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# ARBITRATION IN CHINA AND SINGAPORE

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Is *ad hoc* arbitration permissible in the People's Republic of China? Can foreign arbitration institutions administer arbitration cases seated in China? How difficult is it to navigate through the concept of foreign-related elements? What will be the problems at the enforcement stage in respect of awards rendered outside China? What is the Singapore approach? As the Belt and Road Initiative progresses, these questions will become even more acute and this article seeks to address the issues.

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1 Ten years ago,[1] this author wrote that Arts 10, 16 and 18 of the Arbitration Law of the People's Republic of China[2] ("PRC Arbitration Law"), when read together, do not recognise *ad hoc* arbitration in China.[3]

2 In essence, arbitration commissions are to be established in accordance with the requirements in Art 10 of the PRC Arbitration Law and registered in China. Article 16 requires an arbitration agreement to state, *inter alia*, a designated arbitration commission. Under Art 18, an arbitration agreement that does not mention an arbitration commission or does not clearly

1 Hee Theng Fong, "Arbitration in China" *Singapore Law Gazette* (October 2010) at pp 14–21.

2 Promulgated on 31 August 1994. Effective as of 1 September 1995 and amended on 1 September 2017.

3 In this article, the words "China" and "PRC" are used interchangeably.

provide for it is invalid. *Ad hoc* arbitration is thus not recognised in China.

3 Ten years on, the position remains very much the same in China as the same articles in the PRC Arbitration Law have remained unchanged. The Supreme People's Court ("SPC") of the PRC addressed this issue, to a limited extent, by issuing an Opinion on 30 December 2016 concerning free trade zones. Article 9 of the "Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones"[4] provides, *inter alia*, that, companies registered within a free trade zone can among themselves agree to have disputes resolved by arbitration at a specified place in mainland China, in accordance with specified arbitration rules with specified arbitrators; such an arbitration agreement will be considered as valid.

4 It appears that *ad hoc* arbitration is now permissible for companies registered within the free trade zones in China. However, the full effect of it is yet to be tested in the PRC courts.

## I. Foreign arbitration institution – People's Republic of China-seated arbitration

5 Above all, problems arising from Arts 10, 16 and 18 of the PRC Arbitration Law have taken on a new dimension – can foreign arbitration institutions administer PRC-seated arbitration? Conversely, can arbitration institutions from China administer arbitration cases seated outside China? These problems will become even more apparent with the implementation of the Belt and Road Initiative policy initiated by China that would cover cross-border transactions in as many as 65 countries.

6 As the issue, namely whether foreign arbitral institutions can administer PRC-seated arbitration, may become the subject

4 Fafa [2016] No 34 (updated 9 January 2017) *China International Commercial Court* <http://cicc.court.gov.cn/html/1/219/199/201/807.html> (accessed 5 November 2019).

matter before the PRC courts in due course, this article does not seek to express any conclusive view on the issue. Instead, it merely seeks to extract the reasoning from the PRC courts on the issue. Where appropriate, this article will identify the area of debate and provide its comments. To understand the issue, it is useful to set out the relevant articles in the PRC Arbitration Law:[5]

> Article 10 Arbitration 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 with subordinate 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.
>
> Article 16 An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise.
>
> An arbitration agreement shall contain the following particulars:
>
> > (1) an expression of intention to apply for arbitration;

5 For the English version of the Arbitration Law of the People's Republic of China (promulgated on 31 August 1994; effective as of 1 September 1995 and amended on 1 September 2017), see ICCA-Tsinghua University Working Group on Chinese Arbitration Practice, *Compendium of Chinese Commercial Arbitration Laws* (ICCA Reports No 5) (International Council for Commercial Arbitration, 2019) <https://www.arbitration-icca.org/media/13/57240743298210/compendium_of_chinese_commercial_arbitration_laws_13_may_final.pdf> (accessed 5 November 2019) ("*Compendium of Chinese Commercial Arbitration Laws*").

(2) matters for arbitration; and

(3) a designated arbitration commission.

7 What exactly is meant by the phrase "a designated arbitration commission" under Art 16? Must it be an arbitration commission registered under Art 10 of the PRC Arbitration Law? If so, does it mean that a foreign arbitration commission is not recognised? The inherent difficulty in the above articles is illustrated in the *Reply of the Supreme People's Court regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co, Ltd and BP Agnati SRL*[6] ("*Longlide*").

8 In *Longlide*, the arbitration clause provides that:

> Any dispute arising out of or in connection with this Agreement shall be submitted to ICCICA, with one or several arbitrators appointed according to the ICC Arbitration Rules, for arbitration pursuant to the ICC Arbitration Rules. The place of jurisdiction shall be Shanghai and the language shall be English.

9 The Intermediate People's Court of Hefei held that the arbitration agreement was invalid under Art 10 of the PRC Arbitration Law as the International Chamber of Commerce ("ICC") was not a registered arbitration institution in China. The Intermediate People's Court of Hefei's opinion relied on Art 16 of the Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China[7] which provides that:

> The examination of the effectiveness of an agreement for arbitration which involves foreign interests shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place

6 [2013] Min Si Ta Zi No 13 (25 March 2013). See also *Guide on Adjudication of Cases involving Commercial and Maritime Affairs* vol 26 at pp 125–129.

7 Fa Shi [2006] No 7 (adopted 26 December 2005) *Beijing Arbitration Commission* <http://www.bjac.org.cn/english/page/ckzl/htf3.html> (accessed 18 November 2019).

> of arbitration shall apply; if they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply.

10 As the parties did not agree on the applicable laws governing the validity of the arbitration agreement, the Intermediate People's Court of Hefei held that PRC law, being the law of the place of the arbitration, shall be the applicable law. It held that:

> The Chinese arbitration law does not expressly provide whether foreign arbitration institutions, for instance, the ICC Court of Arbitration, may conduct arbitration proceedings in China. However, since the parties chose to arbitrate in the People's Republic of China, the said arbitration shall be regarded as domestic arbitration instead of 'arbitration awards not considered as domestic awards' under the New York Convention. Article 10 of the *Arbitration Law of the People's Republic of China* provides that 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. Thus, in China, arbitration is a professional service that requires special approval from the administrative authorities. The Chinese government has not opened the domestic arbitration market. Therefore according to the law, foreign arbitration institutions may not conduct arbitration proceedings in the People's Republic of China.

11 The High People's Court of Anhui Province had a split decision. The majority held that the arbitration agreement is valid:

> Article 16 of the *Arbitration Law of the People's Republic of China* provides that 'An arbitration agreement shall contain the following particulars: (1) An expression of intention to apply for arbitration; (2) Matters for arbitration; and (3) A designated arbitration commission.' The contract of sale in question represented the true intention of the parties, and therefore it is legal and valid. The arbitration agreement in question contains an expression of intention to apply for arbitration, matters for arbitration and clearly specified the designated arbitration

> institution. Thus it is a valid arbitration clause. The grounds supporting Longlide's application to confirm the invalidity of the said arbitration clause are therefore not established. The court of first instance's confirmation of the invalidity of the arbitration clause in question based on the reasoning that foreign arbitration institutions, such as the ICC Court of Arbitration, may not conduct arbitration proceedings in the People's Republic of China lacked legal grounds.

12 The minority in the High People's Court of Anhui Province held that the arbitration agreement is invalid:

> Article 10 of the Arbitration Law of the People's Republic of China provides that 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. In China, arbitration is a professional service which requires special approval from the administrative authorities. The Chinese government has not opened the domestic arbitration market. Therefore according to the law, foreign arbitration institutions may not conduct arbitration proceedings in the People's Republic of China. In addition, the New York Convention classified arbitration into ad hoc arbitration and institutional arbitration. The Arbitration Law of the People's Republic of China establishes the system of institutional arbitration in China. Therefore the clause providing arbitration in the ICC Court of Arbitration contained in the contract of sale in question shall be deemed invalid since it was in violation of the arbitration law.

13 The SPC agreed with the majority opinion in the High People's Court of Anhui Province. The SPC's reply is reproduced below:

> This is a case of confirming the validity of a foreign-related arbitration agreement. The contract between the parties stipulated that disputes arising from the contract shall be brought to the ICC International Court of Arbitration for arbitration, and also stipulated that 'PLACE OF JURISDICTION SHALL BE SHANGHAI, CHINA.' From the context of the arbitration agreement, the expression of 'PLACE OF JURISDICTION SHALL BE SHANGHAI, CHINA' shall be understood that the seat of arbitration is in Shanghai. In this

> case, the parties failed to agree upon the law governing the confirmation of the validity of the arbitration agreement. Therefore, in accordance with Article 16 of the Interpretation of the Supreme People's Court on Several Issues concerning Application of the Arbitration Law of the People's Republic of China, the laws at the locality of the court, i.e., the laws of the People's Republic of China, shall apply to the examination on the validity of the arbitration agreement.
>
> In accordance with Article 16 of the Arbitration Law of the People's Republic of China, an arbitration agreement shall contain the following elements: (a) an expression of intention to apply for arbitration; (b) matters for arbitration; and (c) a designated arbitration commission. The arbitration agreement involved in this case, which had the intention of requesting for arbitration, stipulated subject matter of arbitration and specified the choice of arbitration body, shall be deemed valid. This Court concurs with your majority opinion that the arbitration agreement is valid.

14 The judgments from the PRC courts at three levels are reproduced *in extenso* as their reasoning will be useful for foreign lawyers who might not be familiar with PRC law. When giving its reply, the SPC was aware of the reasoning given by the Intermediate People's Court of Hefei as well as the minority view from the High People's Court of Anhui Province. In giving effect to the arbitration agreement, the SPC recognised ICC as a designated arbitration institution without explicitly saying whether ICC falls within the meaning of a designated arbitration commission in Art 16 of the PRC Arbitration Law. Crucially, the SPC did not address the issue of whether the "designated arbitration commission" in Art 16 bears the same meaning as the "arbitration commission" in Art 10, albeit both terms appear in the same section of the Act. It is also unclear as to which aspect of the minority view was rejected by the SPC.

15 The SPC approach in *Longlide* can be explicable on the basis that foreign arbitration institutions should also be deemed "arbitration commissions" under Art 16 of the PRC Arbitration Law. However, if that is so, it seems to have ignored the wording in Art 10.

16 *Longlide* was followed nine months later in the *Reply of the Supreme People's Court to the Request for Instructions on the Validity of the Arbitration Clause under the Purchase and Sale Contract between Ningbo Beilun Licheng Lubricating Oil Co Ltd and Formal Venture Corp*[8] ("*Beilun*"). The SPC in its reply said as follows:

> This provision shows that both parties agree to submit to the arbitration in accordance with the ICC Rules of Arbitration; therefore, whether or not the arbitration clause in this case has designated an arbitration institution shall be determined in accordance with the ICC Rules of Arbitration in force at the time of conclusion of the contract. Article 6(2) of the ICC Rules of Arbitration effective as of 1 January 2012 provides that 'By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court', which means the ICC International Court of Arbitration has jurisdiction over disputes arising under or in connection with any contract that only stipulates to apply its rules but does not designate another arbitration institution for arbitration. In this case, the parties agreed to apply the ICC Rules of Arbitration but did not designate another arbitration institution for arbitration, which should constitute a circumstance where 'the arbitration institution can be ascertained in accordance with the agreed rules of arbitration'.

17 Again, the SPC did not address the issue of whether the term "arbitration commission" appearing in both in Arts 10 and 16 bears the same meaning.

18 The approach adopted by the SPC in *Longlide* and *Beilun* is a departure from another line of cases. The relevant judgments are set out below for ease of reference.

19 In the SPC reply dated 8 July 2004 in the *Case between German Züblin International GmbH and Wuxi Woco General Engineering Rubber Co Ltd to Acknowledge the Validity of Arbitration Agreement*[9] ("*Züblin*"), the SPC held that:

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8 [2013] Min Si Ta Zi No 74 (5 December 2013).

9 *Reply of the Supreme People's Court to the Request for Instructions Concerning the Validity of the Arbitration Agreement in the Case between German Züblin International GmbH and Wuxi Woco General Engineering Rubber Co Ltd to* (*cont'd on the next page*)

> The parties in this case stipulated in their agreement, 'Arbitration: ICC Rules, Shanghai shall apply.' Where the parties have not stipulated the law applicable in determining the validity of the arbitration clauses, according to general choice of law principles, the law of the place of arbitration should be applied in determining the validity of the arbitration clauses. Therefore the laws of our country shall apply.
>
> According to the relevant provisions of the Arbitration Law, valid arbitration clauses should include stipulations expressing the parties' intent to arbitrate, identifying the matters subject to arbitration, and specifying the parties' choice of arbitration institution. A review of the arbitration clauses at issue here reveal that while a clear expression of the parties' intent to arbitrate is present as is the place of arbitration and the applicable arbitration rules, it is not clear which arbitration institution is to be used. As such, the arbitration clauses are invalid.

20 In the case of *Cangzhou Donghong Packaging Materials Co Ltd v DMT Company of France*[10] ("*DMT*"), the arbitration clause provides that:

> All disputes arising from the performance of this contract, both parties shall aim to resolve matters through friendly negotiation; should negotiations fail to reach a settlement, then the dispute shall be resolved by submission to arbitration. The place of arbitration is in Beijing, China, and the arbitration shall proceed according to the relevant rules of the International Chamber of Commerce ...

21 The SPC in its reply held that:

> Because the parties had not stipulated the governing law that would determine the validity of the arbitration clauses, the laws of the place of arbitration shall be applied; namely, the laws of [the] People's Republic of China. Article 18 of the Arbitration

*Acknowledge the Validity of Arbitration Agreement* [2003] Min Si Ta Zi No 23 (8 July 2004).

10 *Reply of the Supreme People's Court to the Request for Instructions on the Validity of Arbitration Clauses in the Sales Contract Dispute Case Between the Cangzhou Donghong Packaging Materials Co Ltd and DMT Company of France* [2006] Min Si Ta Zi No 6 (26 April 2006).

> Law of the People's Republic of China clearly states that: 'if the matters concerning arbitration or the arbitration committee have not yet been stipulated or have been stipulated in an ambiguous or unclear manner in the arbitration agreement, the parties can supplement the agreement; if a supplementary agreement has not yet been reached, the arbitration agreement shall be invalid'. Because the parties did not stipulate clearly the arbitration institution in their arbitration clauses and furthermore could not reach a supplementary agreement on this point, the arbitration clauses are invalid.

22 A similar approach was adopted by the SPC in its reply to the *Request for Instructions on Determining the Validity of the Arbitration Clauses in the Distributorship Agreement between Amoi Technology Co Ltd and Societe de Production Belge AG*[11] ("*Amoi*") concerning a similar clause.

23 In short, the SPC in these three cases held that an arbitration clause providing for arbitration in China in accordance with the ICC Rules of Arbitration ("ICC Rules") was invalid as it did not have a designated arbitration commission. This line of cases did not really address the issue of whether foreign arbitration institutions fall within the meaning of arbitration commission in Arts 10 and 16 of the PRC Arbitration Law. What it said was that the arbitration institution was not clearly identified and thus failed to comply with the requirement under Art 18 of the PRC Arbitration Law. It is noteworthy that in *Züblin*, *DMT* and *Amoi*, the arbitration clauses stipulated only ICC Rules but not the name of the arbitration institution. In contrast, ICC was specified in *Longlide* as the arbitration institution. In *Beilun*, the SPC referred to the amended ICC Rules which said that if the ICC Rules are agreed by the parties as the rules of arbitration, ICC will be regarded as the institution administering the arbitration. The amended ICC Rules took effect in 2012 after *Züblin*, *DMT* and *Amoi* were decided.

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11 *Reply of the Supreme People's Court to the Request for Instructions on Determining the Validity of the Arbitration Clauses in the Distributorship Agreement between Amoi Technology Co Ltd and Societe de Production Belge AG* [2009] Min Si Ta Zi No 5 (20 March 2009).

24 In that context, *Longlide* and *Beilun* can be distinguished from the other three cases on the ground that the arbitration institution was not specified in those three cases. The requirement of having a designated arbitration institution specified in an arbitration clause as prescribed in Art 16 of the PRC Arbitration Law was thus not satisfied in those three cases. However, this is not really a satisfactory distinction because the Intermediate People's Courts and the minority in the High People's Court of Anhui Province in *Longlide* decided against the validity of the arbitration agreement on a different ground, namely that ICC is not a registered arbitration commission under Art 10 of the PRC Arbitration Law. The real issue is whether foreign arbitration institutions can administer PRC-seated arbitration cases. That in turn depends on whether a foreign arbitration institution can be regarded as the "designated arbitration commission" within the meaning of Art 16 of the PRC Arbitration Law. If so, the question becomes whether the arbitration commission in Art 16 bears the same meaning of the term "arbitration commission" in Art 10 of the PRC Arbitration Law which requires an arbitration commission to be registered with the regulatory authorities in China. The fact that an arbitration clause adopting ICC Rules is deemed to have designated ICC as the arbitration institution does not mean that it is a designated institution within the meaning of Art 16 of the PRC Arbitration Law, let alone being a registered arbitration commission within the meaning of Art 10.

25 One month before *Longlide* was published, the SPC decided in the *Reply of the Supreme People's Court 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*[12] ("*Shenhua*") that the term "arbitration commission" under Art 20 of the PRC Arbitration Law does not include foreign arbitration institutions. The approach adopted by the SPC in *Longlide* and *Beilun* is different from the approach in *Shenhua*.

12 [2013] Min Si Ta Zi No 4 (4 February 2013).

26 In *Shenhua*, the arbitration agreement provided that disputes arising from the contract in question shall be resolved by arbitration in London with English law as the applicable law. Shenhua Coal Trading Co ("Shenhua Coal") challenged the jurisdiction of the London arbitral tribunal. The London arbitral tribunal ruled that it had jurisdiction. Shenhua Coal then applied to the Tianjin Maritime Court in the PRC challenging the validity of the arbitration agreement. The Tianjin Maritime Court, by a majority decision, dismissed the application on the ground that, pursuant Art 13(2) of the interpretation of the PRC Arbitration Law issued by the SPC in 2006,[13] once a decision on the validity of an arbitration agreement is decided by an arbitral tribunal, the People's Courts cannot hear an application on the same issue.[14]

27 The High People's Court of Tianjin rejected Shenhua Coal's appeal and sought direction from the SPC. In its reply, the SPC held that the Tianjin Maritime Court should have proceeded to hear the application challenging the validity of the arbitration agreement. The reason is, *inter alia*, that the term "arbitration

13 Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Fa Shi [2006] No 7 (adopted 26 December 2005) *Beijing Arbitration Commission* <http://www.bjac.org.cn/english/page/ckzl/htf3.html> (accessed 18 November 2019).

14 The provision reads:

> As required by Paragraph 2 of Article 20 of the Arbitration Law, if a party concerned fails to object to the effectiveness of the agreement for arbitration prior to the first hearing in the arbitral tribunal, and then applies to the people's court for confirming the agreement for arbitration as ineffective, the application shall not be accepted by the people's court.
>
> Where, after an arbitration institution makes a decision on the effectiveness of an agreement for arbitration, a party concerned applies to the people's court for confirming the agreement for arbitration as effective or applies for revoking the arbitration institution's decision, the application shall not be accepted by the people's court.

See Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Fa Shi [2006] No 7 (adopted 26 December 2005) *Beijing Arbitration Commission* <http://www.bjac.org.cn/english/page/ckzl/htf3.html> (accessed 18 November 2019).

commission" in Art 20 of the PRC Arbitration Law does not apply to foreign arbitration institutions, and the decision by the London arbitral tribunal is not binding on the Tianjin Maritime Court.[15]

28 The SPC reply is significant. If the arbitration commission in Art 20 does not apply to foreign arbitration institutions, it suggests strongly that the same term "arbitration commission" in Arts 10 and 16 in the same Act should likewise exclude foreign arbitration institutions. It would also suggest that foreign arbitration institutions are not allowed to administer PRC-seated arbitration. That would, on the face of it, be different from the reasoning in *Longlide*.

29 It is not easy to reconcile the different approaches in *Longlide* and *Beilun* on the one hand, and the other line of cases on the other hand including *Züblin*, *DMT*, *Amoi* and *Shenhua*. Above all, *Longlide* and *Beilun* did not really address the meaning of the term "registered commission" in Arts 10 and 16 of the PRC Arbitration Law. The SPC in *Longlide* affirmed that ICC is a designated arbitration institution within the meaning of Art 16 without expressly saying whether it also falls within the meaning of Art 10 of the PRC Arbitration Law.

30 The PRC Arbitration Law was enacted in 1994. The SPC reply in *Longlide* in 2013 has to be reconciled with Arts 10 and 16 of the PRC Arbitration Law. The SPC in *Longlide* did not say whether a designated arbitration commission in Art 16 has to be an arbitration commission within the meaning of Art 10 of the PRC Arbitration Law. The question remains as to whether foreign

15 The "arbitration commission" provided in Art 20 of the Arbitration Law refers to arbitration commissions established pursuant to Arts 10 and 66 of the Arbitration Law, instead of foreign arbitration institutions. Therefore Art 13 of the Interpretation of the Arbitration Law is not applicable in situations where the foreign arbitration institutions' determination of the validity of the arbitration agreements is in question: *Reply of the Supreme People's Court 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 (4 February 2013).

arbitration institutions are arbitration commissions "registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government". As it stands, arbitration agreements with foreign arbitration institutions administering PRC-seated arbitration cases are still exposed to the risks of being considered as invalid in China.

31 It is noteworthy that on 27 July 2019 the State Council of China issued a notice on the Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone[16] ("Lingang Notice"). Article 4 therein provides as follows:

> ... Well-known overseas arbitral and dispute resolution institutions shall be allowed to establish business divisions in the New Area, as registered with the justice department of the Shanghai Municipal People's Government and filed with the justice department of the State Council, to conduct arbitral business with respect to civil and commercial disputes arising in international commerce, maritime, investment, and other fields, so as to legally support and guarantee Chinese and foreign parties' application for and enforcement of temporary measures such as property preservation, evidence preservation and conduct preservation before and during arbitration.

32 It appears that the Lingang Notice allows foreign arbitration institutions to apply for registration with the justice department in Shanghai and conduct arbitral business in China. If effectively implemented, it may successfully address the inherent difficulty of whether foreign arbitration institutions can administer PRC-seated arbitration in PRC.

33 In 2018, an amendment to the PRC Arbitration Law was formally listed in the legislative plan of the Standing Committee

16 "Notice by the State Council of Issuing the Framework Plan for the New Lingang Area of China (Shanghai) Pilot Free Trade Zone" (27 July 2019) <http://en.pkulaw.cn/display.aspx?cgid=c3e12896cc1d238bbdfb&lib=law> (accessed 2 December 2019).

of the National People's Congress.[17] The proposed amendments may address issues like whether the PRC should incorporate the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985[18] ("Model Law"), and if so, to what extent, and whether foreign arbitration institutions can administer PRC-seated arbitration.

## II. Foreign-related elements

34 Apart from the issue of whether a foreign arbitration institution falls within the meaning of Arts 10 and 16 of the PRC Arbitration Law, a related question is whether a dispute has any foreign-related element.

### *A. Can People's Republic of China-seated arbitration cases without foreign-related elements be administered by foreign arbitration institutions?*

35 The significance of this concept, foreign-related elements (涉外因素), lies in the argument that, in China, only disputes or contracts with foreign-related elements can be administered by foreign arbitration institutions. In other words, even assuming that foreign arbitration institutions can administer PRC-seated arbitration, they may still be prohibited from doing so if the dispute or contract does not have foreign-related elements.

36 We need to examine the relevant articles:

(a) Article 128 of the Contract Law of the People's Republic of China[19] ("PRC Contract Law") provides that:

17 "13th NPC Standing Committee Legislative Plan" <https://zh.wikisource.org/wiki/User:NPCObserver/13thNPCSCLegislativePlan> (accessed 2 December 2019).

18 UN Doc A/40/17 Annex I (21 June 1985), amended in 2006 ("Model Law") <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (accessed 2 December 2019).

19 Issued 15 March 1999; effective 1 October 1999. See the *Compendium of Chinese Commercial Arbitration Laws*.

> "Parties to a *foreign-related contract* may, in accordance with an arbitration agreement, apply to a Chinese arbitration institution or *another arbitral institution* for arbitration." [emphasis added]
>
> (b) Article 271 of the Civil Procedural Law of the People's Republic of China[20] ("PRC Civil Procedure Law") provides that: "Where, for disputes arising from *foreign-related economic and trade activities or foreign-related transportation or maritime activities*, the parties have included an arbitration clause in the contract or have reached a written arbitration agreement after a dispute arose to refer such disputes for arbitration to an international arbitral institution of the People's Republic of China or any other arbitral institution, the parties shall not file a lawsuit in a people's court." [emphasis added]

37 Article 128 of the PRC Contract Law places emphasis on whether the *contract* in question has foreign-related elements, whereas Art 217 of the PRC Civil Procedure Law focuses on the *dispute* in question. Put simply, foreign-related elements will have to be present in either the contract or the dispute in question before the matter can be submitted to foreign arbitration institutions for arbitration.

38 It is implied from the above that only parties to a foreign-related contract or a foreign-related dispute are allowed to submit their disputes to foreign arbitration institutions for arbitration. Conversely, parties to a contract or commercial transaction that is *not* foreign-related are not allowed to submit their arbitration to a foreign arbitration institution. In effect, it means purely domestic disputes in China cannot be administered by foreign arbitration institutions. By extension, purely domestic disputes in China cannot have their seats of arbitration outside China. For completeness, it must be pointed out immediately that Art 128 of the PRC Contract Law and Art 217

20 Issued 9 April 1991; effective 9 April 1991. See the *Compendium of Chinese Commercial Arbitration Laws*.

of the PRC Civil Procedure Law cannot be taken to mean that foreign arbitration institutions can administer PRC-seated arbitration. What they can safely mean is that cases with foreign-related elements can be administered outside China by foreign arbitration institutions. However, even with the presence of foreign-related elements, whether PRC-seated cases can be administered by foreign arbitration institutions is still the subject of debate as mentioned in the preceding section.

39 In the *Reply of the Supreme People's Court to the Request for Instructions on the Application Submitted by Beijing Chaolai Xinsheng Sport Leisure Co Ltd for Recognizing No 12113-0011 and No 12112-0012 Arbitral Awards Rendered by the Korean Commercial Arbitration Board*[21] ("*Chaolai*"), the SPC, after referring to the arbitral award that was rendered within the territory of the Republic of Korea by the Korean Commercial Arbitration Board, ruled that:

> Pursuant to the provisions under Article 271 of the Civil Procedure Law of the People's Republic of China and the second paragraph of Article 128 of the Contract Law of the People's Republic of China, the PRC laws do not allow parties to submit disputes without any foreign-related elements to any *foreign arbitration institutions or* ad hoc *arbitration outside the PRC*. Therefore, the clause providing that the parties to this case agree to submit the disputes to the Korean Commercial Arbitration Board is an invalid agreement. [emphasis added]

40 In the *Reply of the SPC on an Application to Confirm the Validity of an Arbitration Clause between Jiangsu CASC Energine Wind Turbine Manufacture Co Ltd and LM Wind Power Blades (Tianjin) Co Ltd*[22] ("*CASC*"), the SPC in a reply to the Jiangsu High People's Court held that: "Because arbitral jurisdiction is a power granted by law, and PRC law does not permit the parties to submit disputes without any foreign-related elements to any foreign arbitration institutions or ad hoc arbitration outside the

21 [2013] Min Si Ta Zi No 64 (18 December 2013).

22 [2012] Min Si Ta Zi No 2 (31 August 2012).

PRC, the agreement between the parties to the case to submit the relevant disputes to ICC arbitration has no legal ground."

41 In *Siemens International Trading (Shanghai) Co Ltd v Shanghai Golden Landmark Co Ltd*[23] ("*Siemens*"), the Shanghai First Intermediate People's Court stated:

> The determinative key factor having impact on the validity of this clause is whether the concerned contractual relationship contains foreign-related elements. If the dispute in this case is foreign-related contractual dispute, then the parties' agreement agreeing to submit the contractual dispute to a foreign arbitration institution shall be valid; if not, then the arbitration clause shall be deemed void.

42 In *Suzhou Xingye Environmental Protection Equipment Co Ltd and Suzhou Industrial Park Xingye Environmental Protection Equipment Co Ltd v Hottinger Baldwin (Suzhou) Electronic Measurement Technology Co Ltd*[24] ("*Xingye*"), it was held that "because arbitral jurisdiction is a power granted by law, and PRC law does not permit the parties to submit disputes without any foreign-related elements to any foreign arbitration institutions, the agreement between the parties to the case to submit the relevant disputes to ICC arbitration has no legal ground. Accordingly the arbitration agreement in this case is void".

### *B. What constitutes foreign-related elements?*

43 These PRC cases have taken the position that a dispute or a contract without foreign-related elements cannot be administered by foreign arbitration institutions. That much is clear. However, what would constitute foreign-related elements is less clear. To illustrate the point, it is useful to reproduce the material paragraph in *Siemens*:[25]

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23 [2013] Hu Yi Zhong Min Ren (Wai Zhong) Zi No 2 (27 November 2015).

24 [2013] Hu Min Xia Chu Zi No 0004 (10 March 2014).

25 *Siemens International Trade (Shanghai) Co Ltd v Shanghai Golden Landmark Co Ltd* [2013] Hu Yi Zhong Min Ren (Wai Zhong) Zi No 2 (27 November 2015) *China International Commercial Court* <http://cicc.court.gov.cn/html/1/219/199/204/766.html> (accessed 31 October 2019).

In this case, Siemens and Golden Landmark are corporate legal persons registered in China; the place of delivery, the subject matter of the contract (the equipment) are in China. It seems that the contract does not contain a typical foreign element. However, considering the parties to the contract and the characteristics of the contractual performance as a whole, this contract is obviously different from ordinary domestic contracts and can be deemed as involving a foreign-related civil legal relationship. The main reasons are as follows: firstly, the parties to the contract were foreign-related to some degree. Although they were Chinese legal persons according to Chinese law, their *registration places were in the Shanghai Pilot Free Trade Zone. The sources of capital, the allocation of the final income, the governance of the companies were closely related to overseas investors*. Compared with ordinary domestic enterprises, these two companies as parties to the contract, had quite obvious foreign-related elements. Secondly, the performance of the contract has foreign-related characteristics. Though the subject matter (the equipment) was delivered at the construction site in China, the transportation process of the subject matter has the characteristics of an international sale of goods: the equipment was transported from overseas to the Pilot Free Trade Zone (originally Shanghai Waigaoqiao Bonded Zone) for bonded supervision, the customs clearance procedures were timely completed for the purpose of contract performance, and the equipment was transported from the Zone to outside of the Zone. Then the importation procedures were finally completed. Therefore, the performance of the contract was different from that of an ordinary domestic sales contract, since the performance of the contract involved the special customs supervisory regulations in the Pilot Free Trade Zone. In conclusion, this Court holds that, the contractual relationship in this case is among the 'other circumstances under which the civil relationship may be determined as foreign-related civil relationship' stipulated in Article 1(5) Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of Choice of Law for Foreign-Related Civil Relationships (I). Thus, the disputed contract contains a foreign-related element and the agreement to submit the dispute to a foreign arbitration commission was valid. [emphasis added]

44 Article 128 of the PRC Contract Law and Art 271 of the PRC Civil Procedure Law, however, do not really explain what constitute foreign-related elements. The answer is to be found in the following documents:

(a) Opinions of the Supreme People's Court on Certain Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial):[26]

> Article 178 Where one or both parties to a civil relationship are foreigners, stateless persons, or foreign legal persons, or the subject matter of the civil relationship is located abroad, or the legal facts that create, change, or destroy a relationship of civil rights or obligations occur abroad, these civil relationships are all foreign-related civil relationships.
>
> When handling cases involving foreign-related civil relationships, the People's Court must determine the applicable substantive law in accordance with the provisions of Chapter VIII of the General Principles of Civil Law.

(b) Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" (I):[27]

> Article 1 Where a civil relationship falls under any of the following circumstances, the people's court may determine it as foreign-related civil relationship:
>
> 1. whether either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons;

26 Effective from 1 January 1987. See the *Compendium of Chinese Commercial Arbitration Laws*.

27 Fa Shi [2012] No 24 (28 December 2012; effective 7 January 2013) *China International Commercial Court* <http://cicc.court.gov.cn/html/1/219/199/201/679.html> (accessed 2 December 2019).

> 2. where the habitual residence of either party or both parties is located outside the territory of the People's Republic of China;
>
> 3. where the subject matter is outside the territory of the People's Republic of China;
>
> 4. where the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of the People's Republic of China; or
>
> 5. *other circumstances under which the civil relationship may be determined as foreign-related civil relationship.*
>
> [emphasis added]

45 It can be observed from the above judicial interpretation and opinion that the Shanghai First Intermediate People's Court in *Siemens*, in setting out various foreign-related elements, in effect relied on "other circumstances under which the civil relationship may be determined as foreign-related civil relationship" in Art 1(5) of the Interpretation of the SPC on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" (I). Indeed, the SPC in its reply at the enforcement stage confirmed that the facts in *Siemens* fall within the said Art 1(5).[28]

### *C. Can a purely domestic dispute be seated outside China?*

46 It is also noteworthy that in *Siemens*, the seat of arbitration was Singapore. However, at the enforcement stage, the PRC courts at all the three levels from the intermediate court to the SPC focused on whether the case had any foreign-related element, rather than whether a dispute without foreign-related elements could be seated outside China.

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28 *Reply of the Supreme People's Court to the Request for Instructions on the Application of Siemens International Trading (Shanghai) Co Ltd for Recognition and Enforcement of a Foreign Arbitral Award* [2015] Min Si Ta Zi No 5.

47 In *Chaolai*, the seat of arbitration was in Korea. The SPC held that the arbitration clause providing for the parties' agreement to submit disputes to arbitration administered by the Korean Commercial Arbitration Board is invalid because PRC law does not allow parties to submit the disputes without foreign-related elements to *foreign arbitration institutions or* ad hoc *arbitration outside the PRC.*

48 It appears from *Siemens* and *Chaolai* that parties to a purely domestic arbitration (without foreign-related elements) cannot have the seat of arbitration outside China. The SPC in its reply to practical questions stated under question 83 that an arbitration agreement submitting a purely domestic dispute to a foreign arbitration institution for arbitration outside China is invalid.[29]

49 It must be pointed out that there is another view – "China's current regulatory framework does not explicitly prohibit dispute without foreign-related elements from arbitrating outside Mainland China. However, past judicial interpretations and policies tend to negate the validity of such arbitration agreements."[30] In short, despite the fact that the PRC courts have adopted the view that purely domestic disputes cannot be seated outside China, the fact remains that neither Art 128 of the PRC Contract Law nor Art 271 of the PRC Civil Procedure Law expressly prohibits domestic disputes from being seated outside China. Given that PRC courts do not have the doctrine of precedent, it remains to be seen how PRC law will develop from here.

50 Singapore, like many countries that follow the Model Law, does not have the concept of foreign-related elements. Article 1(3) of the Model Law adopts the concept of international arbitration which includes cases where parties to an arbitration

29 The Chinese version is available at <http://www.shiac.org/SHIAC/laws_detail.aspx?p=0&id=148> (accessed 1 November 2019).

30 Gu Weixia, "Issues of Extraterritorial Arbitration in Non-Foreign-Related Disputes" (2018) 30(3) *Peking University Law Journal* 651 at 670.

agreement have different places of business. This concept of international arbitration is expanded in s 5(2)(*a*) of the Singapore International Arbitration Act[31] ("IAA"); it includes cases where one of the parties to the contract has its place of business outside Singapore. Above all, s 5(2)(*b*)(i) of the IAA states that an arbitration is international if the *seat/place of arbitration, pursuant to the parties' agreement*, is outside the state in which the parties have their places of business. Under the dual-track system in Singapore, parties can choose to have the disputes governed by either the Arbitration Act[32] ("AA") or the IAA.[33] Under s 2 of the IAA and AA, an arbitral tribunal is defined to mean a sole arbitrator or a panel of arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties.

51 Consequently and conceptually, parties to a purely domestic dispute in Singapore can therefore choose the seat of arbitration outside Singapore, and have the arbitration administered by a foreign arbitration institution.

52 In summary, the concept of foreign-related elements in China is similar, but not identical, to the concept of international

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31 Cap 143A, 2002 Rev Ed.

32 Cap 10, 2002 Rev Ed.

33 Section 5(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") reads: "This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration."

Section 15(1) of the IAA states:

> If the parties to an arbitration agreement (whether made before or after 1st November 2001*) have expressly agreed either —
>
> ** Date of commencement of the International Arbitration (Amendment) Act 2001 (Act 38/2001).*
>
> (*a*) that the Model Law or this Part shall not apply to the arbitration; or
>
> (*b*) that the Arbitration Act (Cap. 10) or the repealed Arbitration Act (Cap. 10, 1985 Ed.) shall apply to the arbitration,
>
> then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

arbitration in the Model Law or Singapore law. More importantly, even assuming that foreign arbitration institutions can administer PRC-seated arbitration cases in China, the cases must have foreign-related elements. While domestic cases in Singapore can be seated outside Singapore and administered by foreign arbitration institutions, it is arguable whether purely domestic cases in China without foreign-related elements can be seated outside China.

## III. Enforcement

53 For ease of reference, a comparative table is produced below.

| | **Singapore** | **China** |
|---|---|---|
| | **Domestic Arbitration Awards** | **Domestic Arbitration Awards** |
| Enforcement: | s 46 of the AA | Art 62 of the PRC Arbitration Law |
| Setting aside: | s 48 of the AA | Art 58 of the PRC Arbitration Law |
| Appeal: | s 49 of the AA (question of law) | Art 9 of the PRC Arbitration Law |
| Refusal of enforcement: | AA is silent on this point though it can be argued that it should not be wider than the grounds in s 48 of the AA. | Art 237 of the PRC Civil Procedure Law |
| | **Domestic International Awards** | **Arbitration Awards with Foreign-related Elements** |
| Enforcement: | s 19 of the IAA | Art 62 of the PRC Arbitration Law |
| Setting aside: | s 19B(2) of the IAA; s 24 of the IAA; and Art 34(2) of the Model Law | Art 70 of the PRC Arbitration Law; Art 274 of the PRC Civil Procedure Law |
| Appeal: | Not appealable | Not appealable |

| | | |
|---|---|---|
| Refusal of enforcement: | Art 36 of the Model Law | Art 71 of the PRC Arbitration Law;<br>Art 274 of the PRC Civil Procedure Law |
| | **Foreign Arbitration Awards** | **Foreign Arbitration Awards** |
| Enforcement: | s 29 of the IAA | Art 62 of the PRC Arbitration Law;<br>Art 283 of the PRC Civil Procedure Law |
| Refusal of enforcement: | s 31 of the IAA;<br>New York Convention[34] | Art 283 of the PRC Civil Procedure Law |

54 Though not specifically expressed as such, Art 237 of the PRC Civil Procedure Law is understood to include both procedural and substantive issues, whereas Art 274 of the PRC Civil Procedure Law is confined to only procedural issues.[35] To a large extent, the grounds set out in Art 237 of the PRC Civil Procedure Law are similar to those in s 48 of the AA. However, in Singapore, it is clearly provided in s 49 of the AA that a party in a domestic arbitration may, either by the agreement of the parties or by leave of court, appeal against the award on a *question of law*, arising out of an award made in the proceeding.

55 Senior Judge Gao Xiao Li from the SPC said in an article[36] that since an arbitral award issued by a foreign arbitration institution in China is not considered as a foreign award, the New York Convention, including Art V therein, does not apply. Effectively, it means even if PRC-seated arbitration cases can be administered by foreign arbitration institutions, the applicable

34 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (330 UNTS 3) (10 June 1958; entry into force 7 June 1959) ("New York Convention").

35 王生长, "《仲裁裁决执行规定》的新意与隐忧" *Huizhong Law Firm* (2 March 2018).

36 Gao Xiao Li, "Positive practice of Chinese courts in recognizing and enforcing foreign arbitral awards" *China International Commercial Court* (28 March 2018) <http://cicc.court.gov.cn/html/1/219/199/203/805.html> (accessed 4 November 2019).

article governing an arbitral award is Art 274 of the PRC Civil Procedure Law. In the same article, Senior Judge Gao clarified that the words "[a]wards of a foreign arbitration institution" (国外仲裁机构的裁决) in Art 283 of the PRC Civil Procedure Law mean a foreign arbitral award made by a foreign arbitration institution *outside* China,[37] rather than an award made by a foreign arbitration institution *in* China. To put it briefly, the enforcement of foreign arbitral awards is governed by Art 283 of the PRC Civil Procedure Law instead of Art 274. However, it is observed that the grounds for the resistance of enforcement under Art 274 of the PRC Civil Procedure Law are similar to those in Art V of the New York Convention. For completeness, it is useful to bear in mind that the SPC in *Longlide* was only concerned with the validity of the arbitration agreement at the jurisdiction stage. When it comes to the stage of enforcement, the immediate issue is whether Art 274 of the PRC Civil Procedure Law would apply and, if it does, whether the enforcement can be allowed.

56 Under the IAA,[38] the only recourse against a domestic international award is to set aside the award on grounds set forth

37 Gao Xiao Li, "Positive practice of Chinese courts in recognizing and enforcing foreign arbitral awards" *China International Commercial Court* (28 March 2018) <http://cicc.court.gov.cn/html/1/219/199/203/805.html> (accessed 4 November 2019). Senior Judge Gao Xiao Li had instructively explained that "'the award of a foreign arbitration institution' stated in Article 283 of the Civil Procedure Law shall be understood as an arbitration award made by a foreign arbitration institution in a foreign country". Senior Judge Gao added: "Article 283 of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the 'Civil Procedure Law') provides the basic legal basis for how foreign arbitral awards are recognized and implemented in China. Awards of a foreign arbitration institution that need recognition and enforcement by a people's court of the People's Republic of China, shall be applied in the intermediate people's court of the domicile of the person or the location of property subject to enforcement, the people's court shall handle in accordance with the international treaties concluded or acceded to by the People's Republic of China, or in accordance with the principle of reciprocity."

38 Section 19B(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) reads: "Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with

(*cont'd on the next page*)

in Art 34 of the Model Law. In addition, s 24 of the IAA provides further grounds – the making of the award was affected by fraud or corruption, or there was a breach of the rules of natural justice. The grounds for setting aside under Art 34 of the Model Law and resisting an arbitral award under Art 36 of the Model Law are similar. They are also similar to those set out in Art V of the New York Convention which in so far as they are material to this article are set out below for convenience:

> *Article V*
>
> 1. Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or *the said agreement is not valid under the law to which the parties have subjected it* or, failing any indication thereon, under the law of the country where the award was made; or
>
> ...
>
> [emphasis added]

57 It is useful to note that when PRC courts consider applications to enforce and recognise foreign arbitral awards, meaning awards made outside China, Art V of the New York Convention will be applicable.[39]

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section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award." Article 34(4) of the Model Law reads: "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

39 Gao Xiao Li, "Positive practice of Chinese courts in recognizing and enforcing foreign arbitral awards" *China International Commercial Court* (28 March 2018) <http://cicc.court.gov.cn/html/1/219/199/203/805.html> (accessed 4 November 2019). Article 283 of the People's Republic of China Civil Procedure Law (issued 9 April 1991; effective 9 April 1991. See the (*cont'd on the next page*)

58 A related question is whether the enforcing court has a residual discretion. It arises from the phrase "may be refused" in the New York Convention. The UK Supreme Court has in *Dallah Real Estate & Tourism Holding Co v Pakistan*[40] taken the position that it has. In Singapore, the court of appeal in *PT First Media TBK v Astro Nusantara International BV*[41] is instructive. It held, *inter alia*, that (a) parties are entitled to challenge the jurisdiction at the preliminary stage of the arbitration proceeding and challenge it again at the enforcement stage;[42] and (b) the issue of whether an arbitration agreement existed was capable of being subsumed under Art 36(1)(*a*)(i) of the Model Law or Art V(1)(*a*) of the New York Convention. In the course of determining if the ground for refusing enforcement was established, the enforcement court was entitled to undertake a *de novo* approach, namely *a fresh examination* of the issues which were alleged to establish that ground of challenge.[43] While the SPC has not expressly stated its position as such, PRC courts in enforcing arbitration awards always undertake a *de novo* approach.[44] This is evident from the SPC's reply in *Chaolai* where the SPC undertook a fresh examination, at the enforcement stage, of whether the arbitration agreement was valid. It held that:

> Moreover, such defect [*referring to the lack of foreign-related elements*] in the arbitration agreement cannot be corrected or supplemented by the fact that the parties did not raise objections during the arbitral proceedings. The arbitral tribunal did not have jurisdiction over the dispute. Pursuant to Article V(1)(*a*) of the New York Convention, where the party against whom the award is invoked provides evidence to prove the arbitration agreement is not valid under the law to which the parties have subjected it, the recognition and enforcement of the award may be refused, thus the arbitral award involved in

*Compendium of Chinese Commercial Arbitration Laws*) requires the People's Courts to process the application according to the New York Convention.

40 [2009] EWCA Civ 755.

41 [2014] 1 SLR 372.

42 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [84].

43 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [152]–[158] and [162]–[164].

44 See paras 41 and 45 above.

> this case shall not be recognized. However, your court's [the Beijing High People's Court] ruling that the public policy reason under Article V(2)(*b*) of the New York Convention shall be applied is improper and shall be corrected.

59 It bears noting that China had in 1995 implemented a report and approval system[45] ("1995 Notice"). The intermediate court at which the enforcement is sought will have to report to and seek approval from the High People's Court if the intermediate court dismisses the enforcement application. Likewise, the High People's Court will have to seek approval from the SPC if it dismisses the enforcement application. Upon receipt of the SPC's review opinion, the Intermediate People's Court or special People's Court may render a ruling based on the review opinions of the SPC. The 1995 Notice has been supplemented by the Relevant Provisions of the Supreme People's Court on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review[46] and Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Arbitration-Related Judicial Review[47] which took effect in 2018. It is noteworthy that at the *jurisdictional phase* the approaches adopted in China and Singapore are different. In Singapore, after an arbitral tribunal has rendered a jurisdiction decision, a dissatisfied party can apply to court under s 10 of the IAA for review. However, in China, once a jurisdiction decision is made by an arbitral tribunal in China, the People's Court will not review it. This is clearly the position under Art 20 of the PRC Arbitration Law and Art 13 of the Interpretation of the Supreme

45 Notice of the Supreme People's Court on the Handling by the People's Courts of Issues Concerning Foreign-related Arbitration and Foreign Arbitration, Fafa [1995] No 18 (revised 31 December 2008) *China International Commercial Court* <http://cicc.court.gov.cn/html/1/219/199/201/701.html> (accessed 3 December 2019). See also the *Compendium of Chinese Commercial Arbitration Laws*.

46 Fa Shi [2017] No 21 (entry into force 1 January 2018) *China International Commercial Court* <http://cicc.court.gov.cn/html/1/219/199/201/785.html> (accessed 3 December 2019). See also the *Compendium of Chinese Commercial Arbitration Laws*.

47 Fa Shi [2017] No 22 (26 December 2017; effective 1 January 2018). See the *Compendium of Chinese Commercial Arbitration Laws*.

People's Court Concerning Some Issues on Application of the "Arbitration Law of the People's Republic of China".[48] For ease of reference, the said articles are produced below:

(a) PRC Arbitration Law Art 20:

> 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 arbitral tribunal's first hearing.

(b) Interpretation of the Supreme People's Court Concerning Some Issues on Application of the "Arbitration Law of the People's Republic of China" Art 13:

> As required by Paragraph 2 of Article 20 of the Arbitration Law, if a party concerned fails to object to the effectiveness of the agreement for arbitration prior to the first hearing in the arbitral tribunal, and then applies to the people's court for confirming the agreement for arbitration as ineffective, the application shall not be accepted by the people's court.
>
> Where, after an arbitration institution makes a decision on the effectiveness of an agreement for arbitration, a party concerned applies to the people's court for confirming the agreement for arbitration as effective or applies for revoking the arbitration institution's decision, the application shall not be accepted by the people's court.

48 Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Fa Shi [2006] No 7 (adopted 26 December 2005) *Beijing Arbitration Commission* <http://www.bjac.org.cn/english/page/ckzl/htf3.html> (accessed 18 November 2019).

60 However, if the arbitration is administered by foreign arbitration institutions, then the PRC courts may review the jurisdiction decision even after the foreign arbitral tribunal has rendered its decision on jurisdiction. This was the situation in *Shenhua* where the arbitral tribunal in London had rendered a jurisdiction decision. The SPC nonetheless held that PRC courts have the power to review the jurisdiction issue.

## IV. Determination of seat and its governing law

61 The questions of how a seat of arbitration is determined and how the proper law governing an arbitration agreement is determined are closely related. It is in turn related to the issue of whether a foreign arbitration institution can administer PRC-seated arbitration cases. It is interesting to see whether the courts in Singapore and China will adopt the same approach towards the questions. As these questions are related to a matter now before the Court of Appeal in Singapore,[49] the author will not comment on it at this point in time.

## V. Conclusion

62 Different jurisdictions have different approaches to issues concerning *ad hoc* arbitration, foreign arbitration institutions, *kompetenz-kompetenz* and the power of arbitral tribunals, including the power to order interim measures such as injunction in the PRC.

63 While it is unrealistic to expect complete uniformity of arbitration laws from different countries, it is hoped that, with better understanding of the arbitration jurisprudence and law in each other's jurisdictions, the laws on international arbitration from different countries will converge at the same point in promoting the internationality of arbitration.

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49 *BNA v BNB* [2019] SGHC 142. The Court of Appeal in Singapore allowed the appeal on 15 October 2019. The grounds of decision will be released in due course.