

## Document information

## Publication

Spain Arbitration Review |  
Revista del Club Español  
del Arbitraje

## Jurisdiction

China

Bibliographic  
reference

Omar Puertas Álvarez, Ana  
Fernández Araluze, et al.,  
'Can foreign arbitration  
institutions validly  
administer cases in  
mainland China: The last  
update', Spain Arbitration  
Review | Revista del Club  
Español del Arbitraje,  
(© Club Español del  
Arbitraje; Wolters Kluwer  
España 2021, Volume 2021  
Issue 42) pp. 119 - 134

## Can foreign arbitration institutions validly administer cases in mainland China: The last update

Omar Puertas Álvarez; Ana Fernández Araluze; Jane Jin

(\*)

(\*\*)

(\*\*\*)

*In this article, the authors explore the presence and participation of foreign arbitration institutions in China. While commendable efforts have been made in recent years, the liberalization and opening up of the Chinese arbitration market is still a work-in-progress. Through this article we will reflect on China's efforts to loosen state control over alternative dispute resolution mechanisms: from the enactment of the Arbitration Law of the People's Republic of China in 1994 to Supreme People's Court's shifting interpretations as to how Chinese legislation should be applied, including as well the most recent (and certainly most remarkable) changes in the domain of Chinese arbitration.*

### 1 Introduction

East Asia has long been seen worldwide as a promising region for trade and investment and, needless to say, arbitration activity has followed East Asia's unparalleled growth over the last twenty years. Nevertheless, while Hong Kong and Singapore have followed closely and embraced the trends in international arbitration, mainland China has tended to lag behind in this regard.

For quite a long time, China exhibited a lukewarm attitude towards international arbitration and devoted significant efforts to dispelling all external disturbances that could potentially represent a menace to the foundations of its dispute resolution system. Thus, drawing upon the lessons learned from the management of disputes within its own territory, China devised a bifurcated regime for arbitration, referring to “domestic” versus “foreign-related” arbitration. (1) This system, unique of its kind yet still somewhat rigid, evidences China's reluctance to loosen state control over alternative dispute resolution mechanisms.

This system, which neither prohibits nor encourages international arbitration but rather subjects foreign-related arbitration to judicial review before national courts while remaining ambiguous as to whether non-Chinese institutions have the right to administer arbitrations in China, has proved to be a double-edged sword.

Even though China wielded this sword gracefully for years, staunchly resisting the added pressure for liberalization of the arbitration market, it seems that China is finally releasing its tight grip on foreign-related arbitration. This is, to a large extent, the result of the Supreme People's Court's (hereinafter, **SPC**) shifting interpretations ● on how Chinese legislation should be applied regarding court treatment of China-seated arbitrations administered by foreign arbitration institutions.

The SPC's valuable yet often unpredictable input has been accompanied by parallel efforts in terms of enhancement of international arbitration, all of which share a common objective: to regain the trust of international arbitration practitioners in order for China to earn its rightful place in the international arbitration community. Said efforts have culminated in three pioneering initiatives: (i) the Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (hereinafter, **SPFTZ Measures**); (ii) the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (hereinafter, **Arrangement Concerning Mutual Assistance**) and (iii) the consultation draft of the revised Arbitration Law released by the Ministry of Justice of China (hereinafter, **Draft Revision of Arbitration Law**).

Altogether, it appears that China has decided to change course and is now attempting align its arbitration regime with international standards, though we must say, very circumspectly, trying to find an optimal balance between preservation and progress. Yet, some major issues remain unresolved in the opening up of China's arbitration market. Recent developments may timidly signal a new direction, but there are still too many unknowns as to whether China will rise up to the challenge in the years ahead and allow international arbitration to ripen fully.

In this paper we will deal with these and other conundrums, trying to establish a timeline of events that have shaped China's current mindset towards foreign-related arbitration, from the enactment of the Arbitration Law of the People's Republic of China (hereinafter, **PRC Arbitration Law**) in 1994—basic foundation on which China's arbitration system is

built—to the most recent (and certainly most remarkable) changes in the domain of Chinese arbitration.

## 2 The PRC Arbitration Law: The Beginning of a New ERA

Arbitration in China is marked by a number of distinctive and somewhat rigid features. These “Chinese characteristics” begin with its distinct regulatory framework. (2)

The central piece of legislation governing arbitration in China is the PRC Arbitration Law (1994, as amended 2017), which has undisputedly contributed to the establishment, development and improvement of China's arbitration system. However, that being said, there are a number of idiosyncrasies to the PRC Arbitration Law which deserve to be singled out, for they widen the gap between the Chinese arbitration system and international standards. (3)

P 121 ●

Prior to the enactment of the PRC Arbitration Law, arbitration law in China was governed by a plethora of often contradictory references in various laws, administrative regulations and local regulations. (4) Furthermore, domestic and foreign-related arbitration were kept rigorously separate in terms of both regulation and procedure: domestic arbitrations were administered by domestic arbitration bodies whereas foreign-related arbitrations were administered by one of China's two only international arbitration institutions, the China International Economic and Trade Arbitration Commission (hereinafter, **CIETAC**) or the China Maritime Arbitration Commission. (5)

However, with the enactment of the PRC Arbitration Law, which was intended to reduce administrative interference and unify international and domestic arbitration, (6) China missed out on a unique opportunity to facilitate the onshoring of foreign-related disputes and foster arbitration as a critical dispute resolution tool. In fact, there has been little legislative improvement in meeting the changing needs of the arbitration market since then. (7) Chinese authorities have showcased an ambivalent attitude towards international arbitration and have weathered the impact of international arbitration in China without formally meddling with the PRC Arbitration Law's text. (8) To that end, most of the changes proposed by the Chinese authorities have been designed primarily to reinforce and improve the existing system while positioning international arbitration within the context of larger policy objectives, such as China's gradual reform and opening-up policies or the Belt and Road Initiative (BRI). (9)

P 122

Perhaps what is most striking about the PRC Arbitration Law is that, unlike most jurisdictions in Asia, it chose not to mirror the UNCITRAL Model Law on International Commercial Arbitration, meaning that it substantially deviates from the accepted international legislative standard. (10) Further, despite a number of promising developments, the PRC Arbitration Law chose not to alleviate the burden on foreign-related arbitration and instead retained a much-controversial bifurcated or “dual-track” approach to domestic versus foreign-related disputes. (11) The implications of this ● dichotomy (domestic versus foreign-related disputes) are substantial and they have placed a significant burden on the development of the international arbitration market in China over the years.

This distinction, which nearly three decades later still lingers on, coupled with the fact that foreign arbitration institutions seem to have been left out of this dual-track approach, has triggered an intense discussion over (i) the validity of arbitration clauses providing for China-seated arbitrations administered by foreign institutions and (ii) the restraints to which foreign arbitral institutions have long been subjected within Chinese territories. However, before considering the implications of this approach and the prospects for foreign arbitration institutions administering arbitrations in China, some preliminary remarks on several core provisions of the PRC Arbitration Law are in order.

First, Articles 16 and 18 of the PRC Arbitration Law (12) have been said to discourage (and even disqualify), if not *de lege*, at least *de facto*, international arbitrations from drawing near China. (13) This is because Articles 16 and 18 of the PRC Arbitration Law expressly require that an arbitration agreement must contain a designated “arbitration commission”, but also and especially because of the restrictive, protectionist and inconsistent way in which this rigid framework has been interpreted and handled by the different People's courts. (14)

P 123

In fact, one of the most salient features the PRC Arbitration Law is that it limits the power of arbitral tribunals for the benefit of powers co-shared between state courts and arbitration commissions. (15) The most glaring example of this centralization of powers is the fact that China has not yet embraced the well-established doctrine of *kompetenz-kompetenz*. Instead, according to Article 20 of the PRC Arbitration Law, (16) ● where the parties challenge the validity of an arbitration agreement, a request can be made to the arbitration commission for a decision or to the People's Court for a ruling, (17) the latter of which would prevail in case of overlapping requests.

It should be noted, however, that, despite the peculiar wording chosen, the term “arbitration commission” used in the PRC Arbitration Law is no different from the commonly used term “arbitration institution”. Nevertheless, perhaps the most vexing

challenge in dealing with the third prong of Article 16 is whether a foreign arbitration institution like the ICC qualifies as a “designated arbitration commission” within the meaning of the PRC Arbitration Law.

In all fairness, we must anticipate that there are no right or wrong answers to this question. In fact, the difficulty in interpreting Article 16 of the PRC Arbitration Law is tied to the quandary of how Article 10 (18) should be interpreted. However, the complex interplay between Article 10 and Article 16 of the PRC Arbitration Law is far from clear. A restrictive (and, in our opinion, overly narrow) interpretation would be to read Article 16 together with Article 10 of the PRC Arbitration Law, thus implying that Article 16 requires the designation of a Chinese arbitration institution. Meanwhile, those who endorse a more liberal approach consider that Articles 10 and 16 of the PRC Arbitration Law merit a separate reading and advise that the specification of an “arbitration commission” in Article 16 be interpreted as only prohibiting *ad hoc* arbitrations. (19)

Nevertheless, while the status of foreign arbitration institutions remains ambiguous, the SPC has sought to clarify its position over time and has thus acted as an agent of change, tacitly recognizing foreign arbitration institutions as permissible arbitration institutions that can administer “foreign-related” arbitration cases in China. (20)

P 124 ● *Second*, yet another shortfall in the PRC Arbitration Law is that the concepts of “domestic”, “foreign-related” and “foreign”—all of which are at the core of China’s arbitration system—are not explicitly defined therein. While the definitions of “domestic” and “foreign” arbitrations are relatively straightforward, the concept of “foreign-related” hinges upon different elements: the nationality and habitual ● residence of the parties, the legal facts of their relationship and the subject matter of the dispute. (21)

As we have anticipated, the importance of this distinction (domestic versus foreign-related disputes) cannot be overestimated. Although not explicitly stated in the law, PRC courts have adopted a simple and straightforward approach: purely domestic disputes must be arbitrated in China, *ergo*, only foreign-related disputes may be arbitrated outside China, (22) the application of this default approach has proved to be a much debated and highly controversial issue. (23)

### 3 Cases and Judicial Review of Foreign-Related Arbitration Administered By Foreign Arbitration Institutions

Much has changed since the enactment of the PRC Arbitration Law in 1994. Still, while commendable efforts have been made, the liberalization and opening up of the Chinese arbitration market is still a work-in-progress.

Despite the apparent difficulty in squeezing foreign-related arbitrations within the rigid framework of the PRC Arbitration Law, the SPC has played a leading role in moulding and shaping the Chinese arbitration system. (24) In fact, in order to fill the structural gaps in the PRC Arbitration Law, from 2003 onwards the SPC has played a dual role as both the highest judicial authority and a *de facto* judicial legislative power in China through the issuance of judicial interpretations. These sporadic yet shifting judicial interpretations—which have mostly taken the form of “replies”—have been issued to guide lower-level Chinese courts in their application of the PRC Arbitration Law, addressing, among others, important questions pertaining to the status of foreign arbitration institutions and the validity of arbitration agreements providing for foreign arbitration institutions. (25)

P 125 ● It has been argued that the SPC’s reservations when addressing controversial issues originate from its hesitancy in interfering where the PRC Arbitration Law remains silent or uses terms which are purposefully vague. However, truth is that ● from initial refusal in the *Züblin* case, the SPC has progressively embraced a more lenient approach towards foreign arbitration institutions seated in China. (26)

#### 3.1 The early opinions: *Züblin* and *Duferco* cases

In 2004, in the landmark *Züblin* (27) case, an arbitration clause that read “Arbitration: ICC Rules, Shanghai shall apply” was considered invalid by the SPC for lack of designation of arbitration institution as per Article 16 of the PRC Arbitration Law. Accordingly, the relevant award rendered by the ICC was denied enforcement by the Chinese local court. The rationale behind the *Züblin* case resonated well with the Chinese judiciary and similar decisions soon followed suit. (28)

By contrast, in 2009, in the much-quoted *Duferco* (29) case, the Ningbo Intermediate People’s Court upheld the enforcement of an award rendered by an ICC tribunal seated in Beijing and did so pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, **New York Convention**). However, it should be noted that precisely because enforcement was supported by the local court, the ruling did not reach the SPC and thus, the SPC was not afforded the opportunity to provide its input.

Following the seemingly contradictory opinions in the *Züblin* and *Duferco* cases, the debate over the validity of “foreign arbitration institution plus China seat” clauses seized the spotlight. Unfortunately, both cases underestimate the scale of the problem. In fact, neither decision truly addressed the issue at stake: whether a foreign arbitral institution

can lawfully administer an arbitration seated in China. In the *Züblin* case the court refused recognition and enforcement of an ICC award because the arbitration clause failed to expressly designate an arbitration commission as required by Articles 16 and 18 of the PRC Arbitration Law. Likewise, in the *Duferco* case the court recognized and enforced an ICC award because the respondent had failed to raise its jurisdictional objection in a timely manner, thus being deemed to have waived its right to challenge the validity of the arbitration agreement. (30)

P 126 ●

### 3.2 On the cusp of the SPC's interpretations: *Shenhua Coal* and *Longlide* cases

It was not until 2013, after years of confusion and ambiguity, that the SPC resolved to address the real issue: whether foreign arbitration institutions can administer China-seated arbitration cases, which, in turn, depends on whether a foreign arbitration institution can be regarded as a “designated arbitration commission” within the wording and meaning of Articles 16 and 18 of the PRC Arbitration Law. (31)

One month before *Longlide* was published –generally regarded as a milestone for arbitration in China–, the SPC concluded in the *Shenhua Coal* (32) case that the term “arbitration commission” in Article 20 of the PRC Arbitration Law referred only to Chinese arbitration institutions and hence excluded foreign arbitration institutions. Although the SPC's reply to the *Shenhua Coal* case was overshadowed by the *Longlide* case and thus, did not feature prominently on the radar screen of the international arbitration literature, it called attention to serious unresolved issues regarding the dichotomy between “arbitration commissions” and “arbitration institutions”.

*First*, in utter disregard of the doctrine of *kompetenz kompetenz*, the SPC concluded that the decision of a London arbitral tribunal to retain jurisdiction was not binding on Chinese courts, for “foreign arbitration institutions” are not “arbitration commissions” as per Article 20 of the PRC Arbitration Law, and thus, Chinese courts shall hear any application challenging the validity of agreements providing for foreign arbitration institutions.

*Second*, if the term “arbitration commission” in Article 20 did not apply to foreign arbitration institutions, the odds are that the SPC was strongly suggesting that the same term “arbitration commission” in Article 16 of the PRC Arbitration Law should likewise exclude foreign arbitration institutions, meaning that the latter would be barred from administering China-seated arbitrations. (33)

Nevertheless, the SPC's opinion in the *Shenhua Coal* case was living on borrowed time. In fact, Chinese lower courts could barely grasp the SPC's insights into the *Shenhua Coal* case before cracks in the SPC's interpretation reappeared.

Immediately after the reply to the *Shenhua Coal* case, the *Longlide* (34) case surfaced, breaking ground on the long-standing question as to the validity of “foreign arbitration institution plus China seat” arbitration clauses. In *Longlide*, the SPC adopted a different meaning for the same term “arbitration commission” and upheld the validity of an arbitration agreement providing for Shanghai-seated, ICC-administered arbitration. (35)

P 127 ●

Nevertheless, upon a closer look, it appears that *Longlide* was no silver bullet and indeed left a number of critical issues unresolved.

*First*, although the SPC's reply to *Longlide* was published as a guideline to local courts it is not binding on the SPC itself. (36) Therefore, it was still uncertain whether any future case would be reviewed in the same way by the SPC. (37) Accordingly, despite signaling a new direction, *Longlide* was not meant to be a one-size-fits-all solution to all of the issues surrounding foreign-related arbitrations in China.

*Second*, in *Longlide*, the SPC avoided or failed to clarify whether foreign arbitration institutions fall within the definition of “arbitration commission” under Articles 16 and 18 of the PRC Arbitration Law and instead focused its reasoning on the parties' express designation of an arbitration institution. (38)

*Last*, the SPC's reply to the *Longlide* case triggered an intense debate on the inconsistent, shifting and unpredictable nature of the SPC's opinions: how could the SPC's seemingly contradictory cases be reconciled?

Even so, a cursory review of both cases reveals that the differences between them are not insurmountable. It should be noted that while the *Longlide* arbitration was seated in Shanghai, China, the *Shenhua Coal* arbitration was seated in London. Thus, the most sensible and favored explanation for the opinion in the *Shenhua Coal* case is that while the SPC considered that Article 20 of the PRC Arbitration Law was not applicable to a case administered by a foreign arbitration institution, it was in fact referring to an arbitration seated abroad. (39)

Shortly after *Longlide*, in *Beilun Licheng*, (40) a case similar to *Züblin* where the parties specified that “ICC Rules of Arbitration shall apply” but failed to comply with the requirement of a “clear and specific arbitration institution” as per Article 16 of the PRC Arbitration Law, the SPC recognized the arbitration agreement as valid on the

understanding that by agreeing to arbitration under the ICC rules, the parties had accepted that the arbitration would be administered by the ICC. However, from 2013 onwards, there was a judicial vacuum concerning a harmonised approach towards the status of foreign arbitration institutions in China, with relevant cases being rare and the SPC's opinion in *Longlide* still being subject to much debate.

### 3.3 Most recent judgements relaxing China-seated foreign institutional arbitrations: is the debate settled?

P 128 ● While *Duferco* and *Longlide* cases have been widely interpreted as an unofficial commitment by the Chinese judiciary to turn a new leaf and adopt a more lenient approach towards arbitration, there was still uncertainty as to the validity of clauses providing for foreign institutional arbitration seated in China.

However, on a positive note, recent cases have continued to push the boundary of China's traditional approach towards foreign institutional arbitration, endorsing the opening up of arbitration practice in China and thus providing comfort to the international arbitration community and giving greater effect to the parties' autonomy in choosing a preferred institution and seat.

One of the most remarkable examples of this change of paradigm is the 2020 *Daesung* (41) decision, which confirms that foreign arbitration institutions can lawfully administer China-seated arbitrations. In *Daesung*, the arbitration agreement provided that all disputes were to be submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai under the SIAC Rules. In essence, the respondent argued that the SIAC is precluded from administering China-seated arbitrations and therefore the arbitration agreement was inherently defective and fatally flawed under Chinese law. The Shanghai No.1 Intermediate Court openly addressed the flaws of the PRC Arbitration Law and echoed the *Longlide* decision while providing further clarification on the meaning of the term "arbitration commission."

Among the various points raised in the *Daesung* decision, there is one that deserves to be highlighted, for it provides encouraging evidence of progress as of China's mindset towards foreign arbitration institutions. The court ruled that the respondent's line of argument for challenging the validity of the arbitration agreement was based on a narrow and outdated vision of the "arbitration commission" concept in the PRC Arbitration Law and concluded that the flaws and structural gaps contained therein were to be cured and filled on the basis of the SPC's judicial interpretations. (42)

Another outstanding example of China's increasing receptiveness and flexibility is the recent *Brentwood Industries* case (August 2020). (43) In fact, we may even go as far as to say that *Brentwood Industries* has shaken the foundations of the Chinese arbitration market. For the first time in history, a Chinese court (Guangzhou Intermediate Court) applied the "seat standard" to entertain an arbitral award rendered in China under the auspices of a foreign arbitral institution (ICC-Hong Kong) as a Chinese award. (44) Accordingly, the Guangzhou Court rejected recognition and enforcement under the New York Convention or the Arrangement Concerning Mutual Enforcement (as sought by the claimant) and instead supported that the award could and should be enforced under the PRC Civil Procedure Law. (45)

P 129 ●

Overall, the *Brentwood Industries* ruling calls into question many assumptions and defies prior court decisions categorizing awards in light of the place where the foreign arbitration institution is located. Having said that, we must acknowledge that there is no guarantee that things will develop along the lines of *Brentwood Industries* in the future.

## 4 Loosening the Grip on International Commercial Arbitration: Further Developments That Open the Gate to Foreign Arbitration Institutions in China

Parallel to the vagaries of the SPC's judicial interpretations on the the PRC Arbitration Law, there have been two notable advancements that have significantly broadened the choices available to the parties in China or Hong Kong -seated disputes: (i) the China (Shanghai) Pilot Free Trade Zone (SPFTZ) and the measures in support of arbitration it has encouraged and (ii) the execution of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures between mainland China and Hong Kong on April 2, 2019. (46) While the results of these pioneering initiatives may still be preliminary, even at this early stage they merit positive recognition and herald a new stage in China's economic reform and opening-up policies.

### 4.1 The impact of the SPFTZ in arbitration practice

When the SPFTZ was launched nearly eight years ago, the idea was to grow Shanghai into its full potential through an ambitious plan that would consolidate Shanghai's position as an international financial center and trading hub by 2020, by loosening the government's grip on foreign investment. However, it was not until 2015 (47) that the State Council took the first steps towards realigning the initial plan to fit the changing landscape of

international commercial arbitration and meet the continually increasing demand for dispute resolution services within mainland China. (48)

Starting in 2015, the SPFTZ emerged as an incubatory space for international dispute resolution in China. Foreign arbitration institutions were encouraged to take root in the SPFTZ by being allowed to set representative offices within the zone. Even so, the original policies fell short of expectations, for they failed to bolster certainty over the role, purpose and undertakings of foreign arbitration institutions within the SPFTZ. Foreign arbitration institutions including the ICC, the HKIAC, the SIAC and the KCAB had already established representative offices in the SPFTZ; however, those offices were largely focused on promotion and logistical support, serving as liaison and for marketing purposes, rather than administering China-seated cases.

P 130 ●

Fortunately, in mid-2019 the State Council of China decided to cater for these unfulfilled expectations and addressed foreign arbitration institutions' concerns through drawing up concrete and meaningful action plans regarding the New Lingang Area of SPFTZ. (49) All these legal tools loosely signal further policy liberalisation and invigorate the status of foreign arbitration institutions in China, which may now be comfortable in administering civil and commercial China-seated cases, subject to the relevant successful registrations.

In the same vein, and echoing the earlier policy adopted by the People's Government of Shanghai Municipality, on December 28, 2020, the Beijing Municipal Bureau of Justice issued the "Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone". (50) These measures, which have received the SPC's recognition and support, (51) represent yet another step on the road to the internationalization and liberalization of the Chinese arbitration market. Nevertheless, both the SPFTZ Measures and the equivalent measures for the China (Beijing) Pilot Free Trade Zone expressly provide that the business offices of foreign arbitration institutions established thereunder may only handle foreign-related cases. Thus, we are to assume that, for the foreseeable future, purely domestic will continue to be arbitrated in China, presumably by Chinese arbitration institutions.

#### 4.2 Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings

On October 1, 2019, the landmark arrangement between the SPC and the Hong Kong Special Administrative Region (HKSAR) on interim measures in aid of arbitrations came into force. (52) It should be noted, however, that the Arrangement Concerning Mutual Assistance builds on existing agreements between China and Hong Kong, (53) further reinforcing the political, economic and cultural ties between both regions.

P 131 ●

In the past, Chinese courts would only grant interim measures to arbitration cases administered by domestic arbitration institutions. Hence, China's unbending stance placed foreign parties in a precarious position, which ultimately resulted in many parties being concerned about the implications of entering into business with Chinese parties. (54)

The Arrangement Concerning Mutual Assistance relaxes this severe restriction, providing greater certainty and a much-needed sense of reassurance to foreign parties entering into contracts with Chinese parties. Under the Arrangement Concerning Mutual Assistance, PRC courts may grant interim relief in aid of Hong Kong seated arbitrations, so long as they are administered by one of the following arbitral and dispute resolution institutions and permanent offices: HKIAC, CIETAC-Hong Kong, ICC-Asia, Hong Kong Maritime Arbitration Group, South China International Arbitration Center or eBRAM International Online Dispute Resolution Centre.

Although it remains to be seen how it will be applied by Chinese courts, the general consensus is that the Arrangement Concerning Mutual Assistance is a win-win situation for all those involved: it gives Hong Kong arbitrations the added significant advantage that its regional competitors lack and provides Chinese law firms with a golden opportunity to gain momentum in arbitrations seated in Hong Kong. (55) It is worth mentioning that, as of February 9, 2021, the HKIAC had already processed 37 applications made to the PRC courts for interim measures. (56) These promising initial figures demonstrate that the Arrangement Concerning Mutual Assistance is another unquestionable success for China and a prime example of China's efforts to liberalize and streamline a once-closed and much-regulated arbitration market.

#### 5 Is A Revised PRC Arbitration Law Just Around The Corner?

On July 30, 2021, the Ministry of Justice of China issued the much-awaited *Revised Arbitration Law (Draft for Comment)* (hereinafter, **Draft Revision**) for public comments. The arbitration community has welcomed with great interest this new endeavour to modernise the PRC Arbitration Law, for it heralds a bright future for arbitration and promises to bring China's legislative framework in line with international standards. If implemented as it stands right now, the Draft Revision would bring about profound

changes to China's foreign-related arbitration landscape and largely mitigate the legal uncertainties that have been hindering the opening-up of China's arbitration market to foreign institutions.

*First*, the Draft Revision uses the more straightforward term “arbitration institution” throughout its text, which is defined as any not-for-profit corporation established in accordance with the PRC Arbitration Law—the Draft Revision requires that the arbitration institution be registered with the Ministry of Justice or its local bodies—for resolving contractual disputes and any other disputes over property ● rights and interests. (57) However, despite the remarkable developments the Draft Revision foreshadows—it follows the lead of the SPFTZ Measures and the equivalent measures for the China (Beijing) Pilot Free Trade Zone and allows foreign arbitration institutions to establish branch offices within the whole territory of the PRC—the traditional “dual-track” approach still persists, especially since the branch offices of foreign arbitration institutions in China may only handle foreign-related cases. Even so, if implemented, the Draft Revision will provide comfort to foreign arbitration institutions, thus enhancing their motivation to venture into the Chinese arbitration market.

*Second*, the Draft Revision proposes a review (and further loosening) of China's current stringent requirements for the validity of an arbitration agreement. Article 16 of the PRC Arbitration Law as it stands today provides that an arbitration agreement shall be invalid if no concrete arbitration institution is selected. Under the Draft Revision, however, if there is no agreement on the arbitration institution, the arbitration agreement will still be valid. (58) This forward-looking approach will hopefully put an end to the long standing issue surrounding the validity of arbitration clauses providing for China-seated arbitrations administered by foreign institutions. However, it is important to keep in mind that the definition of “arbitration institution” under the Draft Revision only covers the registered branch offices of foreign arbitration institutions in China and clearly leaves out all non-registered foreign arbitration institutions, which ultimately appears to suggest that China is imposing licensing requirements on foreign arbitration institutions that administer China-seated arbitration. Thus, while it is too early to predict the full impact of the Draft Revision on the status of the said registered branch offices, the current version is a subtle play ● of lights and shadows, which may create further uncertainty and unpredictability in the outcome of arbitration proceedings and the enforceability of the resulting award.

*Third*, the adoption of the “seat of arbitration” standard in determining the nationality of an arbitral award is another key change introduced by the Draft Revision. (59) This approach, if adopted, would pave the way for awards issued in China under the auspices of a foreign arbitration institution being regarded as domestic awards, thereby facilitating their enforcement.

*Last*, the Draft Revision also spearheads other important changes, which attest to China's efforts to bring Chinese arbitration practice in line with international norms and standards: (i) allowing ad hoc arbitration in foreign-related disputes; (ii) fully embracing the doctrine of *kompetenz-kompetenz*; (iii) empowering arbitral tribunals to order interim measures; and (iv) establishing the emergency arbitrator mechanism. The Draft Revision is to be regarded as a necessary first step towards the building of a pro-arbitration environment in China, but the targets it sets are not ambitious enough in certain respects.

The Draft Revision makes commendable efforts to overcome the rigidity of the current arbitration system and remove certain boundaries and peculiarities of the PRC Arbitration Law that have resulted in China lagging behind in the field of international arbitration for many years. The Draft Revision, however, simultaneously creates some new uncertainties and fails to address several fundamental issues of concern. On the whole, though, despite there being room for improvement and further reforms, the Draft Revision is expected to be a major breakthrough and make a remarkable impact on China's reputation before the international arbitration community.

## 6 Conclusion

Since the enactment of the PRC Arbitration Law in 1994, China has, slowly but surely, made tremendous progress in the field of international commercial arbitration. China has increased, and is further increasing, the presence and participation of foreign arbitration institutions within its arbitration market. As we have seen, the SPC's valuable input has been key to achieving this success and it will be vital in the forthcoming years of consolidation and growth of the Chinese arbitration market.

Still, while commendable improvement has been made—with China gaining an increasingly firm foothold within the international arbitration community—the liberalization and opening up of the Chinese arbitration market is still a work-in-progress.

The current system has functioned well in practice, particularly for China; however, it is not free from defects. There are still a number of unresolved issues and legislation loopholes under debate. In fact, amendment to the PRC Arbitration Law remains the missing piece of the puzzle and only when the whole puzzle is put together will China be able to provide certainty and predictability in the field of international commercial

arbitration.

P 134 ●

Although difficulties and challenges will be inevitable in the course of future legal reforms and finding an optimal balance between domestic and international legal standards will not be an easy task, it is expected that China will continue working along these lines in order to build a more pluralistic and inclusive international commercial arbitration market, more responsive to the real needs and demands of its users.

P 134 ●

## References

- \*) **Omar Puertas Álvarez:** is a partner at the litigation and arbitration department of Cuatrecasas in Barcelona, where he specializes in international commercial arbitration. From 2002 to 2003, he worked as a *seconded* at Skadden's New York office. In 2007 he moved to Shanghai to set up and manage Cuatrecasas' first office in Asia, where he stayed as its managing partner until 2019.
- \*\*\*) **Ana Fernández Araluce:** is an associate at the litigation and arbitration department of Cuatrecasas in Barcelona. She holds a double master's degree from *Universidad Carlos III de Madrid* ('18), specializing in Private International Law. She currently collaborates with *Universitat Pompeu Fabra* (UPF) as coach for the Moot Madrid International Commercial Arbitration Competition.
- \*\*\*) **Jane Jin:** is an associate at the corporate department of Cuatrecasas in Shanghai, where she specializes in business law. She received her LL.M. degree from *Duke University* in 2018.
- 1) Erie, Matthew and Prusinowska, Monika. "The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges Ahead", *Asia Pacific Law Review*, Forthcoming (written November 23, 2020): p. 7. Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3735810](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735810).
- 2) Gu, Weixia. "Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects.", *The American Journal of Comparative Law*, Volume 65, No. 4 (Winter 2017): p. 800. Retrieved from: [www.jstor.org/stable/26425366](http://www.jstor.org/stable/26425366).
- 3) For example, the PRC Arbitration Law does not allow ad hoc arbitration; however, parties may pursue ad hoc arbitration abroad. Hence, the incompatibility of the PRC Arbitration Law with general international standards providing for ad hoc arbitration could undermine the finality of arbitral awards. In this regard, see Kloppenberg, Lisa A. and Xiuwen, Zhao. "Reforming Chinese Arbitration Law and Practices in the Global Economy", *University of Dayton Law Review*, Volume 31, Issue 3: pp. 435-436. Retrieved from: <https://core.ac.uk/download/pdf/149268875.pdf>.
- 4) Thorp, Peter. "The PRC Arbitration Law: Problems and Prospects for Amendment", *Journal of International Arbitration*, Volume 27, Issue 6 (2007): p. 608.
- 5) Kun, Fan. "Arbitration in China: Practice, Legal Obstacles and Reforms", *ICC Bulletin*, Volume 19, No. 2 (2008): p. 25. Retrieved from: <https://ssrn.com/abstract=1933045>.
- 6) Kun, Fan. "Arbitration in China...", *Op. Cit.*, p. 26.
- 7) See Gu, Weixia. "Piercing the Veil of Arbitration Reform in China...", *Op. Cit.*, p. 800.
- 8) Mollengarden, Zachary. "One-Stop Dispute Resolution on the Belt and Road: Toward an International Commercial Court with Chinese Characteristics", *UCLA Pacific Basin Law Journal*, Volume 36, No. 1 (2019): p. 79. Retrieved from: <https://escholarship.org/uc/item/43q7s46n>.
- 9) Bath, Vivienne. "Chapter 8: Recent Developments in China in Cross-Border Dispute Resolution: Judicial Reforms in the Shadow of Political Conformity" in Ali, Shahla; Jetin, Bruno et al. (eds). *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution*, International Arbitration Law Library, Volume 59 (Kluwer Law International 2020): pp. 209-210.
- 10) Erie, Matthew and Prusinowska, Monika. "The Future of Foreign Arbitration...", *Op. Cit.*, p. 3. For example, the UNCITRAL Model Law and the PRC Arbitration Law vary greatly with regard to the treatment of ad hoc arbitration, interim protection measures and the judicial review of arbitration.
- 11) Mollengarden, Zachary. "One-Stop Dispute Resolution...", *Op. Cit.*, p. 79.

It is worth mentioning, however, that this two-pronged approach is not in itself necessarily a problem and that the main reason why it is such a delicate matter in the Chinese context is that the gap between the rules governing domestic and foreign-related arbitrations is too wide, particularly in the area of challenge and enforcement of arbitral awards. In this regard, see Thorp, Peter. "The PRC Arbitration Law...", *Op. Cit.*, pp. 614-615.



- 12) See Article 16 of the PRC Arbitration Law, which lays down the formal requirements for an arbitration agreement: *“An arbitration agreement shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration. The following contents shall be included in an arbitration agreement: (1) the expression of the parties’ wish to submit to arbitration; (2) the matters to be arbitrated; and (3) the Arbitration Commission selected by the parties.”* The first requirement is standard in most jurisdictions and the second requirement regarding the subject matter of the dispute is perhaps superfluous. However, the third requirement is important, and read in conjunction with Article 18, it clearly suggests that an arbitration agreement will be void if the parties fail to clearly designate an “arbitration commission”. In any event whether a foreign arbitration institution can qualify as an arbitration commission within the meaning of this Article 16 is still a highly controversial issue open for discussion.

See as well Article 18 of the PRC Arbitration Law, which is the natural continuation of Article 16 and further provides that: *“If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.”*

- 13) See Tao, Jingzhou and Von Wunschheim, Clarisse. “Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions”, *Arbitration International*, Volume 23, Issue 2 (June 2007): pp. 309-326. Retrieved from: <https://doi.org/10.1093/arbitration/23.2.309>.
- 14) Kun, Fan. “Prospects of Foreign Arbitration Institutions Administering Arbitration in China”, *Journal of International Arbitration*, Volume 28, No. 4 (2011): p. 344. Retrieved from: <https://ssrn.com/abstract=1933024>.
- 15) Prusinowska, Monica. “China as a Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes”, *Tsinghua China Law Review*, Volume 10, No. 1: p. 41. Retrieved from: [http://www.tsinghuachinalawreview.org/articles/1001\\_Prusinowska.htm](http://www.tsinghuachinalawreview.org/articles/1001_Prusinowska.htm).
- 16) Article 20 of the PRC Arbitration Law provides that: *“If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or apply to the People’s Court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the People’s Court for a ruling, the People’s Court shall give a ruling. A party’s challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal’s first hearing.”*
- 17) Tao, Jingzhou. “Salient Issues in Arbitration in China”, *American University International Law Review*, Volume 27, Issue No. 4 (2012): p. 813. Retrieved from: <https://digitalcommons.wcl.american.edu/auilr/vol27/iss4/6/>

Von Wunschheim, Clarisse and Kun, Fan. “Arbitrating in China: The Rules of the Game | Practical Recommendations concerning Arbitration in China”, *ASA Bulletin (Kluwer Law International)*, Volumen 26, Issue 1 (2008): pp. 38-39.

- 18) Article 10 of the PRC Arbitration Law elaborates on the concept of “arbitration commission” and provides that *“[a]rbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people’s governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. Arbitration commissions shall not be established at each level of the administrative divisions. People’s governments of the cities referred to in the preceding paragraph shall arrange for the relevant departments and chambers of commerce to organize arbitration commissions in a unified manner. The establishment of an arbitration commission shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government.”*
- 19) Kun, Fan. “Prospects of Foreign Arbitration Institutions...”, *Op. Cit.*, p. 346.
- 20) Erie, Matthew and Prusinowska, Monika. “The Future of Foreign Arbitration...”, *Op. Cit.*, p. 10.
- 21) According to SPC’s Interpretation on Several Issues Concerning the Law on the Application of Laws to Foreign-Related Civil Relations, a dispute is foreign-related if (a) at least one of the parties is foreign, (b) at least one of the parties habitually resides outside of China, (c) the subject matter of the dispute is outside of China, (d) the legal facts that lead to the establishment, change or termination of the civil relations occurred outside of China, or (d) other circumstances under which the civil relations may be deemed foreign-related. In this regard, see Lee, Sabrina. “Arbitrating Chinese Disputes Abroad: A Changing Tide?”, *Kluwer Arbitration Blog* (April 7, 2016). Retrieved from: <http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changi...>

- 22) See Article 271 of the Civil Procedure Law: “Where disputes arising from foreign-related economic, trade, transport or maritime activities, if the parties have included an arbitration clause in their contract or subsequently reach a written arbitration agreement that provides that such disputes shall be submitted for arbitration to an arbitration institution of the People’s Republic of China for foreign-related disputes or to other arbitration institution, no party may institute an action in a People’s Court. If the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement, an action may be instituted in a People’s Court”.
- 23) However, it is worth noting that, following the SPC’s opinions in 2016, the access to offshore arbitration has been extended: parties registered in the Pilot Free Trade Zones can arbitrate their disputes offshore regardless of whether the disputes are foreign-related or not.
- 24) In this regard, see Bath, Vivienne. “Chapter 8: Recent Developments...”, *Op. Cit.*, pp. 192-193. See as well Fan, Kun. “Supreme Courts and Arbitration: China”, *b-Arbitra | Belgian Review of Arbitration*, Volume 2019, Issue 2 (2019): pp. 587-614.
- 25) Kun, Fan. “Arbitration in China...”, *Op. Cit.*, p. 29.
- 26) Gu, Weixia. “The Developing Nature of Arbitration in Mainland China and its Correlation with the Market: Institutional, Ad Hoc and Foreign Institutions Seated in Mainland China”, *Contemporary Asia Arbitration Journal*, Volume 10, No. 2 (November 2017): p. 271. Retrieved from: <https://ssrn.com/abstract=3085568>.
- 27) *Reply of the SPC to the Request for Instructions on the Case concerning the Application of Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement* ([2003] Min Si Ta Zi No23) (“Züblin”). In this regard, see <http://en.pkulaw.cn/display.aspx?cgid=75330&lib=law>.
- 28) Replies of the SPC (i) to the Hebei Higher People’s Court concerning *Cangzhou Donghong Packing Material Co. Ltd. v. France DMT* on April 26, 2006; (ii) to the Fujian Higher People’s Court concerning *Amoi Electronics Co., Ltd. v. Belgium Products Co., Ltd.* on March 20, 2009 and (iii) to the Jiangsu Higher People’s Court concerning *Taizhou Haopu Investment Co., Ltd. v. Wicor Holding AG* on March 1, 2012; all of which concerned arbitration clauses that provided for ICC rules plus China seat.
- 29) *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd.* ([2008] Yong Zhong Jian Zi No4) See: <http://www.newyorkconvention.org/11165/web/files/document/1/7/17495.pdf>.
- 30) Gu, Weixia. “The Developing Nature of Arbitration...”, *Op. Cit.*, p. 271. See as well Duan, Zhouyuan Diana. “Legal Uncertainty Remains in International Arbitration for Chinese-Foreign Disputes”, *Michigan Journal of International Law*. Retrieved from: <http://www.mjonline.org/legal-uncertainty-remains-in-international-arbitration-for-chinese-foreign...>
- 31) Hee, Theng Fong. “Arbitration in China and Singapore”, *SAL Practitioner* 28, Singapore Academy of Law (December 12, 2019): p. 11. Retrieved from: <https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Arbitration-and-Mediation/...>
- 32) *Reply of the SPC to the Request for Instructions on Issues concerning the Case of Shenhua Coal Trading Co. v. Marinic Shipping Company for Confirmation of an Arbitration Clause* ([2013] Min Si Ta Zi No 4), dated February 4, 2013 (“Shenhua Coal”).
- 33) Hee, Theng Fong. “Arbitration in China...”, *Op. Cit.*, p. 12.
- 34) *Reply of the SPC regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati SRL* ([2013] Min Si Ta Zi No 13), dated March 25, 2013 (“Longlide”). See: <http://www.lawinfochina.com/display.aspx?id=17948&lib=law>.
- 35) Hu, Ke and Lin, Xi. “Chinese Law or No Law: The Lex Arbitri for Arbitrations Conducted by Overseas Arbitration Institutions in Mainland China”, *Kluwer Arbitration Blog* (September 9, 2015). Retrieved from: <http://arbitrationblog.kluwerarbitration.com/2015/09/09/chinese-law-or-no-law-the-lex-arbitri-for-ar...>
- 36) In this regard, note that, as a civil law country, PRC courts are not bound by the principle of legal precedent.
- 37) Duan, Zhouyuan Diana. “Legal Uncertainty Remains...”, *Op. Cit.*
- 38) Shouzhi, Zhang; Tao, Huang and Yan, Xiong. “China” (Country Chapter), *The Asia-Pacific Arbitration Review 2021*, Global Arbitration Review. Retrieved from: <https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/china>.
- 39) Hu, Ke and Lin, Xi. “Chinese Law or No Law...”, *Op. Cit.*
- 40) *Reply of the SPC to the Request for Instructions on the Purchase and Sale Contract Dispute between Ningbo Beilun Licheng Lubricating Oil Co., Ltd. and Formal Venture Co. concerning the Validity of the Arbitration Agreement* ([2013] Min Si Ta Zi No 74), dated December 5, 2013 (“Beilun Licheng”).
- 41) Decision rendered by the Shanghai No.1 Intermediate People’s Court in *Daesung Industrial Gases Co., Ltd. v. Praxair (China) Investment Co., Ltd.* ([2020] Hu 01 Min Te No. 83) (“Daesung”).

- 42) Dong, Arthur. "Shanghai Holds that "SIAC Arbitration in Shanghai" is Valid After Longlide Case" (September 2020). Retrieved from: <https://www.mediate.com/articles/longlidearb.cfm>.
- 43) Decision rendered by the Guangzhou Intermediate People's Court in *Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd. and Others* ([2015] Sui Zhong Fa Min Si Chu No. 62) ("Brentwood Industries").
- 44) Gao, Tereza and Yao, Ziyi. "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I", Kluwer Arbitration Blog (October 12, 2020). Retrieved from: <http://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign...>
- 45) "PRC Court Clarifies Enforcement of Mainland Award Made by Foreign Institution", Herbert Smith Freehills (September 21, 2020). Retrieved from: <https://hsfnotes.com/arbitration/tag/brentwood/>.
- In this regard, see as well Zhang, Jian. "Good or Bad News? Arbitral Awards Rendered in China by Foreign Arbitral Institutions Being Regarded as Chinese Awards", China Justice Observer (September 27, 2020). Retrieved from: <https://www.chinajusticeobserver.com/a/good-news-or-bad-news-arbitral-awards-rendered-in-china-by-fo...>
- 46) In this regard, see Erie, Matthew and Prusinowska, Monika. "The Future of Foreign Arbitration...", *Op. Cit.*
- 47) *Notice of the State Council on Issuing the Plan for Further Deepening the Reform and Opening of China (Shanghai) Pilot Free Trade Zone* (Guo Ban Fa [2015] No. 21). See [http://www.gov.cn/zhengce/content/2015-04/20/content\\_9631.htm](http://www.gov.cn/zhengce/content/2015-04/20/content_9631.htm) (Chinese only).
- 48) Rogers, Martin and Mak, Noble. "Foreign Administered Arbitration in China: The Emergence of a Framework Plan for the Shanghai Pilot Free Trade Zone", Kluwer Arbitration Blog (September 6, 2019). Retrieved from: <http://arbitrationblog.kluwerarbitration.com/2019/09/06/foreign-administered-arbitration-in-china-th...>
- 49) On July 27, 2019 the State Council issued the *Circular on Issuing the Overall Plan for the New Lin-gang Area of the China (Shanghai) Pilot Free Trade Zone*. In order to implementate the State Council's Circular, on August 12, 2019, the Shanghai government issued *Administrative Measures of the Lin Gang Area in China (Shanghai) Free Trade Zone*. Further, in December 2019, the SPC and the Shanghai High People's Court issued two policy papers on the Lingang Special Area of the Shanghai Pilot Free Trade Zone (Lin-gang FTZ): (i) *Opinion on People's Courts' Provision of Judicial Services and Safeguard to the Development of China (Shanghai) Pilot Free Trade Zone Lin-gang New Area*, published by the SPC on December 13, 2019 and (ii) *Implementing Opinion on Shanghai Courts' Judicial Services to Safeguard the Development of China (Shanghai) Pilot Free Trade Zone Lin-gang New Area*, published by the Shanghai High People's Court on December 30, 2019.
- 50) On December 28, 2020, the Beijing Municipal Bureau of Justice issued the "Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot Free Trade Zone", which are in effect since January 1, 2021. See [http://english.beijing.gov.cn/investinginbeijing/WhyBeijing/lawpolicy/policies/202012/t20201231\\_2191...](http://english.beijing.gov.cn/investinginbeijing/WhyBeijing/lawpolicy/policies/202012/t20201231_2191...)
- 51) In this regard, see <https://www.chinajusticeobserver.com/a/spc-s-new-policy-backs-beijing-free-trade-zone>.
- 52) In this regard, see "ICC Note on Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of ICC Arbitrations seated in Hong Kong and Administered by the Secretariat Asia Office", ICC (December 1, 2019). Retrieved from: <https://iccwbo.org/content/uploads/sites/3/2019/12/icc-note-on-arrangement-interim-measures-mainland....>
- 53) These include (i) the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements Between Parties Concerned (Arrangement on Reciprocal Recognition), and (ii) the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR (Arrangement Concerning Mutual Enforcement).
- 54) Erie, Matthew and Prusinowska, Monika. "The Future of Foreign Arbitration...", *Op. Cit.*, p. 15.
- 55) Chin, Andrew, Li, Valierie and Li, Edison. "Asia/Pacific: Hong Kong – A Game Changer: Interim Measures from the Mainland Chinese Courts in Support of Hong Kong Arbitrations", ICC Dispute Resolution Bulletin 2019, Issue 3 (2019).
- 56) In this regard, see "HKIAC Releases Statistics for 2020" (February 9, 2021). Retrieved from: <https://www.hkiac.org/news/hkiac-releases-statistics-2020>.

- 57) See Article 13 of the Draft Revision: “[a]rbitration institutions are not-for-profit corporations established in accordance with this law that provide public-benefit services for resolving contractual dispute and other dispute involving property rights and interests, including arbitration commission and other specialized organization that carries out arbitration business. Arbitration institutions obtain the status of a legal person upon registration.”

See Article 12 of the Draft Revision: “[t]he establishment of an arbitration institution shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government. The arbitration institutions organized and established by China Chamber of International Commerce shall be registered with the administrative department of justice of the State Council. The foreign arbitration institutions that set up business organizations in the People's Republic of China to handle foreign-related arbitration business shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government and filed with the administrative department of justice of the State Council. The administrative measures on registration of arbitration institutions shall be formulated by the State Council.”

- 58) In this regard, it should be noted that a recent decision by the Beijing No. 4 Intermediate People's Court in the case *Sichuan Daiyalan v. Hong Kong New Wish Electronics* has openly addressed this issue, upholding an arbitration clause which failed to specify the seat of arbitration and provided for disputes to be submitted to a non-existent arbitral institution (the “Hong Kong Arbitration Commission”).

The Beijing No. 4 Intermediate People's Court first concluded that the parties intended to have a Hong Kong-seated arbitration by agreeing on said non-existent arbitration institution. Then, the Beijing No. 4 Intermediate People's Court deferred the matter to a Hong Kong barrister, Mr. Alan Kwong, who submitted a legal opinion on the validity of the disputed arbitration agreement under Hong Kong law. Adopting a manifestly pro-arbitration stance and embracing Mr. Kwong's legal opinion, the Beijing No. 4 Intermediate People's Court held that the challenged arbitration agreement was valid and invited the plaintiff Daiyalan to apply to Hong Kong International Arbitration Centre. In this regard, see Tan, Philip. “Beijing Court Upholds Arbitration Clause Designating Non-Existent Arbitral Tribunal”, White & Case publication (October 6, 2021). Retrieved from: <https://www.whitecase.com/publications/alert/beijing-court-upholds-arbitration-clause-designating-no...>

- 59) See Article 27 of the Draft Revision: “[t]he parties may agree on the seat of arbitration in the arbitration agreement. If there is no agreement regarding the seat of arbitration or the agreement is not clear, the seat of arbitration shall be the place where the arbitration institution administering the case is situated. An arbitral award is deemed to have been made at the seat of the arbitration [...]”

© 2022 Kluwer Law International, a Wolters Kluwer Company. All rights reserved.

Kluwer Arbitration is made available for personal use only. All content is protected by copyright and other intellectual property laws. No part of this service or the information contained herein may be reproduced or transmitted in any form or by any means, or used for advertising or promotional purposes, general distribution, creating new collective works, or for resale, without prior written permission of the publisher.

If you would like to know more about this service, visit [www.kluwerarbitration.com](http://www.kluwerarbitration.com) or contact our Sales staff at [lrs-sales@wolterskluwer.com](mailto:lrs-sales@wolterskluwer.com) or call +31 (0)172 64 1562.