanghai Pilot Free Trade Zone, and already accepted its first case in July 2020.[45]

The developments that have taken place are arguably in contradiction to the stipulations of the 1995 Arbitration Law. An example of this is the possibility to set up international arbitral institutions in Free Trade Zones, which the Arbitration Law (at least on its face) is not supposed to permit. However, they also show that the time is ripe for amendments. The Ministry of Justice's Draft Amendments published on August 30, 2021[46] reflect the developments in which practice has already proceeded to go beyond the wording of the present arbitration law. As clarified in the Ministry of Justice's Explanation,[47] the Draft Amendments also go further; and are symptomatic of China's new role in the world economy – in global trade, as a major capital-exporting and -importing

海)自由贸易试验区临港新片区管理办法) [Measures for the Administration of the Lingang Special Area of China (Shanghai) Pilot Free Trade Zone] (promulgated by Shanghai Municipal People's Government, Aug. 12, 2019, effective Aug. 20, 2019), art. 13, CLI.11.1535062 (Chinalawinfo); Jingwai Zhongcai Jigou Zai Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Lingang Xin Pianqu Sheli Jigou Guanli Banfa (境外仲裁机构在中国(上海)自由贸易试验区临港新片区设立业务机构管理办法) [Administrative Measures for Business Offices Established by Overseas Arbitral Institutions in the Lingang Special Area of China (Shanghai) Pilot Free Trade Zone] (promulgated by the Shanghai Municipal Bureau of Justice , Oct. 21, 2019, effective Jan. 1, 2020); *See also* Zhang, *supra* note 29.

[41] *See* Zhang, *supra* note 29.

[42] *Id.*

[43] *Id.*

[44] *See* Joel Evans, *An Arbitration Paradise? The Importance of Dispute Resolution for Hainan's Development*, KLUWER ARBITRATION BLOG (Nov. 27, 2020), http://arbitrationblog.kluwerarbitration.com/2020/11/27/an-arbitration-paradise-the-importance-of-dispute-resolution-for-hainans-development/.

[45] *Id.*

[46] *See* Zhonghua Renmin Gongheguo Zhongcai Fa (Xiuding) (Zhengqiu Yijian Gao) (中华人民共和国仲裁法（修订）(征求意见稿)) [Arbitration Law of the People's Republic of China (Revised) (Draft for Comment)], MINISTRY OF JUSTICE OF CHINA (July 30, 2021), http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html.

[47] *See* Guanyu "Zhonghua Renmin Gongheguo Zhongcai Fa (Xiuding) (Zhengqiu Yijian Gao)" De Shuoming (关于《中华人民共和国仲裁法（修订）（征求意见稿）》的说明) [Explanation on the "Arbitration Law of the People's Republic of China (Revised) (Draft for Comment)"] (hereinafter "Explanation on the Revision of the Arbitration Law"), MINISTRY OF JUSTICE OF CHINA (Jul. 30, 2021), http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432965.html.

country, and as a major hub for international dispute settlement. The recognition of this new role is also alluded to in the Draft Proposal Article 1, which adds that the promotion of international economic exchanges is one of the purposes of the Arbitration Law.

III. THE PROPOSED CHANGES IN THE DRAFT AMENDED ARBITRATION LAW

Having shown the historical context in which the proposed amendments to the Arbitration Law arise, the following Part analyzes the most significant amendments contemplated by the Draft Amended Arbitration Law and compares them to the current Arbitration Law and framework in China.

A. Scope of Subject Matter Capable of Being Submitted to Arbitration

The first discernable amendment relates to the subject matter capable of being submitted to arbitration. Article 2 of the Draft Proposal has expanded the scope of arbitrable disputes by removing the requirement that the parties be "equal subjects". This proposed amendment relates to the jurisdiction *ratione personae*. Although the amendment may seem vague, it is intended to open the doors for individuals, corporations, and associations to bring claims against subjects which are not equal, *i.e.*, the government. This is confirmed by the Ministry of Justice's Explanation on the Revision of the Arbitration Law, which explains that the change is intended to provide a basis for the application of investment and sports arbitration in China.[48] At least for investment arbitration, this is arguably a welcome and necessary change because the current framework does not envisage that an individual or corporation should be able to bring a claim against a state,[49] even though China is party to numerous BITs giving investors the choice to pursue commercial arbitration against a sovereign state, usually through ad-hoc arbitration under UNCITRAL Arbitration Rules.[50]

With respect to arbitrable subject matter, the new Article 2 largely incorporates the wording of the current Arbitration Law's Article 3 but adds that, if there are special regulations relating to arbitration in other laws, those will apply.

B. Arbitration Agreement: Requirements

Articles 16 and 18 of the present Arbitration Law require that an arbitration agreement shall contain (1) an expression of intention to "apply" for arbitration; (2) matters for arbitration; and (3) a designated Arbitration Commission. If an arbitration commission is not designated or it is unclear which one is designated, the wording of the present Arbitration Law makes it clear that the

[48] *See id.*

[49] *See* Julian Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6 CONTEMP. ASIA ARB. J. 31, 32 (2013).

[50] *See, e.g.*, China-Switzerland BIT, Jan. 27, 2009, art. 11.

arbitration agreement is null and void. These requirements have long been criticized for not being in line with international standards and for their rigidity. Most countries only require an arbitration agreement to indicate party intent to submit disputes to arbitration, not subject matter of arbitration and a designated arbitration commission.[51]

The Ministry of Justice explains that an important goal of the Proposed Draft is to establish an arbitration agreement validity system based on party autonomy more in line with international arbitration practice.[52] The Proposed Draft rightly addresses both these areas of criticism.

With respect to subject matter of arbitration, the Proposed Draft has entirely removed the requirement that an arbitration agreement must contain the subject matter for arbitration to be valid. Many in the arbitration community have called for a loosening-up of this nature to avoid a formalistic requirement for arbitration agreements' validity.[53] This makes the proposed change highly welcome.

With respect to the designation of an arbitration commission, the Proposed Draft still maintains as a main rule that an Arbitration Commission must be indicated in the arbitration agreement. However, the Proposed Draft Article 35 builds considerably on the judicial developments reflected in Articles 3 to 7 of the SPC's Judicial Interpretation on the Arbitration Law,[54] which are aimed at correcting "unclearly" designated arbitration commissions in an attempt to avoid invalidity of poorly worded arbitration agreements. The new proposed Article 35 goes much further and adds that even arbitration agreements lacking a designated arbitration institution will be valid, as the parties can initiate arbitration with an institution in the common domicile of the parties or another place. Thus, while the designation of an arbitration commission has not been entirely removed, the contemplated change would make it highly unlikely that an arbitration clause be invalid owing to the parties' failure to designate an arbitration commission.

C. Judicial Review

Articles 58, 70 and 71 of the current law and Articles 238 and 274 of the Civil Procedure Law[55] set out the grounds for which an arbitral award may be

[51] *See* Sun, *supra* note 38.

[52] *See* Explanation on the Revision of the Arbitration Law, *supra* note 47.

[53] *See* Sun, *supra* note 38.

[54] *See* Zuigao Renmin Fayuan 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) [Interpretation of the Supreme People's Court Concerning Some Issues on the Application of the Arbitration Law of the People's Republic of China] (promulgated by Sup. People's Ct., Dec. 26, 2005, effective Sept. 8, 2006, rev'd Dec. 16, 2008, effective Dec. 31, 2008), arts. 3 to 7, *translated by* ICCA – Tsinghua University Working Group on Chinese Arbitral Practice, THE ICCA REPORTS, NO. 5, at 147–59 [hereinafter "Judicial Interpretation on the Arbitration Law"].

[55] *See* Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991; amended Oct. 28, 2007, amended on Aug. 31, 2012, amended June 27, 2017), *translated by* ICCA –

refused enforcement and/or annulled. The present Arbitration Law differentiates between the grounds for setting aside a domestic and foreign-related arbitral award, with a so-called "twofold dual-track system."[56] Article 274 of the Civil Procedure Law sets out the grounds for refusing to enforce a foreign-related arbitral award, and pursuant to Articles 70 and 71 these grounds apply for annulment and enforcement of foreign-related arbitral awards, respectively. Meanwhile, Article 237 of the Civil Procedure Law sets out the grounds for non-enforcement of domestic arbitral awards and Article 58 of the Arbitration Law sets out the grounds for annulment of domestic arbitral awards. This distinction is important because the grounds are different for domestic and foreign-related awards. For foreign-related awards, only procedural irregularities constitute grounds to set aside the award, while domestic awards may also be set aside if the award was based on forged evidence, if the other party withheld evidence sufficient to affect the impartiality of the arbitration, and/or if the arbitrators have accepted bribes or committed other malpractices for personal benefits.[57] While there may be certainly good policy reasons for refusing to enforce or to set aside an award affected by one of the above, this is not entirely in line with international practices.[58] Thus, some scholars and practitioners have advocated for the removal of judicial review of substantive issues for domestic awards.[59] The Proposed Draft has done the exact opposite and has added the substantive review also for foreign-related awards – but seemingly only for annulment proceedings. Since there is no mention of annulment proceedings in Chapter VII on the special provisions for foreign-related arbitration, the new proposed Article 77 applies to both domestic and foreign-related awards. Another addition proposed in Article 77 of the Draft Proposal is the possibility to set aside an award where the respondent has not been notified to appoint an arbitrator or proceed with the arbitration procedure, or fails to state its opinions for reasons outside of its own control.

D. "Seat Standard"

Chinese law follows the so-called "institution standard" to determine the nationality of an arbitral award. The determinative factor is the domicile of the institution,[60] which means that the nationality of the award is generally considered to be the domicile of the arbitral institution. According to the Second National Working Conference on Foreign-Related Commercial and Maritime

Tsinghua University Working Group on Chinese Arbitral Practice, THE ICCA REPORTS, NO. 5, at 65-79 [hereinafter "Civil Procedure Law"].

[56] *See* Sun, *supra* note 38.

[57] *See* Civil Procedure Law, *supra* note 55, Article 58 (4), (5) and (6).

[58] *See infra* Part IV.

[59] *See* Sun, *supra* note 38.

[60] *See* SUN WEI & MELANIE WILLEMS, ARBITRATION IN CHINA: A PRACTITIONER'S GUIDE 104 (Kluwer Law International, 2015).

Trials Article 81,[61] Chinese courts are to refer to Article 283 of the Civil Procedure Law in an annulment or enforcement proceeding:

> "Where an arbitral award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, a party shall apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity."[62]

China's unique acceptance of this standard stands in contrast with the generally accepted "seat standard", under which the nationality of the award is determined based on the seat of the arbitration. This causes trouble where the arbitral institution is located outside of China, but the seat of the arbitration is in China. For instance, if the administering institution is the International Chamber of Commerce ("ICC") and the arbitration is seated in China, the institution standard would consider the award to be French,[63] while countries adopting the seat standard would consider the award to be Chinese. This has the potential to cause contradictions at the annulment stage, in which case the court where the institution is "domiciled" may consider that Chinese law, and therefore Chinese courts, should determine whether to set aside the award.[64]

Until last year in the case of *Brentwood v. Guangdong Fa'anlong*,[65] Chinese courts have consistently applied the institution standard.[66] Following a coherent practice of considering arbitration agreements appointing a foreign arbitral institution[67] with the seat in China as valid, the Guangzhou Inter-

[61] *See* Di Er Ci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Summary of the Second National Working Conference on Foreign- Related Commercial and Maritime Trials] (promulgated by Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), *translated by* ICCA – Tsinghua University Working Group on Chinese Arbitral Practice, THE ICCA REPORTS, NO. 5, at 230–46.

[62] Civil Procedure Law, *supra* note 55, art. 283 (emphasis added).

[63] *See* SUN & WILLEMS, *supra* note 60.

[64] *See* Tereza Gao & Ziyi Yao, *Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I*, KLUWER ARBITRATION BLOG (Oct. 12, 2020), http://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-no-mans-land-part-i.

[65] *See* Bulantewude Gongye Youxian Gongsi Su Guangdong Fa'anlong Jixie Chengtao Shebei Gongcheng Youxian Gongsi Deng (布兰特伍德工业有限公司诉广东闳安龙机械成套设备工程有限公司等) [Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd. and Others], Guangdong Interm. People's Ct., Aug 06, 2020.

[66] *See* Gao & Yao, *supra* note 64.

[67] *See e.g.*, Dacheng Chanye Qiti Zhushi Huishe Deng Su Pulaikesi (Zhongguo) Touzi Youxian Gongsi (大成产业气体株式会社等诉普莱克斯（中国）投资有限公司) [Deasung Industrial Gases Co., Ltd. and Others v. Praxair (China) Investment Co., Ltd.], Shanghai 1st Interm. People's Ct., Aug. 3, 2020; Zuigao Renmin Fayuan Guanyu Shenqingren Anhui Sheng Longlide Baozhuang Yinshua Youxian Gongsi Yu Bei Shenqingren BP Agnati S.R.L Shengqing Queren Zhongcai Xieyi Xiaoli An De Qingshi De Fuhan (最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人BP Agnati S.R.L申请确认仲裁协议效力案的请示的复函) [Reply of the Supreme People's Court on the Case of Longlide Packaging Co. Ltd. v. BP Agnati S.R.L] (promulgated by the Sup. People' Ct., Mar. 25, 2013).

mediate People's Court ("Guangzhou IPC") first upheld the validity of the arbitration agreement. After an award was rendered, Brentwood sought enforcement before the Guangzhou IPC with reference to the New York Convention since the Chinese "institution standard" would result in the award being considered as seated in France. However, the Guangzhou IPC refused to consider the award as foreign. In doing so, the Guangzhou IPC signaled for the first time that a Chinese court was willing to accept the "seat standard".

Although the case stands alone in its adoption of the seat standard and is not binding, the Draft Proposal has now also embraced the recognition of the seat standard. For domestic arbitrations, the starting point under draft Article 27 is that the award will be deemed to be made at the seat. Absent an agreement, however, the institution standard still will apply and determine that the award is rendered at its domicile. For foreign-related arbitrations, draft Article 91 makes it clear that parties may agree on a seat of arbitration. If the parties have not agreed, the tribunal is to determine the place of arbitration based on the circumstances of the case.

The proposed recognition of the seat standard in the Arbitration Law is a tremendous step forward for Chinese arbitration. It goes a long way in eliminating the complex issues that can arise because of the institution standard, and which have already arisen in numerous cases.

E. Foreign Arbitral Institutions

As mentioned above,[68] in the past few years Free Trade Zones have begun to welcome foreign arbitral institutions in China. While WIPO's Arbitration & Mediation Center has already begun administering cases in Free Trade Zones in China, other foreign arbitral institutions that are already set up in Free Trade Zones do not appear to have conducted arbitrations yet.[69] This includes the International Chamber of Commerce ("ICC"), the Hong Kong International Arbitration Centre ("HKIAC"), the Singapore International Arbitration Centre ("SIAC"), and the Korean Commercial Arbitration Board ("KCAB").[70] Most likely, the non-operation of these arbitral institutions is due to the uncertainty of their status and the status of awards rendered by tribunals administered under such institutions.

These developments have not been ignored in the Ministry of Justice's draft proposal. Draft Article 12 explicitly recognizes the possibility for foreign arbitral institutions to establish a business in China. While such institutions may only handle foreign-related arbitrations, this represents a tremendous milestone for the development of China as an international arbitration hub. Having seen

[68] *See supra* Part I.

[69] *See* Martin Rogers & Noble Mak, *Foreign Administered Arbitration in China: The Emergence of a Framework Plan for the Shanghai Pilot Free Trade Zone*, KLUWER ARBITRATION BLOG (Sept. 6, 2019), http://arbitrationblog.kluwerarbitration.com/2019/09/06/foreign-administered-arbitration-in-china-the-emergence-of-a-framework-plan-for-the-shanghai-pilot-free-trade-zone.

[70] *See id.*

more than 250 domestic arbitral institutions blossom over the past few decades, China finally seems willing to accept the competition that foreign arbitral institutions will bring. However, since the majority of the cases administered by Chinese institutions are domestic, the institutions will only compete for a relatively small number of China's enormous caseload.

One advantage of permitting foreign arbitral institutions is the perceived "internationalization" and advancement of arbitration in China. As foreign businesses trading or investing in China have historically been reluctant to conduct their arbitrations in China, the presence of internationally recognized institutions indicates that the institutions have gained sufficient confidence in the Chinese legal system to set up local offices there. In turn, this may increase the perceived legitimacy of China's arbitration framework and of China as an international arbitration hub. Another possible upside of permitting foreign institutions is efficiency. Many major arbitral institutions in China are already overloaded with cases,[71] so the introduction of well-known foreign institutions may contribute to spread some of the burden to other major institutions, thereby potentially reducing the caseload of each. Furthermore, costs for international travel to attend arbitrations abroad may be reduced if the parties have a closer connection to China, which is also in line with recent years' emphasis on greener and more environmentally friendly arbitration.

However, it remains to be seen which of the major international institutions will set up local representative offices in China, and if so, where. Even if they do, it also remains to be seen whether they will actually administer cases in China, as so far most foreign institutions with local offices do not appear to administer cases. Finally, differences in costs, in the range of services, in the degree of involvement in each case, and legal-cultural differences might impact the foreign institutions' ability to penetrate the Chinese market. It therefore remains to be seen whether foreign institutions will be able to compete with domestic institutions.

F. Foreign-Related Ad Hoc Arbitration

Ad hoc awards rendered by tribunals seated abroad are already enforceable pursuant to Article 545 of the Civil Procedure Law. However, because of the requirement to appoint an arbitration commission in order for an arbitration clause to be valid, where the seat of arbitration is in China, an ad hoc arbitration agreement will generally not be recognized as valid in China.[72] Thus, an award rendered by a domestic ad hoc tribunal will not be enforceable and will be set aside. While there are no provisions explicitly dealing with this in the present Arbitration Law, judicial practice has traditionally taken a tough stance against such arbitration agreements and awards. One limited exception to this practice

[71] *See* Sun, *supra* note 38.
[72] *See* TAO, *supra* note 9, at 76–77.

is if the arbitration is between companies in Pilot Free Trade Zones,[73] where ad hoc arbitration may be permitted.

While the arbitration community has long called on the Chinese legislature to completely introduce ad hoc arbitration to China,[74] the Ministry of Justice does not seem to be willing to open China's doors completely to ad hoc arbitration. Articles 91 and 93 of the draft Arbitration Law explicitly permit ad hoc arbitration, but only for foreign-related disputes. Again, the somewhat unclear distinction between domestic and foreign-related disputes is problematic for parties that are not sure if their status and contractual relationship will be considered domestic or foreign-related. Since domestic ad hoc arbitration will still not be permitted, an arbitration agreement calling for an ad hoc tribunal to arbitrate a dispute would likely not be enforced if the court finds that the parties and the nature of their relationship is purely domestic.

G. Competence-Competence Doctrine

The present Arbitration Law contains no provision recognizing the arbitral tribunal's Competence-Competence,[75] but provides for a maze-like division of powers between courts and arbitral institutions. Article 5 of the present Arbitration Law states that the People's Court shall not accept a case if the parties have concluded an arbitration agreement, unless the arbitration agreement is null and void. This is clarified by Article 20, which stipulates that disputes concerning the validity of an arbitration agreement can be made to the arbitration commission or to the People's Courts; however, if both the commission and the courts have been requested to make a decision, the court's ruling takes precedence over the commission. Again, this is further reinforced by Article 26, which stipulates that the People's Court shall make a ruling even after "the opening of the arbitral tribunal" if the "agreement for arbitration is invalid." It is also worth noting that the party must object to the People's Court's jurisdiction before the first hearing, otherwise it will be considered as having forfeited the arbitration agreement.[76] Additionally, according to Article 3 of the Reply on Several Issues Relating to the Validity of Arbitration Agreements,[77] the People's Court shall not accept a case if the arbitration

[73] *See* Zuigao Renmin Fayuan Guanyu Wei Ziyou Maoyi Shiyan Qu Jianshe Tigong Sifa Baozhang De Yijian (最高人民法院关于为自由贸易试验区建设提供司法保障的意见) [Opinion of the Supreme People's Court on Providing Judicial Safeguards for the Construction of Pilot Free Trade Zones] (issued by Sup. People's Ct., Dec. 30, 2016), art. 9.

[74] *See* Sun, *supra* note 38; Zhang Xianda (张贤达), *Zhongguo Linshi Zhongcai Zhidu De Goujian* (中国临时仲裁制度的构建) [*On the Construction of China's ad hoc Arbitration System*], 3 SHANGHAI SHIFAN DAXUE XUEBA (上海师范大学学报 (哲学社会科学版)) [SHANGHAI NORM. U. J. (PHIL. & SOC. SCI. ED.)] 57.

[75] *See* TAO, *supra* note 9, at 55–56.

[76] *See id.*

[77] *See* Zuigao Renmin Fayuan Guanyu Queren Zhongcai Xieyi Xiaoli Jige Wenti De Pifu (最高人民法院关于确认仲裁协议效力几个问题的批复) [Reply of the Supreme People's Court Regarding Several Issues Relating to the Validity of Arbitration Agreements] (issued by Sup. People's Ct., Oct. 21, 1998, effective Nov. 5, 1998).

commission has *already made a decision* on jurisdiction pursuant to Article 20 of the Arbitration Law. On the other hand, if the commission has accepted the case but not yet made a decision, the People's Court shall accept the case and issue a ruling on jurisdiction, and also notify the commission to terminate the arbitral proceedings. Pursuant to Article 13 of the Judicial Interpretation on the Arbitration Law,[78] if the commission has decided on the validity of an arbitration agreement, the People's Court shall not accept a case where a party asks the People's Court to determine the validity of the arbitration agreement or to set aside the decision of the commission.

The Proposed Draft rejects most of this precarious patchwork with a far simpler framework. Article 28 of the Proposed Draft provides that the tribunal is to decide on its jurisdiction based on *prima facie* evidence, and explicitly states that the courts shall not accept a jurisdictional objection unless the tribunal has decided whether to proceed with the arbitration. Only after the tribunal has rendered its decision on jurisdiction, by way of a partial or complete award, may the court review whether the tribunal had jurisdiction.

This is a welcome change that reflects international standards of arbitration practices. It is likely that this change will expediate arbitrations where a party is attempting to obstruct the arbitral process, which some commentators have noted as a prominent guerilla tactic in arbitration in China.[79]

H. Appointment of Arbitrators and Presiding Arbitrator

Under the existing framework, parties are not given the freedom to appoint their own arbitrators. Under Article 31 of the Arbitration Law, the chair of the arbitration institution appoints the "party-appointed" arbitrators and the presiding arbitrator from a panel of arbitrators at the institution.

The draft amendment's Article 50 completely removes this requirement and gives the parties the power to appoint their arbitrator, including arbitrators outside of the arbitral institution's panel of arbitrators. This proposed amendment represents a major step forward, recognizing the principle of party-appointment of arbitrators found in modern international arbitration practices. Article 51 also recognizes that the parties or the party-appointed arbitrators should decide on the presiding arbitrator, unless they are unable to appoint a presiding arbitrator. The same applies to sole arbitrators. These developments are also in line with international arbitration practices.

I. Interim Measures

Under the current arbitration framework, tribunal-imposed interim measures are completely unavailable, and can only be sought from a competent court.

[78] *See* Judicial Interpretation on the Arbitration Law, *supra* note 54.
[79] *See* Zhang, *supra* note 29.

The draft proposal's Article 43 explicitly gives the arbitral tribunal the power to make temporary or emergency measures related to the subject of the dispute in order to ensure the progress of the arbitration procedure, ascertain the facts in dispute or execute the award, and include measures such as property preservation, evidence preservation, injunctive orders, and other necessary short-term measures.

The proposed changes are in line with international developments on tribunals' powers to order interim measures.

J. Arbitrators

While it is explicitly permitted for foreign-related arbitration commissions to appoint foreign nationals with "special knowledge in the fields of law, economy and trade, science and technology, etc." under Article 67 of the current Arbitration Law, it is not clear whether institutions may also allow for the appointment of Chinese nationals with such "special knowledge in the fields of law, economy and trade, science and technology, etc."

In line with the proposed amendment to allow the appointment of arbitrators who are not on an arbitral institution's panel of arbitrators, Article 67 is replaced by draft Article 89, which has been completely overhauled. Instead of relating to the appointment of foreign nationals by foreign-related arbitration commissions, Article 89 will instead allow for the appointment of both Chinese and foreign nationals who possess the same knowledge in foreign-related arbitrations.

Another proposed change relating to arbitrators is the additional requirement that an arbitrator must not have limited capacity for civil conduct, a criminal record (except for negligent crimes), and other circumstances as provided by law. The latter of these requirements may prove to be a flexible approach to address some of the criticisms of the investor-state dispute settlement mechanisms, in which arbitrators frequently engage in so-called double hatting. At the present stage in the ISDS reform process, it is not yet certain how the system of ISDS will change in the future. It is also impossible to anticipate the role that China will come to play in the future of ISDS and arbitration over the coming years. The inclusion of this requirement is likely connected to the possibility that the ISDS system will entail changes to global practices, and does not give cause for concern.

IV. EVALUATION AND WAY FORWARD

A. Evaluation

Overall, the Draft Proposal addresses a number of shortcomings with the current arbitration framework. Perhaps most importantly, the Draft Proposal discards a rigid and maze-like system for the determination of an arbitration agreement's validity and replaces it with the recognition of the principle of Competence-Competence, which is a tremendous step forward.

In addition to the major and mostly positive amendments discussed in Part III above, the Draft Proposal also includes a plethora of minor changes that – overall – make the Arbitration Law significantly more modern. These include, *inter alia,* the express permission of using modern technology to serve documents (Article 34), the recognition of the enforceability of partial awards (Article 74) and the possibility for the arbitral tribunal to clarify its award where it might otherwise be unenforceable (Article 75). For foreign-related disputes, the Draft Proposal expressly provides for the parties' autonomy to decide on the *lex arbitri* (Article 90), for the parties' autonomy to choose an administering institution (Article 91) and provides Chinese courts with the power to assist with the administration of an ad hoc arbitration (Article 92).

However, the Draft Proposal also contains significant shortcomings that will continue to puzzle arbitration practitioners who are more used to the international standards found at other global arbitration hubs. Most importantly, China's archaic distinction between domestic and foreign-related arbitrations continues to have relevance in the Draft Proposal. Unfortunately, the Draft Proposal of the Arbitration Law seems to place even greater emphasis on this shortcoming in the current law. It is therefore very surprising that the Draft Proposal does not properly address how to determine which category an arbitration falls into. A rough sketch of the current framework for this determination is set out in Article 522 of the SPC's Interpretation on the Civil Procedure Law, and states that the courts may determine that a case is foreign-related if

> "(1) One or both parties concerned are foreigners, stateless persons, or foreign enterprises or organizations; or
>
> (2) The habitual residences of one or both parties concerned are beyond the territory of the People's Republic of China; or
>
> (3) The subject matter is located beyond the territory of the People's Republic of China; or
>
> (4) The legal facts generating, altering or terminating civil relations occur beyond the territory of the People's Republic of China; or
>
> (5) Other situations based on which the case can be regarded as a foreign-related case."[80]

Items (4), "legal facts generating, altering or terminating civil relations occur beyond the territory" and (5) "[o]ther situations based on which the case can be regarded as a foreign-related" can reasonably be characterized as classic cases of "I know it when I see it." Since China has no system of binding precedence, there is considerable leeway for courts to determine on a case-by-case basis whether a relationship will end up being classified as a domestic or foreign-related one, and consequently whether an arbitration is domestic or

[80] Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Minshi Susong Fa" De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation of the Sup. People's Ct. on the Application of the Civil Procedure Law of the People's Republic of China] (issued by Sup. People's Ct., Dec., 18, 2014, effective Feb. 4, 2015, amended Dec. 23, 2020), art. 522, CLI.3.349767 (Chinalawinfo).

foreign-related, at the post-award stage. This is also shown by courts' practice.[81] For contractual relationships that are in the grey zone of being either domestic or foreign-related, this could have serious implications on the enforceability of the award. In addition, the nature of a contractual relationship can change throughout its course. For instance, obligations may be added or removed, and those obligations may be more or less related to China or foreign countries. There is therefore also a possibility that a contractual relationship that was domestic at the outset might become a foreign-related one, and vice versa.

Thus, as the Proposed Draft elevates the importance of the distinction between domestic and foreign-related arbitrations, it is surprising that it does not attempt to provide more clear guidance. There are several examples of the issues this can lead to.

First, parties who are unsure if their contractual relationship will be considered domestic or foreign-related, and who have not explicitly chosen a seat of arbitration, would not know at the time of entering into the arbitration agreement whether the institution standard will apply under the Proposed Draft Article 27, or the circumstances-of-the-case determination under the Draft Article 91. In line with the New York Convention Article I(1),[82] because Chinese entities are generally prohibited from submitting purely domestic disputes to arbitration outside China,[83] parties would not know for certain that the choice of a foreign institution will be respected by Chinese courts at the enforcement stage.[84]

Secondly, while the acceptance of foreign-related ad hoc arbitration is a step in the right direction, the shortcomings of the proposed amendments will not satisfy critics voicing for the implementation of ad hoc arbitration in China. Permitting domestic ad hoc arbitration would have had the potential to reduce the caseload of arbitral institutions and to open for a more flexible and cost-efficient arbitral procedure.[85] However, that flexibility might be precisely the reason why they are not fully permitted. The role of arbitral institutions as expressed in the Draft Proposal's Chapter II is to provide non-profit dispute resolution services, managed with effective checks and balances. While arbitral institutions are autonomous legal persons with a large degree of self-determination, domestic arbitral institutions are still required to be registered under the government, and both the present law and the Proposed Draft contain

[81] *See* Sabrina Lee, *Arbitrating Chinese Disputes Abroad: A Changing Tide?*, KLUWER ARBITRATION BLOG (Apr. 7, 2016), http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/.

[82] *See* GARY BORN, INTERNATIONAL ARBITRATION, LAW AND PRACTICE 57 & 445–48 (Kluwer Law International, 3rd ed. 2021).

[83] *See* Zhang, *supra* note 29.

[84] *See* Anton Ware, Tereza Gao & Grace Yang, *Proposed Amendments to the PRC Arbitration Law: A Panacea?*, KLUWER ARBITRATION BLOG (Sept. 9, 2021), http://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/.

[85] *See* Sun, *supra* note 38; Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, 2 INT'L CT. ARB. BULL. 8 (1991).

a number of rigid requirements on the establishment and management of arbitral institutions and on the qualifications of arbitrators. Domestic ad hoc arbitration would undermine these rigid requirements in the Arbitration Law. Since China apparently still considers it necessary to maintain control of its domestic arbitral institutions, it is therefore not surprising that the introduction of ad hoc arbitration only applies to foreign-related disputes. This is also consistent with the fact that foreign institutions will only be allowed to administer foreign-related disputes. Nevertheless, it is unfortunate that China's continued bifurcation between domestic and foreign-related disputes was also carried over and might end up prohibiting ad hoc arbitration of domestic disputes, as the introduction of domestic ad hoc arbitration would have likely had the possibility to significantly ease the burden of domestic arbitral institutions.

Third, as mentioned, the Draft proposes that the additional domestic substantive review provisions will also be adopted at the annulment stage for foreign-related awards. It is not clear why the additional grounds seemingly only apply for annulment but not for enforcement of foreign-related awards, whereas they apply for both annulment and enforcement of domestic awards. This proposed change further complicates the arbitral framework by giving more grounds for annulment under Article 77 of the Draft Proposal (annulment) than enforcement under Article 274 of the Civil Procedure Law (enforcement). Suffice to say, this proposed change seems to be exactly the opposite of what some critics have advocated for, namely to remove any substantive grounds for judicial review of both domestic and foreign-related awards. Nevertheless, in the present author's view, all the provisions on substantive review are intended to target conduct that seriously jeopardizes the arbitral process and the legitimacy of the arbitral system. As such, it would in most cases fall under the scope of the public policy exception in the New York Convention Article 5(2)(b). For instance, anti-corruption is widely considered to be encompassed in the notion of transnational public policy,[86] and which would form part of every state's international public policy. Thus, even without a specific provision granting courts the power to refuse to enforce or set aside an award that has been tainted with corruption, the courts of most countries would (rightly) set aside such an award with reference to the public policy exception. The present author therefore does not consider that there is any compelling reason for removing such grounds for setting aside an award, as advocated by other critics.[87]

Ideally, therefore, before the proposed amendments are implemented, the specific criteria for determining whether the relationship is domestic or foreign-related should be very clearly defined in the Arbitration Law. Preferably, items (4) and (5) mentioned above should be further clarified so businesses can

[86] *See* Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35 ARB. INT'L 1, 14 (2019).

[87] *See* Sun, *supra* note 38.

determine with certainty whether their contractual relationship will be considered domestic or foreign-related. While this would not eliminate the possibility that the relationship may change in the future, it will at least provide certainty at the outset.

With respect to the arbitrable subject matter in the Draft Proposal Article 2, the Proposed Draft does not elaborate or include the judicial developments that have taken place with respect to arbitrable subject matter. The judicial developments set forth in Article 2 of the SPC's Judicial Interpretation on the Arbitration Law have defined more precisely the scope of subject matter capable of being resolved through arbitration,[88] and states that

> "[w]here the parties have generally agreed that the subject matter of arbitration is a contractual dispute, any dispute arising as a result of the formation, validity, modification, transfer, performance, liability for breach, interpretation, rescission, etc., of the contract may be deemed as a subject matter of arbitration."[89]

While it may be obvious that these form part of the arbitrable subject matter of a contractual dispute, the SPC clearly considered it necessary to include it in its interpretation on the Arbitration Law. It is therefore somewhat surprising that the Draft Proposal's Article 2 does not build on or incorporate this. Article 98 of the Draft Amendment makes it clear that provisions of law formulated before the Amended Arbitration Law comes into effect will become ineffective if there is a conflict, so it is likely that the entire SPC interpretation will become ineffective at the time the Draft Amendments are promulgated. Because the SPC interpretation has been in effect for a long time, however, it seems likely that courts will continue to construe "contractual disputes" with the SPC Judicial Interpretation on the Arbitration Law in mind. It is also possible that the SPC will issue another interpretation to account for this.

In the present author's view, it seems that the Draft Proposal represents a missed opportunity to clarify the meaning of "contractual disputes" in the Arbitration Law itself. While the argument could be made that courts will likely continue to apply the definition as set forth in the current SPC Interpretation, the better approach would have been to incorporate the definition of "contractual disputes" to eliminate any uncertainty in the modernized Arbitration Law. Last, but not least, the Draft Proposal Article 93 requires an ad hoc tribunal to submit a copy of its (foreign-related) arbitral award to the Intermediate People's Court at the place of arbitration at the same time as to the parties. Since the courts may not have had any involvement in the case up to this point, it is unclear why the award should be submitted to courts. Parties choosing ad hoc arbitration often prefer to keep their arbitration confidential, and the requirement that the award be given to the courts absent a clear purpose may deter businesses from choosing ad hoc arbitration seated in China. While this might be used for statistical purposes in preparation of (hopefully) eventually

[88] *See* Judicial Interpretation on the Arbitration Law, *supra* note 54.
[89] *Id.*

permitting domestic ad hoc arbitration, it is not clear whether ad hoc arbitral awards will be subject to some sort of internal scrutiny. Therefore, a clarification as to the purpose of such a submission and a provision limiting the courts' review to a rudimentary classification for statistical purposes would be highly desirable. This would have a two-fold purpose of preventing misuse and avoiding the risk that confidential awards are leaked or published at some point in the future.

B. The Way Forward for Chinese Arbitration

The public consultation period on the Draft Proposal issued by the Ministry of Justice was closed on 29 August 2021. Considering China's role in the global business world, it is to be expected that stakeholders from law firms, arbitral institutions and business associations – both domestic and international ones – have contributed their views on the Draft Proposal.

While the Draft Proposal represents a significant step forward for Chinese arbitration, this Note has shown that there is also considerable room for improvement. Although prominent arbitration experts have been involved with the Draft Proposal, the present author is hopeful that the Ministry of Justice will seriously consider the public's point of views. This is especially true for the maintained distinction between domestic and foreign-related arbitration. Maintaining this distinction in the Arbitration Law will likely make it impossible to discard it through judicial developments at a later point. Thus, although it will require a significant revision of the Draft Proposal to abandon that distinction, in the long run it will be beneficial to the development of international arbitration in China.

Nevertheless, it is important to underline that the Draft Proposal is symbolic of a changed perception of international arbitration by Chinese authorities. The proposed changes to the Arbitration Law are only one indicator of this positive trend, and it may spark hope among the Chinese arbitration community that China has a future as an internationally recognized arbitration hub.