

# The Complex and Evolving Legal Status of Ad Hoc Arbitration in China

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*The current People's Republic of China (PRC) Arbitration Law rejects ad hoc arbitration by requiring the arbitration agreement to specify an arbitration institution. However, such rejection does not constitute a barrier to the enforcement of foreign ad hoc arbitration awards under the New York Convention. To determine the validity of a foreign ad hoc arbitration agreement, China adopts a conflict-of-laws approach in ascertaining its applicable law. Recent years have witnessed China's initiative to experiment with ad hoc arbitration in its Free Trade Zones (FTZs). The draft revised PRC Arbitration Law published by the Chinese Ministry of Justice (MOJ) in 2021 proposes allowing foreign-related disputes to be resolved by ad hoc arbitration. This article argues that the legal status of ad hoc arbitration in China demonstrates a complex and evolving nature. It notes that while complete legalization of ad hoc arbitration in China is unlikely in the short term, its legal status will continue to evolve, reflecting the complicated relationship between China's bureaucratized arbitration regime and its increasingly sophisticated arbitration market.*

**Keywords:** Ad Hoc Arbitration, Legal Status, PRC Arbitration Law, Article 16, Article 18, Conflict-of-Laws Approach, Enforcement of Foreign Arbitration Awards, New York Convention, Free Trade Zones, China's Bureaucratized Arbitration Regime

## 1 INTRODUCTION

As an approach to conducting arbitration proceedings, ad hoc arbitration is opposed to institutional arbitration. In institutional arbitration, a specialized institution intervenes and undertakes the role of administering the arbitration process. Each institution such as the International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC) and China International Economic and Trade Arbitration Commission (CIETAC) has its own set of rules providing for an operating framework for the arbitration and its own form of administration to

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assist in the process.<sup>1</sup> In ad hoc arbitration, however, it is the parties and the arbitrators who jointly and independently determine the procedure without the involvement of an arbitration institution.

Compared to institutional arbitration, ad hoc arbitration has the advantage of avoiding administrative fees for services and use of the facilities, which can be considerable if the stakes in dispute are high. Delays and additional costs caused by bureaucracy from within an arbitration institution are also problems that push parties to turn to ad hoc arbitration, although it can prove more costly than institutional arbitration for investor-state disputes.<sup>2</sup> There could be many other reasons for which parties prefer ad hoc arbitration to institutional arbitration. According to an empirical survey conducted by the School of International Arbitration at Queen Mary University of London, a considerable number of interviewees underlined the fact that, despite its perceived lack of exposure as compared to institutional arbitration, ad hoc arbitration is used to resolve a significant number of disputes, particularly in the maritime industry and various commodity markets.<sup>3</sup> Take the maritime industry for example: most international maritime disputes are resolved by ad hoc arbitration, with London often being selected as the seat. And in London, most maritime arbitrations are handled on an ad hoc basis under the London Maritime Arbitrators Association (LMAA) Terms.<sup>4</sup>

Ad hoc arbitration has long been a debated topic for Chinese academics,<sup>5</sup> because China remains one of the few countries where ad hoc arbitration is rejected by law or treated skeptically.<sup>6</sup> With the development of China's economy,

<sup>1</sup> The level of administrative control that arbitration institutions exert on the arbitral process varies depending on their own rules. For example, the ICSID, the ICC and the SCC are well known for their relatively tight administrative control, compared with other arbitration institutions such as the LCIA and the HKIAC.

<sup>2</sup> A statistical survey shows that the average arbitral tribunal costs of UNCITRAL ad hoc arbitration are higher than those of ICSID arbitration (partly because ICSID provides an arbitrators' fee cap). See BIICL/Allen & Overy, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration Minor Comments* 13 (Jun. 2021), [www.biicl.org/documents/136\\_isds-costs-damages-duration.pdf](http://www.biicl.org/documents/136_isds-costs-damages-duration.pdf) (accessed 28 Oct. 2022).

<sup>3</sup> *2018 International Arbitration Survey: The Evolution of International Arbitration* 14, [www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf) (accessed 28 Oct. 2022).

<sup>4</sup> According to HFW's analysis, London was the preferred jurisdiction for international maritime arbitration with an 80% share of maritime arbitrations in 2017. In 2018 and 2019, London remained at the centre of global maritime dispute resolution. The LMAA handled approximately 1,668 individual maritime arbitrations in London in 2019. See HFW, *The Maritime Arbitration Universe in Numbers: London Remains Ever Dominant* (Jul. 2020), [www.hfw.com/downloads/002203-HFW-Maritime-Arbitration-in-Numbers-July-2020.pdf](http://www.hfw.com/downloads/002203-HFW-Maritime-Arbitration-in-Numbers-July-2020.pdf) (accessed 28 Oct. 2022).

<sup>5</sup> By searching the 'China National Knowledge Infrastructure' (CNKI), the largest Chinese academic database, it is found that over a hundred academic papers on ad hoc arbitration have been published over the past twenty years.

<sup>6</sup> Another example is Russia where the courts are treating ad hoc arbitration skeptically. According to Russian judges, if an arbitration clause did not specify an arbitration institution to administer the case, it would be regarded as unenforceable. Since ad hoc arbitration clauses typically do not designate any

the practical advantages of ad hoc arbitration are increasingly recognized by the Chinese arbitration community. Chinese scholars have been active in advocating the legalization of ad hoc arbitration since the promulgation of the 1994 Arbitration Law of the People's Republic of China ('1994 Arbitration Law' or 'PRC Arbitration Law').<sup>7</sup>

However, the legal status of ad hoc arbitration in China is not entirely defined by the simple rejection of the legislation. It shows a complex and evolving nature over the years. First and foremost, the Chinese courts are not inflexible to the validity of an ad hoc arbitration agreement when it involves a foreign-related element. Although it has not been determined by Chinese courts what arbitration constitutes foreign-related arbitration, it is generally accepted that when one of the parties to the arbitration is non-Chinese or the subject matter concerns a foreign country, the arbitration in question is foreign-related. Worth noting is that Chinese courts do not allow Chinese parties to submit purely domestic cases to foreign arbitration institutions where the seat is outside China. Secondly, recent years have witnessed the willingness of the Supreme People's Court (SPC) to open the doors to ad hoc arbitration in China's Free Trade Zones (FTZs).<sup>8</sup> Thirdly, the draft revised PRC Arbitration Law ('Draft Revised Arbitration Law') published by the Chinese Ministry of Justice ('Chinese MOJ') in 2021 even proposes to allow foreign-related disputes to be resolved by ad hoc arbitration, which augurs well for future development of ad hoc arbitration in China.<sup>9</sup>

This article seeks to examine the complex and evolving legal status of ad hoc arbitration in China. The next section will examine how and why ad hoc arbitration was rejected by the 1994 Arbitration Law and the consequences of the rejection. Section 3 will analyse the Chinese courts' judicial practice in

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institution for the purposes of case administration, the Russian judges' unqualified statement that an enforceable clause should include 'a particular name of the institution entrusted with the resolution of the dispute' could spell great risks that all awards issued by ad hoc tribunals including UNCITRAL tribunals can be challenged by recalcitrant award debtors. See the Resolution of the Commercial Court for Moscow Circuit (07 May 2018) and the Resolution of the Ninth Commercial Appeal Court (09 Feb. 2018) on Case No. A40-130828/16.

<sup>7</sup> See e.g., J. Han, *Agreeing on an Arbitration Institution in Arbitration Agreements—With a Side Note on Related Clauses of the Chinese Arbitration Law* (仲裁协议中关于仲裁机构的约定——兼评我国仲裁法中有关条款的规定), 4 L. Rev. (法学评论) 29 (1997); X. Zhang & S. Zhang, *On How to Establish China's Legal Regime for Ad Hoc Arbitration* (论我国临时仲裁制度的构建), 4 J. E. China U. Pol. Sci. & L. (华东政法大学学报) 149 (2010); X. Li, *Ad Hoc Arbitration Should Be Introduced into the Maritime Field in China* (我国海事仲裁应引入临时仲裁制度), 1 J. Hubei U. Sci. & Tech. (湖北科技大学学报) 46 (2011).

<sup>8</sup> In 2013, China established its first Free Trade Zone in Shanghai as a testing ground for new regulations. More FTZs were set up in the following years to support China's national economic strategies such as the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area Development.

<sup>9</sup> The Draft Revised Arbitration Law published by the Chinese Ministry of Justice on 30 July 2021 is, [www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730\\_432958.html](http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html) (accessed 28 Oct. 2022).

enforcing foreign ad hoc arbitration awards. Section 4 will address the initiative by the SPC to pilot ad hoc arbitration in FTZs. Section 5 will provide some future perspectives for the legal status of ad hoc arbitration in China by examining the Draft Revised Arbitration Law.

## 2 1994 ARBITRATION LAW'S REJECTION OF AD HOC ARBITRATION

### 2.1 DEDUCING THE REJECTION

The 1994 Arbitration Law rejects ad hoc arbitration implicitly because it requires the arbitration agreement to specify an arbitration institution. The rejection can be deduced from the wording of two articles of the 1994 Arbitration Law.<sup>10</sup>

Article 16 of the 1994 Arbitration Law requires the parties to agree on an arbitration institution to administer the arbitration proceedings. It states: 'An arbitration agreement shall contain the following particulars: ... a designated arbitration commission'.<sup>11</sup> The consequence of failing to honour this requirement is provided for by Article 18 which stipulates that:

If an arbitration agreement contains no or unclear provisions concerning ... the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.

In practice, when a dispute arises, the parties who did not specify an arbitration commission in their arbitration agreement are often not able to reach a supplementary agreement designating one to administer their case.<sup>12</sup> To resolve their dispute, they have to turn to the court for litigation because the above provision of Article 18 of the 1994 Arbitration Law leaves no other room for the validity of

<sup>10</sup> See J. Tao & C. von Wunschheim, *Articles 16 and 18 of the Chinese Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23(2) *Arb. Int'l* 309 (2007).

<sup>11</sup> The peculiar nomenclature 'arbitration commission' adopted by the legislature, while reflecting the fact that every arbitration institution based in China is called 'XX arbitration commission', is hardly able to cover non-Chinese arbitration institutions which are making efforts to grab a share of China's huge arbitration market. As a result, this nomenclature caused confusion about the recognition of non-Chinese arbitration institutions which mostly are not called 'XX arbitration commission'. As J. Tao notes: 'It is not any random arbitration commission, but rather arbitration commissions registered in China under the Chinese Arbitration Law. A direct consequence becomes that foreign/international arbitration institutions are erased from the list of arbitration institutions available to parties seeking arbitration in China'. J. Tao, *Salient Issues in Arbitration in China*, 27(4) *Am. U. Int'l L. Rev.* 807, 810–811 (2012).

<sup>12</sup> See Z. Ma, *New Developments Concerning the Determination of the Validity of Arbitration Agreements in China: A Comment on the Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Chinese Arbitration Law* (我国仲裁协议效力认定的新发展——评《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的解释》相关规定), 3 *Hebei L. Rev. (河北法学)* 154, 156 (2008).

their arbitration agreement. In effect, the validity of an arbitration agreement depends, *inter alia*, on it being an institutional arbitration.

With the implementation of the 1994 Arbitration Law, new issues began to emerge concerning how to interpret the parties' intention to have chosen an identifiable arbitration commission. For example, what if the parties choose two or more arbitration commissions in their arbitration agreement? What if the parties have only specified in their arbitration agreement some institutional arbitration rules without specifying an arbitration commission? What if the parties misspell the name of the arbitration commission in their arbitration agreement? Or what if the parties choose an arbitration institution with a name such as arbitration 'centre' or arbitration 'court' rather than arbitration 'commission' which is mostly the case in China but has, in recent years, changed as several well-established Chinese arbitration institutions begin to employ a more internationalized name to harmonize better with world-renowned arbitration institutions such as the ICC, the Singapore International Arbitration Center (SIAC), and the SCC.<sup>13</sup>

All these practical difficulties were addressed in 2006 by the 'Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China' ('2006 SPC Arbitration Interpretation'). This judicial interpretation enjoys quasi-statutory status in China. It was released by the SPC to clarify a myriad of issues regarding the application of the 1994 Arbitration Law. It devotes three articles to solving the above problems:

Article 4

Where an agreement for arbitration only stipulates the arbitration rules applicable to the dispute, it shall be deemed that the arbitration institution is not stipulated, unless the parties concerned reach a supplementary agreement or unless the arbitration institution may be identified from the arbitration rules agreed upon between them.

Article 5

Where an agreement for arbitration stipulates two or more arbitration institutions, the parties concerned may choose either arbitration institution upon agreement when applying for arbitration; if the parties concerned cannot agree upon the choice of the arbitration institution, the agreement for arbitration shall be ineffective.

Article 6

Where an agreement for arbitration stipulates that the disputes shall be arbitrated by the arbitration institution at a certain locality and there is only one arbitration institution in this locality, the arbitration institution shall be deemed as the stipulated arbitration institution. If there are two or more arbitration institutions, the parties concerned may choose one

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<sup>13</sup> For example, the Beijing Arbitration Commission in its 2015 revised Arbitration Rules launched the Beijing International Arbitration Center (BIAC). The Shenzhen Arbitration Commission did the same by launching the SCIA.

arbitration institution for arbitration upon agreement; if the parties concerned fail to agree upon the choice of the arbitration institution, the agreement for arbitration shall be ineffective.

These judicial provisions are able to rescue a defective arbitration agreement to the extent that an arbitration institution can be identified by various means.<sup>14</sup> It is worth noting that the term arbitration ‘commission’ (*zhongcai weiyuanhui*) employed by the 1994 Arbitration Law has been replaced by arbitration ‘institution’ (*zhongcai jigou*) which has a much broader scope. Arbitration ‘institution’ includes all types of organizations that administer arbitration cases, including the ICC, the Hong Kong International Arbitration Center (HKIAC), and the SIAC. Arbitration ‘commission’ only refers to the Chinese arbitration institutions whose name includes the term ‘*weiyuanhui*’. Nevertheless, these provisions are neither able nor intended to honour parties’ intention to have their dispute resolved through arbitration by allowing ad hoc arbitration if an arbitration institution cannot be identified. This is unfortunate in those cases where both parties have only agreed on the place of arbitration, which is typical in ad hoc arbitrations.

## 2.2 REASONS FOR THE REJECTION

The rejection of ad hoc arbitration has its historical and institutional roots. When the 1994 Arbitration Law was under preparation, few in China had heard of ad hoc arbitration, nor had practical experience of it. As senior CIETAC official Wang Wenying observed, arbitration in China has always been conducted under the auspices of arbitration institutions.<sup>15</sup> Throughout the history of commercial arbitration in China, ad hoc arbitration has never existed as a legally permitted dispute resolution method.<sup>16</sup> Before the 1994 Arbitration Law was promulgated, provisions of relevant Chinese laws and regulations effectively denied access to ad hoc arbitration.<sup>17</sup> A case in point is Article 14 of the 1979 Law on Chinese-Foreign Joint Ventures which states that ‘disputes arising between the parties to a joint venture which the board of directors fails to settle through consultation may be settled through conciliation or arbitration by an *arbitration institution* of China or through an *arbitration institution* agreed upon by the parties’ (emphasis added). The 1983 Implementing Regulations for the Law on Chinese-Foreign Equity Joint

<sup>14</sup> See X. Qiao, *Support Arbitration and Develop Arbitration: A Comment on the Interpretation of the Supreme People’s Court Concerning Some Issues on Application of the Arbitration Law of the People’s Republic of China* (支持仲裁——对最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释之解读与评析), 4 Beijing Arb. Q. (北京仲裁) 49 (2006).

<sup>15</sup> See W. Wang, *Distinctive Features of Arbitration in China*, 23(1) J. Int’l Arb. 49, 54 (2006).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

Ventures<sup>18</sup> and the Law on Chinese-Foreign Contractual Joint Ventures<sup>19</sup> did not permit ad hoc arbitration either.

When drafting the 1994 Arbitration Law, the Legislative Affairs Commission of the National People's Congress of China studied ad hoc arbitration intentionally. They concluded that ad hoc arbitration was in decline while institutional arbitration was growing and replacing it.<sup>20</sup> This was certainly an ill-informed observation, because ad hoc arbitration has always been a widely used form of arbitration for resolving international commercial disputes. The prominence that institutional arbitration had gained over time has not diminished ad hoc arbitration's utility and comparative advantages. Furthermore, even if ad hoc arbitration was in decline, parties should still have access to it if they wish to choose ad hoc arbitration rather than institutional arbitration.

In fact, the goal of the Chinese legislature in promulgating the 1994 Arbitration Law was to modernize the Chinese arbitration regime by re-organizing the then chaotic arbitration institutions and making them more independent of administrative interference from the government,<sup>21</sup> a mission that has still not been accomplished today.<sup>22</sup> It was not motivated to legalize ad hoc arbitration, a type of arbitration that the legislature was unfamiliar with. As senior Chinese arbitration expert Wang Shengchang puts it:

The promulgation of the 1994 Arbitration Law was focused on institutional arbitration. When the law was in the process of being drafted, the main problem with Chinese arbitration was whether we need to abandon forced arbitration with administrative elements and establish voluntary arbitration based on consent. Going along the lines of the Chinese tradition of treasuring institutions and slighting individuals, ad hoc arbitration was not regarded as an important issue worth dealing with.<sup>23</sup>

<sup>18</sup> 1983 Implementing Regulations for the Law on Chinese-Foreign Equity Joint Ventures, Art. 110.

<sup>19</sup> 1988 Law on Chinese-Foreign Contractual Joint Ventures, Art. 26.

<sup>20</sup> Legislative Affairs Commission of the Standing Committee of the National People's Congress of China (全国人大法工委), *Commentaries on the Chinese Arbitration Law* (中华人民共和国仲裁法律释评) (1997), at 38.

<sup>21</sup> Not only had there only been institutional arbitration historically, but Chinese arbitration institutions were also considered to be part of government administration before the 1994 Arbitration Law was promulgated. See H. Wang, *The Opportunities and Challenges Facing Chinese Arbitration* (中国仲裁面临的机遇和挑战), 1 Beijing Arb. Q. (北京仲裁) 1, 4 (2008); H. Wang, *The Obstacles to the Development of Arbitration in China* (中国仲裁的坎), 2 China Reform (中国改革) 70 (2008).

<sup>22</sup> As K. Fan notes, Chinese arbitration institutions are still subject to administrative influence and government control in terms of their establishment, financial resources and personnel. See K. Fan, *Salient Issues in International Commercial Arbitration in East Asia: A Comparative Study of China and Japan*, 5(3) Am. U. Bus. L. Rev. 448, 476 (2016).

<sup>23</sup> S. Wang, *China Embracing Ad Hoc Arbitration on a Limited Scale* (中国域内临时仲裁的有限度开放), [www.360doc.com/content/17/0114/14/22548411\\_622418218.shtml](http://www.360doc.com/content/17/0114/14/22548411_622418218.shtml) (accessed 28 Oct. 2022).



### 2.3 CONSEQUENCES OF THE REJECTION

The rejection of ad hoc arbitration has first and foremost caused practical inconveniences for arbitration end-users in China. In practice, parties often contest the wording of the arbitration clause usually inserted into the main contract. They would only find it a problem when a dispute arises. A frequent challenge raised by the party resisting arbitration is that an arbitration institution cannot be identified from the wording of the arbitration clause.<sup>24</sup>

For example, the SPC faced a case in 2005 where the parties agreed to submit a possible dispute to the 'Beijing International and Economic Trade Arbitration Commission' ('Beijing Jingji Maoyi Zhongcai Weiyuanhui'). However, such an arbitration institution by that exact name did not exist. Although it could be inferred that the parties intended to have their future dispute submitted to an arbitration institution in Beijing, it could not be identified which one corresponded to their real intention because there are three arbitration institutions in Beijing, namely Beijing Arbitration Commission (BAC), CIETAC and China Maritime Arbitration Commission (CMAC). Based on such reasoning and by invoking Article 16 and Article 18 of the 1994 Arbitration Law, the SPC decided that the arbitration agreement in question was invalid.<sup>25</sup>

The 2006 SPC Arbitration Interpretation was greatly concerned with the difficulties in identifying the arbitration institution selected by the parties in a defective arbitration agreement.<sup>26</sup> It takes a relatively pro-arbitration stance because it tries to preserve, to the extent the 1994 Arbitration Law permits, the validity of an arbitration agreement which has misspelled the name of the arbitration institution. However, since the release of the 2006 SPC Arbitration Interpretation, Chinese courts still frequently encounter cases involving such issues.<sup>27</sup> If ad hoc arbitration was permitted by the 1994 Arbitration Law, such issues would have arguably been better addressed, because the court could suggest that the parties submit the dispute to ad hoc arbitration where it is not possible to identify an arbitration institution in the arbitration agreement.

<sup>24</sup> See J. Song, *Judicial Review of Defective Arbitration Agreements* (瑕疵仲裁协议的司法审查), 19 People's Judicature (人民司法) 4, 6–8 (2018).

<sup>25</sup> SPC's Letter of Reply Concerning the Request for Clarifications over the Validity of the Arbitration Agreement 《最高人民法院关于确认仲裁协议效力请示的复函》[2005] Min Si Ta Zi No. 52 ([2005]民四他字第52号).

<sup>26</sup> See D. Luo, Z. Wu & X. Lu, *A Reading of the Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Chinese Arbitration Law* (解读《最高人民法院关于适用〈仲裁法〉若干问题的解释》), 8 China Trial (中国审判) 61, 62 (2006).

<sup>27</sup> See L. Song, H. Lin & H. Chen, *Annual Review on Commercial Arbitration in China*, in *Commercial Dispute Resolution in China: An Annual Review and Preview* 38, 39 (Beijing Arbitration Commission/Beijing International Arbitration Commission ed., Wolters Kluwer Hong Kong Limited 2017).



The rejection of ad hoc arbitration has also had negative impacts on the development of the Chinese arbitration regime. In particular, it has been largely responsible for the expansion of the legal functions of Chinese arbitration institutions.<sup>28</sup> First, the SPC has held that the nationality of an arbitral award should be determined by the location of the arbitration institution, in contrast to the widely accepted international practice in which the seat of arbitration determines the nationality of arbitral awards.<sup>29</sup> Second, the 1994 Arbitration Law allows the arbitration commission that administers the arbitration case to rule on arbitral jurisdiction.<sup>30</sup> It does not permit the arbitral tribunal to decide its own jurisdiction, which goes against the common international practice of *kompetenz-kompetenz*.<sup>31</sup> Third, the law of the location of the arbitration institution can determine the validity of the arbitration agreement.<sup>32</sup> And arbitration institutions can even undertake the responsibility of ascertaining the content of foreign law, if the law of a country other than China will apply.<sup>33</sup>

This expansion of the legal functions of arbitration institutions prevents the notion of ‘seat’ from being established as the connecting factor in determining the legal forum for arbitration.<sup>34</sup> It constitutes a substantial barrier to the legalization of ad hoc arbitration in China. The reason is that, as there is no arbitration institution involved in administering ad hoc arbitration proceedings, how can a legal forum be singled out to exercise judicial review or provide assistance for an ad hoc arbitration if the location of the arbitration institution rather than the seat of arbitration serves as the connecting factor in determining the legal forum?

<sup>28</sup> See L. Yang, *Critique of the Legal Functions of China's Arbitration Institutions* (仲裁机构法律功能批判), 2 Sci. L. (法律科学) 175, 176 (2016).

<sup>29</sup> Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case of Not Executing the Final Award 10334/AMW/BWD/TE of the International Court of Arbitration of International Chamber of Commerce (最高人民法院关于不予执行国际商会仲裁院10334/AMW/BWD/TE最终裁决一案的请示的复函) [2004] Min Si Ta Zi No. 6 ([2004]民四他字第6号). For an analysis of the evolution of the SPC's approach to determining the nationality of foreign arbitral awards, see X. Gao, *The Court Should Determine the Nationality of Arbitral Awards According to the Seat of Arbitration Rather Than the Locality of the Arbitration Institution* (司法应依仲裁地而非仲裁机构所在地确定仲裁裁决籍属), 20 People's Judicature (人民司法) 68 (2017).

<sup>30</sup> According to Art. 20 of the 1994 Arbitration Law, the court and the arbitration institution are jointly empowered to rule on arbitral jurisdiction, excluding the possibility for the arbitral tribunal to rule on its own jurisdiction prior to the award being rendered.

<sup>31</sup> See P. Fu, *The Doctrine of Kompetenz-Kompetenz: A Sino-French Comparative Perspective*, 52(1) H.K. L.J. 257, 265 (2022).

<sup>32</sup> Law of the PRC on Application of Laws to Foreign-Related Civil Relations (in force as from 2011), Art. 18 states: ‘The parties may choose the law applicable to the arbitration agreement by agreement. Absent the parties’ choice, the law of the location of the arbitration institution or the law at the seat shall apply’.

<sup>33</sup> *Ibid.*, Art. 10 states: ‘Foreign laws applicable to foreign-related civil relations shall be ascertained by the people's court, the arbitration institution or the administrative organ’.

<sup>34</sup> Yang, *supra* n. 28, at 180.

### 3 ENFORCEMENT OF FOREIGN AD HOC ARBITRAL AWARDS IN CHINA

Since its promulgation, the 1994 Arbitration Law has not been substantially revised except for a few minor technical tweaks intended to bring the law in line with other laws that underwent legislative revisions.<sup>35</sup> The rejection of ad hoc arbitration in China remains. However, since China is a Member State of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'),<sup>36</sup> the Chinese courts have to address the issue whether they are obliged by the New York Convention to recognize and enforce foreign ad hoc arbitral awards.

#### 3.1 NEW YORK CONVENTION DOES NOT DISTINGUISH INSTITUTIONAL AND AD HOC ARBITRATION

The New York Convention does not differentiate between ad hoc arbitral awards and institutional arbitral awards. Article I(2) of the Convention states:

The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

The question of practical relevance to the New York Convention is whether particular decisions qualify as 'arbitral awards'. It is widely accepted that to answer this question, a court needs only to look at whether the decisions made by the arbitral tribunal have final and binding effect.<sup>37</sup> The New York Convention is not concerned with the question of whether the arbitral award is rendered by an ad hoc arbitral tribunal or an arbitral tribunal under the auspices of an arbitration institution.

As to the validity of the arbitration agreement, the New York Convention does not require it to specify an arbitration institution. Article II(1) of the New York Convention provides that:

<sup>35</sup> The 1994 Arbitration Law was modified both in 2009 and 2017 but no substantial change was made.

<sup>36</sup> The New York Convention is arguably one of the most important legal instruments at the global level for international arbitration. No one doubts the critical role it has played and continues to play in underpinning the edifice of international arbitration – the international arbitration community sometimes calls it the 'constitution of modern international arbitration'. The Standing Committee of the National People's Congress, China's legislative body exercising legislative powers by delegation while the National People's Congress is not in session, decided in 1986 to join the New York Convention which became binding on China as from 1987. Up until 4 May 2022 (the day when Turkmenistan acceded to the New York Convention), 170 countries have joined the New York Convention.

<sup>37</sup> See United Nations (with the assistance of E. Gaillard and G. Bermann), *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 12 (2016 ed., UN Publications).

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Obviously, the New York Convention is not concerned with the question of whether an arbitration agreement is ad hoc or institutional. The question with which the New York Convention is concerned is the form of the arbitration agreement as evidenced by the immediate subsequent provision in Article II(2):

The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

### 3.2 CHINA'S CONFLICT-OF-LAWS APPROACH TO THE VALIDITY OF FOREIGN ARBITRATION AGREEMENTS

A brief examination of arbitration-related judicial review cases by Chinese courts reveals that the 1994 Arbitration Law's rejection of ad hoc arbitration does not itself constitute a barrier to the enforcement of ad hoc arbitration awards under the New York Convention.<sup>38</sup> A conflict-of-laws approach has been established over the years that obliges Chinese courts to determine the law applicable to a given foreign ad hoc arbitration agreement rather than to directly apply the 1994 Arbitration Law.

The Chinese courts have long been aware of the potential conflict between the 1994 Arbitration Law's rejection of ad hoc arbitration and China's international obligation to recognize and enforce arbitral awards under the New York Convention. In 1995, the year immediately following the promulgation of the 1994 Arbitration Law, the SPC had an opportunity to address this issue. It was a case concerning an ad hoc arbitration clause contained in a bill of lading. The SPC's opinion in that case regarding the validity of the ad hoc arbitration clause stated:

In foreign-related cases where the parties have agreed in their contract in advance or reached an agreement after a dispute arose that the dispute shall be submitted to a foreign ad hoc arbitration institution or non-permanent arbitration institution, the validity of such an arbitration agreement shall be recognized in principle.<sup>39</sup>

<sup>38</sup> See X. Gao, *China's Positive Judicial Practice Regarding the Recognition and Enforcement of Foreign Arbitral Awards* (中国承认和执行外国仲裁裁决的积极实践), 5 J.L. Appl. (法律适用) 2, 3 (2018).

<sup>39</sup> Letter of Reply Concerning the Validity of the Arbitration Clause in the Bill of Lading in the International Shipping Dispute Between Fujian Province Means of Production Corporation and Jinge Shipping Co., Ltd (最高人民法院关于福建省生产资料总公司与金鸽航运有限公司国际海运纠纷一案中提单仲裁条款效力问题的复函).

It should not come as a surprise that the SPC used the term ad hoc arbitration ‘institution’ whereas it should be understood as ad hoc arbitral tribunal. As noted at the beginning of this article, when the 1994 Arbitration Law was promulgated, the Chinese judiciary was unfamiliar with ad hoc arbitration. Chinese local arbitration culture has planted an ‘institution-centred’ mentality in the minds of most, if not all, Chinese judges.<sup>40</sup>

This short opinion expressed in a specific case by the SPC is of reference value for future similar cases encountered by courts at different levels. However, it did not mention the law applicable to the arbitration agreement. The question is, if the law applicable to the arbitration agreement is Chinese law, would the validity of such an arbitration agreement still be recognized? Or is it possible to interpret this opinion as establishing a substantive law approach to the validity of foreign-related ad hoc arbitration agreements, abandoning the conflict-of-laws approach?

In a case in 1990, the Guangzhou Maritime Court was requested to recognize and enforce an arbitral award rendered in London.<sup>41</sup> Although it was an ad hoc arbitral award, it did not prevent the court from recognizing and enforcing it. It can be inferred from the court opinions that ad hoc arbitral awards are enforceable under the New York Convention provided that the seat of arbitration is in a country that recognizes ad hoc arbitration agreements.<sup>42</sup> In other words, the validity of an ad hoc arbitration agreement depends on its applicable law and it is the law of the seat that should be applied.

In another similar case in 2000, the Wuhan Maritime Court was ready to refuse to recognize and enforce an ad hoc arbitral award rendered in London.<sup>43</sup> Before making such a negative decision, it had to report to a higher people’s court for confirmation, a requirement under China’s prior-reporting system initially established to uphold the enforcement of foreign-related arbitration agreements and awards.<sup>44</sup> The case eventually went to the SPC which reversed the lower

<sup>40</sup> As T. Zhang notes, the term ‘ad hoc arbitration institution’ in this case is confusing because the SPC seems not to have used the correct terminology. Perhaps starting from the presumption under the PRC Arbitration Law that all arbitration is institutional, the SPC referred to the arbitration tribunal as the ‘arbitration institution’. See T. Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China’s Incomplete Ad Hoc Arbitration System*, 46(2) Cornell Int’l L.J. 361, 372 (2013).

<sup>41</sup> *Guangzhou Ocean Shipping Co., Ltd v. Marships of Connecticut Company*, Guangzhou Maritime Court, China (17 Oct. 1990).

<sup>42</sup> *Supra* n. 37, at 21.

<sup>43</sup> Wuhan Maritime Court’s Request for Instructions Regarding the Recognition and Enforcement of the London Final Arbitral Award, [2000] Wu Hai Fa Zhi Zi No. 76.

<sup>44</sup> As J. Tao & M. Zhong note, the prior-reporting system, which was first designed and implemented in 1995, was initially available for foreign-related cases. Its main rationale was to ensure that no court decision denying the validity of a foreign-related arbitration agreement, refusing recognition or enforcement of a foreign-related arbitral award, or setting aside a foreign-related arbitral award, may be rendered without final review by the SPC. The prior-reporting system has the merit of avoiding local protectionism and ensuring a consistent application of the New York Convention by the Chinese local courts. See J. Tao & M. Zhong, *China’s 2017 Reform of Its Arbitration-Related Court Review*

court's decision, holding that there existed a valid arbitration agreement between both parties and there were no circumstances under the New York Convention that could justify non-enforcement.<sup>45</sup> However, the SPC dodged the issue of the law applicable to foreign arbitration agreements.

In 2001, the then SPC President Xiao Yang was asked in an interview about how the SPC would deal with foreign-related ad hoc arbitration agreements that did not specify an arbitration institution or in which the arbitration institution agreed upon could not be identified. Although his answer had no legal force, he held that:

if the law of the seat applicable to the ad hoc arbitration agreements in question permits ad hoc arbitration practice, Chinese courts shall recognize such foreign-related ad hoc arbitration agreements on an ad hoc basis in principle.<sup>46</sup>

Xiao's mentioning of the 'law of the seat' shows that the SPC would first resort to a conflict-of-laws approach to ascertain the law applicable to foreign ad hoc arbitration agreements. The conflict-of-laws approach was later affirmed by Article 16 of the 2006 SPC Arbitration Interpretation which states:

The examination of the validity of a foreign-related arbitration agreement shall be governed by the law agreed upon by the parties; if the parties did not agree upon the applicable law but have agreed upon the seat of arbitration, the law at the seat of arbitration shall apply; if they neither agreed upon the applicable law nor agreed upon the seat of arbitration or the seat of arbitration is not clearly agreed upon, the law at the locality of the court shall apply.

Absent the parties' choice of law on the validity of a foreign-related arbitration agreement, the 'seat' serves as the connecting factor. If the seat is in China, the ad hoc arbitration agreement will certainly be invalid. The question is what if the parties have agreed upon the law applicable to the main contract that contains an ad hoc arbitration clause, but the latter does not specify the seat? Would the Chinese court regard the law applicable to the main contract as also applicable to the arbitration agreement or would it directly apply the Chinese law instead?

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*Mechanism with a Focus on Improving Chinese Courts' Prior-Reporting System*, 35(3) J. Int'l Arb. 371, 375 (2018).

<sup>45</sup> The Supreme People's Court's Reply to the Request for Instructions Regarding the Recognition and Enforcement of the London Final Arbitral Award, [2000] Jiao Ta Zi No. 11 (最高人民法院关于不承认及执行伦敦最终仲裁裁决案的请示的复函[2000]交他字第11号).

<sup>46</sup> F. Gao, *Chinese Courts' Support for and Supervision over Arbitration: An Interview with the President of the Supreme People's Court* (中国法院对仲裁的支持与监督:访最高人民法院院长肖扬), 6 *China's Foreign Trade* (中国对外贸易) 6, 7 (2001).

This is what happened in the case of *Hi-Tech Wealth* in 2006.<sup>47</sup> In this case, the SPC was faced with an ad hoc arbitration clause inserted into the main contract that four Hong Kong companies agreed. The main contract provided that if a dispute arose, Hong Kong law would apply. The SPC held that as the arbitration clause did not specify the seat, the 1994 Arbitration Law as the *lex fori* should apply instead to determine the validity of the arbitration agreement. Based on such reasoning, the SPC considered that it was an invalid arbitration agreement because it did not specify, as required by the 1994 Arbitration Law, an arbitration institution.<sup>48</sup>

Along the lines of its evolving approach to foreign ad hoc arbitration agreements, the SPC's judicial interpretation of the PRC Civil Procedure Law issued in 2015 specifically addressed the recognition and enforcement of foreign ad hoc arbitral awards. Article 545 of the Interpretation states:

If a party applies to the people's court for the recognition and enforcement of an arbitral award rendered by an ad hoc arbitral tribunal outside China, the people's court should proceed according to article 283 of the PRC Civil Procedure Law.

Article 283 of the PRC Civil Procedure Law is a provision addressing procedural requirements for seeking the recognition and enforcement of a foreign institutional arbitral award in a Chinese court.<sup>49</sup> Read in conjunction with this provision, the above Article 545 requires the Chinese court to treat a foreign ad hoc arbitral award as an institutional one when it comes to the matter of recognition and enforcement. If there are no other circumstances justifying its non-recognition or non-enforcement, the law applicable to the arbitration agreement identified through a conflict-of-law approach will determine if a foreign ad hoc arbitral award is to be honoured or not.

<sup>47</sup> Supreme People's Court Min Si Zhong Zi No. 28 Civil Verdict (2006) (最高人民法院 (2006) 民四终字第28号民事裁定书).

<sup>48</sup> As X. Song critically observed, the rationale behind the SPC's reasoning in this case was a dogmatic approach to the doctrine of separability which ignored the important relevance of the law applicable to the main contract to the law applicable to the arbitration agreement. See X. Song, *The Law Applicable to Foreign-Related Arbitration Clause: The Hi-Tech Wealth's Challenge to the Court Decision and Its Approach to the Substantive Law* (涉外仲裁条款的准据法——恒基公司案'对实在法和法院裁判的双重拷问'), 6 L. Sci. (法学) 121, 127 (2008). Not surprisingly, a judicial interpretation issued by the SPC in 2017 states: 'parties shall make an express declaration of will when choosing by agreement the law applicable to the validity of the arbitration agreement, and the law applicable solely to the contract as agreed upon by the parties may not be invoked as the law applicable to the validity of the arbitration clause of the contract'.

<sup>49</sup> PRC Civil Procedure Law (2012), Art. 283, states: 'if an award made by a foreign arbitration institution requires the recognition and enforcement by the people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity'.

#### 4 SPC'S INITIATIVE TO EXPERIMENT WITH AD HOC ARBITRATION IN FREE TRADE ZONES

The breakthrough over the legal status of ad hoc arbitration in China came in 2016 as the SPC released the 'Opinions on Providing Judicial Protection for the Development of the Pilot Free Trade Zones' ('SPC Opinions').<sup>50</sup> The SPC Opinions contain a measure to pilot ad hoc arbitration in FTZs.<sup>51</sup>

##### 4.1 'SPC OPINIONS' PROVIDING FOR AD HOC ARBITRATION

Article 9.3 of the SPC Opinions was particularly eye-catching to the Chinese arbitration community. It states:

In case companies registered within the Pilot Free-Trade Zones agree to arbitration in certain locations in mainland China, with certain arbitration rules, and by certain persons, such arbitration agreement may be recognized as valid. In case a people's court finds such arbitration agreement to be invalid, it shall report the matter to a higher court for review. In case the higher court agrees with the lower court, it shall further report the matter to the SPC and shall only decide on the matter upon the SPC's reply.

The key word here is 'certain'. The three 'certains' concern locations, arbitration rules and persons. No defined 'certain arbitration institution' appears in this provision as a requirement. The gist of this provision is to validate arbitration agreements that do not specify an arbitration institution required by the 1994 Arbitration Law. This provision is understood to allow ad hoc arbitration practice in FTZs.<sup>52</sup>

The requirement of 'certain locations' concerns the selection of the place of arbitration.<sup>53</sup> It does not make sense to interpret 'locations' as venues where hearings will be held. In fact, the locations should be understood as being nowhere else than the FTZs where some deviation from the 1994 Arbitration Law is tolerated.

<sup>50</sup> For an analysis of the potential implications of the SPC Opinions for China-based arbitration, see A. Dong & D. Mayberry, *Enterprises in China's Free Trade Zones Enter 2017 with New Options for Arbitration*, Kluwer Arbitration Blog (14 May 2017), <http://arbitrationblog.kluwerarbitration.com/2017/05/14/enterprises-in-chinas-free-trade-zones-enter-2017-with-new-options-for-arbitration/> (accessed 28 Oct. 2022).

<sup>51</sup> Wang, *supra* n. 23: 'the SPC Opinions embracing ad hoc arbitration are but a small step, they are however a big stride for the development of Chinese arbitration regime'.

<sup>52</sup> See W. Sun, *Recent Development of Ad Hoc Arbitration in China: SPC Guidance and Hengqin Rules*, Kluwer Arbitration Blog (19 Dec. 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/19/recent-development-ad-hoc-arbitration-china-spc-guidance-hengqin-rules/> (accessed 28 Oct. 2022).

<sup>53</sup> See J. Zhang, *The Significance of the 'Three Certains' to Arbitration and Their Limitations* ('三特定'对仲裁的意义及其限度), 28 People's Judicature (人民司法) 41, 42 (2019).



As to ‘certain arbitration rules’, it allows parties to choose rules dedicated to non-institutional arbitration. Arbitration rules such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, widely used in ad hoc arbitrations, will certainly be allowed to apply.<sup>54</sup> As noted below, some arbitration institutions in FTZ cities quickly issued new arbitration rules exclusively dedicated to ad hoc arbitration.

The language of ‘certain persons’ effectively relaxes the rigid requirement of the 1994 Arbitration Law concerning the qualifications of the arbitrator. Under the 1994 Arbitration Law, an arbitrator must fulfil one of the following conditions:

- (1) they have been engaged in arbitration work for at least eight years;
- (2) they have worked as a lawyer for at least eight years;
- (3) they have been a judge for at least eight years;
- (4) they are engaged in legal research or legal teaching and in senior positions; or
- (5) they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level.<sup>55</sup>

Such rigid requirements imposed on arbitrators are rarely seen in other jurisdictions. The difficulty for one to act as an arbitrator in China is compounded by the obligatory ‘*mingcezhì*’ (list of arbitrators) which requires all arbitration institutions to establish a list of arbitrators and appoint an arbitrator from it in principle, if the parties are not able to appoint one.<sup>56</sup> The language of ‘certain persons’ is understood to allow a wider range of persons, as long as they are agreed upon by the parties and regardless of their nationality, to act as an arbitrator for FTZ-related cases.

#### 4.2 REACTIONS TO THE SPC OPINIONS

Upon the promulgation of the SPC Opinions, numerous arbitration institutions took the initiative to work out ad hoc arbitration procedural rules. A case in point are the Hengqin Pilot FTZ Ad Hoc Arbitration Rules (‘Hengqin Rules’)<sup>57</sup> which were jointly launched by the Zhuhai Arbitration Commission (ZHAC) and the

<sup>54</sup> The UNCITRAL Arbitration Rules were developed for ad hoc arbitration. Under the UNCITRAL Arbitration Rules, the Secretary General of the Permanent Court of Arbitration in The Hague is mandated to act as the default designator of an appointing authority.

<sup>55</sup> 1994 Arbitration Law, Art. 13.

<sup>56</sup> *Ibid.*

<sup>57</sup> The Hengqin Rules (in force as from 15 Apr. 2017) are, [www.zhac.org.cn/?p=434](http://www.zhac.org.cn/?p=434) (accessed 28 Oct. 2022).

Hengqin Management Committee in 2017.<sup>58</sup> The role of ZHAC under the Hengqin Rules is to provide procedural assistance if necessary to ad hoc arbitrations, especially when either party is unable or refuses to appoint an arbitrator or both parties fail to agree on the appointment of the presiding arbitrator.<sup>59</sup>

It is not uncommon for arbitration institutions such as the ICC<sup>60</sup> or the HKIAC<sup>61</sup> to issue and update procedural rules tailored to ad hoc arbitration. These rules are generally called ‘appointing authority rules’. Parties opting for ad hoc arbitration can agree on a specific set of appointing authority rules in case external assistance is needed to address problems arising in constituting the arbitral tribunal. The key role that appointing authority rules play lies in the constitution of the arbitral tribunal. However, the Hengqin Rules serve as something far more than that.

In theory, the Hengqin Rules are supposed just to serve as appointing authority rules, because the arbitration institution (ZHAC) which released the Hengqin Rules has its own arbitration rules which are the counterpart of the ICC Arbitration Rules. However, the length of the Hengqin Rules is extraordinary compared with common appointing authority rules. For example, the ICC appointing authority rules contain fourteen articles plus five additional articles on costs for services. The Hengqin Rules contain sixty-one articles which provide a detailed framework for the conduct of the arbitration proceedings, leaving the arbitral tribunal little space to shape them according to specific circumstances.

Under the Hengqin Rules, the role of the ZHAC is not limited to being an appointing authority. For example, the ZHAC can review the arbitral tribunal’s decision on the validity of the arbitration agreement at the request of either party.<sup>62</sup> If need be, the ZHAC can transform the essentially ad hoc arbitral award into an institutional one by confirmation.<sup>63</sup> The purpose of such confirmation is arguably to facilitate court enforcement.<sup>64</sup> This is because, even if the SPC Opinions are considered to permit ad hoc arbitration in FTZs and arbitral awards

<sup>58</sup> Sun, *supra* n. 52.

<sup>59</sup> Hengqin Rules, Art. 20(3).

<sup>60</sup> The Rules of ICC as Appointing Authority in UNCITRAL or Other Arbitration Proceedings (in force as from 1 Jan. 2018) are, <https://iccwbo.org/publication/2018-rules-icc-appointing-authority-uncitral-arbitration-proceedings/> (accessed 28 Oct. 2022). Such rules shall apply when the ICC or any authority within ICC is empowered to act as appointing authority by agreement of the parties, designation by the Secretary-General of the Permanent Court of Arbitration, or otherwise.

<sup>61</sup> The HKIAC Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Amendment Rules (in force as from 1 Aug. 2019) are, [www.hkiac.org/sites/default/files/ck\\_filebrowser/PDF/arbitration/Cap\\_609C\\_E-legislation.pdf](http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/Cap_609C_E-legislation.pdf) (accessed 28 Oct. 2022). HKIAC is the default appointing authority for ad hoc arbitrations seated in Hong Kong under the Hong Kong Arbitration Ordinance.

<sup>62</sup> Hengqin Rules, Art. 9(7).

<sup>63</sup> *Ibid.*, Art. 47.

<sup>64</sup> Sun, *supra* n. 52.

rendered in such a context should be considered enforceable all over China, transforming an ad hoc arbitral award into an institutional one will only enhance its enforceability, given that the SPC Opinions as a quasi-formal source of law are inferior to the 1994 Arbitration Law which essentially prohibits ad hoc arbitration practice.

## 5 FUTURE PERSPECTIVES FOR AD HOC ARBITRATION IN CHINA: FOCUSING ON THE DRAFT REVISED ARBITRATION LAW

The revision of the 1994 Arbitration Law was put on the legislative agenda of the National People's Congress of China in 2018.<sup>65</sup> In 2019, the Chinese MOJ invited arbitration scholars and practitioners from around the country to undertake practically oriented research on relevant issues that needed to be addressed in the reform of the 1994 Arbitration Law. One of the issues concerned ad hoc arbitration.<sup>66</sup> The Chinese MOJ intended to better understand the feasibility of legalizing ad hoc arbitration in China. It is not surprising that the Draft Revised Arbitration Law which it later released proposes to give the green light to ad hoc arbitration for foreign-related disputes.

The following sections will first examine the Draft Revised Arbitration Law's provisions on ad hoc arbitration, particularly its characteristics and limitations, before predicting possible developments of its legal status in the future. It concludes with the view that, while partial legalization of ad hoc arbitration confined to foreign-related disputes is to be expected in the reform of the 1994 Arbitration Law, its complete legalization is not likely.

### 5.1 DRAFT REVISED ARBITRATION LAW'S PROPOSAL TO PERMIT AD HOC ARBITRATION FOR FOREIGN-RELATED DISPUTES: CHARACTERISTICS AND LIMITATIONS

The Draft Revised Arbitration Law contains three articles dedicated to ad hoc arbitration, namely Articles 91, 92 and 93. Although it limits ad hoc arbitration to

<sup>65</sup> Legislative Program of the thirteenth Standing Committee of the National People's Congress (十三届全国人大常委会立法规划), [www.npc.gov.cn/npc/c30834/201809/f9bffa485a57f498e8d5e22e0b56740f6.shtml](http://www.npc.gov.cn/npc/c30834/201809/f9bffa485a57f498e8d5e22e0b56740f6.shtml) (accessed 28 Oct. 2022).

<sup>66</sup> A research project entitled 'The Fusion and Coordination between Ad Hoc and Institutional Arbitration' was entrusted by the Chinese Ministry of Justice to the Institute of International Law of the Chinese Academy of Social Sciences. See a news report at: [http://iolaw.cssn.cn/xshy/202003/t20200306\\_5098042.shtml](http://iolaw.cssn.cn/xshy/202003/t20200306_5098042.shtml) (accessed 28 Oct. 2022).

foreign-related disputes, it is still regarded as an important breakthrough in the development of the legal status of ad hoc arbitration in China.<sup>67</sup>

Article 91 defines the subject matter scope for ad hoc arbitration practice. It states:

The parties can agree to submit their dispute with a foreign-related element to an arbitration institution for arbitration. They can also agree to submit their dispute to an ad hoc arbitral tribunal directly.

A prominent feature of Article 91 is the direct employment of the language of ‘ad hoc arbitration’ which reflects China’s perceived dichotomy between institutional and ad hoc arbitration. In fact, the line between institutional and ad hoc arbitration is blurred in some circumstances. As Lord Mustill once noted, some arbitrations might be under the general auspices of an association but they are essentially ad hoc arbitrations.<sup>68</sup>

Article 92 provides the framework for supporting ad hoc arbitration externally. It concerns the circumstances in which the arbitral tribunal cannot be constituted promptly or a member of the arbitral tribunal faces a challenge due to a potential conflict of interests that can prevent him from acting as an arbitrator. Under both circumstances, the parties can agree on an arbitration institution to act as an appointing authority or to decide on the challenge. Otherwise, the court at the seat or the court where a party is domiciled or the court which has the most significant relationship with the dispute may designate an arbitration institution to provide assistance.

It is evident that Article 92 establishes a division of responsibilities between the court and the arbitration institution. The role of the arbitration institution is to act as the direct appointing authority. The court will not intervene unless the parties are not able to agree on an arbitration institution to undertake this role. And when the court does, it will not designate arbitrators or decide on the challenge against an arbitrator directly but will instead designate an arbitration institution to handle it. Such a division of responsibilities reflects China’s entrenched tradition of institutional arbitration. Arguably, this arrangement would mitigate the obstruction from arbitration institutions in allowing ad hoc arbitration because, in this case, ad hoc arbitration and institutional arbitration are put into a cooperative rather than competitive mode.<sup>69</sup>

<sup>67</sup> For an international report on the Draft Revised PRC Arbitration Law, see Y. Lin & M. Townsend, *China Publishes Draft Revised Law*, Global Arbitration Review (9 Aug. 2021), <https://globalarbitrationreview.com/china-publishes-draft-revised-law> (accessed 28 Oct. 2022).

<sup>68</sup> See M. Mustill, *Arbitration: History and Background*, 2 J. Int’l Arb. 43, 50 (1989).

<sup>69</sup> See P. Fu, *How Can the Court Assist in Ad Hoc Arbitration? – Juge d’appui Under the French Arbitration Law and Its Reference Value* (司法如何协助临时仲裁——法国‘助仲法官’制度及其启示), 3 Beijing Arb. Q. (北京仲裁) 108, 124 (2019).

However, two problems present themselves. One problem is, what if the parties agree on an organization or association other than an arbitration institution to assist the arbitration? The Draft Revised Arbitration Law only permits an arbitration institution to undertake this role, excluding the possibility of other professional organizations or associations providing assistance to the arbitration proceedings. While such a scenario would not arise in the short run, a full-fledged ad hoc arbitration market, especially for disputes involving small claims, could find this provision insufficient. The other problem is, what if the court at the seat, the court where a party is domiciled and the court which has the most significant relationship with the dispute compete to act as the indirect appointing authority? The Draft Revised Arbitration Law does not specify which court has priority, which means a future judicial interpretation by the SPC on this point is inevitable.

Article 93 requires the arbitral tribunal to file their arbitral award with the court for recording.<sup>70</sup> The purpose of this provision was said to be to strengthen the supervision of ad hoc arbitration practice.<sup>71</sup> However, as setting-aside proceedings are already in place under the 1994 Arbitration Law to control arbitral awards,<sup>72</sup> the necessity of establishing such a supervision mechanism is questionable.

## 5.2 TOWARDS COMPLETE LEGALIZATION OF AD HOC ARBITRATION IN CHINA?

According to the Chinese MOJ's explanation, the decision to propose permitting ad hoc arbitration but only for foreign-related disputes was based on two considerations. On the one hand, as a Member State of the New York Convention, China is obliged to recognize and enforce ad hoc arbitral awards emanating from another Member State, which is not fair for domestic arbitration because domestic ad hoc arbitral awards are not enforceable under the 1994 Arbitration Law.<sup>73</sup> On the other hand, as the Chinese MOJ explains, in light of 'our country's national circumstances', the legalization of ad hoc arbitration should be confined to foreign-related commercial disputes.<sup>74</sup> However, the Chinese MOJ did not specify what the national circumstances are. In the author's view, China's entrenched

<sup>70</sup> Draft Revised Arbitration Law, Art. 93, states: 'the arbitral tribunal shall file with the court at the seat for recording purposes the original copy of the arbitral award as well as the recording of the service process within 30 days of the service to the parties'.

<sup>71</sup> 'The Explanation Concerning the Draft Revised Arbitration Law' issued by the Chinese Ministry of Justice is, [www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730\\_432965.html](http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432965.html) (accessed 28 Oct. 2022).

<sup>72</sup> 1994 Arbitration Law, Art. 58.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

bureaucratized arbitration regime is the main factor that prevents the Chinese MOJ from putting forward a more progressive proposal.

In China, arbitration commissions are established by local governments.<sup>75</sup> Although the 1994 Arbitration Law states ‘arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs’,<sup>76</sup> the Plan for Reorganization of Arbitration Institutions issued by the General Office of the State Council in 1995 (still in force today) took a realistic approach which was reflected in the following provision:

During the initial period of the establishment of an arbitration commission, the local people’s government of the city where the commission is located shall, referring to the relevant provisions on institutional organizations, arrange the establishment of the staff, funds and sites for the arbitration commission. The arbitration commission shall gradually establish a system of independent revenue and expenditure.<sup>77</sup>

Up until today, most Chinese arbitration institutions are still categorized as public institutions (*shiye danwei*).<sup>78</sup> In these arbitration institutions, it is not uncommon that the important executive positions such as Secretary General are concurrently held by government officials,<sup>79</sup> and cadres from the Communist Party of China as well as the local government take a significant number of seats on the board of arbitration commissions.<sup>80</sup> Some of them are affiliated with the government departments that supervise the running of arbitration institutions. Admittedly, leading arbitration institutions in China, such as the CIETAC and the BAC, are committed to ensuring that party autonomy is honoured and the arbitral award rendered is of high quality. It is still possible that in a given case the arbitral process can be tainted by local government influences. This is particularly so for arbitration institutions located in less developed areas where constraints on government powers are weak and the rule of law is fragile.<sup>81</sup> In ad hoc arbitration, it would be difficult for the local government to influence the arbitration proceedings. Legalizing ad hoc arbitration for domestic disputes would substantially deprive local government officials

<sup>75</sup> *Ibid.*, Art. 10.

<sup>76</sup> *Ibid.*, Art. 14.

<sup>77</sup> Plan for Reorganization of Arbitration Institutions (No. 44 [1995] of the General Office of the State Council), Art. 4.

<sup>78</sup> See L. Jiang, *The Legal Nature of Chinese Arbitral Institution and Its Reform* (论我国仲裁机构的法律属性及其改革方向), 3 J. Comp. L. (比较法研究) 142, 143 (2019).

<sup>79</sup> See H. Wang, *The Harm of Bureaucratization of Arbitration and the Countermeasures* (仲裁行政化的危害及应对之策), 2 Beijing Arb. Q. (北京仲裁) 14, 16 (2007).

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

of the opportunity to monitor an important part of arbitration-related activities. As J. Zhou noted:

the Chinese government believed that institutional arbitration should be the only acceptable model in China since it allows the government conveniently to monitor arbitral institutions and cases. By contrast, under ad hoc arbitration, parties enjoy unfettered autonomy in stipulating procedures and selecting arbitrators. Moreover, the government would have no access to information regarding most ad hoc arbitrations unless a party initiated court proceedings.<sup>82</sup>

In fact, the establishment of arbitration institutions in China is often driven by political motives rather than by market needs.<sup>83</sup> To date, there are around 270 arbitration institutions dispersed all over China.<sup>84</sup> Although the arbitration institutions in large or coastal cities such as the BAC generally have no concerns about their case numbers, most of the Chinese arbitration institutions based in small or inland cities are struggling to attract cases.<sup>85</sup> These arbitration institutions rely on government finance to support their operations.<sup>86</sup> Yet, the staff working in these arbitration institutions enjoy a relatively high level of job stability and social status ensured by the institution's association with and financial guarantee from the government. They constitute a strong force standing in the way of market-oriented reform of Chinese arbitration law.<sup>87</sup>

In view of the above, the author considers that complete legalization of ad hoc arbitration in China is not foreseeable in the short term. As the Draft Revised Arbitration Law is still under discussion and could be subject to multiple revisions, it is not even certain whether the Chinese MOJ's current proposal will become law. However, as long as China sticks to its 'opening-up' policy and is committed to building a business-friendly environment, hopes are high that China will legalize ad hoc arbitration for foreign-related disputes.

<sup>82</sup> J. Zhou, *Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration*, 23(2) J. Int'l Arb. 145, 169 (2006).

<sup>83</sup> See L. Song & L. Yang, *The Difficulties in De-bureaucratizing China's Arbitration Institutions: From the Perspective of China's Legislation on Non-governmental Organizations* (我国仲裁机构民间化的制度困境——以我国民间组织立法为背景的考察), 3 L. Rev. (法学评论) 49, 51 (2009).

<sup>84</sup> *Arbitration Institutions in China Administered 415,000 Cases Last Year* (去年全国仲裁机构受案41.5万余件) Legal Daily (法治日报) 2 (23 Mar. 2022).

<sup>85</sup> Wang, *supra* n. 79, at 16.

<sup>86</sup> *Ibid.*, at 16, 17. To make arbitration institutions financially independent of the government, the Chinese State Council released in 1995 'The Measures on Arbitration Fees to be Charged by Arbitration Commissions' by which arbitration institutions should undertake the responsibility for their own profit and loss. However, up until today, a significant number of arbitration institutions are still financed by the government.

<sup>87</sup> *Ibid.*



## 6 CONCLUSION

The legal status of ad hoc arbitration is an inevitable topic in the development of the Chinese arbitration regime. Although the 1994 Arbitration Law rejected ad hoc arbitration, the latter's legal status has shown a complex and evolving nature over the years, with the SPC playing a leading role in mitigating the law's rigidity. First, the recognition and enforcement of foreign ad hoc arbitral awards is possible in China provided that the applicable law ascertained by a conflict-of-laws approach recognizes the validity of ad hoc arbitration agreements. Second, the SPC's initiative to pilot ad hoc arbitration in FTZs essentially deviates from the relevant provisions of the 1994 Arbitration Law, further promoting and complicating the legal status of ad hoc arbitration in China. Third, the Draft Revised Arbitration Law, which proposes to legalize ad hoc arbitration for foreign-related disputes, is sending a strong signal for future positive development of ad hoc arbitration in China. However, China's bureaucratized arbitration regime stands in the way of full recognition of ad hoc arbitration in the foreseeable future. The legal status of ad hoc arbitration will continue to evolve, reflecting the complicated relationship between China's bureaucratized arbitration regime and its increasingly sophisticated arbitration market. At the present stage, one can only hope that the Draft Revised Arbitration Law's proposal regarding ad hoc arbitration will finally be accepted in the forthcoming reform of Chinese arbitration law.

