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Opening a Window for Chinese Ad Hoc Arbitration

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OPENING A WINDOW FOR CHINESE AD HOC ARBITRATION

By

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Abstract

This article presents a complete picture of the remarkable recent movement in China towards allowing an ad hoc arbitration that originates in the numerous Free Trade Zones ("FTZs"). This article analyzes the decision of the Chinese judicial system to consider the validity of an ad hoc arbitration agreements, which are currently subject to strict prohibition by the Chinese Arbitration Law. The article then analyzes the Chinese Supreme People's Court's ("SPC") recent announcement regarding open ad hoc arbitration originating in FTZs. After comparing three available ad hoc arbitration rules, the article describes the numerous factors to consider in creating a Chinese model for ad hoc arbitration rules. Taking the deficiencies of the legislative and regulatory resources into account, the article also addresses several required conditions for conducting ad hoc arbitration in mainland China. Ultimately, the article argues that China should at least prepare itself in fields of legislation, judicial supervision, available arbitration rules, and human resources to construct a workable ad hoc arbitration regime.

Key Words: Ad Hoc Arbitration, Chinese Arbitration Law, Free Trade Zone, Chinese Supreme People's Court

1 Introduction

With China increasingly becoming an important player in the international arbitration world, the unique Chinese practice of prohibiting ad hoc arbitration will eventually impede the development of arbitration and prevent China from attracting international arbitration business. Although the Chinese judicial system, led by the Chinese Supreme People's Court ("SPC"), has promoted a series of judicial reforms and legal rulings to coordinate domestic arbitration and international practice, it has not yet properly addressed the subject of ad hoc arbitration. After a series of iconic decisions, the SPC has finally found a workable approach to get around restrictions of the Arbitration Law of the People's Republic of China,("CAL").

Chinese courts have consistently made divergent and confusing judgments on the validity of ad hoc arbitration agreements for domestic, foreign-related, and international disputes. When the Chinese arbitration market started to take off, the Chinese arbitration community began to discuss whether they have reached the right moment to officially embrace ad hoc arbitration. In 2017, the SPC announced that it would experimentally permit ad hoc arbitration originating in the Free Trade Zones ("FTZs"). This article indicates that, apart from this single announcement by the SPC, the existing Chinese arbitration system is woefully underprepared for the emerging ad hoc arbitration market. Before practitioners celebrate this meaningful and long-anticipated news, this article proposes that China should make more efforts to reform its arbitration system to prepare China in providing adequate support for the potential development of the ad hoc arbitration business.

This article analyzes the decision of the Chinese judicial system to consider the validity of

ad hoc arbitration agreements, which are currently subject to strict prohibition by the Chinese Arbitration Law. After analyzing the SPC's recent announcement and comparing three available ad hoc arbitration rules, the article describes the numerous factors to consider for creating a Chinese model for ad hoc arbitration rules. Taking the deficiencies of the legislative and regulation resources into account, the article addresses several required conditions for conducting ad hoc arbitration in mainland China. Ultimately, the article argues that China should at least prepare itself in fields of legislation, judicial supervision, available arbitration rules, and human resources to construct a workable ad hoc arbitration regime.

2 Reforming Chinese Ad Hoc Arbitration

a Background

It is widely known in the international arbitration world that Article 18 of CAL implicitly prohibits ad hoc arbitration. Article 18 provides: "If . . . the arbitration commission is not agreed to 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."[1] This provision means that only arbitration agreements designating qualified arbitration institutions or commissions are valid in mainland China. Commentators have argued that the underlying purpose of this rule is to protect the development of Chinese arbitration institutions.[2] Academics have

[1] Arbitration Law of the People's Republic of China (promulgated by 8th Standing Meeting Nat'l People's Cong., Aug. 31, 1994, effective 1 Sept. 1, 1995), art 18 (China).

[2] Jingzhou Tao & Clarisse von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: the Great Wall of China for Foreign Arbitration Institutions*, 23 ARB. INT'L 309 (2007).

explained that arbitration was a completely new mechanism for the resolution of disputes when CAL was promulgated and that China does not have a tradition of arbitration or the experience to support effective ad hoc arbitral proceedings.[3] To guarantee fairness and justice in arbitration, therefore, it was more appropriate to restrain arbitral jurisdiction to competent arbitration institutions.[4]

In the beginning, only two arbitration institutions were eligible to administer foreign-related arbitration: the China International Economic and Trade Arbitration Commission ("CIETAC") and the China Maritime Arbitration Commission ("CMAC").[5] These two arbitration institutions rapidly dominated the alternative dispute resolution market in China.[6] Meanwhile, the Chinese institutional arbitration market has been rapidly expanding. In early 2017, the number of arbitration institutions has quickly grown to 255, coming close to the maximum allowed by CAL.[7] In some big cities, there are more than three local arbitration

[3] Standing Meeting National People's Congress Law Commission, Interpretation on Arbitration Law of the People's Republic of China (Beijing: Fa lv chu ban she, 1997).

[4] Id.

[5] Jian Zhou, *Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration*, 23 JOURNAL OF INTERNATIONAL ARBITRATION 145, 148 (2006).

[6] Circular of the Regarding Some Problems Which Need to Be Clarified for the Implementation of the Arbitration Law of the People's Republic of China (promulgated by General Office of the State Council, Jun. 8, 1996, effective Jun. 8, 1996) Guo ban fa [1996] No 22, which provides that "the main duties of the reorganized arbitration commissions shall be to accept domestic arbitration cases. Where the parties to a foreign-related arbitration case voluntarily select arbitration by a reorganized arbitration commission, such commission may accept the case."

[7] Arbitration Law of the People's Republic of China (promulgated by 8th Standing Meeting Nat'l People's Cong., Aug. 31, 1994, effective 1 Sept. 1, 1995), art 10 (China). "Arbitration commissions may be established in the municipalities directly under the Central Government, in the municipalities where the people's governments of provinces and autonomous regions are located or, if necessary, in other cities divided into districts. Arbitration commissions shall not be established at each level of the administrative divisions."

institutions.[8]

The Chinese institutional arbitration market is unprecedentedly prosperous and complicated due to competition and a delicate relationship among institutions.[9] In 2015, for example, arbitration institutions located in mainland China administered 136,924 arbitration cases in total, 2,085 of which were foreign-related arbitrations. The total disputed monetary amount reached 411.2 billion RMB.[10] In 2016, CIETAC administered 2,183 arbitration cases, 485 of which were foreign-related.[11] Demonstrated by these numbers, CIETAC has rapidly grown into one of the busiest arbitration institutions in the world.

The Chinese prohibition of ad hoc arbitration has eventually led to an awkward dilemma in arbitral practice. According to Article I of the New York Convention ("the Convention") on the Recognition and Enforcement of Foreign Arbitral Awards, both ad hoc and institutional arbitral awards can be recognized and enforced.[12] Therefore, if an ad hoc arbitral award is rendered correctly in a signatory of the Convention and submitted for the enforcement in mainland China, Chinese courts must recognize and enforce the award. Ironically, an ad hoc arbitral award rendered in mainland China will be set aside or refused enforcement due to an

[8] For example, there are CIETAC Shanghai Commission, Shanghai Arbitration Commission and Shanghai International Arbitration Center in Shanghai, China. Shenzhen and Guangzhou also have same situation.

[9] Chen Meng, *Is CIETAC Breaking Apart? An Analysis of the Split in the CIETAC System*, 6(1) CONTEMP. ASIA ARB. J. 107 (2013).

[10] China Academy of Arbitration Law, CHINESE ARBITRATION ANNUAL REPORT 2015, 26-30 (2016).

[11] CIETAC, *Statistics*, http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en (last visited Sep. 30, 2017).

[12] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38, art I, "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." [hereinafter New York Convention].

invalid arbitration agreement subject to CAL. Concisely, all arbitration agreements designating ad hoc arbitration that are governed by the CAL will be considered invalid and will consequently make arbitral awards unenforceable under the Convention. The situation becomes more complicated when it involves Hong Kong and Macau, which have legal systems that are comparatively independent from that of mainland China. The mutual recognition and enforcement of arbitral awards among mainland China, Hong Kong and Macau is governed by several arrangements issued by the SPC.[13] These arrangements provide grounds for refusing enforcement that are similar to those of the Convention.[14] Because both Hong Kong and Macau arbitration laws allow ad hoc arbitration, ad hoc arbitral awards rendered in Hong Kong and Macau are enforceable in mainland China, while the reverse is not the case.[15] Hong Kong and Macau, therefore, become perfect places to conduct ad hoc arbitration and avoid the negative influence of CAL.

Even though forum shopping or designating a foreign governing law to validate ad hoc arbitration agreements[16] are two possible solutions to getting around CAL,[17] Chinese courts have consistently struggled over deciding the validity of various ad hoc arbitration

[13] Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (promulgated by Sup. People's Ct., Feb. 1, 2000) Fa shi [2000] No 3; Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards, (promulgated by Sup. People's Ct., Jan. 1, 2008) Fa shi [2007] No 17.

[14] HUANG YAYING, CHINESE INTERNATIONAL PRIVATE LAW COURSE 320 (Xiamen University Press, 2017).

[15] Gu Weixia, *The Changing Landscape of Arbitration Agreements in China: Has The SPC-led Proarbitration Move Gone Far Enough?* 22 N.Y. INT'L L. REV. 1, 50 (2009); José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?* 6 CHINESE J. INTL' L. 345, 345(2007).

[16] Law on Application of Law in Foreign-related Civil Relations (promulgated by the Standing Meeting National People's Congress, 28 October 2010, effective 1 April 2011), Art 18.

[17] Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L.J. 361, 372 (2013).

agreements.[18] In many cases, the SPC has insisted that purely domestic disputants cannot select foreign arbitration laws to govern their ad hoc arbitration agreements or select Hong Kong or other foreign seats of arbitration to get around CAL.[19] Therefore, even though choice-of-law rule and forum shopping can save some ad hoc arbitration agreements, unfair treatment between purely domestic and extraterritorial ad hoc arbitral awards makes the unique Chinese practice of prohibiting ad hoc arbitration less and less reasonable.

b Relaxing restrictions on the validity of ad hoc arbitration agreements

Even though the CAL requires a valid arbitration agreement to designate a qualified arbitral institution, the Chinese judicial system has consistently utilized its powers of interpretation and discretion to save as many arbitration agreements as possible.

In October 1995, only two months after CAL took effect, the SPC, in its Reply to the Higher People's Court of Guangdong Province, stated that parties of foreign-related cases can select ad hoc arbitration held in a foreign country.[20] Despite potential conflicts with CAL and inconsistent judicial practices, the SPC was inclined to enforce arbitration agreements

[18] *See* discussion *infra* Section II.B.

[19] Zhao Xiuwen, *Arbitrating Disputes with Chinese Entities* in RENMIN UNIVERSITY CHINA LAW SUMMER TEACHING MATERIALS 114, 118-9 (2004); Jingzhou Tao, *Salient Issues in Arbitration in China*, 27 AM. U. INT'L L. REV. 807, 826 (2012).

[20] Prod. Materials Corp. of Fujian Province v. Jinge Shipping Co. Ltd., 1995 FA HAN NO. 135, Oct.20, 1995 (Sup. People's Ct. 1995). In foreign-related cases where parties have agreed in the contract in advance or reached an agreement after the dispute occurs that the dispute should be arbitrated by a foreign ad hoc arbitration institution or nonpermanent arbitration institution, the validity of such an arbitration agreement should be recognized in principle. The court shall not accept the case.

designating ad hoc arbitration to resolve foreign-related disputes outside of China.[21]

Subsequently, in a 1996 judicial ruling, the SPC instructed the High People's Court of Fujian Province to hold an ad hoc arbitration agreement valid based on the parties having selected ICC arbitration rules, which implied that they had selected the ICC as their administrating arbitral institution.[22] In 2003, the SPC issued a draft version of the Provisions on Handling Foreign-Related Arbitrations and Arbitrations Adjudicated Abroad by People's Courts ("Draft Provision"),[23] which included the following articles:

> Article 20. People's courts should hold arbitration agreements invalid in case of [the] following situations: . . . (6) agreed arbitration institution does not exist or agreed ad hoc arbitration[,] but the arbitration agreement does not provide rules for constituting arbitral tribunal, and parties could not reach supplemental agreement. . . .
>
> Article 26. Parties agreed an institutional arbitration rule to govern the arbitration rather than submit their disputes to the arbitration institution, the People's Courts should consider [that] the arbitration institution can administer the disputes. . . .
>
> Article 27. An ad hoc arbitration agreement will not be valid unless the domestic law of each party's country recognizes ad hoc arbitration and . . . all parties to the arbitration must come from contracting countries of the New York Convention.[24]

The Draft Provision reflected that, the SPC's approach regarding the validity of ad hoc

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[21] Jian Zhou, *Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration,* 23 J. INT'L ARB. 145, 166 (2006). Nove Nordisk v. Hainan Ji Zhong, 1996 FA JING HAN NO. 499, Dec. 20, 1996 (Sup. People's Ct. 1996) (holding that an arbitration agreement designating London as the place of arbitration was invalid because the parties failed to choose an arbitral institution).

[22] Weige Wood Craft Ltd. Co. v. Taiwan Fuyuan Enterprise Ltd. Co., 1996 FA FA NO. 78 (Sup. People's Ct. 1996).

[23] Supreme People's Ct., *Provisions on Handling Foreign-Related arbitrations and Arbitrations Adjudicated Abroad by People's Courts*, People's Court Daily, Dec. 31, 2003, at 1-3.

[24] *Id.*

arbitration agreements has gone through the following fundamental changes. First, ad hoc arbitration taking place outside of China is now acceptable. Second, an arbitration agreement designating existing institutional rules can be read as implicitly designating the relevant institution; it thus conforms to CAL. Third, Article 20(6) of the Draft Provision implies that ad hoc arbitration agreements that provide rules for constituting arbitral tribunals may be valid. In sum, the Draft Provision awkwardly indicates that ad hoc arbitration agreements between parties from New York Convention signatories are valid if the domestic law of all parties allows ad hoc arbitration. It was clear that the SPC attempted to take a completely different approach to CAL in the Draft Provision.

There is a controversy, however, over the question of whether the SPC has exceeded its power of judicial interpretation by issuing these provisions, which were quite possibly in contradiction with the existing CAL. The immature Draft Provision indicated the SPC's pro-arbitration but still uncertain attitude towards ad hoc arbitration taking place in mainland China. Regrettably, the SPC deleted the above provisions in the official version of the judicial interpretation regarding foreign-related arbitration, which it issued later.[25] The Draft Provision nonetheless had a profound influence on lower courts' relevant practice. For example, the Xiamen Intermediate Court, applying the Draft Provision, held valid an ad hoc arbitration agreement asking for ad hoc arbitration to take place in Beijing, China following ICC arbitration rules.

In *XiangYu Group Co. v Mechel Trading AG (MTA)*, the Chinese company XiangYu signed

[25] Gu Weixia, *supra* note 15, at 39.

a steel sales contract with MTA, a Swiss company. It included an arbitration clause providing that "disputes related to or which arise from this contract shall be arbitrated by one or more arbitrators according to ICC arbitration rules. Arbitration will take place in Beijing, China."[26] At the beginning of its verdict, the Xiamen Intermediate Court declared that the arbitral clause was an ad hoc arbitration agreement, despite the fact that the CAL did not admit ad hoc arbitration in mainland China.[27] The Court further explained, however, that according to the 2003 Draft Provision, the selection of ICC arbitration rules was enough for the constitution of arbitral tribunals, and it also implied that the ICC Arbitration Court shall administer the arbitration.[28] The Court's verdict was that the ad hoc arbitration clause was valid. This was the first valid arbitration agreement, which applied foreign institutional rules and permitted the parties to seek ad hoc arbitration in mainland China. Although no subsequent Chinese court decision has gone this far, the decision shows that the Chinese judicial system was exploring a legitimate approach to accepting ad hoc arbitration for foreign-related disputes no matter where the arbitration would take place. The SPC gradually expanded the range of valid ad hoc arbitration agreements to get around the CAL through the choice-of-law rule. In 2006, the SPC issued an official interpretation, providing:

> Article 16. 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 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

[26] Xiang Yu Grp. Co. v. Mechel Trading AG (MTA), 2004 XIA MIN REN ZI NO. 81 (Xiamen Intermediate Ct. 2004).

[27] Id.

[28] Id.

apply.[29]

Theoretically, if parties can select a foreign governing law that allows ad hoc arbitration, the ad hoc arbitration agreement is valid. At the local level, the Beijing High Court offered an opinion providing that an ad hoc arbitration agreement will be considered valid if it is valid under the law in force at the place of arbitration, the seat of a designated arbitral institution, or the law chosen by parties.[30] Despite these judicial opinions, it was still uncertain whether Chinese courts would apply a foreign governing law to validate an arbitration agreement asking for ad hoc arbitration to take place in mainland China.[31]

Things became clearer when the Law on Application of Law in Foreign-related Civil Relations (hereafter the Law on Application of Law) entered into force on April 1, 2011, providing that "[t]he parties may choose the laws applicable to arbitral agreement by agreement. If the parties do not choose, the laws at the locality of the arbitral authority or of the arbitration shall apply."[32] In 2013, in a reply to the Beijing High Court regarding a case involving an ad hoc arbitration clause designating arbitration in Hong Kong, the SPC stated that, according to Article 18 of the Law on Application of Law, the applicable law of the arbitration clause was the Hong Kong Arbitration Law, which allows ad hoc arbitration. The arbitration clause was therefore valid.[33]

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[29] Interpretation on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Sept. 8, 2006), art 16, 2006 (China).

[30] Opinion Concerning Issues in Adjudicating Petitions for Ruling on Validity of Arbitration Agreement or for Setting Aside Arbitration Awards (Beijing Municipal High Court, Dec. 3, 1999) [hereafter "Beijing Opinion"].

[31] Tietie Zhang, *supra* note 17, at 373-377.

[32] Law on Application of Law in Foreign-related Civil Relations, *supra* note 16, Art 18.

[33] Reply to Jurisdiction Disputes Between Haiwan Group Investment Ltd. and Taiwan Ltd. (promulgated by the

In conclusion, current legitimate ad hoc arbitration agreements for foreign-related disputes include: (1) agreements asking for ad hoc arbitration outside of China, (2) agreements asking for ad hoc arbitration to be administered by a foreign arbitration institution, and (3) agreements applying foreign governing laws that allow ad hoc arbitration. Parties can choose a foreign arbitration law expressly or implicitly by designating a foreign place of arbitration to validate an ad hoc arbitration agreement. Most foreign-related disputes that are allowed to apply foreign governing laws can therefore move to ad hoc arbitration.[34]

Subject to the CAL, ad hoc arbitration agreements for purely domestic disputes are strictly invalid. For example, in a 2004 case, an arbitration clause stated that "arbitration: ICC Rules, Shanghai shall apply." The SPC concluded that this type of arbitration agreement, without designating an arbitration institution, is invalid.[35] Interestingly, the Xiamen Intermediate Court had reached the opposite conclusion in the case, *XiangYu Group Co. v Mechel Trading AG (MTA).*[36] In a case heard by the SPC in 2015, an arbitral clause signed by two Chinese companies provided for ad hoc arbitration in Beijing, China, which applied Chinese law.[37] Citing Article 18 of the CAL, the SPC replied that the ad hoc arbitration

Sup. People's Ct., effective Nov. 28, 2013) Min si ta zi, No. 58, 2013 (China).

[34] Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (promulgated by the Sup. People's Ct., effective Jan. 7, 2013) Fa Shi No. 27, 2013 (China)(regarding definition of foreign-related disputes); Law on Application of Law in Foreign-related Civil Relations, *supra* note 16, art. 4; Contract Law of People's Republic of China (promulgated by the Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), Art 126, para. 2, 1999 (China).

[35] Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Concerning the Application of Zublin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement (promulgated by the Sup. People's Ct. 2003, effective July 8, 2004) Min si ta zi, No. 23, 2004 (China).

[36] XiangYu Group Co, v Mechel Trading AG (MTA), *supra* note 26.

[37] Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case Concerning the

clause was invalid because it did not designate a qualified arbitration institution.[38] In a similar case, a disputed arbitration agreement between a Chinese company and a Singapore company applied the "Chinese Arbitration Rules" (the term "Chinese Arbitration Rules" does not exist and is not clear enough to designate an arbitration institution) and provided for arbitration in Zhuhai, China.[39] However, Jin Wan District People's Court held that because the seat of arbitration is Zhuhai, China, the parties have implicitly selected the Zhuhai Arbitration Commission to administer their disputes.[40] Even though such reasoning is somewhat far-fetched, it shows that Chinese courts are willing to maximize their judicial discretion to validate ad hoc arbitration agreements as long as the relevant disputes involve foreign factors.[41]

On the other hand, existing judicial practice confirms that purely domestic disputes will be governed by the CAL without any submission to foreign arbitration. In *Siemens International Trade Ltd v Shanghai Gold Land Ltd*, the two parties were both foreign-invested companies registered in the Shanghai Free Trade Experimental Zone. The Shanghai

Voyage Charter Party Between Zhong Hai North Logistic Ltd. and Ben Xi Bei Ying Steel Group Import Ltd. (promulgated by Sup. People's Ct., 2015, effective Sept. 21, 2015) Min si ta zi, No. 22, 2015 (China).

[38] Id.

[39] Chang Yu Jian She Ltd. v. SEMBAWANG ENGINEERS AND CONSTRUCTORSPTE LTD, Zhu jin fa min er chu zi No. 35, Zhu hai jin wan (District People's Ct., 2013).

[40] Id.

[41] The SPC, Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (Fa shi [2012] No 24, 7 January 2013), Art 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. where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; 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."

First Intermediate People's Court held that even though this case did not involve the required foreign factors, *Siemens International* could nevertheless count as a foreign-related case because both parties are foreign-invested companies registered in the Shanghai Free Trade Experimental Zone.[42] The parties were therefore allowed to select foreign arbitration institutions to administer their arbitration. Some scholars have claimed that the Chinese judicial system is expanding the range of foreign-related disputes, especially those that involve parties that are foreign-invested companies registered in FTZs, to promote the Chinese national policy of free trade zones and the "One Belt One Road" policy.[43] It is reasonable to predict that Chinese courts will apply the same expansion when considering the validity of ad hoc arbitration agreements for resolving disputes between foreign-invested companies registered in FTZs.

c Allowing Ad Hoc arbitration in Free Trade Zones

In the last days of 2016, the Chinese judicial system's preference for enterprises registered in FTZs finally took shape in a remarkable announcement from the SPC entitled Advice on Providing Judicial Supports for Establishing Free Trade Zones (hereafter the Advice).[44] The Advice generally shows that the Chinese judicial system will support FTZs in several ways. Article 9 of the Advice stipulates,

> One or both parties are foreign-invested companies registered in Free Trade Zones.

[42] *Siemens International Trade Ltd v Shanghai Gold Land Ltd*, Shanghai First Intermediate People's Court ([2015] hu yi min si (shang) zhong zi No1555).

[43] GAO FEI & XU GUOJIAN, GUIDE FOR CHINA AD HOC ARBITRATION PRACTICE 46-8 (Fa lv Publishing, 2017).

[44] The SPC, Advice on Providing Judicial Supports for Establishing Free Trade Zones (hereafter Advice) (Law)(Fa [2016] No. 34, 30 December 2016) , available at http://www.chinacourt.org/law/detail/2016/12/id/149055.shtml (visited 30 September 2017).

> They agree to submit disputes to arbitration abroad. After disputes arise, the parties submit to the foreign arbitration and obtain an enforceable foreign arbitral award. People's courts shall not support one party's claim that such arbitration agreement is invalid…
>
> People's courts can consider agreements between companies registered in Free Trade Zones, for submitting their disputes to arbitration by specific arbitrators, for a specific arbitration, according to specific arbitration rules, to be valid. If people's courts consider such agreements invalid, they should report this decision to higher courts for review. If the higher courts agree with the lower courts' decision, they should report this decision to the SPC for review. They can only issue the verdict after the SPC confirms the decision.[45]

First, the Advice confirms that disputes involving foreign-invested companies registered in FTZs can be considered foreign-related disputes. Thus, these disputes are allowed to submit to arbitration abroad if no party challenges the arbitral jurisdiction before the arbitral awards are rendered. In particular, disputes between wholly foreign-owned enterprises registered in FTZs are allowed to submit to arbitration abroad. This implies that foreign-invested companies registered in FTZs are also allowed to select ad hoc arbitration outside of China.

The Advice then expands the application of ad hoc arbitration to all companies registered in FTZs. The Advice stipulates four controversial requirements of legitimate ad hoc arbitration.[46] The first requirement is that only disputes between companies registered in FTZs are allowed to submit to ad hoc arbitration. The second is that parties should designate specific rules to govern their ad hoc arbitration. The Advice does not clarify how specific this rule should be. For example, it is enough to provide ways of constituting arbitral tribunals, or does the Advice strictly asks parties to indicate existing ad hoc arbitration rules? If the latter

[45] Id.

[46] Advice, *supra* note 44.

is the case, it is more likely that most parties will choose to apply some widely-used international rules, like the UNCITRAL Arbitration Rules or LMAA Terms. The third requirement is that parties should designate specific arbitrators. The SPC did not explain whether it requires parties to indicate the identities of selected arbitrators, which is unreasonable in practice. Moreover, the CAL stipulates several qualifications required of professionals who can be selected as arbitrators in Chinese institutional arbitration.[47] It is uncertain whether the selected ad hoc arbitrators shall also fulfill these qualifications. Finally, the specific places referred to in the Advice are not limited to Chinese FTZs. Theoretically, ad hoc arbitration can take place in any corner of mainland China.

As the SPC has explained, so-called "specific arbitration" (ad hoc arbitration) is limited to companies registered in FTZs and can take place anywhere else in mainland China under proper judicial supervision.[48] The SPC has said that if its experiment with ad hoc arbitration originating in FTZs works smoothly, it will expand the application of ad hoc arbitration to other areas of China and promote an appropriate revision of the CAL.[49]

3 Available Ad Hoc Arbitration Rules

[47] Arbitration Law of the People's Republic of China, *supra* note 1, Art 13 "The arbitration commission shall appoint fair and honest person as its arbitrators. Arbitrators must fulfil one of the following conditions: 1. they have been engaged in arbitration work for at least eight years; 2. they have worked as a lawyer for at least eight years; 3. they have been a judge for at least eight years; 4. they are engaged in legal research or legal teaching and in senior positions; and 5. they have legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level. The arbitration commission shall establish a list of arbitrators according to different professionals."

[48] The SPC, *Interpreting and applying the Advice on Providing Judicial Supports for Establishing Free Trade Zones,* available at http://rmfyb.chinacourt.org/paper/images/2017-01/18/05/2017011805_pdf.pdf (visited 30 September 2017).

[49] The SPC, *supra* note 48.

Ad hoc arbitration has many advantages compared with institutional arbitration. Theoretically, ad hoc arbitration is more flexible, quicker, and less expensive than institutional arbitration, but much depends on the arbitrators' experience and availability to handle the matter.[50] If the parties have not agreed on the rules for constituting arbitral tribunals and conducting arbitral proceedings in advance, it is highly possible that after disputes have arisen they will find themselves trapped in disagreements about every detail of arbitral proceedings. Additionally, applicable arbitration rules directly determine the effectiveness of arbitral proceedings. Most importantly, they determine whether parties will obtain an enforceable arbitral award.

Furthermore, ad hoc arbitration is quite vulnerable to delay tactics and litigant strategies.[51] Any delay and deficiency in ad hoc arbitral proceedings greatly increases the expense of the dispute resolution. Therefore, commentators have insisted that parties should include detailed procedural rules in arbitration clauses for potential procedural obstacles.[52] However, considering the complexity of international trade and the comparatively limited time that parties spend on dispute resolution provisions, it is not likely that parties spend much time negotiating obscure ad hoc arbitration clauses. In practice, many contracts regularly include simple words, like "arbitration in London," to designate ad hoc arbitration. It is often

[50] 1 Bette J. Roth, Randall W. Wulff, & Charles A. Cooper, *Alternative Dispute Resolution Practice Guide* § 19:14 (Westlaw, 2016); Duncan Mackay & Kathleen Bryan, *'Ad Hoc Arbitration Keeps Costs Down' A Special Report,* NAT'L L. J. (2009); Samuel T. Reaves, *Self-Administered Arbitration: Something Worth Considering,* UNDER CONSTRUCTION, Mar. 2007, at 4, 5.

[51] John W. Hinchey & Troy L. Harris, *International Construction Arbitration Handbook* § 6:3 (Westlaw, 2016).

[52] Anne Véonique Schlaepfer & Angelina M. Petti, *Chapter 2: Institutional versus Ad Hoc Arbitration,* in INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 16 (Elliott Geisinger & Nathalie Voser eds., (Kluwer Law International, 2013).

recommended that parties adopt pre-established arbitration rules to govern their ad hoc arbitration.[53] Because the Advice requires parties to include specific arbitration rules in agreements, it is necessary that arbitration rules for Chinese ad hoc arbitration be available.

Many entities provide arbitration rules for ad hoc arbitration. A set of arbitration rules covers all aspects of the arbitral process, including a model arbitration clause. It sets out rules regarding the appointment of arbitrators, arbitral proceedings, the calculation of arbitration expenses, and the form, effect and interpretation of arbitral awards. Parties can simply incorporate well-established arbitration rules in agreements to guarantee the effectiveness of their ad hoc arbitration. The most widely known rule set is the UNCITRAL Arbitration Rules. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in both ad hoc and administered arbitration.[54] Except for the UNCITRAL Arbitration Rules, there are other rules often used in ad hoc arbitration. Examples include the London Maritime Arbitrators Association Terms (LMAA Terms)[55] and the Paris Home of International Arbitration Rules.[56]

Because China has no relevant tradition or previous experience, the time and legal resources needed to establish more mature procedural rules for a future ad hoc arbitration

[53] Schlaepfer & Petti, *supra* note 52.

[54] *See* UNCITRAL, *UNCITRAL Arbitration Rules*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited Sept. 30, 2017) [hereinafter UNCITRAL Arbitration Rules].).

[55] LONDON MARITIME ARBITRATORS ASSOCIATION, *LMAA Terms,* http://www.lmaa.london/terms2017.aspx (last visited Sept. 30, 2017) [hereinafter LMAA Terms 2017].).

[56] Romain Dupeyré, *The Paris Arbitration Rules: A New Kind of Ad Hoc Arbitration Rules for Sophisticated Users of International Arbitration*, 11 REVISTA BRASILEIRA DE ARBITRAGEM 84-99 (2014).

market are limited. But the Chinese arbitration community is definitely on its way. Soon after the SPC announced the Advice, the Zhuhai Arbitration Commission took the lead in publishing the Heng Qin Free Trade Experiment Zone Ad Hoc Arbitration Rules (hereafter Heng Qin Rules) in March 2017.[57] The Heng Qin Rules are based on both the Zhuhai Arbitration Commission Arbitration Rules and the UNCITRAL Arbitration Rules, with minor modifications based on features of ad hoc arbitration that originated in Heng Qin FTZ. In addition, some Chinese practitioners have endeavored to contribute their experience to drafting Chinese ad hoc arbitration model rules.[58] The entire Chinese community has consistently declared that, because China has a special background regarding ad hoc arbitration, the production of tailor-made ad hoc arbitration rules to meet the specific needs of Chinese companies is essential. The truth is that China has ambitions to achieve greater speaking rights in cross-border trade and to reconstruct international economic order.[59] The China International Economic and Trade Arbitration Commission (CIETAC), for example, recently released Arbitration Rules on International Investment Disputes.[60] Producing its own ad hoc arbitration rules is, therefore, imperative in the foreseeable future.

Arbitration rules are applied to streamline arbitral proceedings in order to prevent and overcome potential causes of delay and inefficiency. In order to establish integrated and

[57] ZHUHAI ARBITRATION COMMISSION, *Heng Qin Free Trade Experiment Zone Ad Hoc Arbitration Rules*, http://www.zhac.org.cn/zcgzall/html/?528.html (last visited Sept. 30, 2017) [hereinafter Heng Qin Rules].).

[58] *See* Fei & Guojian, *supra* note 43, at 48.

[59] Chief Justice Zhou Qiang, President, SPC. Address at the 2017 Silk Road Judicial Cooperation International Forum (Sept. 26, 2017) (explaining the SPC's plans to establish a permanent commercial court to administer cross-border disputes originating in "One Belt One Road" countries).

[60] CIETAC, *China International Economic and Trade Arbitration Commission Arbitration Rules on International Investment Disputes,* http://www.cietac.org/index.php?m=Article&a=show&id=14473&l=en (last visited Sept. 30, 2017).

mature procedural rules, China has to incorporate mechanisms to overcome the inherent deficiencies and challenges that are expected in ad hoc arbitral proceedings. To examine the essential components of well-established ad hoc arbitration rules, this research compares the following aspects of the UNCIRTAL Arbitration Rules, the London Maritime Arbitrator Association Terms 2017 (hereafter LMAA 2017), and the Heng Qin Rules: (1) the model clause; (2) the sphere of application; (3) the default appointing authorities; (4) the solution when parties fail to appoint arbitrators; (5) the qualifications of arbitrators; (6) the extra power of arbitral tribunals on optimizing efficiency of the arbitral proceeding; (7) the exclusion of liability; (8) the place of arbitration; (9) multiple parties; (10) interim measures; (11) form and enforceability of arbitral awards; (12) mediation and settlement; (13) fees. A detailed comparison is presented in the following table:

	UNICITRAL Arbitration Law (December 16, 2013)	LMAA Terms 2017 (May 1, 2017)	Heng Qin Free Trade Experiment Zone Ad Hoc Arbitration Rules (April 15, 2017)
Model Clause	Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. Note. Parties should consider adding: (a) The appointing authority shall be . . . [name of institution or person]; (b) The number of arbitrators shall be . . . [one or three]; (c) The place of arbitration shall be . . . [town and country]; (d) The language to be used in the arbitral proceedings shall be . . .	This contract is governed by English law and all disputes arising under or in connection with it shall be referred to arbitration in London. Arbitration shall be conducted in accordance with one of the following LMAA procedures applicable at the date of the commencement of the arbitral proceedings: … (iii) In any case where the LMAA procedures referred to above do not apply, the reference shall be to three arbitrators in accordance with the LMAA Terms current at the date of commencement of the arbitral proceedings.	Not provided
Sphere of application	Article 1. Parties agreed their disputes shall be referred to arbitration under the UNCITRAL Arbitration Rules, including investor-State arbitration.	Article 4-7. Parties agreed, sole arbitrator or both the original arbitrators are full Members of the Association.	Article 3. Any statements that can be reasonably concluded to mean that the parties exclusively selected this Rule.
Default appointing authority	Article 6. Parties may agree on any person or institution. Absence of agreement, any party may request the Secretary-General of the PCA to designate the appointing authority.	Not provided	Article 20. The appointing authority is the Zhuhai Arbitration Commission unless parties agree otherwise.
Solution when parties fail to	Article 7-9. The appointing authority shall appoint the second arbitrator or a sole	Article 10. The provisions of section 17 of the Act will apply unless the parties agree otherwise. “The other	Article 20. The appointing authority shall appoint arbitrators.

appoint arbitrators	arbitrator.	party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator."[61]	
Qualification of arbitrators	Not provided	Not provided	Article 20. Arbitrators should fulfill the requirements of the CAL.[62]
Extra Power of the arbitral tribunal	Not provided	Article 16. The tribunal shall have the following specific powers to be exercised in a suitable case so as to avoid unnecessary delay or expense . . .	Not provided
Exclusion of liability	Article 16. Excluding liability except for intentional wrongdoing.	Not provided	Article 59. The Zhuhai Arbitration Commission and its staff are exempted from any arbitral tribunal's liability in ad hoc arbitration.
Place of arbitration	Article 18. Parties agree or determined by the arbitral tribunal in the absence of agreement.	Article 6. The seat of the arbitration is in England unless parties agree otherwise.	Article 6. The place of arbitration is in Zhuhai unless parties agreed otherwise.
Multiple parties	Article 10. Multiple parties jointly appoint an arbitrator.	Not provided	Article 36. Other party may join the arbitration at the request of any party, by discretion of the arbitral tribunal.
Interim Measures	Article 26. The arbitral tribunal may grant interim measures.	Not provided	Article 13. The arbitral tribunal may grant interim measures.
Form and enforceability of arbitral awards	Article 34. All awards shall be made in writing and shall be final and binding on the parties. The arbitral tribunal shall give reasons unless parties agreed otherwise.	Article 22-28. The arbitral tribunal shall give reasons unless parties agreed otherwise.	Article 43. All awards shall be made in writing and shall be final and binding on the parties. The arbitral tribunal shall give reasons unless parties agreed otherwise.

[61] *Arbitration Act 1996,* § 17 (entered into effect in 1997).

[62] Arbitration Law of the People's Republic of China, *supra* note 1, at art 13.

Mediation and settlement	Article 36. At parties' request, the arbitral tribunals may record the settlement into an award.	Article 18 & 19. Parties shall inform the arbitral tribunal of the settlement.	Article 37 & 38. The arbitral tribunal should review the settlement agreement and record it in a settlement statement or award at parties' request. The arbitral tribunal may conduct the mediation at parties' request.
Fees	Article 40-41. The arbitral tribunal shall fix the costs of arbitration. The fees should be reasonable, taking into account any schedule or particular method for determining the fees for arbitrators applied by the appointing authority.	Article 13 and The First Schedule Provisions set out fees payable to the tribunal and other related matters.	Article 17 & 18. Parties should negotiate fees with arbitrators. In absence of agreement, the appointing authority or Zhuhai Arbitration Commission determine the fees.
Other rules	-	Intermediate Claims Procedure (ICP), Small Claims Procedure (SCP), Fast and Low Cost Arbitration (FALCA), and Mediation Terms.	Article 47. After review, Zhuhai Arbitration Commission can transform an ad hoc arbitral award to an institutional arbitral award at parties' request.

Ad hoc arbitration and institutional arbitration rules have much in common regarding arbitral procedures, multiple parties, interim measures, the form and enforceability of arbitral awards, and the like. The biggest difference between ad hoc and institutional arbitration is whether an arbitration institution is designated to administer the entire proceeding. Where arbitration institutions are not involved, the ad hoc arbitration rules allocate administrative responsibilities to other participants.

The first function of ad hoc arbitration rules is to direct communication between parties and arbitrators regarding the organization of the arbitral proceedings. The claimant is normally in charge of communication and notification before an arbitral tribunal is created.[63] Once the arbitral tribunal is formed, the arbitral tribunal will then direct the proceeding. The organization of the arbitral tribunal is, therefore, crucial to conduct the arbitral proceeding. The three above-mentioned sets of arbitration rules all provide multiple solutions to guarantee the formation of arbitral tribunals, especially when parties cannot reach an agreement on how to compose a tribunal, or when one party fails to appoint an arbitrator. Both the UNCITRAL Arbitration Rules and the Heng Qin Rules stipulate that, by default, appointing authorities shall appoint arbitrators, while the LMAA Terms 2017 delegate the performing party to appoint a sole arbitrator.[64] Additionally, all three sets of rules provide a default place of arbitration where parties have failed to reach an agreement.[65] Moreover, the three sets of

[63] *See* UNCITRAL Arbitration Rules, *supra* note 54, at art. 3.

[64] *Compare* UNCITRAL Arbitration Rules, *supra* note 54, at art. 7-9, *and* Heng Qin Rules, *supra* note 57, at art. 20, *with* LMAA Terms 2017, *supra* note 55, at art. 10.

[65] *See* UNCITRAL Arbitration Rules, *supra* note 54, at art. 18; *see also* LMAA Terms 2017, supra note 55, at art. 6; Heng Qin Rules, *supra* note 57, at art. 6.

rules have similar provisions for determining the allocation of fees.[66] In negotiating fees with arbitrators, parties must account for the complexity of the case and analyze any methods used by the appointing authority for determining arbitration fees.

In other respects, the three sets of rules include unique provisions. Both the Heng Qin Rules and the UNCITRAL Arbitration Rules allow arbitral tribunals to record the parties' settlement into arbitral awards, while the LMAA Terms 2017 require only that parties inform the arbitral tribunal that they have reached a settlement.[67] Furthermore, only the Heng Qin Rules allow the arbitral tribunal to conduct mediation at the parties' request.[68] In addition, the UNCITRAL Arbitration Rules exempt arbitrators from liability, apart from intentional wrongdoing.[69] Finally, the Heng Qin Rules only exempt its promulgator, the Zhuhai Arbitration Commission, and its staff, from liability,[70] while the LMAA Terms are silent on arbitrator liability.

Regarding arbitrator qualifications, parties can theoretically select anyone as their arbitrators because there is no list of arbitrators provided in ad hoc arbitration. Neither the UNCITRAL Arbitration Rules nor the LMAA Terms 2017 impose limitations on the qualifications of arbitrators, while the Heng Qin Rules stipulate that selected arbitrators

[66] UNCITRAL Arbitration Rules, *supra* note 54, Art40-1; LMAA Terms 2017, *supra* note 55, Art 13; Heng Qin Rules, *supra* note 57, art. 17-8.

[67] UNCITRAL Arbitration Rules, *supra* note 54, art. 36; LMAA Terms 2017, *supra* note 55, art. 18-9; Heng Qin Rules, *supra* note 57, art. 37-8.

[68] Heng Qin Rules, *supra* note 57, art. 37-8.

[69] UNCITRAL Arbitration Rules, *supra* note 54, art. 16.

[70] Heng Qin Rules, *supra* note 57, art. 59.

should fulfill the CAL's requirements.[71] Remarkably, the Heng Qin Rules include an interesting provision that permits the arbitral tribunal to transfer ad hoc arbitral awards into institutional awards, which are endorsed by the Zhuhai Arbitration Commission at the parties' request.[72] Permitting ad hoc awards to be transferred into institutional awards obviously aims to avoid any potential violation of the CAL and increase the enforceability of the awards.

In the end, the LMAA Terms 2017 place greater emphasis on increasing procedural efficiency. For example, the rules delegate specific powers to arbitral tribunals to avoid unnecessary delay or expense, which include the ability to limit the discovery of evidence and to punish parties who refuse to cooperate.[73] The LMAA Terms also provide useful tools for streamlining arbitral proceedings. The questionnaire and checklist provided in the end of the Terms, for example, can help arbitrators explore the most appropriate way of progressing through an arbitration. Remarkably, the LMAA establishes specific procedural rules for disputes where claimants have claimed less than US$400,000 (LMAA Intermediate Claims Procedure), less than US$100,000 (LMAA Small Claims Procedure), less than US$250,000 (Fast and Low Cost Arbitration) and Mediation Terms.[74] The LMAA Terms thus provide a wide range of procedural rules suitable for small claim disputes. Coincidently, in recent years most arbitration institutions have followed this method to provide expedited procedural rules

[71] Heng Qin Rules, *supra* note 57, art. 20.

[72] Heng Qin Rules, *supra* note 57, art. 47.

[73] LMAA Terms 2017, *supra* note 55, art. 16.

[74] LMAA, *LMAA Terms,* http://www.lmaa.london/terms2017.aspx (visited 30 September 2017).

for small claims.[75] The method is a promising direction for the international arbitration community, enabling it to develop diversified and more efficient service.

In conclusion, ad hoc arbitration rules and institutional rules provide similar provisions for conducting arbitration procedures, which offer specific instruments to promote the formation of arbitral tribunals, determine fees, and guarantee procedural efficiency. Ad hoc arbitration rules also often include provisions regarding the model clause, sphere of application, liability of arbitrators, expedited procedures for small claims, and the like. In addition, to support ad hoc arbitration taking place in mainland China, arbitration rules should mandate specific considerations regarding the qualifications of arbitrators, default places of arbitration, and default appointing authorities.

4 Constructing a Chinese ad hoc arbitration regime

The SPC's movement to test ad hoc arbitration in FTZs is the beginning of an overall reform of the Chinese arbitration regime. The international community has witnessed China rapidly develop a mature and characteristic institutional arbitration regime. Most existing laws and regulations are specifically tailored for institutional arbitration. The SPC's judicial interpretation and judges' discretion are limited. Currently, the scarcity of legal resources, available arbitration rules, judicial support and human resources is producing great uncertainty around Chinese ad hoc arbitration. The SPC's small step of confirming the validity of some ad hoc arbitration agreements is far from sufficient to enable mainland China

[75] Meng Chen, *Emerging Internal Control in Institutional Arbitration,* 18 CARDOZO JOURNAL OF CONFLICT RESOLUTION 295, 305-07 (2016).

to construct a complete ad hoc arbitration regime. Unless China revises its arbitration law and garners more judicial support, parties who select ad hoc arbitration in mainland China will remain burdened by many procedural and enforcement risks.

a Debates regarding Chinese ad hoc arbitration

The SPC's acceptance of ad hoc arbitration originating in FTZs greatly inspires the Chinese arbitration community's confidence in promoting Chinese ad hoc arbitration. Many practitioners have asserted that we have reached the moment for dramatically expanding ad hoc arbitration.[76] However, before this moment really arrives, several issues need to be properly addressed.

The first issue is whether it is *necessary* to promote or allow ad hoc arbitration in mainland China. After all, as empirical research has shown, it is possible that disputants will end up spending a great deal of time and money on inefficient ad hoc arbitral proceedings without receiving an enforceable arbitral award.[77] Many inherent deficiencies are to be expected in the application of ad hoc arbitration in mainland China, especially if the Chinese legal system is not well prepared for it.[78] To give China the determination to revise its arbitration law and tradition and to embrace ad hoc arbitration, practitioners should prove that ad hoc arbitration

[76] Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 435-377 (2006).

[77] Roger Enock & Alexandra Melia, *Chapter 6: Ad Hoc Arbitrations*, in JULIAN D. M. LEW &HARRIS BOR (EDS), ARBITRATION IN ENGLAND, WITH CHAPTERS ON SCOTLAND AND IRELAND 91 (Kluwer Law International, 2013).

[78] Liu Xiaohong & Zhou Qi, *The Pros and Cons and Timing for Introduction of Ad hoc Arbitration in the PRC*, 9 NANJING SOCIAL SCIENCE 95 (2012).

is a necessary part of a modern commercial dispute resolution regime. To some extent, the most important reason for China to promote ad hoc arbitration is not that it is cheaper or more flexible for resolving international commercial disputes. Establishing a completed ad hoc arbitration regime is necessary to coordinate Chinese arbitration with international practice, and to increase the influence of Chinese arbitral experience.[79] Incorporating ad hoc arbitration is also a significant step toward enacting the Chinese national policy of "One Belt One Road" and other investment arrangements.[80]

If ad hoc arbitration does indeed prove desirable in mainland China, the next issue is whether we should limit the application of ad hoc arbitration to foreign-related disputes or FTZ disputes. This author believes that a determination as to whether it is necessary to expand ad hoc arbitration to purely domestic disputes depends on whether the demand for domestic dispute resolution will seriously exceed the capacity of Chinese arbitration institutions. The fact that the number of Chinese arbitration institutions is rapidly approaching the maximum number allowed by the CAL suggests that a domestic Chinese arbitration market has great potential.[81] Moreover, distinguishing international, foreign-related ad hoc arbitration from purely domestic ad hoc arbitration is impractical and will, in practice, cause a great deal of confusion.[82] The SPC's Advice aims to initiate a major reform of the Chinese arbitration system, not only in ad hoc arbitration, but also in the sphere of

[79] Zhao Xiuwen & Lisa A. Kloppenberg, *supra* note 76; Gu Weixia, *supra* note 15.

[80] The SPC, *supra* note 48.

[81] *See* section 2.a.

[82] Jingzhou Tao, *supra* note 19, at 823-6; Wang Wenying, *Distinct Features of Arbitration in China,* 23 JOURNAL OF INTERNATIONAL ARBITRATION 49, 59-65(2006).

foreign-related disputes, and eventually to expand such experience to the national level.[83]

If China allows ad hoc arbitration to resolve both foreign-related and purely domestic disputes, the next challenge is whether Chinese companies and practitioners are willing to select ad hoc arbitration rather than other dispute resolution methods with which they are more familiar and for which they have trained. First of all, the Advice only delegates more discretion to courts for validating relevant ad hoc arbitration agreements. Without further judicial and legislative guidelines, practitioners remain in doubt about how far the Chinese judicial system will go toward supporting ad hoc arbitration. Potential violations of the CAL is an inevitable threat for Chinese courts that expand their discretion and also affects the extent to which Chinese companies are motivated to select ad hoc arbitration. Other psychological factors also negatively influence the accessibility of ad hoc arbitration. One practitioner pointed out that arbitrators are generally uncomfortable about negotiating fees directly with parties.[84] Considering that some well-known arbitrators are already overwhelmed with institutional appointments, it is clear that the number of arbitrators available for ad hoc arbitration is limited. Counselors may also be reluctant to suggest ad hoc arbitration to their clients unless they have plenty of relevant experience. Until China properly addresses these challenges, the Chinese ad hoc arbitration market will not take off.

b Uniform Chinese ad hoc arbitration rules

[83] The SPC, *supra* note 48.

[84] Adriana Aravena-Jokelainen & Sean P. Wright, *Chapter 16: Balancing the Triangle: How Arbitration Institutions Meet the Psychological Needs and Preferences of Users*, in TONY COLE, THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION 391-418 (Kluwer Law International, 2017).

Availability of arbitration rules is necessary for developing Chinese ad hoc arbitration. A comparison of two popular international sets of rules and the Heng Qin Rules indicates that, although the three sets of arbitration rules all aim to streamline arbitral proceedings, they each have their own features. The Heng Qin Rules have special provisions related to default appointing authority, arbitrators' qualifications, and transforming ad hoc arbitral awards to institutional awards.[85] All these features reflect a specific Chinese conception of ad hoc arbitration. China has an enormous and complicated institutional arbitration market. Most arbitration institutions located in metropolitan areas that have FTZs are interested in capturing the emerging ad hoc arbitration market. The Zhuhai Arbitration Commission, for example, established the Heng Qin Rules designating the Commission as the default appointing authority.[86] In some cities that have FTZs, there are at least three local arbitration institutions.[87] If every institution attempts to participate in the ad hoc arbitration market by providing ad hoc arbitration rules, the entire Chinese ad hoc arbitration system will be devastated by increased confusion between institutional and ad hoc arbitration. Furthermore, it is unreasonable for each FTZ to establish its own ad hoc arbitration rules. China currently has twelve FTZs and more will probably be established in the future. China needs integrated and internationalized arbitration rules that focus on streamlining and increasing the efficiency of arbitral proceedings. Therefore, China needs a more qualified entity to establish rules tailored for FTZ ad hoc arbitration. The author believes that the China Council for the

[85] See section 3.

[86] Heng Qin Rules, *supra* note 57, Art 20.

[87] Shanghai and Shenzhen, *supra* note 8.

Promotion of International Trade (CCPIT) or a national arbitrator association are the competent authorities to take on this responsibility. In addition, rules that relate to default appointing authority and places of arbitration must be modified from a national perspective. The default appointing authorities, for example, could be the local courts for the FTZs in which the parties register, while the default places of arbitration could be the cities where parties or respondents register. In 2015, for example, the SPC established a permanent circuit, named the SPC First Circuit, in Shenzhen, Guangdong. The First Circuit hears cases and appeals from Guangdong, Guangxi, and Hainan provinces. Under the auspices of the SPC, the First Circuit in Guangdong Province can take on judicial supervision responsibilities for ad hoc arbitration originating in three FTZs (Qian Hai FTZ, Nan Sha FTZ and Heng Qin FTZ).

c Confirming judicial supervision on ad hoc arbitration

The CAL's requirement that all arbitration agreements designate a qualified arbitration commission is the source of all obstacles in Chinese ad hoc arbitration. The Chinese judicial system, led by the SPC, has taken many approaches to overcome the limitations of the CAL. Currently, parties of foreign-related disputes can choose foreign governing laws or seats of arbitration outside of mainland China to avoid applying the CAL. The SPC further expands the application of ad hoc arbitration to disputes between companies registered in FTZs. Theoretically, companies registered in FTZs can stipulate that their ad hoc arbitration will take place anywhere in mainland China. The implication is that if ad hoc arbitration works well in FTZs, the SPC will subsequently expand its application to the whole of mainland

China.[88] Even though the SPC has taken the lead in reforming Chinese arbitration, its potential violation of the CAL still impedes ad hoc arbitral practice. Without further confirmation in the form of legislation, practitioners will be reluctant to have their ad hoc arbitration take place in China because it may be considered illegitimate. Until China revises the CAL the ad hoc arbitration will make up only a small proportion of the Chinese dispute resolution market.

The SPC's Advice is basically a declaration for enhancing judicial support for dispute resolutions originating in FTZs and delegating judges more discretion in deciding the validity of ad hoc arbitration agreements. More judicial supervision lies in courts' authority to set aside and enforce ad hoc arbitral awards. The good news is that Chinese courts may not set aside ad hoc arbitral awards based on ad hoc arbitration agreements being found invalid after the Advice was published. Because ad hoc arbitration that takes place on mainland China between two Chinese companies does not fall within the sphere of the New York Convention, setting aside and enforcing Chinese ad hoc arbitral awards is subject to Chinese Law. The provisions provided in CAL and Chinese Civil Procedure Law regarding the setting aside and enforcement of arbitral awards are all specifically applied to institutional arbitration.[89] The SPC could make legal interpretation to modify and expand existing national laws to ad hoc arbitral awards. It could, for example, announce that people's courts located in places of arbitration or related FTZs have the jurisdiction to set aside ad hoc arbitral awards based on

[88] The SPC, *supra* note 48.

[89] Arbitration Law of the People's Republic of China, *supra* note 1, Art 58; Civil Procedure Law of the People's Republic of China (promulgated by the National People's Congress, 9 April 1991, effective 9 April 1991), Art 237, 274 and 275 (P.R.C.).

the same statutory grounds for setting aside institutional awards. In addition, it is expected that the inconsistent Chinese laws for setting aside and enforcing purely domestic and foreign-related arbitral awards will increase the complexity of judicial supervision in FTZ ad hoc arbitration.[90] In a word, there is a long way to go for China to provide adequate legal resources for ad hoc arbitration.

d Human resources

The experience and skills of arbitrators directly determine the quality of ad hoc arbitration. Because China has never previously had an ad hoc arbitration system, Chinese arbitrators have less experience of managing cases without the assistance of arbitration institutions. There are certainly many experienced ad hoc arbitrators in the international market, but they may not be familiar with Chinese substantive law, which will very possibly become the governing law in disputes between two companies registered in FTZs. Nor does the Advice stipulate the required qualifications for persons to be selected as ad hoc arbitrators. Some have suggested that the relevant provisions in the CAL should apply.[91] Even if that were the case, however, this would still not be enough to ensure that Chinese ad hoc arbitration would be in good hands.

Currently, China has a large group of arbitrators appointed by approximately 255 arbitration institutions. The number of arbitrators who possess the experience and ability to administer ad hoc arbitral proceedings is much smaller, however. Apart from informal

[90] Wang Wenying, *supra* note 82, at 67-70.

[91] Arbitration Law of the People's Republic of China, *supra* note 1, art. 13.

institutional guidelines, moreover, China has not established any official ethical regulations for arbitrators. Notably, Article 399 of the Criminal Law of the People's Republic of China establishes criminal liability for arbitrators for intentional violations of the law.[92] Most ethical problems among arbitrators are not serious enough to trigger criminal liabilities, however.[93] Ethic rules and guidelines for the professional responsibilities of arbitrators are still a vacuum in the Chinese arbitration system. Apart from the Criminal Law, there are no official provisions to regulate the behavior of arbitrators in ad hoc arbitration. The Chinese arbitration community cannot deny that corruption and negligence are serious ongoing problems.[94] The purpose of establishing ethical rules for arbitrators is to prevent unethical behavior by arbitrators from depriving parties of fair arbitral proceedings and awards—not throwing misbehavior arbitrators into jail. The best way to prevent potential violations is, first, to clarify what kinds of behavior are prohibited or need to be disclosed at the beginning of arbitral proceedings and, second, to establish liability rules and effective remedy methods. Finally, a national code of ethics for arbitrators is also essential to the overall development of the Chinese arbitration system.

5 Conclusion

[92] Criminal Law of the People's Republic of China (promulgated by National People's Congress, 1 June 1979, effective 1 January 1980), art. 399 (P.R.C.).

[93] For example, when arbitrators have ex parte communications with one party.

[94] Carrie Menkel-Meadow, *Ethic Issues in Arbitration and Related Dispute Resolution Process: What's Happening and What's Not*, 56 UNIVERSITY OF MIAMI LAW REVIEW 949 (2002); Henry Gabriela & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards,* 5 WYO. L. REV. 453 (2005).

China has a singular tradition of institutional arbitration due to the CAL's prohibition of ad hoc arbitration. To develop and internationalize Chinese arbitration, the SPC made many pro-arbitration moves in an effort to alleviate the restrictions imposed by the CAL. Parties in foreign-related disputes are allowed to select ad hoc arbitration by choosing foreign governing law or seats of arbitration outside of China. In 2017, the SPC expanded this permission to ad hoc arbitration between companies registered in FTZs. It is also possible for the SPC to further expand the FTZ experience to the whole of mainland China. This article has shown that even though the SPC experimentally opened ad hoc arbitration for FTZ-originated cases, the current Chinese arbitration system is far from ready to conduct effective ad hoc arbitral proceedings. After examining the judicial history and official guidelines regarding FTZ ad hoc arbitration, this author asserts that the parties should, at a minimum, provide rules for constituting arbitral tribunals, organizing arbitral proceedings, and selecting specific places of arbitration in order to make ad hoc arbitration agreements valid. Providing effective arbitration rules tailored for FTZ ad hoc arbitration is essential for fulfilling these requirements. Instead of transplanting international rules or applying domestic rules promulgated by certain arbitration institutions, this article has explained that China should delegate more qualified entities to establish uniform ad hoc arbitration rules at the national level. Furthermore, China is completely lacking in the legal resources, judicial supervision, and human resources required for ad hoc arbitration. This deficiency will eventually prevent parties from being able to select such arbitration. In consequence, China should reform its arbitration regime by establishing national ad hoc arbitration rules, revising arbitration laws,

confirming judicial supervision responsibilities and training practitioners to prepare for the emergence of a full-fledged, nationwide ad hoc arbitration market.