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ARBITRATO COMMERCIALE INTERNAZIONALE IN CINA

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Introduction

Solving a dispute via arbitration can be described in three words: independence, speed and efficiency. Those features are, indeed, what this era requires in business relations: there is no time to waste litigating. And that is why parties to commercial transactions have always turned to arbitration as a dispute resolution mean, especially when multiple jurisdictions are involved. While Courts do lack the time and the expertise to deal with matters connected to multiple jurisdictions, arbitrators are often picked out among the best experts of the field, with the knowledge required to understand all issues in depth. By the same token, some countries have adopted friendly arbitration regimes to attract big companies and even smaller businesses to arbitrate within their jurisdictions. However, this is not always the case: there is a country that has first attracted big companies and businesses and then needed a solid arbitration regime to satisfy parties' needs. That country is the People's Republic of China. While the list of big companies with Chinese branches is endless and well-known, the fact that the Chinese arbitration framework is anything but clear is not. The Chinese legal framework for Arbitration is deeply rooted in its old-fashioned tradition, struggling to keep up with established international standards among the arbitration practice. With a long tradition of Mediation, the People's Republic of China has always been on the side of alternative dispute resolution means rather than in-court litigation. However, while the Mediation practice kept its efficiency, the same did not happen for arbitration. It was not until China realized the importance of arbitration on an international and commercial level that it started opening up to new practices. This could be seen by China's effort to become a State Party to some relevant conventions on arbitration – such as the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* – and becoming a member of the WTO. However, China still does not recognize ad hoc arbitration, which has been very popular within the international arbitration field. Moreover, the requirements set forth by the Arbitration Law of the People's Republic of China led to an endless amount of arbitration agreements held immediately invalid by Chinese Courts, which apply the law strictly. As of today, this arbitration framework is anything but easy to handle, leading to foreign arbitral institutions absence in the Mainland. However, there is an exception: the International Chamber of Commerce, known as the ICC, has worked itself up in China and has been recently recognized as a valid arbitral institution under the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region,* along with only a few Chinese arbitral institutions. The ICC represents indeed the leading arbitral institution worldwide, with lots of international cases administered and a strong influence over other

arbitral bodies that has no comparison. Its Arbitration Rules, along with the Terms of Reference, made its administration of arbitral proceedings run smooth and effectively. Based in Paris, this influential arbitral body has played a role in the development of the French Arbitration Law, which is now deemed as an example for many other countries, due to his openness and clarity. It could be argued that the French Arbitration Framework developed mirroring the ICC's practice or vice versa. What could be certainly said is that France could be taken as an example while amending arbitration laws – as one might have guessed, the People's Republic of China is among the countries that should look up to France, in the hope of bridging the existing gaps of its arbitration framework. Most important, the ICC's strong intent to administer arbitrations in China has at least planted the seed required to point out the gaps of the Chinese legal framework for arbitration. This seed has led to the Chinese Legislator and the Chinese Supreme People's Court taking big steps toward change, e.g. establishing the *pre-reporting system* of arbitral awards or by announcing the amendment of the PRC Arbitration Law with the *Draft.* However, while the Supreme People's Court has pointed out its stance on welcoming a more friendly arbitration environment, Chinese Courts remain skeptical. This could be easily seen by their work practice: while the international applied standard to arbitral awards is the Seat Standard, Chinese courts have been applying the Institution Standard instead, leading up to big uncertainties and "chaos".

The first chapter aims to illustrate fully all the bodies of law that make up the Regime of Arbitration in Mainland China, along with the dual-track framework established for foreign and domestic awards. Then, the focus switches to the New York Convention, as the cornerstone of International Commercial Arbitration. The second chapter aims instead to provide the reader with the required background on the ICC, along with the steps taken throughout the history of French Law to get to its establishment. The third chapter brings the first two together by analyzing the most relevant Chinese Courts' decisions that have seen the involvement of the ICC. The methods of this work have been based on the analysis – straight to the point – of all the bodies of law involved in each chapter. The fundamental aim is to first, understand the structure beneath arbitration in China. Second, the importance of institutional arbitration, given the fundamental role played out by arbitral bodies. In particular, the ICC, whose work over the decades has brought up the introduction of new innovative practices. By means of those practices, the ICC has managed to influence other arbitral institutions as well as the arbitration practice as a whole. In a nutshell, this work aims to illustrate the Regime of Arbitration of the People's Republic of China along with its upsides and downsides, while also setting forth the greatness of the ICC as an arbitral institution whose "brand" and power could play a role in changing the Chinese path of Arbitration.

The Regime of Arbitration in China

The People's Republic of China has established itself as one of the leading economies worldwide and keeps attracting businesses and investors from all over the world. The expansion and globalization of cross-border investment and trade brought along more and more disputes, and parties have been seeking out the best dispute resolution mechanism. In many cases, that has been Arbitration. Within China, Arbitration is deemed as the preferred method for the resolution of international commercial disputes, having more upsides than in-court litigation.[1] Over the last 50 years or so, the International Community pointed out the significance of Arbitration as a necessary tool in resolving complex, transnational disputes. Arbitration is, indeed, a creature of contract that allows parties to have their needs met throughout the entire arbitration proceeding: parties' control over the process, lower costs, a reasonable length, flexibility, final and enforceable awards are among the many benefits over in-court litigation.[2] According to the statistics provided by the major arbitration bodies, the average time from the proceeding outset until the final award comes out is around 7 months.[3] Given that the median time length from filing to the completion of a civil case in a U.S. District Court was around 23 months in 2011, there is enough to point out what a time saver Arbitration can be to solve cross-border, commercial disputes.[4] Most important, Arbitration permits parties to pick out adjudicators with the specific expertise to decide complex disputes that intertwine different countries, fostering the harmonization of cross-border legal or cultural differences among parties.[5] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention), to which the People's Republic of China is a party, enables enforcement of international arbitration agreements and awards across borders.[6]

For the foregoing reasons, Arbitration ended up being first choice for foreign companies that developed commercial ties with Chinese companies. This scenario in Mainland China played out as a brilliant example of the uncertainty rooted in the Chinese Legal Framework. The People' s Republic of China is "devoted" to its old-fashioned arbitration practice, despite the Supreme People's Court recent efforts to level up. One of its leading arbitration institutions, the

[1] Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 HKLJ 171 (2006).
[2] American Bar Association*, Benefits of Arbitration for Commercial Disputes*, Data on file with the ABA Section of Dispute Resolution.
[3] *Id.*
[4] Judicial Business of the U.S. Courts, U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, Table C-5, last visited June 15, 2022, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05sep11.pdf.
[5] American Bar Association, *Benefits of Arbitration for Commercial Disputes,* Data on file with the ABA Section of Dispute Resolution, last visited June 18, 2022, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/materials/aba-dr-arbitration-guide.pdf
[6] *Id.*

China International Economic and Trade Arbitration Commission (CIETAC), started out a process toward modernization by amending the CIETAC Arbitration Rules multiple times over the years, yet the Chinese Government did not get "the hint" and has failed to even out the existing differences to bridge the gap between its arbitration regime and the international standards.[7]

Historical Background

The history of arbitration in China can be divided up into two stages: the primitive stage and the modernization stage.[8] The former lasted for centuries, while the latter took place in a shorter window of time, mainly during the eras of the late Qing dynasty, the Republic of China and the People's Republic of China.[9]

During the primitive stage, parties that needed to solve a dispute would refer to a neutral third party to help them out, given the unlikely existence of a court system.[10] There was also no well-defined distinction between arbitration, mediation and conciliation, due to the lack of a strong-based legal system. To this day, the only difference set out between those three dispute resolution means is the fact that arbitral awards are enforceable by law while mediation and conciliation settlements only have contractual value.[11] As previously mentioned, the primitive stage of arbitration in the Mainland lasted over centuries, leaving Chinese arbitration untouched for over 2,000 years.[12] The main two hurdles to overcome as to develop an arbitration system were:

(1) the mindset of avoiding litigation or arbitration and thus solve every dispute via a more harmonious mean, such as mediation;

(2) An economic and commercial structure that was rather rudimentary, oppressed by national policies and mostly based on agriculture, whose underdevelopment did not carry along commercial disputes.[13]

As one might have guessed, this scenario was everything but friendly toward arbitration, also because all economic and propriety disputes were left in the hands of the State.[14]

[7] China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, last visited June 27, 2022 http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en.
[8] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

A drastic upheaval was brought along by the Qing dynasty, forced by Western powers to open up the Mainland to the outside world.[15] Among the many reforms that took place under the Qing Government, the one dedicated to the fostering of commerce was crucial.[16] By the twentieth century, the Qing Government had figured out the inadequacy of the Chinese legal system on solving commercial disputes and this scenario led up to the enactment of the Concise Chamber of Commerce Act in 1994.[17] The Concise Chamber of Commerce Act provided for the establishment of chambers of commerce all over the Mainland: each chamber had a specific department whose aim was to arbitrate disputes between merchants.[18] However, arbitration awards rendered by chambers of commerce were binding on the parties only if they both agreed on it, and parties were allowed to submit the case to courts regardless of the already conducted arbitration.[19] Furthermore, chambers of commerce mainly solved disputes via mediation, given its popularity among Chinese people and the lack of arbitration laws governing proceedings.[20] One noteworthy aspect of the Concise Chamber of Commerce Act was Article 16, which sets forth the rules on disputes involving a Chinese party and a non-Chinese party, establishing a different procedure compared to the one set out for disputes between only Chinese parties.[21] As we will see later in this chapter, this distinction survived the test of time and is still present within the Chinese Arbitration Legal Framework.

When Imperial China saw its final downfall, a new era of modernization took over the Mainland: the new Republican China took inspiration from Western countries, in an attempt to keep up with those modern legal systems.[22] By 1913, the Division of Commercial Arbitration Act was promulgated, establishing:

(a) Specific divisions in each chamber of commerce to deal with commercial arbitration disputes between merchants;
(b) A set of rules on arbitral proceedings, internal operation, personnel and arbitration fees.[23]

Despite the effort, the Republican China era was characterized by many regional and national wars, causing an instability that reflected on the arbitration legal framework as well.[24]

After the founding of the People's Republic of China in 1949 and prior to the start of the Reform Era in 1978, the preferred dispute resolution mean was people's mediation, whose only aim was

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

deepening the Socialist ideology among Chinese people.[25] It was not until China began its "Reform and Opening up" policy in 1978 that things started to change, hastening the path to a rapid economic growth in the country. The arbitration legal framework benefited from this era of reform, yet still keeping the aforementioned distinction between disputes seated in China but involving only Chinese parties (i.e. domestic disputes) and those involving Chinese and non-Chinese parties (foreign-related disputes).[26] Furthermore, the arbitration system was held off by the highly centralized planned economy that China adopted by 1957, leaving business entities with no alternative but to comply with governmental orders.[27] All disputes were solved under the supervision of governmental bodies, and it was not until the 1980s that China carved out an arbitration system for commercial domestic disputes.[28]

However, arbitration commissions were completely under governmental bodies' control, whose power to dictate over arbitration proceedings was overwhelming.[29] Due to this lack of independence, many scholars regard China's arbitration over those years as an administrative proceeding, rather than a private, independent dispute resolution mean in which parties can tailor rules according to their needs.[30]

Despite the many flaws that have characterized China's reform plan, many bodies of law were enacted over the course of the following years, leading up to the promulgation of China's company law, along with Securities law and Economic Contract law.[31] In the 1990s China opened up its securities market to foreign investors as well.[32]

On December 11, 2001, China officially became a World Trade Organization's Member, fulfilling its opening up plan to the outside world.[33] This event was seen as China's strong commitment to reform: after 15 years of negotiation, the deal was welcomed with high hopes of integrating the country within the global economic order.[34] The WTO membership boosted Beijing to bring domestic laws and policies in line with the high standards of the international

[25] Carlos Winghung Lo, *China's Legal Awakening: Legal Theory and Criminal Justice in Deng's Era* 12 (Hong Kong University Press 1995).
[26] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).
[27] *Id.* at 8.
[28] *Id.* at 8.
[29] *Id.* at 8.
[30] *Id.*
[31] Sparogle and Baranski, *Chinese Commercial Dispute Resolution Methods: The State Commercial and Industrial Administration Bureau*, 35 Am. J. Comp. L. 761, 133 (1987).
[32] Zhu Sanzhu, *Securities Regulation in China* 3-8 (Transnational Publishers 2000).
[33] The Member Information are obtained from the World Trade Organization (WTO) Website. Available at https://www.wto.org/english/thewto_e/countries_e/china_e.htm. Last visited June 27, 2022.
[34] Yeling Tan, How the WTO Changed China, The Mixed Legacy of Economic Engagement, *Foreign Affairs,* March/April 2021, Last visited July 05, 2022, https://www.foreignaffairs.com/articles/china/2021-02-16/how-wto-changed-china.

trading system (e.g. reforming customs, copyright and trademark laws).[35] Foreign businesses jumped in quickly to catch the benefits of China's accession to the WTO and by 2003, 70% of U.S. firms surveyed in China claimed that the Chinese business environment had improved greatly.[36] China's economic landscape finally opened up to private and foreign enterprises to do business in China, but a big downfall was just behind the corner.[37] Many subnational governments adopted multiple strategies to hold the liberalization off, and along with the change in leadership of the China's Ministry of Commerce (whose aim was to fulfill China's harmonization to the international set of rules), China got back on the path toward the old overwhelming state control of the economy.[38] To sum up, China benefited greatly from the WTO accession in 2001, yet it did not fully integrate into the international trading system due to its inability to keep subnational governments under the reform "trend".

Starting out in 1978 with a GDP of 0.15 trillion, China's GDP reached 14.63 trillion in 2020, running second after the United States (whose GDP peaked at 19.29 trillion).[39] Foreign investment and trade sped up the growth significantly but also carried along transnational commercial disputes, as economic relations between parties broke down. Foreign investors started looking for an efficient, rapid dispute resolution mechanism to get their interests protected.[40] Foreigners started out skeptical toward in-court litigation, and this is not surprising at all since Chinese courts were deemed unsafe even in the traditional Confucian China. The common belief at the time was that "it is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit."[41] This unsafe environment set up the path toward private dispute resolution means instead of in-court litigation.[42] Given the importance of providing foreigners a safe and efficient environment to solve their legal disputes, China kept its dual legal system, dividing up cases regarding foreign investors and traders from domestic cases.[43] Despite the special treatment given to foreign investors, along with the many legal reforms that followed up China's economic growth, foreign parties were everything but satisfied with the Chinese Judicial system. On the one hand, China's Judicial system is compelled to act under strong governmental interferences, therefore lacking the independence

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] The statistics are obtained from the World Bank Database. Available at https://data.worldbank.org/. Last visited June 24, 2022.
[40] Gu Weixia, "Arbitration in China" in Shahla F.Ali, Tom Ginsburg (ed.) *International Commercial Arbitration in Asia.* Huntington NY, 2012, pp. 77-133.
[41] Bobby Wong, *Traditional Chinese Philosophy and Dispute Resolution,* 30 HKLJ 306 (2000).
[42] *Id.*
[43] Guo Yu, *People's Republic of China*, *Comparison between UN Model Law and Chinese Arbitration Law*, *The UNCITRAL Model Law and Asian Arbitration Laws,* 297, (Gary F. Bell ed., 2018).

needed to be deemed "safe" by foreigners.[44] Therefore, foreign businessmen are scared off from bringing a dispute before Chinese Courts. On the other hand, this environment shed light on Arbitration, laying down the basis of its success among investors.[45] This was the lead-up to a new wave of reform that started out in the early 1990s and ended up with the enactment of the Arbitration Law of the People's Republic of China in 1994.[46] Those years were characterized by the denial of ad hoc and foreign arbitration.[47] Many reforms followed up, yet leaving China's Arbitration regime undeveloped and with multiple gaps to fill. One aspect worth mentioning is the growth the Arbitration practice has experienced despite a quite "hostile" environment. Since the enactment of the Arbitration Law of the People's Republic of China, Chinese arbitral bodies reported to have handled more than 2.6 million arbitration cases, either commercial or civil.[48] Furthermore, it was estimated that the number of arbitral cases heard in 2018 peaked at 540,000, with a 127% increase if compared to the 2017 numbers.[49]

China's Arbitration Framework

The fundamental laws that make up the arbitration framework in China are the Arbitration Law of the People's Republic of China (hereinafter the "Arbitration Law" or the "AL") and the arbitral-related rules of the Civil Procedure Law of the People's Republic of China (hereinafter the "CPL").[50] While the former regulates both domestic and foreign arbitration, the latter covers jurisdiction, recognition and enforcement of arbitral awards in China. [51] In addition, China's highest judicial body, the Supreme People's Court, sets forth "guidelines" on the application of the law to lower courts via its judicial interpretations.[52]

The topics that follow are Chinese arbitration fundamentals that the reader needs to know before going deeper into our analysis.

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[44] Taroh Inoue, *Introduction to International Commercial Arbitration in China,* 36 HKLJ 171 (2006).
[45] Benjamin Liebman, "China's Courts: Restricted Reform", 191 (2007) *The China Quarterly*, pp. 620-643.
[46] Zhang Shouzi, "Arbitration procedure and practice in China: Overview*, Westlaw*, Law stated as March 01, 2021, https://content.next.westlaw.com/practical-law/document/Iacc21dac1c9a11e38578f7ccc38dcbee/Arbitration-procedures-and-practice-in-China.
[47] Gu, Weixia, The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China (November 30, 2017). Contemporary Asia Arbitration Journal, Vol. 10, No. 2, pp. 257-291, November 2017, University of Hong Kong Faculty of Law Research Paper No. 2017/037, Available at SSRN: https://ssrn.com/abstract=3085568
[48] Zou Mimi, "*An Empirical Study of Reforming Commercial Arbitration in China", Pepperdine Dispute Resolution Law Journal,* 20.3 (2020).
[49] *Id.*
[50] Annie X. Li, *Challenges and Opportunities of Chinese International Arbitral Institutions and Courts in a new era of Cross-Border Dispute Resolution,* 38:2 BOSTON UNIVERSITY INTERNATIONAL L.J.354, 355-393 (2019-2020).
[51] *Id.* at 18.
[52] *Id.* at 18.

The ill-famed cornerstone of Chinese Arbitration is its institution-monopolized system: only institutional arbitration is allowed in Mainland China.[53] Article 16 of the Arbitration law has no leeway: in order for the arbitration agreement to be valid, it must list a designated arbitration commission.[54] According to this provision, ad hoc arbitration, i.e. any arbitration in which the parties did not pick out an arbitral body to administer the arbitration,[55] is completely cut off in Mainland China, despite the Supreme People's Court most recent yet uncertain stance on this issue.

Some "safe" exceptions to the rule against Ad Hoc Arbitration are those provided under the Opinions on Providing Judicial Safeguard for the Development of Pilot Free Trade Zone, issued by the SPC by the end of 2016 (Opinions for Pilot Free Trade Zones).[56] According to the opinion, ad hoc arbitration in the Pilot Free Trade Zone that meets certain requirements is a doable alternative. Therefore, in order to make it viable, the arbitration agreement must provide:

(1) A specific seat of arbitration;
(2) A specific set of arbitration rules;
(3) Designated arbitrators.[57]

Once satisfied those requirements, courts will be able to recognize the arbitration agreement between companies registered in the Pilot Free Trade Zone as valid.[58] Despite the SPC's aim to promote ad hoc arbitration as a pilot measure in certain Free Trade Zones (i.e. types of special economic zones where goods may be imported, handled, manufactured or exported without customs' direct intervention)[59], reported ad hoc arbitration cases among those zones were rather rare.[60]

Chinese law makes a distinction between domestic, foreign-related and foreign cases, making up the "dual-track" system.[61] To each track applies a different procedure and a different standard of judicial review.[62] Even though China has not provided a definition to "foreign-

[53] *Id.* at 18.
[54] Article 16 of the PRC Arbitration Law.
[55] Ad hoc Arbitration – an introduction to the key features of ad hoc arbitration, LexisNexis, last visited June 25, 2022, https://www.lexisnexis.co.uk/legal/guidance/ad-hoc-arbitration-an-introduction-to-the-key-features-of-ad-hoc-arbitration.
[56] *Id.* at 26.
[57] *Id.*
[58] *Id.*
[59] "Free Trade Zones in China", Government of Canada, last visited July 05, 2022, https://www.tradecommissioner.gc.ca/china-chine/ftz-zle.aspx?lang=eng.
[60] Ming Liao, "The turn to Fact or Fiction: Ad Hoc Arbitration in the Draft Amendment to PRC Arbitration Law, *Kluwer Arbitration Blog,* October 24, 2021 http://arbitrationblog.kluwerarbitration.com/2021/10/24/the-turn-to-fact-or-fiction-ad-hoc-arbitration-in-the-draft-amendment-to-prc-arbitration-law/.
[61] Gu Weixia, "Arbitration in China" in *International Commercial Arbitration in Asia*, ed. Shahla F. Ali, Tom Ginsburg, (Huntington: JurisNet LLC, 2013), 77-133.
[62] *Id.*

related", Article 178 of *the Several Opinions on the Implementation of the General Principles of Civil Law* provides that a foreign element is present when:

(a) either one party or both parties to the agreement are foreign entities, legal persons or stateless persons;
(b) the subject matter of the contract is located outside Mainland China; or
(c) the act that gives rise, extinguishes or modifies obligations and rights under the contract occurs outside in another country's territory.[63]

Therefore, if the dispute arises out of a contract with a foreign element, the dispute would be regarded as foreign-related.[64]

Another distinguishing element is China's refusal to adopt the UNCITRAL Model Law on International Commercial Arbitration, 2006, UN General Assembly Resolution 61/33 (4 December 2006) (hereinafter the "ML").[65] The ML's aim, praised by many, is to assist States throughout all stages of arbitration proceedings, starting out with the formation of the arbitration agreement to the degree of court intervention.[66]. Furthermore, legislation based on the ML has been adopted in 85 states in a total of 118 jurisdictions.[67]

On an international perspective, China became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the "New York Convention") in 1987.[68] Under the New York Convention, China has to recognize and enforce foreign arbitral awards rendered in other contracting states.[69]

China also became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of the Other States (hereinafter the "Washington Convention"), which provided the establishment of the International Center for the Settlement of Investment Disputes ("ICSID") under the World Bank and its jurisdiction over investment disputes between governments and foreign private investors.[70] The Washington Convention entered into force in 1993, and by the end of the same year China notified the ICSID that the PRC

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[63] Sabrina Lee, "Arbitrating Chinese Disputes Abroad: A Changing Tide?", *Kluwer Arbitration Blog,* April 7, 2016, http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/.
[64] *Id.* at 31.
[65] Guo Yu, The UNCITRAL Model Law and Asian Arbitration Laws, People's Republic Of China, Comparison Between The UN Model Law and Chinese Arbitration Law, 271, (Gary F. Bell ed., 2018).
[66] United Nations Commission on International Trade, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, Last visited July 5, 2022. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status
[67] *Id.*
[68] Raymond Leung (ed.), *China Arbitration Handbook,* 13-14, (Sweet & Maxwell 2011).
[69] *Id.* at 21.
[70] ICSID Convention, Regulation and Rules, Washington, D.C: International Centre for Settlement of Investment Disputes, 2003, https://icsid.worldbank.org/.

Government would only submit to the ICSID jurisdiction disputes on compensation aroused out of expropriation and nationalization.[71] However, this limitation might be cut off if China agrees on broadening the scope of disputes submitted to the ICSID arbitration through a subsequent bilateral investment treaty (BIT) or multilateral treaty.[72]

Before getting into the analysis of the Arbitration Law, we will briefly discuss the different courts that interplay under the power of the Supreme People's Court, since the SPC has often taken advantage of its judicial interpretations to level up and bridge the gaps of the AL.

China's Judiciary

The Chinese judicial system is made up of four hierarchical levels:

(1) Basic People's courts;
(2) Intermediate People's courts;
(3) Higher People's courts; and
(4) The Supreme People's courts, the highest judicial body of Mainland China.[73]

In general, Basic people's courts play no role in the arbitration setting.[74]

Intermediate people's courts have jurisdiction first, over the validity and enforcement of foreign arbitral awards, and second – after the *Interpretation No. 21* published by the Supreme People's Court – over the validity and enforcement of every arbitration agreement, regardless of whether domestic, foreign-related or foreign.[75]

Based on the pre-reporting system made up by the SPC to ensure that the non-enforcement of foreign arbitral awards is as rare as possible, Higher people's courts have to review every Intermediate people's courts' decision against the enforcement of arbitral awards.[76] In the case the Higher people's court agrees with the lower court on the unenforceability of the award, it must report the case up to the Supreme People's Court, whose say on the matter is final and definitive.[77]

[71] Shengchang Wang et al., "Investor-State Arbitration Laws and Regulations in China", *International Comparative Legal Guide,* November 2021, 2022, https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/china.
[72] *Id.*
[73] Latham & Watkins, "Five key considerations in China-related Arbitration", *Latham & Watkins International Arbitration Practice,* no. 1752, October 9, 2014, https://www.lw.com/thoughtLeadership/LW-China-abritration-key-considerations.
[74] *Id.*
[75] Anyta Lee, "Newly published judicial interpretations on arbitration in China", *Hogan Lovells* Publications, January 2018, https://www.hoganlovells.com/en/publications/newly-published-judicial-interpretations-on-arbitration-in-china.
[76] *Id.* at 44.
[77] *Id.*

The Supreme People's Court

The Supreme People's Court (the "SPC") sits atop of the pyramid of China's judicial system.[78] The SPC has both legislative competence and judicial power over the arbitration setting.[79] It was given by the National People's Congress – the legislative cornerstone of the PRC – the power to shape the way existing laws are applied via its judicial interpretations.[80] Many of the SPC's influential judicial interpretations are discussed later in this chapter.

In terms of judicial power, the SPC has a final say over the enforcement and validity of foreign arbitral awards, based on the previously mentioned pre-reporting system.[81]

The Arbitration Law

We will now focus on the analysis of the main provisions of the Arbitration Law of the People's Republic of China. The aim is to provide the reader with the background required to understand some topics that will follow, while some aspects of the Arbitration Law and Regime, such as the Recognition and Enforcement of arbitral awards and Ad Hoc Arbitration will be discussed separately.

A twofold system

As aforementioned, China promulgated its Arbitration Law in 1994.[82] The AL lays out the nuts and bolts of the Arbitration regime in China. This body of law has remained unchanged since its enactment and is generally applicable to all arbitrations conducted in Mainland China, both domestic, foreign-related and foreign.[83] A "domestic dispute" involves only Chinese parties, with no foreign element.[84] It is seated in China and must be administered by a Chinese Arbitration Institution and only Chinese Law applies.[85]
According to Article 126 of the Contract Law of the People's Republic of China, Chinese Law has to be the governing law of all domestic contracts.[86]

[78] *Id.*
[79] Yuan Wang, "*The Role of the Supreme People's Court in Chinese International Commercial Arbitration*", (University Press Halle-Wittenberg, 2018) https://uvhw.de/files/3_uvHW_Leseproben/uvHW-189-2_LESEPROBE.pdf
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 21.
[84] *Id.* at 18.
[85] Jingzhoou Tao, *Arbitration in China*, *International Commercial Arbitration in Asia,* 10 (Philip J. McConnaghay et Thomas B. Ginsburg eds., 2nd ed. 2006).
[86] Article 126 of the Contract Law of the People's Republic of China, Promulgated by the Second Session of the Ninth Nat'l People's Congress, effective March 15,1999).

Article 128 of the Contract Law of the People's Republic of China does not set forth the elements of a foreign-related disputes, yet it allows parties to a foreign-related dispute to apply either before a Chinese arbitral institution or any other arbitration institution for arbitration.[87] The SPC has intervened to provide a definition to "foreign-related" disputes via many of its interpretations, such as the *Opinions of the Supreme People's Court on Several Issues concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China* (the "1988 Opinions") or the *Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships* (the "2012 Interpretations").[88] To sum up, those SPC interventions set forth that parties to a foreign-related case are free to pick out the governing law of the arbitration agreement, the arbitral body, arbitration rules and the arbitral seat.[89] Under this set of rules, cases with the following elements are deemed as foreign-related disputes:

(d) At least one party is a foreigner, stateless person or foreign legal person.[90]
(e) The usual residence of one or both parties is within the territory of a foreign state.[91]
(f) The subject matter is located outside China.[92]
(g) The legal facts establishing, altering, or terminating the parties' relationship occurred outside China.[93]
(h) Any other circumstance where the legal relationship can be regarded as being "foreign-related".[94]

Chinese Courts ended up considering just three fundamental requirements in the determination of whether a dispute is foreign-related or not:

(a) If parties are foreign entities;
(b) The place where the subject matter is located;
(c) The place where the contract is performed.[95]

[87] Article 128 of the Contract Law of the People's Republic of China, promulgated by the Second Session of the Ninth National People's Congress, effective March 15, 1999.
[88] Sabrina Lee, "Arbitrating Chinese Disputes Abroad: A changing tide?", *Kluwer Arbitration Blog,* April 7, 2016, http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/.
[89] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).
[90] Freshfields Bruckhaus Deringer, "Resolving Commercial Disputes in China through arbitration", *Westlaw*, https://1.next.westlaw.com/Document/Id248e5111c9611e38578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextDat.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 88.

As a way of example, in *Jiangsu HangTianWanYuan Wind Power Manufacturing Co. Ltd. v. LM Wind Power* (2012), the parties to a purchase agreement were a Chinese joint venture company and a wholly owned foreign enterprise.[96] The dispute resolution clause laid down first amicable negotiation as a dispute resolution mean and second, arbitration before the ICC arbitration in Beijing in the case of failure of the former.[97] The SPC, on the basis of the requirements laid down via its Interpretations, held the agreement invalid because:

(a) Both parties were Chinese;
(b) The subject matter of the agreement was located in the Mainland;
(c) The agreement was to be performed in China.[98]

In *Beijing Chaolaixinsheng Sports and Leisure Co. Ltd. v. Beijing Suowangzhixin Investment Consulting Co. Ltd.* (2014), the SPC held an arbitral award rendered by a foreign arbitral institution invalid because of the domestic nature of the dispute.[99] The parties to the contract, whose subject matter was a golf course in Beijing, were respectively a Chinese company and a wholly owned foreign enterprise owned by a Korean citizen but registered in the Mainland.[100] The arbitration clause set out negotiation as the first dispute resolution mean and arbitration before the Korean Commercial Arbitration Board as a backup plan.[101] When a dispute aroused and an award was granted, the wholly owned foreign enterprise sought the enforcement of the award in the Mainland.[102] The SPC held the agreement invalid on the basis of Article 128 of the PRC Contract Law and the principles laid down via its interpretations: the subject matter of the dispute was located in China, the contract's performance was due in China and both parties were Chinese, by being both registered in the Mainland.[103]

The most remarkable dispute to this day is *Shanghai Golden Landmark Co. Ltd. v. Siemens International Trade Co. Ltd, Shanghai No. 1 Intermediate People's Court* (2015), in which the court found foreign elements in "any other circumstances that can be regarded as foreign-related".[104] Parties to the contract were two wholly owned foreign entities registered in China. They had agreed on arbitration before the Singapore International Arbitration Centre (SIAC) and where the award was granted, the seller applied for recognition and enforcement in the Mainland while its counterparty argued that, given the lack of foreign elements, the agreement

[96] *Id.* at 88.
[97] *Id.* at 88.
[98] *Id.* at 88.
[99] *Id.* at 88.
[100] *Id.* at 88.
[101] *Id.* at 88.
[102] *Id.* at 88.
[103] *Id.* at 88.
[104] *Id.* at 88.

was invalid.[105] The Shanghai No. 1 Intermediate People's Court held that the agreement was valid and foreign-related because of the presence of foreign-related circumstances:

(1) Parties were registered in the Mainland but, more specifically, in the Shanghai Free Trade Zone, and Chinese courts lean toward promoting trade and investment within FTZs;
(2) Special customs regulatory proceedings were involved since goods were transported within the FTZ. Therefore, the goods' shipment was closer to the international standard practice despite having the Mainland as a final destination.[106]

"Foreign" Arbitration refers to arbitration seated outside China or in Hong Kong, Taiwan, Macau or to ad hoc arbitration outside the PRC.[107] Parties' nationality is irrelevant, and the arbitral seat dictates the applicable law.[108]

Despite governing both domestic, foreign-related and foreign arbitration, the AL treats foreign-related disputes way more favorably than domestic ones.[109] Chapter VII of the AL, *Special Provisions for Arbitration Involving Foreign Elements*, sets forth the foreign-related arbitration framework along with its "shortcuts". First, according to Article 66 of the AL, the China Chamber of Commerce is entitled to establish foreign-related arbitration commissions.[110] By contrast, domestic arbitration commissions can be established only on the base of locality, are subordinated to the Central Government and have to be registered with the department of justice of the relevant province.[111]

Second, while Article 66 does not provide any maximum number of members for the foreign-related arbitration commission, Article 12 of the AL strictly imposes a limit of 12 members for domestic arbitration commissions.[112]

Article 68 lays down interim measures rules that apply to foreign-related arbitration: if one of the parties applies to get any interim measure, the request has to be submitted to the intermediate people's court of the place where the evidence is located, but no other condition needs to be met in order to make the application.[113] On the other hand, Article 46, which carves out the rules applied to interim measures in domestic arbitration, is not as permissive

[105] *Id.* at 88.
[106] *Id.* at 88.
[107] Annie X. Li, supra note 26.
[108] *Id.*
[109] *Id.* at 31.
[110] Article 66 of the Arbitration Law of the People's Republic of China, Promulgated by the National People's Congress Standing Committee, effective September 1, 1995, as amended in August 2009 and September 2017.
[111] Article 10 and 15 of the Arbitration Law of the People's Republic of China.
[112] Article 12 of the Arbitration Law of the People's Republic of China.
[113] Article 68 of the Arbitration Law of the People's Republic of China.

as Article 68. Article 46, indeed, specifies that parties "may" apply to get the preservation of the evidence only if under the risk of either destruction, loss, or if it is likely that providing the evidence will get more complex later on.[114]

When it comes to the level of court that shall assist and support the proceedings (if needed), Article 68 of the AL, referencing respectively Article 258 and 259 of the CPL, establishes the competence of Intermediate people's courts, whose jurisdiction was later expanded by the *Interpretation No. 21* of the SPC.[115]

By the same token, foreign-related disputes enjoy a different standard of judicial review. The grounds for setting aside or refusing to enforce an award are narrowed to just procedural matters for foreign-related disputes.[116] Article 260 of the CPL lays out four different requirements a party has to prove in order to avoid the enforcement of the award:

(1) There was no arbitration clause in the agreement or no arbitration agreement at all;
(2) The party against whom the application for enforcement is made was either not given notice to appoint an arbitrator or for the outset of the arbitral proceeding or could not bring his case due to causes beyond his responsibility;
(3) The arbitral tribunal composition or the procedure was not conducted under the arbitral-related rules;
(4) The award regarded matters outside of the scope for which the parties agreed on arbitration or on which the arbitral tribunal has no power.[117]

Article 58 of the AL provides instead that the grounds for setting aside or refusing to enforce a domestic arbitration award are both substantive and procedural, laying out six different circumstances that require the court to do so:[118]

(1) There is no arbitration agreement;
(2) The award regards matters on which the parties did not agree on or that are beyond the arbitral tribunal's power;
(3) The formation of the arbitral tribunal or the procedure were not in conformity with the arbitral-related rules;
(4) The evidence on which the award is based on is false;
(5) The other party withheld the evidence and thus affected the proceedings' impartiality;

[114] Article 46 of the Arbitration Law of the People's Republic of China.
[115] Article 58 of the Arbitration Law of the People's Republic of China.
[116] Article 260 of the Civil Procedure Law of the People's Republic of China, promulgated by the National People's Congress, effective September 1, 1995, as amended in October 2007, August 2012, June 2017.
[117] Article 260 of the Civil Procedure Law of the People's Republic of China.
[118] Article 58 of the Arbitration Law of the People's Republic of China.

(6) The arbitrators were bribed, committed embezzlement, engaged in malpractice to pursue their own benefits or perverted the course of the arbitration.[119]

This dual-track framework made up a system in which certain arbitration institutions could handle foreign-related disputes and those who could just adjudicate domestic ones. The most important arbitral institutions that handle foreign-related cases are the China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission/Beijing International Arbitration Centre (BAC/BIAC), Shanghai International Arbitration Centre (SHIAC), and Shenzhen Court of International Arbitration (SCIA).[120] In 2018, CIETAC and BAC dealt, respectively, with 522 foreign-related disputes among 2,962 overall cases and 88 foreign-related arbitral disputes among 2,547 cases overall.[121]
Back in 1996, the State Council issued the *"1996 Notice*" regarding the jurisdiction of local arbitration commission (LACs). Based on this State Council Notice, LACs are allowed to handle foreign-related disputes, in the hope of smoothing the dual-track arbitration system, yet this has only been the law in the books and not the one in practice.[122] LACs lack the expertise required to compete with the aforementioned arbitral institutions, which have foreign arbitrators on their panels and a sophisticated, experienced knowledge of the field.[123]

General Layout

As a general matter, the AL can be divided up in eight chapters, each with a different arbitral-related topic:

1. General Provisions.
2. Arbitration Commissions and the Arbitration Association.
3. Arbitration Agreement.
4. Arbitration Proceedings.
5. Application for Setting Aside Arbitration Award.
6. Enforcement.
7. Special Provisions for Arbitration Involving Foreign Elements.
8. Supplementary Provisions.[124]

[119] *Id.*
[120] Zou Mimi, "*An Empirical Study of Reforming Commercial Arbitration in China", Pepperdine Dispute Resolution Law Journal,* 20.3 (2020).
[121] *Id.*
[122] *Id.* at 66.
[123] *Id.* at 66.
[124] Arbitration Law of the People's Republic of China, promulgated by the National People's Congress Standing Committee, effective September 1, 1995, as amended in August 2009 and September 2017. https://www.lawinfochina.com/display.aspx?id=710&lib=law&EncodingName=big5.

The first three articles of the "General Provision" chapter provide a definition of the arbitral subject matter and its scope. Article 2 lists types of disputes that can be arbitrated such as contractual disputes, disputes over rights and interests in property between citizens, legal persons and other bodies of law.[125]

Moreover, according to the Mediation and Arbitration Law for Labour Disputes of the People's Republic of China (2007) and the Mediation and Arbitration Law for Rural Land Contract Disputes (2009), the following disputes are arbitrable:

(d) Employment and labour disputes;

(e) Rural land contract disputes. However, that same body of law points out that disputes aroused out of collective land requisition and compensation are regulated by the 1999 PRC Administrative Reconsideration Law and thus, not arbitrable.[126]

On the other hand, Article 3 forbids arbitration for:

(f) Disputes concerning marriage, adoption, custody, fostering and succession.[127]

(g) Administrative disputes, that can be handled only by the authorized administrative organs.[128] By "administrative disputes" the law includes disputes arising out of agreements containing administrative rights and obligations, which have as parties an administrative state organ and either a citizen, a legal person or any other equivalent organization.[129]

Arbitrators

Article 13 starts off with rules on arbitrators: in an effort to level up the moral and professional quality of Chinese arbitrators, the AL lists a few requirements to meet to be appointed as an arbitrator.[130] Arbitrators are generally bound by both the rules parties agreed on to conduct the arbitration and the arbitral-related rules of Chinese Law.[131]

An arbitrator shall have engaged in legal professions (e.g. as an arbitrator, lawyer or judge) or in legal research or education with a professional title for 8 years minimum.[132] Last condition set forth is the expertise of law, in the field of economy and trade in addition to a professional title or an equivalent to it.[133] Moreover, any arbitration commission is required to have arbitrators on different specializations.[134] China clearly sets up a high level of competence for

[125] Article 2 of the Arbitration Law of the People's Republic of China.
[126] Yang Fan, *Foreign-Related Arbitration in China: Commentary and Cases,* (Cambridge: Cambridge University Press, 2016).
[127] Annie X. Li, *Challenges and Opportunities of Chinese International Arbitral Institutions and Courts in a new era of Cross-Border Dispute Resolution,* 38:2 BOSTON UNIVERSITY INTERNATIONAL L.J.354, 355-393 (2019-2020).
[128] Article 3 of the Arbitration Law of the People's Republic of China.
[129] *Id.* at 26.
[130] Article 13 of the Arbitration Law of the People's Republic of China.
[131] *Id.*
[132] Article 13 of the Arbitration Law of the People's Republic of China.
[133] *Id.*
[134] *Id.*

its arbitrators. As aforementioned, rules do vary for foreign-related arbitration commissions. Article 67 of the AL sets forth a more relaxed requirement in terms of arbitrator's competence, providing that the foreign-related arbitration commission might appoint arbitrators with just an expertise in the area of law, economy and trade, science and technology and so on, leaving behind the requirement of having engaged in the legal profession. [135] Foreigners have thus more doors open to serve as arbitrators in Mainland China. Put in a nutshell, arbitration commissions maintain a panel of arbitrators and parties will appoint their arbitrators among those on the panel. Being the arbitrator's list a closed one, this framework ends up decreasing party autonomy.[136] More often than not Chinese arbitration commissions will pick their arbitrators among their employees or Chinese Government officials, turning out to be a terrible downside in the eye of foreigners.[137]

There are circumstances in which parties can challenge the withdrawal of an arbitrator or in which the arbitrator has to withdraw, and those are enlisted under Article 34 of the AL:

(1) The arbitrator happens to be a party of the case or is related to either one of the parties or an agent in the case;
(2) There is a conflict of interest between the arbitrator's own interest and those of the case;
(3) The arbitrator has certain relationships with one of the parties or an agent and therefore lacks independence;
(4) The arbitrator and one of the parties met privately or the arbitrator has accepted gifts from one of the parties.[138] Under this circumstance, the arbitrator will be held legally liable according to the law and removed from the arbitral commission's list of arbitrators.[139]

The decision on whether the arbitrator has to withdraw is up to the chairman of the arbitration commission.[140]

Arbitration commissions or association

Any arbitration institution in Mainland China is deemed to be independent, yet the AL is everything but clear on the topic. Article 14 establishes the independence of all commissions from administrative organs and among other arbitration commissions.[141] Despite the effort, the following provision of the AL contradicts the former by establishing that all commissions

[135] Article 67 of the Arbitration Law of the People's Republic of China.
[136] Gu Weixia, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (Hong Kong: Sweet & Maxwell, 2012).
[137] *Id.*
[138] Article 34 of the Arbitration Law of the People's Republic of China.
[139] Article 38 of the Arbitration Law of the People's Republic of China.
[140] Article 36 of the Arbitration Law of the People's Republic of China.
[141] Article 14 of the Arbitration Law of the People's Republic of China.

are submitted to the China Arbitration Association supervision, whose duty is to find out about any breach of the law.[142]

Any Arbitration Commission or Association in Mainland China has to be established by the local people's Governments and must be registered with the Central Government.[143] According to Article 15, all arbitration commissions and associations are under the supervision of the China Arbitration Association, whose members are all the arbitration commissions on a national level.[144] By looking carefully at those provisions on the establishment of Arbitration Commissions or associations in Mainland China, it seems unlikely for a foreign arbitration institution to "sneak" into the Chinese Arbitration Framework. Furthermore, Article 11 provides for a detailed list of conditions an arbitration commission needs to display in order to be legally established:

(1) Its own name, domicile and charter (made up under the rules of the AL);
(2) The necessary property;
(3) The necessary employees taking part to the commission;
(4) Appointed arbitrators.[145]

The validity of the arbitration agreement

Chapter III sets forth the requirement for the validity of an arbitration agreement, calling off ad hoc arbitration in Mainland China. According to Article 16, an arbitration agreement in order to be valid and enforceable shall be in written form. Under Article 11 of the Contract Law of the People's Republic of China, "written form" embraces any form that is able to clearly set out the contract's contest, such as letters, telegrams, email and so on.[146] Furthermore, the arbitration agreement must lay out:

(a) An arbitration clause or an agreement to arbitrate;
(b) The matters of arbitration;
(c) A designated arbitration commission.[147]

The requisite of a "designated arbitration commission" has been disputed and criticized, especially for its inconsistency with the international standard embodied in the UNCITRAL

[142] Article 15 of the Arbitration Law of the People's Republic of China.
[143] Article 10 of the Arbitration Law of the People's Republic of China.
[144] Article 15 of the Arbitration Law of the People's Republic of China.
[145] Article 11 of the Arbitration Law of the People's Republic of China.
[146] Article 11 of the Contract Law of the People's Republic of China, promulgated by the Second Session of the Ninth National People's Congress, effective March 15, 1999.
[147] Article 16 of the Arbitration Law of the People's Republic of China.

Model Law (hereinafter the "Model Law").[148] Article 18 of the AL follows up establishing that if the parties have failed to designate a specific arbitration commission and did not provide so in a supplementary agreement, the arbitration agreement has to be deemed null and void.[149] It is not surprising at all to find out that this provision ended up making invalid many arbitration agreements in China: a wrong or vague reference to an arbitration commission or just quoting the arbitration institution's name incorrectly are sufficient to make the arbitration agreement void.[150] However, the Supreme People's Courts changed its stance on the matter by issuing its *Interpretation on Several Issues concerning the Application of the Arbitration Law*, in which it clarified that as long as an arbitration commission can be ascertained or the parties can either reach a supplementary agreement or figure out an arbitration commission while filing for arbitration, the arbitration agreement is valid.[151] This big step was taken by the SPC back in 2006, and later the PRC Ministry of Justice followed up with the Draft Amendment, which calls off the ill-famed criteria of a "designated arbitration commission".[152] The only two requirements laid out in the Draft in order to have an effective arbitration agreement in China are now the parties' intention to arbitrate and the written form of the agreement.[153] Moreover, the Draft also incorporated a waiver clause like the one embodied in the UNCITRAL Model Law, Article 7 (5).[154] This waiver clause provides that if one party claims the existence of an arbitration agreement and the counterparty does not deny it, the arbitration agreement has to be deemed as existing and valid among the parties.[155]
The aim of the Draft Amendment is clearly to keep up with the international arbitration practice, given that the Model Law and legislations akin to it are much more open on arbitration agreement requirements, applying just the criteria of whether parties had the intention to arbitrate and whether they put that intention in writing.[156]

One dispute worth mentioning is the *Ace Medical Packaging Co. Ltd v. Dongguan Wei Hong Plastic and Metal Manufactory Co. Ltd. and New Corona Co. Ltd*. In 2008, the parties to the agreement agreed on arbitration before the Hong Kong or Shenzhen International Arbitration

[148] Mariana Zhong, "Validity of Arbitration Agreement: a New Relaxed Approach in the Draft Amendment to PRC Arbitration Law", *Kluwer Arbitration Blog,* September 19, 2021 http://arbitrationblog.kluwerarbitration.com/2021/09/19/validity-of-arbitration-agreement-a-new-relaxed-approach-in-the-draft-amendment-to-prc-arbitration-law/.
[149] Article 18 of the Arbitration Law of the People's Republic of China.
[150] Tao Jingzhou, *Arbitration Law and Practice in China,* (Kluwer Law Int., 2008).
[151] "Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China", (2008 Adjustment PKULAW Version), Pkulaw.com, Last visited June 27, 2022, https://www.pkulaw.com/en_law/c0d4cb469028a461bdfb.html.
[152] Mariana Zhong, "Validity of Arbitration Agreement: a New Relaxed Approach in the Draft Amendment to PRC Arbitration Law", *Kluwer Arbitration Blog,* September 19, 2021 http://arbitrationblog.kluwerarbitration.com/2021/09/19/validity-of-arbitration-agreement-a-new-relaxed-approach-in-the-draft-amendment-to-prc-arbitration-law/.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*

Commission.[157] This vague designation of an arbitration commission – that did not specify the conditions under which one of the two commissions could handle the case excluding the other - did not satisfy Article 5 of the *Interpretation on Several Issues in the Application of the Arbitration Law*, which requires parties to pick out either one or two specific arbitration commissions to apply to and therefore, the SPC held the agreement invalid.[158]

By contrast, in *Shenzhen Food Group Co. Ltd v. Noble Resources Co. Ltd*, the parties to the agreement had agreed on submitting the dispute to arbitration, before:

(a) The Hong Kong International Arbitration Centre, in the case the purchaser was the defendant; or
(b) The Grain and Feed Trade Association in London if the vendor was the defendant.[159]

Even though the arbitration clause mentioned two different arbitration commissions, it also set out the conditions under which one of the two could handle the case and vice-versa. For the foregoing reasons, the SPC held the arbitration clause as valid.[160]

The last noteworthy case on the matter is *Züblin International GmbH v. Wuxi Woke General Engineering Project Rubbler Co., Ltd.*[161] The parties to the case had agreed on an arbitration seated in Shanghai and conducted under the ICC Rules. [162] However, the AL is straightforward on the matter: in order for an arbitration agreement to be valid, it must set out a chosen arbitration institution.[163] Since the seat of arbitration was Shanghai – and therefore the applicable law Chinese law – the arbitration agreement was invalid due to the lack of designation of an arbitration institution.[164]

A comparative perspective is necessary to comprehend the issue better. The aforementioned Article 7 of the Model Law, Option I, requires the arbitration agreement to be:

(a) An agreement between the parties that sets forth their intention to arbitrate;
(b) An agreement aroused out of a defined legal relationship between the parties;
(c) An agreement in writing.[165]

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[157] Yang Fan, *Foreign-Related Arbitration in China: Commentary and Cases,* (Cambridge: Cambridge University Press, 2016).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] Chen Lei and Wang Hao, "Judicial Control of Arbitral Awards in Mainland China", in *The Judicial Control of Arbitral Awards (Conference)*, ed. Cambridge: Cambridge University Press (Universitè catholique de Lyon, 2020), 210-225.
[162] *Id.*
[163] Article 16 of the Arbitration Law of the People's Republic of China.
[164] Judicial control of the Arbitral Awards in Mainland China Chen Lei & Wang Hao.
[165] Article 7 of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008), available from www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

The Hong Kong Law has recently incorporated the entire Article above into its *Hong Kong Arbitration Ordinance.*[166] Under the Singapore International Arbitration Act, an arbitration agreement in order to be valid needs to meet the definition above and the writing requirement.[167] English and French Arbitration Laws go even further. The former requires parties to set out their intention to submit a dispute to arbitration, regardless of the written form.[168] The latter provides no specific form of the arbitration agreements in international arbitration, while demanding the written form in domestic arbitration.[169]

Back to the AL, Article 17 lists other circumstances that, if existing, will render the arbitration agreement null and void:

(1) The matters object of the arbitration agreement are beyond what is arbitrable under the law;
(2) One of the parties to the agreement has no legal capacity or lacks the capacity to conclude an agreement;
(3) One of the parties to the agreement has forced the other to enter into arbitration.[170]

The doctrine of Separability

The doctrine of Separability, also known as one of the cornerstones of international arbitration, sets forth a distinction between the arbitration agreement or clause and the main contract that contains it.[171] Put in a nutshell, the arbitration clause survives the termination or invalidity of the main contract.[172] Article 19 of the AL reflects this view, by establishing that the arbitration agreement shall not be affected by the amendment, rescission, termination or invalidity of the main contract, therefore existing independently.[173] By 2019, the SPC has also published three rulings, issued by the First International Commercial Court ("CICC").[174] The First International Commercial Court is a permanent adjudication organ established by the SPC to deal with international commercial disputes.[175] Based in Shenzhen, its fundamental aim is to create and stable and transparent rule of law of international business

[166] "Arbitration Ordinance, Cap.609", Hong Kong e-legislation, last visited June 27, 2022, https://www.elegislation.gov.hk/hk/cap609.
[167] "International Arbitration Act 1994", 2020 Revised Edition, Singapore Statutes Online, last visited July 5, 2022, https://sso.agc.gov.sg/Act/IAA1994.
[168] "Arbitration Act 1996", UK Public General Acts, Last visited July 5, 2022, https://www.legislation.gov.uk/ukpga/1996/23/section/6.
[169] "Decree No. 2011-48 of 13 January 2011, Reforming the Law Governing Arbitration", Ministry of Justice and Civil Liberties, last visited July 5, 2022, http://parisarbitration.com/wp-content/uploads/2017/02/EN-French-Law-on-Arbitration.pdf.
[170] Article 17 of the Arbitration Law of the People's Republic of China.
[171] Ad hoc Arbitration – an introduction to the key features of ad hoc arbitration, LexisNexis, last visited June 25, 2022, https://www.lexisnexis.co.uk/legal/guidance/ad-hoc-arbitration-an-introduction-to-the-key-features-of-ad-hoc-arbitration.
[172] *Id.*
[173] Article 19 of the Arbitration Law of the People's Republic of China.
[174] Sarah Thomas et al., "MoFo APAC Arbitration Update: October 2019", *Morrison and Foster LLP,* November 21, 2019, https://www.mofo.com/resources/insights/191122-mofo-apac-arbitration-update.html.
[175] "A Brief Introduction of China International Commercial Court", CICC, Updated June 28, 2018, https://cicc.court.gov.cn/html/1/219/193/195/index.html.

environment.[176] Those previously mentioned rulings are all related to the same transaction and strengthened the doctrine of separability within the PRC.[177]

In *Luck Treat Limited v. Shenzen Zhongyuan Cheng Commercial Investment Co., Ltd.,* the disputed contracts were, in a sale of shares transactions:

(a) A sale and purchase agreement between Luck Treat Limited and Zhongyuan Cheng Commercial Investment;
(b) A debt settlement agreement between Luck Treat Limited, its affiliates and Zhongyuan Cheng.[178]

During the negotiations, parties agreed on having:

(a) The PRC law as the governing law of the contract,
(b) An arbitration clause setting out the Shenzhen Court of International Arbitration's administration over the case.[179]

Despite the effort, negotiations did not work out and none of the parties signed the final contract. When a dispute arose among them, Zhongyuan Cheng referred the dispute to arbitration, while Luck Treat filed before the Shenzhen Intermediate People's court to get a ruling that since the contracts themselves were not signed, no arbitration clause was established.[180] Luck Treat's argument was based on Article 32 of the Contract Law of the People's Republic of China, which provides that a contract between the parties is established only upon signature of both.[181] The CICC deemed the case relevant and took it over, holding that the arbitration clause was valid even though the final contracts were never signed on by the parties.[182] The CICC held that under the AL, the validity of an arbitration clause is independent from the main contract that contains it, therefore the latter's invalidity or non-existence does not affect the former.[183] This clarification was welcomed by the international arbitration practitioners and ended up strengthening the Separability doctrine both within the context of the Contract Law of the People's Republic of China and under the AL.[184]

[176] *Id.*
[177] *Id.* at 123.
[178] Luck Treat Limited v. Shenzen Zhongyuancheng Commercial Investment Co., Ltd., September 18, 2019, http://www.lawinfochina.com/display.aspx?lib=case&id=3429.
[179] *Id.* at 123.
[180] *Id*. at 127.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*

The doctrine of Kompetenz-kompetenz

Article 20 deals with the arbitral tribunal's power to rule on its own jurisdiction. The Chinese Legal system does not recognize the arbitral tribunal's power to rule on its own jurisdiction and therefore, the AL sets forth that such competence is attributed either to the arbitration commission or to the people's court.[185] Furthermore, the power of the arbitration commission is secondary to the court's power, i.e., if the application is submitted to both, the latter will prevail and decide the matter.[186] China's denial of the doctrine of Competence-Competence, aka the legal doctrine by which an arbitral tribunal can decide upon its jurisdiction, has caused delays and brought up an intrusive level of control of the arbitration commission over the tribunal.[187]However, things have changed since July 30th, 2021. The PRC Ministry of Justice has issued the *Amendment to the Arbitration Law* (which has been the first amendment to the AL) that covers some arguable matters such as Article 16 of the AL and the Competence-Competence Doctrine.[188] The Draft enforces the Competence-Competence doctrine setting up the arbitral tribunal to decide first on its own jurisdiction and second on the validity and existence of the arbitration agreement.[189] But there is more: the arbitration institution is empowered to decide on such issues before an arbitral tribunal is appointed, and no people's court can hear the case until the issue is submitted either to the arbitral tribunal or the arbitral institution. [190] This Draft opens up the way toward a more independent and private arbitration, delaying the time of courts' intervention, making the arbitration framework less "institutionalized" and more independent and private.[191]

The Arbitral Tribunal

Chapter IV, Section I regards the structure of the proceedings, while the second section sets forth the rules on the formation of the Arbitral tribunal.[192] The arbitral tribunal can be composed of either one or three arbitrators. And the latter shall have a presiding arbitrator.[193] When the arbitral tribunal is composed of three arbitrators, each party has to either appoint an arbitrator or entrust the chairman of the Arbitration Commission to do so. Moreover, parties shall cooperate to either appoint or entrust the arbitration commission's chairman to pick the presiding arbitrator among the three.[194] When the arbitral tribunal is composed by just one

[185] Article 20 of the Arbitration Law of the People's Republic of China.
[186] Annie X. Li, *Challenges and Opportunities of Chinese International Arbitral Institutions and Courts in a new era of Cross-Border Dispute Resolution,* 38:2 BOSTON UNIVERSITY INTERNATIONAL L.J.354, 355-393 (2019-2020).
[187] Tibor Varady, John J. Barcelò III, Stefan Kroll, Arthur T. Von Mehren, *International Commercial Arbitration, A Transnational Perspective,* (West Academic Publishing: 2015).
[188] *Id.* at 135.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] Chapter IV of the Arbitration Law of the People's Republic of China.
[193] Article 30 of the Arbitration Law of the People's Republic of China.
[194] Article 31 of the Arbitration Law of the People's Republic of China.

arbitrator, the same applies: parties can either appoint together one arbitrator or entrust the commission's chairman to do so. In the case parties fail to do so or appoint the arbitrators beyond the time limit provided, it is up to the arbitration's commission chairman to solve the issue and appoint the arbitrator.[195] The arbitral tribunal holds the duty to make records of oral hearings in writing.[196] Each records needs to be signed or sealed by the arbitrators, the person who made the records along with parties and participants to the hearings.[197] The arbitral tribunal also holds the uncommon power to gather evidence on its own.[198]

Hearings: Procedural Rules

Chapter IV follows up with rules regarding oral hearings and awards. Since the enforcement of awards will be treated separately, we will now focus on some details concerning the Hearings. As a general matter, arbitration has to be conducted by means of oral hearings.[199] However, parties might also change the general rule and agree on an arbitration proceeding with no oral hearings, based on written application forms. Given the more private and likable nature of arbitration, oral hearings are generally conducted in camera. However, parties are free to change this set-up into a public arbitration, unless State Secrets are involved in the case. [200] Parties have to be notified of the date of the hearing, and if a claimant fails to appear without an acceptable reason he might be deemed to have withdrawn his application to arbitrate.[201]

According to Article 43, parties have to provide evidence in order to support their own arguments.[202] The evidence must be produced during the oral hearings and parties have the right to examine it.[203] It is noteworthy that the parties have the right to debate and the presiding arbitrator or the sole arbitrator have to gather parties' final opinions by the end of the debate.[204]

[195] Article 32 of the Arbitration Law of the People's Republic of China.
[196] Article 48 of the Arbitration Law of the People's Republic of China.
[197] Article 48 of the Arbitration Law of the People's Republic of China.
[198] Zhang Shouzi, "Arbitration procedure and practice in China: Overview, *Westlaw*, Law stated as March 01, 2021, https://content.next.westlaw.com/practical-law/document/Iacc21dac1c9a11e38578f7ccc38dcbee/Arbitration-procedures-and-practice-in-China.
[199] Article 39 of the Arbitration Law of the People's Republic of China.
[200] Article 40 of the Arbitration Law of the People's Republic of China.
[201] Article 41 and 43 of the Arbitration Law of the People's Republic of China.
[202] Article 43 of the Arbitration Law of the People's Republic of China.
[203] Article 45 of the Arbitration Law of the People's Republic of China.
[204] Article 47 of the Arbitration Law of the People's Republic of China.

As aforementioned, the arbitral tribunal is allowed to gather evidence on its own. The AL has no comparable mechanism as discovery or common law disclosure.[205] The trend among Chinese parties, courts and arbitrators is that a party has to provide evidence in order to supports its claims.[206]

Interim measures

In Mainland China, Courts hold the power to grant and enforce Interim measures, i.e. the power to grant any temporary measure aimed at protecting the outcome of the arbitration proceedings.[207] Therefore, Interim measures are only available from courts, while the arbitral tribunal is denied such power.[208] This ends up being one of the worst drawbacks of arbitration in Mainland China, given the arbitrators' lack of coercive power.[209] The AL falls short on implementing its provisions on interim measures, leaving parties in courts' hands, which are known to deny pre-arbitration measures.[210]

As aforementioned, parties of foreign-related disputes enjoy a much more favorable treatment than those of domestic disputes. Article 46 of the AL (evidence preservation) compels parties of domestic disputes to demonstrate the on-going risk of destruction or loss of the evidence to apply to a people's court to get an interim measure.[211] By contrast, parties of a foreign-related dispute have no strict requirement on their way to get an interim measure, besides the standard procedure to apply before the intermediate people's court.[212]

Conciliation and the Med-Arb Tradition

An arbitration proceeding does not always end with an arbitral award. A settlement agreement might take its place if conciliation is successfully conducted.[213] According to Article 51 of the AL, the arbitral tribunal might hold the proceeding off and conduct conciliation before giving its final award. This can only happen if both parties settle on conciliation to resolve the dispute.[214] If conciliation is carried on effectively, the arbitral tribunal can either end the dispute with a conciliation agreement or an arbitral award.[215] Both are provided of the same

[205] Zhang Shouzi, "Arbitration procedure and practice in China: Overview*, Westlaw*, Law stated as March 01, 2021, https://content.next.westlaw.com/practical-law/document/Iacc21dac1c9a11e38578f7ccc38dcbee/Arbitration-procedures-and-practice-in-China.
[206] *Id.*
[207] Milena Tona, "Interim Measures in Arbitration: is it really an effective instrument?", *LitigAction,* June 19, 2015, http://www.litigaction.com/interim-measures-in-arbitration-is-it-really-an-effective-instrument/.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] Article 46 of the Arbitration Law of the People's Republic of China.
[212] Article 68 of the Arbitration Law of the People's Republic of China.
[213] Article 51 of the Arbitration Law of the People's Republic of China.
[214] *Id.*
[215] *Id.*

legal value. The written conciliation statement must specify the arbitration claim, the settlement results the parties agreed on and must be signed by the arbitrators.[216]If conciliation turns out to be unsuccessful, the arbitral tribunal will turn to the "standard" and final arbitral award.[217]

Even though there have been differences between "mediation" and "conciliation" among the international arbitration literature and practice, those terms are switchable in the Chinese arbitration setting.[218] Both their meanings entail the involvement of a third neutral party helping parties' amicable settlement.[219] Article 51 of the AL represents the key legal framework for Med-Arb, the combination of mediation with arbitration.[220] Med-Arb keeps its popularity among Chinese people due to first, its many upsides – such as flexibility, which allows parties to tailor proceeding rules according to their needs – and second its compatibility with the traditional Chinese culture.[221] In terms of flexibility, arbitrators can switch to the role of mediators if parties settle on mediation, while still being allowed to go back to arbitration if mediation turns out unsuccessful.[222] The major arbitration institutions in Mainland China – such as the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission (BAC) and the Shanghai International Arbitration Center (SHIAC) – all provide Med-Arb services, carrying on the "tradition".[223] One of the best upsides of Med-Arb is that arbitral awards are deemed more "trustworthy" than ordinary mediation: as a way of example, only arbitral awards are enforceable under the New York Convention, while there is no mention of conciliation statements.[224] Despite what above-stated, those Med-Arb awards are likely to lack enforceability in foreign jurisdictions where the relevant assets of the dispute are based, since there have yet to be significant upheavals in the international legal framework on the combined practice of mediation and arbitration.[225]

It is worth mentioning that in august 2019, China signed the United Nations Convention on International Settlement Agreements resulting from Mediation (the "Mediation Convention"),

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[216] Article 52 of the Arbitration Law of the People's Republic of China.
[217] *Id.* at 162.
[218] Ali, Shahla F., "The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities" (October 18, 2016). Dispute Resolution International, DRI 119. PP. 119-132, 2016, Available at SSRN: https://ssrn.com/abstract=3216252.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] Cheng, Tai-Heng, "Reflections on Culture in Med-Arb" (March 19, 2010), NYLS Legal Studies Research Paper No. 09/10 #34, Available at SSRN: https://ssrn.com/abstract=1574814.

that came into force by September 2020.[226] According to the Convention, each State party has to enforce settlement agreements as set forth in the parties' agreement.[227] On the one hand, the Convention's aim is to push mediation forward as an effective dispute resolution mean, in particular for commercial disputes.[228] On the other hand, the Mediation Convention does not cover settlement agreements enforceable as arbitral awards, which raises some doubts on how this will affect the Med-Arb Tradition in Mainland China.[229]

The arbitral award

The arbitration award must:

(1) Be made in accordance with arbitral tribunal's majority;
(2) Record the minority's opinion;
(3) Specify the arbitration claim, the facts of the dispute, the ratio of the decision, the results agreed on, the arbitration fees' allocation and the award's date;
(4) Be signed by the arbitrators and sealed by the arbitration commission;
(5) Be amended within 30 days from the receipt of the award if one of the parties asks to do so on the basis of literal or calculation errors or other relevant matters.[230]

Finally, the arbitral award is legally effective as of the date on which it is made.[231]

If there are either literal or calculations errors in the arbitration award, or if the arbitration award has omitted certain matters that must have been arbitrated on, the arbitral tribunal is due to correct those errors.[232]

Foreign-related disputes

Finally, Chapter VII deals with foreign-related disputes. The provisions contained in this chapter shall be applied to disputes on economic, trade, transportation and maritime activities involving a foreign element.[233] The following articles establish that foreign-related arbitration commissions have to be established by the China Chamber of International Commerce and be composed by one chairman, some vice-chairmen and members.[234] The chairman, vice-chairmen and members have to be appointed by the China Chamber of International

[226] Zhang Shouzi, "Arbitration procedure and practice in China: Overview*,* *Westlaw*, Law stated as March 01, 2021, https://content.next.westlaw.com/practical-law/document/Iacc21dac1c9a11e38578f7ccc38dcbee/Arbitration-procedures-and-practice-in-China.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] Article 54, 55 and 56 of the Arbitration Law of the People's Republic of China.
[231] Article 57 of the Arbitration Law of the People's Republic of China.
[232] Article 54 of the Arbitration Law of the People's Republic of China.
[233] Article 65 of the Arbitration Law of the People's Republic of China.
[234] Article 66 of the Arbitration Law of the People's Republic of China.

Commerce.[235] As aforementioned, foreign-related commissions are free from the limit requirement of 12 members, which domestic arbitration commissions have to comply with.[236]

Foreign commissions are also free to pick out their arbitrators among foreigners, as the only condition is to select professionals with great expertise in the fields of law, economy and trade, science, technology and so on.[237]

In the case of an application for interim measures, parties to foreign-related disputes get Intermediate people's court instead of Basic people's court to hear their case.[238] The aim is to provide foreigners with higher quality legal service compared to what lower courts might provide.

Finally, foreign-related arbitral rules are enacted by the China Chamber of International Commerce, in accordance with the AL and the arbitral-related rules of the CPL.[239]

Arbitral-related Rules of the Civil Procedure Law

The Civil Procedure Law of the People's Republic of China ("CPL") is a body of law divided up in 29 chapters, and among those one deals with procedural aspects of Arbitration. Chapter XXVIII provides procedural rules of arbitration proceedings conducted in Mainland China.[240]

Article 257 of the CPL starts off specifying that parties of foreign-related disputes that entered into an enforceable arbitration agreement should not bring an action to a people's court, but they are allowed to do so if no arbitration agreement exists.[241]

The CPL also confirms Intermediate people's courts' jurisdiction on foreign-related disputes, pointing out that any people's courts that encounters a request for interim measures regarding a foreign-related dispute must refer it to the higher court.[242] The higher court in question must be the one of the place where the party against whom the application is made has his domicile or where his property is located.[243] The same rule applies when parties are disputing about the

[235] *Id.*
[236] Article 12 of the Arbitration Law of the People's Republic of China.
[237] Article 67 of the Arbitration Law of the People's Republic of China.
[238] Article 68 of the Arbitration Law of the People's Republic of China.
[239] Article 73 of the Arbitration Law of the People's Republic of China.
[240] Chapter XXVIII of the Civil Procedure Law of the People's Republic of China.
[241] Article 257 of the Civil Procedure Law of the People's Republic of China.
[242] Article 258 of the Civil Procedure Law of the People's Republic of China.
[243] *Id.*

enforcement of the arbitral award: they shall apply for the arbitral award's enforcement before an intermediate people's court.[244]

As aforementioned, Article 260 of the CPL sets forth the procedure to follow when a party to an arbitration agreement of a foreign-related dispute requests the non-enforcement of an arbitral award made by a Chinese arbitral institution.[245] Indeed, if the party against whom the application is made proves the following requirements, the intermediate people's court handling the case must deny the enforcement of the award:

a. There was no arbitration clause or a written arbitration agreement parties agreed on;
b. The party in question was not given notice as to the appointment of the arbitrator or of the arbitration proceeding outset, or was unable to attend for causes beyond his responsibility;
c. The arbitral tribunal's composition was not complying with the rules of arbitration as well as the procedure followed;
d. The topics on which the award decided on were outside the arbitration agreement's scope.[246]

Even though the Enforcement of arbitral awards will be discussed in another chapter, it is worth mentioning that in 2017, the SPC has published one judicial interpretation on the judicial review process.[247] Under this interpretation, any intermediate people's court that wants to refuse the enforcement of an award (regardless of whether domestic, foreign-related or foreign) must commence an approval procedure up to the higher people's court in its jurisdiction. If the latter agrees with the ruling of the first level court, it must report so to the SPC, which has the definitive say on the matter.[248]

As the last arbitral-related rules of the CPL, Article 261 carves out a rule about the possible outcomes after a higher people's court has disallowed the non-enforcement of an arbitral award. If the court has disallowed the non-enforcement of the arbitral award by written order, the parties may either start another arbitration proceeding or bring an action to another people's court.[249]

[244] Article 259 of the Civil Procedure Law of the People's Republic of China.
[245] Article 260 of the Civil Procedure Law of the People's Republic of China.
[246] *Id.*
[247] Anita Lee, "Newly published judicial interpretations on arbitration in China", *Hogan Lovells Publications,* January 2018, https://www.hoganlovells.com/en/publications/newly-published-judicial-interpretations-on-arbitration-in-china.
[248] *Id.*
[249] Article 261 of the Civil Procedure Law of the People's Republic of China.

Enforcement of Arbitral Awards

First and foremost, there is a distinction between Recognition and Enforcement of an award under Chinese Law, since both are regarded as two separate yet related procedures.[250] Recognition proceedings are held by civil divisions handling foreign related cases in Intermediate courts.[251] If the Intermediate people's court recognizes the legal validity of the arbitral award (i.e. the award is regarded definitive on the issues among the parties), it will issue a ruling of its recognition within the PRC.[252] After the award is recognized, the party will have to further submit a request to enforce the award, aka get a mean for its execution.[253] This last request needs to be submitted to the enforcement division of the same court.[254]

There are four types of arbitral awards that can be enforced in China:

i. Chinese Domestic awards;
ii. Foreign-related awards rendered in Mainland China;
iii. Foreign arbitral awards rendered outside China;
iv. Arbitral awards rendered either in Hong Kong, Macau and Taiwan.[255]

Each kind follows a different path in terms of recognition, enforcement and procedural grounds.[256] As aforementioned, the *1996 Notice* called the twofold arbitration system off. Therefore, the distinction between domestic or foreign-related awards based off the arbitration institution that renders them is stepping down in Mainland China, while a new distinction based on the nature of the dispute itself (whether domestic or just foreign) is rising up within the Chinese arbitration practice.[257]

The pre-reporting system

The pre-reporting system, established by the SPC in 1995, has been the most influential contribution of the highest judicial body of the Mainland to the Arbitration framework.[258] The initial aim of the pre-reporting system – designed to cover just foreign and foreign-related disputes – consisted of establishing Intermediate people's courts' duty to report to Higher people's courts any dispute in which the issue is the non-enforcement of an arbitral award. By

[250] Teng Haidi and Yu Qing King & Wood Mallesons' Dispute Resolution Group, "Recognition and Enforcement of Foreign Arbitral Awards in the PRC", *China Law Insight,* June 15, 2017, https://www.chinalawinsight.com/2017/06/articles/dispute-resolution/recognition-and-enforcement-of-foreign-arbitral-awards-in-the-prc/.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] Gu Weixia, "Arbitration in China" in *International Commercial Arbitration in Asia,* ed. Shahla F. Ali, Tom Ginsburg, (Huntington: JurisNet LLC, 2013), 77-133.
[256] *Id.*
[257] *Id.*
[258] Yves Hu (JunHe LLP) and Clarisse von Wunschheim (Altenburger), "Reforms on the "Prior Reporting System" - A praiseworthy effort by the PRC Supreme People's Court or Not?", *Kluwer Arbitration Blog*, January 8, 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/.

the same token, Higher people's courts have to report the case up to the SPC if they do agree with the previous courts' view.[259] This system does not set forth any deadline to report or reply.[260]

Most important, the SPC came out with a new judicial interpretation that attempted to stretch out the pre-reporting system to include domestic arbitration (to a certain level).[261] The *Interpretation No. 21*, rendered by the SPC by the end of 2017, tried to unify the threefold judicial framework.[262] First, an intermediate people's courts that finds an arbitration agreement to be invalid (regardless of whether domestic, foreign-related or foreign) while reviewing a domestic arbitration case, must obtain the approval from the higher people's courts in its jurisdiction.[263] The Higher People's court can, therefore, review every Intermediate Court's decision on the non-enforcement of an arbitration agreement, with the power of having the final say on the matter.[264] If the Higher People's court does not agree with the lower court's decision, it shall report the case up to the SPC.[265] Given the SPC's workload, the Interpretation has also provided that in relation to domestic arbitration, a review up to the Higher People's court level is sufficient.[266] To sum up, in domestic arbitration, the SPC has jurisdiction over the case immediately after a lower people's court only under these two exceptions:

(a) The parties are domiciled provinces;
(b) What is disputed is a matter of public interest.[267]

However, the SPC keeps the power of having a definite say on foreign-related and foreign disputes when a lower court pushes to deny the enforcement of an arbitral award. Any decision that comes out at the end of the judicial review process cannot be subjected to any further review.[268]

The journal *China Trial Guide on Foreign-Related Commercial and Maritime Trial* keeps record and publishes all the SPC' replies within the pre-reporting system.[269] The journal also

[259] *Id.*
[260] *Id.*
[261] Chen Lei and Wang Hao, "Judicial Control of Arbitral Awards in Mainland China", in *The Judicial Control of Arbitral Awards (Conference)*, ed. Cambridge: Cambridge University Press (Universitè catholique de Lyon, 2020), 210-225.
[262] Roy Chan, Jessica Jing Zhao, Eva Yao, "SPC issued two interpretations regarding the judicial review of arbitration cases", *DLA Piper Publications,* January 18, 2018, https://www.dlapiper.com/en/china/insights/publications/2018/01/spc-issued-two-interpretations-regarding-the-judicial-review-of-arbitration-cases/.
[263] *Id.*
[264] *Id.*
[265] *Id.* at 156.
[266] *Id.*
[267] *Id.*
[268] *Id.* at 156.
[269] *Id.* at 219.

includes all the refusals and reasoning of lower people's courts regarding foreign-related civil, commercial and maritime cases.[270]

A sudden upheaval was brought along also by another judicial interpretation the SPC published by the end of 2017. In an effort to increase the level of transparency within the pre-reporting system made up by the SPC, higher courts are now allowed to clarify unclear facts with either the parties to the case or the lower court, before it starts reviewing for a second time.[271]
Moreover, the Interpretation carves out the documentation that should be submitted along with the judicial review application: the most important document is the original arbitral award or a certified copy thereof.[272]

According to a 2012 study made by the SPC judges, among fifty-six requests of non-enforcement from lower courts, the SPC has agreed with the non-enforcement in twenty-one cases.[273] On average, 62% of the non-enforcement requests were either turned down or sent back by the SPC to the lower courts.[274]

Notwithstanding the aim of providing a better quality of legal service, the pre-reporting system presents some pitfalls, such as the lack of supervision upon lower courts.[275] There are, indeed, no sanctions imposed on those courts that do not comply with the pre-reporting system, raising some doubts about its efficiency.[276] As a way of example, in *Chenco Chemical Engineering and Consulting GMBH v. Duofuduo Chemical Corp*, the Xinxiang Intermediate people's court came out with a non-enforcement decision of the arbitral award.[277] The first hearing conducted by the above-mentioned court took place on August 7, 2004 while the refusal decision came out two weeks later.[278] This time length seems too short to have allowed the Xinxiang Intermediate people's court to report the case to the Henan Higher People's Court, and certainly not enough to report it up to the SPC.[279] This was the lead-up to the 2017 SPC judicial Interpretations, that introduced a level of disciplinary sanctions to those courts that do not comply with the pre-reporting system.[280]

[270] *Id.* at 219.
[271] *Id.* at 196.
[272] *Id.*
[273] Chen Lei and Wang Hao, "Judicial Control of Arbitral Awards in Mainland China", in *The Judicial Control of Arbitral Awards (Conference)*, ed. Cambridge: Cambridge University Press (Universitè catholique de Lyon, 2020), 210-225.
[274] *Id.*
[275] *Id.* at 231.
[276] *Id.* at 231.
[277] *Id.* at 231.
[278] *Id.* at 231.
[279] *Id.* at 231.
[280] *Id.* at 231.

Domestic Awards

The fifth chapter of the AL lays out rules to set aside domestic arbitration awards.

Parties can apply to the intermediate people's court of the place where the arbitration institution is based to set aside an arbitral award.[281] The first three grounds to set aside an arbitral award deal with procedural matters as opposed to grounds (e) and (f) that involve substantial matters.[282] Besides supporting its application with evidence, the submitting party has to prove one of the following conditions:

(a) There was no arbitration agreement in the first place;
(b) The matters decided by the tribunal were beyond what was agreed on in the arbitration clause or agreement or the arbitrators' power;
(c) The arbitral tribunal was appointed regardless of the rules provided;
(d) The arbitration agreement is based on fake evidence;
(e) The other party withheld the evidence thus affecting the arbitration proceeding's impartiality;
(f) The arbitrators were either bribed, committed embezzlement or committed wrongdoing to pursue their own benefit.
(g) The arbitration award violates China's public interest.[283]

If the people's court finds out that one of those conditions is met, it shall rule to set aside the arbitral award. In the case of ground (g), the people's court could rule ex officio to set aside the arbitral award.

Another aspect worth mentioning is the possibility to re-arbitrate: Article 61 of the AL provides that when a people's court has accepted an application to set aside a domestic arbitration award, it might consider re-arbitrating the dispute.[284] Re-arbitration plays out as a smart tool to get rid of any procedural defects of the arbitration award, without a deep court's intervention. If once notified, the arbitral tribunal refuses to re-arbitrate the case, the court is entitled to get back on the setting aside procedure.[285] This article of the AL seems to mirror Article 34(4) of the UNCITRAL Model Law, which allows the court to hold the set aside proceeding off and give the arbitral tribunal a chance to resume the arbitral proceedings.[286]

[281] Article 58 of the Arbitration Law of the People's Republic of China.
[282] *Id.*
[283] Article 58 of the Arbitration Law of the People's Republic of China.
[284] Article 61 of the Arbitration Law of the People's Republic of China.
[285] *Id.*
[286] Article 34 of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006* (Vienna: United Nations, 2008), available from www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

Foreign-related Awards

As aforementioned, foreign-related awards get a much more favorable treatment within the Chinese Legal Framework if compared to the time-consuming regime governing domestic arbitration proceedings. According to Article 70 and 71 of the AL, if the submitting party offers the evidence required to show the existence of one of the conditions set forth in Article 260 of the CPL, the people's court shall give a ruling to set aside the arbitral award.[287] By the same token, if the party against whom the enforcement is sought presents evidence of the existence of one of the conditions set out in Article 260 of the CPL, the people's court has to give a ruling of non-enforcement of the award. It is worth pointing out that both Articles 70 and 71 refer only to the first paragraph of Article 260 of the CPL, therefore calling off the chances of having a foreign-related award set aside for reasons of social and public interest.[288]

Finally, the grounds laid down in Article 260 of the CPL are narrower than those governing domestic awards provided by Article 58 of the AL.[289] This sheds light on the rising international trend that the PRC has brought up over the last few decades.[290]

The New York Convention: Recognition and Enforcement of Foreign Arbitral Awards.

According to Article 3 of Chinese Administrative Law, the President of the PRC, alongside the Standing Committee of the National People's Congress, has the power to ratify and abrogate treaties and agreements with foreign countries.[291] International treaties are a source of law in China[292] that, if ratified by the authorities stated above, prevail on domestic legislation if a conflict arises.[293] As aforementioned, China is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention).[294] As of July 2022, parties to the Convention are 170.[295]

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[287] Article 70 of the Arbitration Law of the People's Republic of China.
[288] Article 70 and 71 of the Arbitration Law of the People's Republic of China.
[289] Article 260 of the Civil Procedure Law of the People's Republic of China.
[290] *Id.*
[291] Article 3 of the Administrative Law of the People's Republic of China.
[292] Guo Yu, *People's Republic of China, Comparison between UN Model Law and Chinese Arbitration Law*, *The UNCITRAL Model Law and Asian Arbitration Laws*, 271, (Gary F. Bell ed., 2018).
[293] *Id.*
[294] Annie X. Li, Challenges and opportunities of Chinese International Arbitral Institutions and Courts in a new era of Cross-border Dispute Resolution, 38:2 BOSTON UNIVERSITY INTERNATIONAL LJ. 354, 355-393 (2019-2020).
[295] "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), United Nations Commission on International trade Law, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

General set-up

Since China's accession, the New York Convention has been the paramount legal ground to enforce foreign arbitration awards in Mainland China.[296] The aim of the New York Convention is to provide a common legislative ground to the recognition and enforcement of foreign and foreign-related arbitral awards by courts.[297] Courts of State parties are required to give full effect to arbitration agreements, denying parties access to courts when they have agreed on arbitration beforehand.[298]

Legal Framework

The arbitral awards that can be submitted before Chinese courts as foreign under the New York Convention are:

(a) Arbitration awards made within the territory of another State Party, which sets forth the principle of reciprocity, according to the first reservation China has made at the time of the accession to the New York Convention. Where a country is not a State party to the New York Convention, for recognition and enforcement of arbitral awards the party will have to rely on international agreements China entered into with that country;[299]

(b) Arbitration awards on commercial legal disputes, i.e. arbitral awards aroused out of disputes of commercial nature, according to the second reservation China has made during the accession to the New York Convention.[300] The only exception to the Commercial nature rule are investor-state disputes, which are under the auspices of 1963 Washington Convention.[301]

The New York Convention does not apply to arbitral awards made in Hong Kong, Macau and Taiwan.[302] As an example, under the "One Country, Two systems", Hong Kong is part of China yet, it keeps its own legislative framework and life.[303] One aspect worth noticing is that China has signed an international agreement with Hong Kong on mutual recognition and

[296] Torres Manuel, "Keys to the Enforcement of foreign arbitration awards in Mainland China", *Garrigues, News Room,* May 25, 2021, https://www.garrigues.com/en_GB/new/keys-enforcement-foreign-arbitration-awards-mainland-china.
[297] "Text and Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")", United Nations Commission on International Trade Law, law as stated June 27, 2022, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.
[298] *Id.*
[299] Gu Weixia, "Arbitration in China" in *International Commercial Arbitration in Asia*, ed. Shahla F. Ali, Tom Ginsburg, (Huntington: JurisNet LLC, 2013), 77-133.
[300] *Id.* at 232.
[301] *Id.* at 235.
[302] *Id.* at 232.
[303] "White Paper on the Practice of "One Country, Two systems" in the Hong Kong Special Administrative Region", The State Council Information Office of the People's Republic of China, June 10, 2014, http://www.scio.gov.cn/ztk/dtzt/2014/31039/31042/Document/1372893/1372893.htm.

enforcement of arbitral awards.[304] Hong Kong and China have also recently supplemented the arrangement, made on the terms of the New York Convention to mirror its aim.[305]

Article I lays out:

- The range of application of the Convention, that embraces both non-domestic (i.e. involving a foreign element) awards and foreign arbitral awards;
- The definition of "arbitral award" which includes both awards made by arbitrators specifically appointed to each case (aka ad hoc arbitration) and those made by permanent arbitral institutions (institutional arbitration).[306]

The arbitration agreement

An agreement to arbitrate under the New York Convention has to:

(a) be in writing, either via an arbitral clause in a contract or an arbitration agreement;
(b) regard arbitrable matters of a defined legal relationship.[307]

If parties of an arbitration proceeding seek out courts' help, courts of State parties have to enforce such agreement by referring parties to arbitration, unless the arbitration agreement turns out to be null, void or invalid.[308] Since the most valuable aim of the New York Convention is to even out the differences between the recognition and enforcement of foreign arbitral awards to that of domestic ones, every State party is compelled to enforce the foreign award according to the rules of the country where it was rendered. Furthermore, if any onerous condition or fee is imposed on the recognition and enforcement of foreign awards, those shall be no higher than the ones imposed onto domestic awards.[309]

To obtain the recognition and enforcement of the foreign award, the submitting party has to supply:

(a) The authenticated award or an official copy thereof;
(b) The official agreement in writing.[310]

Both documents need to be in an official language of the State party where the enforcement and recognition of the award are sought or in a translated version.[311]

[304] *Id.*
[305] Peter Yuen, Olga Boltenko, Zi Wei Wong, "Hong Kong, The Asia-Pacific Review 2023, May 27, 2023, https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/hong-kong.
[306] Article I of the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[307] Article II of the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[308] *Id.*
[309] Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[310] Article IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[311] *Id.*

Article V

Article V sets up the judicial review or refusal grounds on the recognition and enforcement of foreign awards. Courts are allowed to refuse to enforce and recognize the award only if certain procedural requirements were not met throughout the arbitration proceeding. Those requirements are similar to those set forth in Article 260 of the CPL:[312]

(a) Parties lacked the legal capacity to enter into the arbitration agreement; there in no equivalent requirement in the CPL;

(b) The party against whom the award is invoked was not given notice or was unable to present his case; which mirrors ground (b) of Article 260 of the CPL;

(c) The award regards matters beyond the scope of arbitration, just as set forth by Article 260 of the CPL, ground (d). In addition, the New York Convention allows those matters within the arbitral scope to be recognized and enforced, dividing them up from the non-contemplated ones;

(d) The composition of the arbitral tribunal was not in accordance with the arbitration agreement or the law under which the award is made, mirroring ground (c) of Article 260 of the CPL;

(e) The award has not yet become binding on the parties or was set aside by the competent institution in the country where the award was rendered.[313]

The second section of Article V follows up adding a twofold scenario in which a foreign award cannot be enforced. First, the recognition and enforcement of the foreign award might be denied when its subject matter cannot be solved by means of arbitration under the law of the country where it needs to be enforced. Second, the same pattern would repeat itself if the recognition and enforcement of the award goes against that country's public policy.

Case Law

Wu Chunying v. Zhang Guiwen represents one of the rare cases in which the non-enforcement of the arbitral award was based on the arbitrability of the matter.[314] In the arbitral award, the Mongolian National Arbitration Centre held that Wu Chunying was the successor in title at law of her husband's investment property.[315] However, according to Article 3 of the AL inheritance is not a matter that can be solved by means of arbitration, therefore the SPC agreed with the Shandong Higher people's court on the non-enforcement of the arbitral award.[316]

[312] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[313] Article V of the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[314] Chen Lei and Wang Hao, "Judicial Control of Arbitral Awards in Mainland China", in *The Judicial Control of Arbitral Awards (Conference)*, ed. Cambridge: Cambridge University Press (Universitè catholique de Lyon, 2020), 210-225.
[315] *Id.*
[316] *Id.*

In *Bullsone Co., Ltd v. Beijing LTC Economic & Trade Co., Ltd,* Bullsone applied for the recognition and enforcement of the arbitral award by the Korean Commercial Arbitration Board (hereinafter the KCAB"), and its counterparty, Beijing LTC argued that it never received notice of the hearing or the arbitral award granted by the KCAB.[317] Beijing LTC's argument was based on the Convention on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters, to which China became a party making reservations on the service by post.[318] Beijing also argued that even though KCAB posted the documents correctly, the post method service was not allowed in Mainland China.[319] The Higher People's court stated that under the aforementioned Convention, Bullsone should have been able to provide evidence of KCAB's correct handling of the documents to Beijing LTC.[320] Given the lack of evidence and Beijing LTC's denial of having received any, the recognition and enforcement of the arbitral award was denied on the second refusal ground of Article V of the New York Convention.[321]

In the *Bunge Agribusiness Singapore Pte. Ltd v. Guangdong Fengyuan Cereals and Oils Group Company Limited* case, Fengyuan's argument was based on the fact that the arbitral award by the London Federation of Oils, Seeds and Fats Association ("FOSFA") was against China's Public interest.[322] This was so because the PRC General Administration of Quality Supervision, Inspection and Quarantine ("AQSIC") had held off Bunge Agribusiness' qualification for exporting soya beans from Brazil to China.[323] The Higher people's court of Guangdong Province found that even though Bunge Agribusiness' qualification to export was suspended, there was no prohibition against the exportation of soya beans in China.[324] Therefore, the Higher court held that Fengyuan could not base his argument on the public policy ground. However, the court refused the recognition and enforcement of the award based on the fifth refusal ground of the New York Convention: the award had not yet become binding between the parties.[325]

There are several cases that involve the public policy refusal ground. Among those there is *Western Bulk Pte. Ltd. v. Beijing Zhong-gang Tiantie Steel Trade Co., Ltd.:* the lower court held that the award was incontestably unconscionable, therefore violating the country's public

[317] Yang Fan, *Foreign-Related Arbitration in China: Commentary and Cases,* (Cambridge: Cambridge University Press, 2016).
[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*

policy.[326] The SPC' reply was not in agreement with the lower court's holding, since unconscionability does not fall under the public policy refusal ground.[327] Moreover, the SPC pointed out how the public policy principle cannot be broadened and should be applied strictly.[328]

Even though there is no exact definition of public policy or interest in the Chinese Legal Framework, in the *TCL Air-conditioner (Zhongshan) Limited v. Castel Electronic Pty Ltd* case the SPC held that the violation of public interest entails a violation of national sovereignty, public security and/or policy.[329] In *Zhongshan,* the contested issue was the meaning of public policy and whether it relates to procedural as well as substantive issues.[330] It is noteworthy that even though the public policy card is often played out when dealing with enforcement and recognition of arbitral awards, Chinese courts are hesitant to rely upon this refusal ground.[331] As aforementioned, lower courts are subjects to the pre-reporting system up to the higher court or the SPC, which ended up preventing lower courts from the non-enforcement of arbitral awards. However, like in the *Wicor v. Taizhou Hao Pu Investment Co., Ltd.,* the SPC denied the enforcement of an arbitral award rendered by the ICC in the Hong Kong Special Administrative Region on the ground of public policy.[332] Wicor submitted an application to the ICC on November 4, 2011 and later on the arbitration institution granted an interim award setting forth the validity of the arbitral agreement.[333] The Taizhou Intermediate People's Court declared the invalidity of the agreement between the parties but the ICC went on affirming the agreement's validity and granting an arbitral award.[334] In spite of the ICC's effort, the SPC held that the enforcement of such award would go against the country's public policy since it was in contrast with the court's holding.[335]

[326] Chen Lei and Wang Hao, "Judicial Control of Arbitral Awards in Mainland China", in *The Judicial Control of Arbitral Awards (Conference)*, ed. Cambridge: Cambridge University Press (Universitè catholique de Lyon, 2020), 210-225.
[327] *Id.*
[328] *Id.*
[329] Teng Haidi and Yu Qing King & Wood Mallesons' Dispute Resolution Group, "Recognition and Enforcement of Foreign Arbitral Awards in the PRC", *China Law Insight,* June 15, 2017, https://www.chinalawinsight.com/2017/06/articles/dispute-resolution/recognition-and-enforcement-of-foreign-arbitral-awards-in-the-prc/.
[330] Castel Electronics Pty v. TCL Air Conditioner (Zhongshan) Co. Ltd. (No. 2), 2012, Federal Court of Australia, Available at http://www.uncitral.org/docs/clout/AUS/AUS_230112_FT.htm or http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2012/1214.html.
[331] *Id.*
[332] *Id.* at 287.
[333] *Id.* at 287.
[334] *Id.* at 287.
[335] *Id.* at 287.

Courts and Time

In Mainland China, a party that wants to apply to get the recognition and enforcement of a foreign arbitral award would do so before the competent Chinese court.[336] As previously mentioned, recognition and enforcement of awards are two different yet related proceedings in the Chinese Legal system, and even though one could think that those procedures are the same all over China, this is not the case.[337] Courts from different regions might skip one of the procedural steps, departing from the standard practice, e.g. deciding on the recognition and enforcement of an arbitral award in a single proceeding.[338] The intermediate people's court of the place of residence or property of the person under the enforcement has jurisdiction over the application.[339]

The statutory time limit to apply for the recognition and enforcement of foreign arbitral awards is two years and starts either from the expiration of the time limit for performance of the award or from the day after the award is granted to the party.[340] In general, courts take between 6 to 8 months to rule on the recognition of foreign awards.[341] However, if the dispute ends up to the higher people's court, it could take significantly longer.[342]

Interim Measures

As aforementioned, in Mainland China only courts hold the power to grant interim measures. The AL does not provide any clear ground on the matter, and neither does the New York Convention.[343] Since there are no specific rules about the application of interim measures during the recognition and enforcement of foreign arbitral awards, the only thing a party can do is waiting for the arbitral award to be recognized and enforced and then apply before a Chinese court to get the interim measure.[344] Thus, due to the lack of any legal ground, a party is generally stopped from enforcing interim measures in China during the arbitration proceedings.[345]

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[336] Torres Manuel, "Keys to the Enforcement of foreign arbitration awards in Mainland China", *Garrigues, News Room,* May 25, 2021, https://www.garrigues.com/en_GB/new/keys-enforcement-foreign-arbitration-awards-mainland-china.
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.*
[345] *Id.*

The Mainland China-Hong Kong Arrangement

One noteworthy exception is the Mainland China-Hong Kong Interim Measures Arrangement, that sets Hong Kong forth to be a much better seat of arbitration.[346]

By 2019, the SPC and the Hong Kong's Department of Justice entered into *the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region* (hereinafter "the Arrangement"). The aim is to strengthen Hong Kong's "charisma" as a seat of arbitration, allowing the courts of both jurisdictions to grant interim measures in support of arbitrations seated in the other territory.[347] Before the Arrangement, it was unlikely for Chinese courts to grant interim measures in support of arbitrations seated outside of Mainland China, while now they are empowered to grant interim measures to back up institution arbitration in Hong Kong.[348] Parties that want to benefit from the arrangement have to pick out both:

(a) Hong Kong as a seat of arbitration;
(b) One of the institutions or permanent offices among the ones laid down in the Arrangement, such as the Hong Kong International Arbitration Centre ("HKIAC"), the China International Economic and Trade Arbitration Commission ("CIETAC"), Hong Kong Center ("HKAC") and the International Court of Arbitration of the International Chamber of Commerce – Asia Office.[349]

As of February 10, 2020, at least 5 applications for property preservation were approved by the courts in Mainland China, and the value of seized assets as a whole peaked at CNY 1.7 billion.[350] Among those 5 applications, there was one related to a maritime dispute aroused out of a charter agreement (i.e. a contract by which the owner of a ship hires out its use to the charterer for the transporting of goods, while the former keeps control over the navigation and management of the vessel, the latter holds the carrying capacity)[351] between a Hong Kong charterer and a Shanghai company.[352] The charterer filed an application before the HKIAC, under the Arrangement of Interim Measures as to seize and freeze the Shanghai company's assets in Mainland China.[353] By October 8, 2019, the Shanghai Maritime Court rendered the

[346] Peter Yuen, Matthew Townsend, John Zhou, "Mainland China-Hong Kong Interim Measures Arrangement Swiftly Put into Use", *Kluwer Arbitration Blog,* October 26, 2019, http://arbitrationblog.kluwerarbitration.com/2019/10/26/mainland-china-hong-kong-interim-measures-arrangement-swiftly-put-into-use/.
[347] *Id.*
[348] *Id.*
[349] *Id.*
[350] *Id.* at 254.
[351] "Charter Party", Thomson Reuters Practical Law, last visited July 3, 2022, https://uk.practicallaw.thomsonreuters.com/w-016-1382?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[352] Sarah Thomas et al., "MoFo APAC Arbitration Update: October 2019", *Morrison and Foster LLP,* November 21, 2019, https://www.mofo.com/resources/insights/191122-mofo-apac-arbitration-update.html.
[353] *Id.*

application of interim measures, establishing the first case in point of a Chinese Court granting interim measures under the Mainland China-Hong Kong Arrangement.[354]

As previously mentioned, The Asia Office (Hong Kong) of the International Chamber of Commerce (hereinafter the "ICC") International Court of Arbitration has been confirmed by the SPC and the Hong Kong Government as a qualified institution under the Arrangement.[355] Therefore, cases administered by the ICC Asia Office in Hong Kong will benefit from the Arrangement, as it allows parties to ICC Arbitration seated in Hong Kong and administered by the Asia Office to apply before Chinese Courts for interim measures against Mainland-based counterparties.[356] This represents an incredible development for ICC's arbitration in Asia, since it will likely bring more parties to choose Hong Kong as a seat of arbitration for disputes involving Chinese parties and the ICC as the best qualified institution.[357]

The 2022 Mainland China-Macau Agreement

Up until very recently, parties that had the need to get interim measures in Mainland China, had to initiate arbitration proceedings in the Mainland. This is no longer the case in Macau thanks to the Agreement for Mutual Assistance regarding Interim Measures issued in arbitration proceedings seated in Mainland China and Macau, signed by the SPC and the Secretary for Administration and Justice of the Macau Special Administrative Region.[358] The Agreement, entered into force in 2022, presents the same aim as the Mainland China-Hong Kong Arrangement: promote Macau as a better seat of arbitration.[359] Parties to institutional arbitration seated either in Mainland China or Macau are now allowed to apply for interim measures from courts in the other respective jurisdiction.

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[354] *Id.*

[355] "ICC, an authorized institution under Mainland China-Hong Kong arrangement on interim relief", ICC News, Hong Kong, October 7, 2019, https://iccwbo.org/media-wall/news-speeches/icc-confirmed-as-authorised-institution-under-china-hong-kong-arrangement-on-interim-relief/#.

[356] "New Practice note for Mainland China-Hong Kong interim relief measures", ICC News, Paris, December 9, 2019, https://iccwbo.org/media-wall/news-speeches/icc-publishes-practice-note-pertaining-to-china-hong-kong-arrangement-for-assistance-in-interim-relief-measures/.

[357] *Id.*

[358] Ana Coimbra Tigro, "The 2022 Agreemebt between Mainland China and Macau: Judicial Interim Measures in Support of Arbitration in the Pearl River Delta", *Kluwer Arbitration Blog,* May 19, 2022, http://arbitrationblog.kluwerarbitration.com/2022/05/19/the-2022-agreement-between-mainland-china-and-macau-judicial-interim-measures-in-support-of-arbitration-in-the-pearl-river-delta/.

[359] *Id.*

Ad Hoc Arbitration

There are two basic forms of Arbitration: ad hoc and institutional.[360] Article IV (6) of the European Convention on International Commercial Arbitration is one of the few provisions that sets forth the distinction between the two, speaking of "mode of arbitration".[361]

Institutional arbitration has been defined as one administered by a specific arbitral institution under the rules of arbitration thereof.[362] There are two elements that are always present when talking of this "kind" of arbitration:

(a) The arbitration institution's administration of arbitral proceedings;
(b) The arbitration institution's own set of rules.[363]

Benefits of Institutional arbitration start out with the great expertise of law that arbitration institutions have gained throughout years and years of practice, providing a better quality of legal services and much more assistance on procedural issues such as the appointment of arbitrators or arbitral fees.[364] This has also allowed those arbitral bodies to gather respect from courts, which would be cautious on non-enforcing their arbitral awards given their position among the Arbitration practice.[365] Arbitration institutions also provide a set of clear, well-defined arbitration rules according to the international standards.[366]

By contrast, ad hoc arbitration can be described as exactly the opposite: any arbitration is "ad hoc" whenever parties are silent on the arbitration mode or the involvement of a specific arbitral institution.[367] Article I (2)(b) of the 1961 Geneva Convention sets out ad hoc arbitration as a "settlement by arbitrators appointed for each case".

The importance of this distinction comes into play when arbitration laws attach different legal consequences to each category, as China's Arbitration Law does.

As aforementioned, according to Article 16 of the AL an arbitration agreement is either an arbitration clause or contract in writing, that in order to be effective shall set forth:

(a) Parties' intention to arbitrate;
(b) A specific arbitration matter;

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[360] Schroeter, Ulrich G., Ad Hoc or Institutional Arbitration — A Clear-Cut Distinction? A Closer Look at Borderline Cases (November 30, 2017). Contemporary Asia Arbitration Journal, Vol. 10, No. 2, pp. 141-199, November 2017, Available at SSRN: https://ssrn.com/abstract=3085554.
[361] European Convention on International Commercial Arbitration, *opened for signature* Apr. 21, 1961 484 U.N.T.S. 364.
[362] *Id.* at 278.
[363] *Id.*
[364] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).
[365] *Id.*
[366] *Id.*
[367] *Id.*

(c) A chosen arbitral institution.

Therefore, according to Article 18 of the same body of law, an arbitration agreement that does not designate a specific arbitration commission will be null and void.[368] This stands for a complete denial of ad hoc arbitration in Mainland China, leaving institutional arbitration as the only arbitration form allowed in the Mainland. Luckily, this prohibition against ad hoc arbitration in the Mainland cannot prevent the enforcement of ad hoc arbitration under a different set of laws. First and foremost, China is a party to the New York Convention, which sets forth no distinction at all between institutional and commercial arbitration. Thus, China is bound by the Convention to enforce foreign ad hoc arbitral awards rendered in another State party thereof. [369]

The Opinion on "Mediation"

In a dispute from 1998, ad hoc arbitration was accomplished without amending the AL.[370] In 1998, Sinotrans Dalian Company ("Sinotrans") and Hainan Dongda Shipping Company ("Dongda"), respectively the charterer and the shipowner, entered into a time charter.[371] The main contract contained an arbitration clause that provided for all disputes arising out thereof to be arbitrated in Beijing, even though both parties were located in Dalian.[372] When the relationship between the shipowner and the charterer broke down, Dongda and Sinotrans agreed on having Mr Hu Zhengliang – a law professor at the Maritime Dalian University and a Beijing CMAC Arbitrator – to arbitrate the dispute.[373] The law professor first asked for the parties' submission to arbitrate and then came out with his decision on the matter named "Opinion on Mediation". Both Dongdan and Sinotrans respected the decision.[374] This document is deemed as de facto ad hoc arbitration, because:

(a) There was parties' clear intention to arbitrate;
(b) Parties had switched from CMAC institutional arbitration based in Beijing to ad hoc arbitration in Dalian;
(c) Both parties picked out Mr. Hu, an arbitrator with expertise in that field of law, to decide the matter;
(d) The "Opinion", despite its name, contained orders to the parties.[375]

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[368] Article 16 and 18 of the Arbitration Law of the People's Republic of China.
[369] *Id.*
[370] Gu, Weixia, The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China (November 30, 2017). Contemporary Asia Arbitration Journal, Vol. 10, No. 2, pp. 257-291, November 2017, University of Hong Kong Faculty of Law Research Paper No. 2017/037, Available at SSRN: https://ssrn.com/abstract=3085568.
[371] *Id.*
[372] *Id.*
[373] *Id.*
[374] *Id.*
[375] *Id.*

Despite the Opinion's remarkability, it could be considered a "risky" move to assume parties would honor the outcome of an ad hoc arbitration award, given the lack of enforcement means thereof in Mainland China. However, this opinion, masked up as a "mediation", ends up being one of the first cases of ad hoc arbitration in Mainland China.

The SPC's uncertainty

The SPC has kept invalidating all arbitration agreements providing for ad hoc arbitration,[376] as it did in *People's Insurance Company of China, Guangzhou v. Guanghope Power (2003),* in which it held that the arbitration clause providing for ad hoc arbitration was invalid.[377] In this case, the People's Insurance Company and the Electric Power Company had a contract providing as a dispute resolution mean arbitration conducted by an arbitrator picked out by both parties.[378] The Guangdong Intermediate people's court held the agreement invalid because of parties' choice toward ad hoc arbitration.[379]When the case was referred to the SPC, the highest judicial body of the Mainland agreed with what the Guangdong court had decided, pointing out again that any arbitration agreement providing for ad hoc arbitration seated in Mainland China will be deemed invalid.[380]

In another 2012 case, the SPC deemed invalid a contract that provided for arbitration conducted under the ICC rules and seated in Beijing.[381] The parties to the arbitration agreement were:

(a) a joint venture between a Chinese company and a Spanish company; and
(b) a wholly-owned subsidiary of a Danish company.

The object of the contract was located in China and its performance was due in the Mainland.[382]

Given the fact that both parties were registered and incorporated in China, the court held that the contract was not foreign-related, and therefore could not be handled by a non-Chinese arbitral institution or under ad hoc arbitration.[383]

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[376] Mollengarden Zachary, "One-stop Dispute Resolution on the Belt and Road: Toward an International Commercial Court With Chinese Characteristics", *UCLA Pacific Basin Law Journal* 36 (1), 2019, Available at https://escholarship.org/content/qt43q7s46n/qt43q7s46n.pdf?t=pm8ts1.
[377] *Id.* at 284.
[378] Bo Yuan, "Foreign-related Commercial Dispute Resolution in China: a focus on litigation and arbitration", (Doctoral Thesis, Erasmus University Rotterdam, 2017) 170-172.
[379] *Id.*
[380] *Id.*
[381] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).
[382] *Id.*
[383] *Id.*

However, the SPC has kept fostering ad hoc arbitration in other contexts, such as in FTZs. In *Zhe Jiang Yisheng Petrochemical Co., Ltd. v. INVISTA Technologies S.à.r.l., Luxembourg,* a U.S. tech company and a Chinese petrochemical firm had a contract that provided for a "hybrid" arbitration clause, which set out CIETAC as the arbitration institution to handle the case and the UNCITRAL Arbitration rules as the laws of the arbitration proceeding.[384] When a dispute aroused, the Chinese party refused arbitration claiming the arbitration clause to be invalid. This was to be so since the parties had agreed on the UNCITRAL Arbitration rules as the rules of the proceeding, which are mainly on ad hoc arbitration that is ruled out under Chinese Law.[385] The Zhejiang Province Ningbo City Intermediate People's Court, based on the aforementioned pre-reporting system, referred the case to the Higher people's court in its jurisdiction, which held the arbitration clause valid.[386] The SPC, in its December 2016 *Opinion on the Provision of Judicial Protection of the Development of the Free Trade Zone,* reinforced parties registered in FTZs the right to solve disputes via ad hoc arbitration, as long as the arbitration agreement sets forth:

(a) an arbitral seat within Mainland China;
(b) a set of arbitration rules;
(c) designated arbitrators to handle the proceedings.[387]

Besides those ad hoc arbitration disputes that take place within FTZs, the SPC leans more toward the denial of ad hoc arbitration, interpreting arbitration clauses or agreements strictly.[388] In the aforementioned *Züblin International GmbH v. Wuxi Woke General Engineering Project Rubbler Co., Ltd.* case, the SPC struck down the arbitration agreement, even though parties clearly set out the ICC rules and, according to the most recent international practice, is common to choose the arbitration institution's rules instead of the institution itself.[389]

A welcome wave of change

In the *Interpretation on Several Issues concerning the Application of the Arbitration Law*, the SPC has clarified that if an arbitration institution:

(a) can be picked out of the agreement even though parties spelled out the name incorrectly, just picked out a set of rules from a specific arbitration body or agreed on more than one institution; or

[384] *Id.* at 290.
[385] *Id.* at 290.
[386] *Id.* at 290.
[387] *Id.* at 290.
[388] *Id.* at 364.
[389] *Id.*

(b) can be designated via a supplementary agreement; or
(c) can be chosen while filing for application,
the arbitration agreement shall be regarded as valid, given that a specific arbitral body is designated.[390]

The 2016 SPC Interpretation was followed up a couple years later by the aforementioned Draft Amendment, issued by the PRC Ministry of Justice by the end of July 2021.[391] Its aim is to level the AL up to the New York Convention standard, whose Article I (2) provides that arbitral awards include both institutional and hoc arbitration awards.[392] Article 21 of the Draft gets rid of the "designated arbitration commission" requisite and only lists:
(a) parties' intention to arbitrate; and
(b) an agreement to arbitrate in writing
in order to deem as valid an arbitration agreement under Chinese Law.[393]

Article 92 and 93 of the Draft Amendment deal only with ad hoc arbitration, providing basic rules, such as arbitrators' challenge, the arbitral tribunal's formation and the level of court supervision on ad hoc arbitration.[394] Yet, Article 88 of the Draft provides that the rules thereof have to be applied to arbitration involving foreign elements along with the other relevant provisions of Chinese Law.[395] However, those provisions are mainly on institutional arbitration, raising doubts about whether this Draft could really push ad hoc arbitration forward in the Chinese Arbitration Framework.[396]

A way around the prohibition of ad hoc arbitration

Given the nature of arbitration, parties are allowed to tailor rules according to their needs. And this is so even in the Mainland. Thanks to the legal framework set up by the AL along with the New York Convention, parties might try to arbitrate their disputes via ad hoc arbitration in China. For this to be so, parties bear the burden of carefully drafting their arbitration agreement and should carry out the following steps:[397]

[390] Mariana Zhong, "Validity of Arbitration Agreement: a New Relaxed Approach in the Draft Amendment to PRC Arbitration Law", *Kluwer Arbitration Blog,* September 19, 2021 http://arbitrationblog.kluwerarbitration.com/2021/09/19/validity-of-arbitration-agreement-a-new-relaxed-approach-in-the-draft-amendment-to-prc-arbitration-law/.
[391] *Id.*
[392] Gu, Weixia, The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China (November 30, 2017). Contemporary Asia Arbitration Journal, Vol. 10, No. 2, pp. 257-291, November 2017, University of Hong Kong Faculty of Law Research Paper No. 2017/037, Available at SSRN: https://ssrn.com/abstract=3085568.
[393] *Id.* at 299.
[394] *Id.* at 299.
[395] *Id.* at 299.
[396] *Id.* at 299.
[397] Zhang, T. (2018) Ad Hoc Arbitration in China. 1st edn. Taylor and Francis. Available at: https://www.perlego.com/book/1382309/ad-hoc-arbitration-in-china-pdf (Accessed: 18 July 2022).

(1) pick out a non-Chinese law as the law regarding the validity of the ad hoc arbitration agreement;
(2) set out that all hearings will be conducted in China yet the seat of arbitration is located outside the Mainland;
(3) set forth that the law governing at the seat will be the Lex Arbitri (i.e. the law chosen by the parties as to govern the arbitral proceedings);
(4) designate a specific set of arbitration rules.[398]

Picking the arbitral seat outside the Mainland along with the choice of a non-Chinese law as the law of the proceedings make Chinese courts recognize and enforce the ad hoc arbitration agreement under the laws thereof.[399] Moreover, choosing an efficient set of arbitration rules would decrease the likelihood of a counterparty holding off the arbitration proceedings because of a rule gap.[400] Most important, providing as the governing law the Lex Arbitri would allow parties to:

(a) be based a non-Chinese law that has enforcement mechanisms for ad hoc arbitration;
(b) have the dispute deemed as foreign in the Mainland, therefore falling under the application of the New York Convention thus avoiding Chinese courts to rule the non-enforcement of the award.[401]

[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*

The Mainland and the cornerstone of International Commercial Arbitration: the International Chamber of Commerce and its International Arbitration Court

Over the last two decades, more and more Chinese companies decided to enter into an arbitration agreement having the ICC has the arbitral institution administering their case.[1] According to the most recent statistics from 2020, approximately 25% of ICC parties came from Asia and the Pacific and among those, 46 were from Mainland China, 33 parties from Hong Kong and one party from Macao.[2]

Under the ICC Arbitration Rules, parties are free to agree upon the place of arbitration.[3] If they fail to do so, the Arbitration Court will step in and designate the place of arbitration.[4] However, not every place of arbitration is "fun" to be in. Mainland China is among one of those. Most parties ignore that there are strict requirements to meet in order to have an enforceable and valid arbitration agreement according to Chinese Law.

First and foremost, according to Article 16 of the AL, parties must designate a specific arbitration commission in their arbitration agreement.[5] Moreover, in order to be recognized as an arbitration commission under the AL, an arbitral institution must first be established by the local people's government and second, registered with the Central Government.[6]

The ICC has taken many steps toward arbitrating in the Mainland, e.g. slightly changing its standard arbitration clause to prevent Chinese courts from holding those null and void. The Standard ICC Arbitration Clause is worded as follows:

[1]Yuwu Liu, "China: ICC Arbitration in Mainland China: Validity of Arbitration Clauses and Enforcement of Awards," *Mondaq*, November 19, 2006, https://www.mondaq.com/china/public-sector-government/44264/icc-arbitration-in-mainland-china-validity-of-arbitration-clauses-and-enforcement-of-awards.
[2] International Chamber of Commerce (ICC), *ICC Dispute Resolution 2020 Statistics,* (International Chamber of Commerce: 2021).
[3] Article 18 of the ICC 2021 Arbitration Rules.
[4] Article 18 of the ICC 2021 Arbitration Rules.
[5] Article 16 of the Arbitration Law of the People's Republic of China.
[6] Article 10 of the Arbitration Law of the People's Republic of China.

"*All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."*[7]

The Arbitration clause that the ICC has been recommending for those parties willing to arbitrate in Mainland China stresses out more the application of the ICC Rules to the proceeding, and the wording goes as follows:

"All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."[8]

The aim of this clause is to avoid the application of the law of the seat as the governing law of the agreement. The law of the seat automatically applies when parties do not clearly set forth the law governing the arbitration agreement, which might end up being a huge mistake if the scenario is Mainland China. Moreover, Chinese courts tend to lean more toward the non-enforcement of arbitration clauses that do not strictly respect Chinese Law, asking for a clear, efficient reference to the rules governing the arbitration agreement - for the purpose of this analysis, the ICC Rules - otherwise making null and void most arbitration agreements.[9] But there is more. Parties' choice of the seat of arbitration is among the most significant in any arbitration proceeding: by picking out a specific seat, parties also accept its legal regime.[10] Under the so-called seat standard, an arbitration seated in China will be subject to Chinese courts for any dispute arising out thereof.[11]

The ICC is, in the writer's opinion, the only arbitral institution solid enough to start off a different path in the Mainland. If the ICC Standard Clause is finally recognized, this will open the way up to foreign arbitral institutions arbitrating in China, boosting up the growth of both the ICC itself and Chinese arbitral institutions as well. However, Chinese courts have started to adopt a different standard, such as the institution standard, aka a standard that allows to

[7] Verbist Herman, "*ICC Arbitration in Practice*," (Aalphen aan den Rijin: Wipf and Stock Publishers, 2016).
[8] Verbist Herman, "*ICC Arbitration in Practice*", (Aalphen aan den Rijin: Wipf and Stock Publishers, 2016).
[9] Yuwu Liu, "China: ICC Arbitration in Mainland China: Validity of Arbitration Clauses and Enforcement of Awards," *Mondaq*, November 19, 2006, https://www.mondaq.com/china/public-sector-government/44264/icc-arbitration-in-mainland-china-validity-of-arbitration-clauses-and-enforcement-of-awards.
[10] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I," *Kluwer Arbitration Blog,* October 12, 2020, http://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-no-mans-land-part-i/.
[11] *Id.*

determine the nationality of an arbitral award based on the nationality of the arbitral institution that granted it.[12]

Before starting out the analysis of multiple cases in which Chinese courts have made the ICC "struggle", it is necessary to bring up those features that made the International Chamber of Commerce and its International Arbitration Court the institution that is today. Hence, the aim of this chapter is to illustrate a bit of the ICC's historical background along with its structure and its arbitration Rules.

The ICC

Article IV of the 1961 European Convention on International Commercial Arbitration is one of the few provisions that sets out the distinction between ad hoc and institutional arbitration.[13] Article IV carves out parties' freedom to submit their dispute either to a permanent arbitral institution or to an ad hoc arbitral procedure. If a permanent arbitral institution is picked out, the arbitral proceedings will be conducted under the rules of the said institution.[14] The upsides of an arbitration administered by a competent institution are many, such as standardized rules, efficiency and security on the enforcement of awards.

Arbitral institutions have been growing in popularity and number over the last few years, and many wonder which institution detains the best reputation and the most power. In this chapter we will focus on the International Chamber of Commerce (hereinafter the "ICC") and its International Court of Arbitration (hereinafter the "ICC Court" or "Court") whose well-established reputation within the international arbitration framework is noteworthy. According to the *2021 International Arbitration Survey: Adapting arbitration to a changing world*, the ICC was among the most preferred arbitral institutions (57%), along with the SIAC (49%), HKIAC (44%), LCIA (39%) and CIETAC (17%).[15] The drivers behind the choice of the arbitral institution were:

(a) The institution's general reputation; and
(b) The respondent's experience with the said institution.[16]

[12] *Id.*
[13] Article IV of the European Convention on International Commercial Arbitration of 1961, Done at Geneva, April 21, 1961 United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964).
[14] *Id.*
[15] School of International Arbitration, Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a changing world,* (School of International Arbitration Queen Mary University of London, 2021).
[16] *Id.*

Most important, the ICC has taken interesting steps toward arbitrating in Mainland China as a foreign institution, trying to "mask it up" as ad hoc arbitration or getting around the requirements set forth under Chinese Law. Besides its first secretariat in Paris, the ICC has, indeed, another branch in Hong Kong to support the Asia workload.[17]

It is noteworthy to provide also some data from 2020. The 2020, indeed, marked the year in which the number of registered cases with the ICC skyrocketed: of all the cases overall, 929 were filled under the ICC Arbitration Rules, while only 17 were filed under the ICC Appointing Authority Rules.[18] Moreover, the 2020 statistics also reported that:

(a) Parties were from 145 countries;
(b) There was a total of 1008 arbitrators of 92 different nationalities;
(c) ICC Arbitration was seated in 113 cities and 65 countries;
(d) The average amount in pending disputes was US$145 million;
(e) The average amount in new disputes was US$54 million.[19]

Institutional Arbitration: An Overview

Institutional Arbitration can be defined as parties' choice to adopt the rules of a particular arbitral institution and the institution whose rules have been chosen as the one administering the proceedings.[20] Even though definitions may vary, the main two components of institutional arbitration are:

(a) A permanent arbitral institution;
(b) The institution's own set of arbitral rules.[21]

Arbitration institutions deal with every detail of the arbitral proceedings, from administrative tasks such as jurisdictional assessment, the seat and language of the arbitration, the appointment of arbitrators to the financial aspects of the case.[22] Those powers are posed upon institutions via the parties' agreement, who contractually agreed to rely on one arbitral

[17] Simon Greenberg and Anders Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," in *International Commercial Arbitration Different Forms and their Features*, ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 204-216.
[18] Pierre Benvenu, "Q&A with Claudia Salomon," in *International Arbitration Report, Issue 17,* ed. C. Mark Baker, (Norton Rose Fulbritght, 2021).
[19] International Chamber of Commerce (ICC), *ICC Dispute Resolution 2020 Statistics,* (International Chamber of Commerce: 2021).
[20] Carita Wallgren-Lindholm, "Ad Hoc Arbitration v. Institutional Arbitration," in *International Commercial Arbitration Different Forms and their Features,* ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 61-81.
[21] Schroeter, Ulrich G., "Ad Hoc or Institutional Arbitration - a Clear-Cut Distinction? A Closer Look at Borderline Cases, *Contemporary Asia Arbitration Journal,* Vol. 10, No. 2, (November 2017), 141-199.
[22] *Id.* at 20.

institution.[23] In a nutshell, they provide parties a procedural framework, professionalism and an established set of rules under the supervision of the best professionals.[24]
Further, they are seen as guardians of the integrity of arbitral proceedings.[25] As pointed out by Neil Andrews in his Roebuck Lecture in 2017, arbitral institutions "can set and maintain standards" via their arbitration rules and the appointment of qualified arbitrators.[26] Arbitrators play, indeed, a key role in arbitration, determining the quality of legal services provided to the parties. That is why most Arbitration rules of arbitral bodies define clear mechanisms to get rid of underqualified arbitrators. Article 15(3) of the ICC Arbitration Rules (2021) places upon the ICC Court the power to decide on the replacement of an arbitrator if the said arbitrator is prevented *de jure* or *de facto* from fulfilling arbitrators' functions properly.[27] The London Court of International Arbitration (hereinafter the "LCIA") Arbitration rules cover the issue as well, establishing that for an arbitrator to be so, the task must be performed diligently, efficiently and within a suitable amount of time.[28]

Arbitral institutions also set the trend on new drifts in the arbitration practice, mainly by amending their own arbitration rules.[29] As a way of example, the Stockholm Chamber of Commerce (the "SCC") has amended its own rules as to introduce provisions on emergency arbitrators. Many arbitral institutions followed up, and among those the ICC, which recently introduced rules on the same matter.[30] In 2014, the LCIA introduced the *General Guidelines for the Parties' Legal Representatives,* bringing up first-time rules on counsels and party representatives' conduct.[31] By the same token, many arbitral institutions took on the challenge and introduced such rules, and among those the ICC, which released the 2017 Note on conduct of arbitration pursuant to ICC Rules of Arbitration for Parties.[32] The ICC Note sets up the standard not only for itself, but also for other arbitral institutions, providing that parties and their representatives must abide by the highest standards of honesty and integrity while carrying out arbitral proceedings.[33] Parties are also encouraged to rely on the *IBA Guidelines*

[23] *Id.*
[24] Wilske Stephan, "The duty of arbitral institutions to Preserve the Integrity of Arbitral Proceedings," in *Contemporary Asia Arbitration Journal,* Vol. 10, No. 2, (November 2017), 201-233.
[25] *Id.*
[26] *Id.*
[27] Article 15(2) of the ICC Arbitration Rules as amended in 2021.
[28] *Id.* at 24.
[29] Carita Wallgren-Lindholm, "Ad Hoc Arbitration v. Institutional Arbitration," in *International Commercial Arbitration Different Forms and their Features,* ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 61-81.
[30] *Id.*
[31] Wilske Stephan, "The duty of arbitral institutions to Preserve the Integrity of Arbitral Proceedings," in *Contemporary Asia Arbitration Journal,* Vol. 10, No. 2, (November 2017), 201-233.
[32] *Id.*
[33] *Id.*

on Party Representation in International Arbitration, adopted by the IBA Council to establish a high counsel standard among the arbitration practice.[34]

In 2006, according to a study of the School of International Arbitration, Queen Mary University of London, 86% of arbitral awards were rendered by arbitral institutions instead of ad hoc arbitrators.[35] Large corporations opted for ad hoc arbitration and 76% of corporations tended toward institutional arbitration.[36]
Despite the Covid-19 Pandemic, most arbitral institutions have reported an increased workload in 2020.[37] This was so thanks to the capacity of arbitral institutions to carry on by switching to virtual hearings in quite a short amount of time.[38] The ICC, along with the HKIAC, witnessed a great increase in demand, peaking at 946 new arbitration cases in 2020.[39] It is worth mentioning that 929 cases were administered under the ICC Arbitration Rules, while the ones left out were ad hoc arbitration proceedings under the ICC Appointing Authority Rules.[40]

Among the advantages offered by relying on an arbitral institution, the reputation or "brand" thereof is the most relevant. Parties to arbitration feel more secure in arbitral institution's hands regarding the award enforcement, given the average high quality of legal services that those arbitral bodies provide.[41] However, the other side of the coin reads that the procedural length is longer and more costly, if compared to other dispute resolution means, such as ad hoc arbitration.[42] In the *2021 Survey,* respondents pointed the lack of autonomy rooted in institutional arbitration – in particular if compared to ad hoc arbitration – given the intrusiveness of the institution on the proceedings, which is, however, what parties bargained for.[43]

As aforementioned, neutrality and reputation of the institution are the main drivers behind the choice of an arbitral institution.[44] According to the *2018 Survey,* those elements are followed up by:

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[34] *Id.*
[35] School of International Arbitration, Queen Mary University of London, *International Arbitration: Corporate Attitudes and Practices 2006,* (School of International Arbitration Queen Mary University of London, 2006).
[36] *Id.*
[37] Simon Chapman, Rebecca Warder and Jacob Sin, "Rise in Arbitration Cases in 2020 despite Reduced Volume of in Person Hearings due to Coronavirus Pandemic," *Herbert Smith Freehills,* March 3, 2021, https://hsfnotes.com/arbitration/tag/statistics/.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 29.
[42] Carita Wallgren-Lindholm, "Ad Hoc Arbitration v. Institutional Arbitration", 61-81.
[43] School of International Arbitration, Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a changing world,* (School of International Arbitration Queen Mary University of London, 2021).
[44] *Id.* at 42.

(a) A high level of administration;
(b) Previous experience of the institution;
(c) Internationalism along with the global presence worldwide;
(d) Access to a wide range of arbitrators.[45]

Regarding the global presence worldwide, it is worth mentioning the path taken on by the ICC in Brazil.[46]

Latin American respondents to the *2018 Survey* pointed out the ICC's efforts to settle and open an office in Brazil, which was the lead-up to more ICC arbitrations seated in Brazil.[47]

The ICC's work in the region was brought up as remarkable for:

(a) Tailoring the proceedings on parties' needs;
(b) Keeping the same quality standards worldwide.[48]

Another important distinction is among international or domestic arbitral bodies, the latter having stronger ties with the jurisdiction they live in. As a way of example, the ICC has been brought up as a non-national institution, given the caseload of foreign disputes administered over the years.[49] Even though the ICC's ties with France are not that strong, an involvement between a certain jurisdiction remains valuable as it sets the institution on the path to master the most characteristic and uncommon elements of the said jurisdiction, which might appear hostile in the eyes of foreign parties to the arbitration.[50] Some regional elements also ended up playing an important role in shaping the arbitral institution's practice, which might differ if compared to the ones adopted by neighboring institutions.[51]

The level of control varies deeply from one institution to the other. In particular, the ICC is well-known for the control exercised over arbitral proceedings. First, parties to an ICC arbitration are compelled to set up the terms of reference. Second, the ICC court will start the award scrutiny procedure, while many other arbitral institutions skip that final step.[52] For instance, the LCIA and HKIAC do not provide for any award scrutiny mechanism, cutting off the time needed to see it through yet, not giving parties the quality of a further review of the

[45] School of International Arbitration, Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,* (School of International Arbitration Queen Mary University of London, 2015).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Gerald Aksen, "International Arbitration: Knowing the Practical Differences", in Gerald Aksen et al., (eds.), *Liber Amicorum in honour of Robert Briner* (Paris: ICC Publishing S.A. 2005). P. 23.
[50] *Id.* at 42.
[51] *Id.* at 42.
[52] Carita Wallgren-Lindholm, "Ad Hoc Arbitration v. Institutional Arbitration", *61-81.*

award.[53] Another aspect worth noticing is the costs of the proceedings. The ICC administrative fees, that depend on the value of the dispute and the number of arbitrators involved, were found to be among the most expensive.[54] The HKIAC charges based on the disputed amount as well, which allows parties to check out the administrative costs via the Schedule of fees that all institutions provide.[55] The LCIA administrative fees are calculated exclusively at an hourly rate, with no regard to the disputed amount.

The not so gold times: the French Arbitration Framework before the ICC

Nowadays, France is among the best seats of arbitration, given both its arbitration friendly regime - as set up by the French Code of Civil Procedure – and the openness of French Courts to help out parties to an arbitration. France is, indeed, a party to many multilateral conventions on arbitration, such as the *New York Convention on the Recognition and Enforcement of Arbitral Awards*, the *European Convention on International Commercial Arbitration*, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.[56] Despite the solid ground for arbitration France enjoys to this day, it is worth mentioning that the framework used to be quite different, and French Arbitration Law has indeed undergone an interesting "evolution" that might be of inspiration to other countries – among them, China – who are urged to set up a better functioning framework for arbitration.

Since the French Revolution, Arbitration has kept a predominant role as a dispute resolution mean between private citizens.[57] The Assemblée Constituante' found arbitration to be the natural dispute resolution way of settlement, which opened the way up to concrete justice.[58] That is why the 16-24 August 1790 cut off courts' interventions on the arbitration system.[59]

The French Revolution also pointed out the importance of arbitration, ending up incorporating in the constitutions of 1793 and 1795 arbitral-related provisions.[60] Both carved out citizens 'right to opt for arbitration as a tool to settle their disputes.'[61] However, that friendly

[53] Sherina Petit, "Choosing the right arbitral rules," in *International Arbitration Report, Issue 18,* ed. C. Mark Baker, (Norton Rose Fulbright, 2022).
[54] *Id.*
[55] *Id.*
[56] Valentine Chessa, Marina Matousekova, Nataliya Barysheva, Arianna Camillacci, *The Legal 500 Comparative Guide, France International Arbitration,* (CastaldiPartners, 2021), 1-5.
[57] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," in *The Three Ages of International Commercial Arbitration,* (Cambridge University Press, 2021), 67-86.
[58] Jean-Louis Devolvé, Gerald H. Pointon, Jean Rouche, *French Arbitration Law and Practice, A Dynamic Civil Law Approach to International Arbitration* (Kluwer Law International, 2009).
[59] *Id.*
[60] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.
[61] *Id.*

environment toward arbitration was stopped by the French legislator's interventions and a few courts' decisions, such as the *Prunier* decision in 1843.[62] By 1805, arbitration started to be perceived as a "parody of judicial administration" and many politicians kept insisting on removing the entire arbitration section from the Code of Civil Procedure.[63]

To limit arbitration's power and popularity among citizens, articles 1006-1028 of the 1806 Code of Civil Procedure made up strict procedural requirements as to the validity of an arbitration agreement.[64] Article 1006 set forth that arbitration agreements, in order to be valid, needed to designate both:

(a) the subject matter of the dispute;
(b) the identity of the arbitrators.[65]

Moreover, the Code set forth a prohibition against arbitration on all matters related to public policy, e.g., any case in which the Department of the Public Prosecutor needed to have notice.[66]

The *Prunier* decision stated the French fear against arbitration, given that the Cassation Court held invalid a clause compromissorie, aka an arbitration clause concluded before any dispute arises.[67] The dispute involved an insurer, Sieur Prunier, and an insurance company, l'Alliance.[68] The two entered into an agreement providing for an arbitration conducted by three arbitrators in the case their contractual relationship break down because of damages resulting from fire.[69] When a fire destroyed Prunier's house and l'Alliance refused to pay the sum, the dispute ended in court up to the Cassation Court.[70]

The Cour de Cassation held the clause compromissorie between Prunier and l'Alliance invalid, given the danger for parties to give up sound justice beforehand.[71] The Cour de Cassation's argument was based on:

(a) the comparison between disputes that could arise in the foreseeable future and those already existing;

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Article 1006 of the 1806 French Code of Civil Procedure.
[66] *Id.* at 57.
[67] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Jean-Louis Devolvé, Gerald H. Pointon, Jean Rouche, *French Arbitration Law and Practice, A Dynamic Civil Law Approach to International Arbitration* (Kluwer Law International, 2009).

(b) the fact that certain guarantees could be provided only by courts.[72]

This was the lead-up to the invalidity and unenforceability of many arbitration clauses, since it was unlikely to designate arbitrators along with the subject matter of a future dispute beforehand.[73]

The result of this hostile context was an underdevelopment of the French arbitration framework. It was not until after the First World War that the business community started having a growing interest into arbitration.[74] Parties figured out that the Business internationalization process asked for an efficient way to settle disputes between people from different countries.[75] The strongest need was the one for neutrality, given that parties from different countries cared about having neutral arbitrators as the ones settling their disputes.[76] That is why many international treaties followed up:

(a) the Geneva Protocol of 24 September 1923;

(b) the Geneva Convention of 26 September 1927.[77]

One aspect worth mentioning is that the International Chamber of Commerce (the "ICC"), founded in Paris in 1919, strongly joined the work on the internalization process.[78]

Finally, in 1925, a French Law providing for the validity of arbitration clauses in commercial disputes was introduced.[79] Despite the effort, this development was not as great as it could appear: besides commercial cases, arbitration clauses were still unenforceable under French law, along with the prohibition against arbitration on matters related to public policy.[80] The *Prunier* case also left many uncertainties among practitioners, and many interesting cases on the matter followed up.[81] One recurring issue was the distinction between domestic cases and international cases.[82] This distinction came up along with relevant disputes such as *Pélissier du Besset* and *Mardelé,* which ended up establishing a different legal framework for international disputes tailored to the needs of international business.[83]

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[72] *Id.*
[73] *Id.* at 66.
[74] Devolvé, Pointon and Rouche, *French Arbitration Law and Practice.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Devolvé, Pointon and Rouche, *French Arbitration Law and Practice.*
[79] *Id.*
[80] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.
[81] *Id.*
[82] *Id.*
[83] *Id.*

In *Pelissier du Besset* (Civ. 17 May 1927, D.P. 1928 I. 25, Note H. Capitant), the dispute involved a lease contract for shops in Algeria, which at the time was under French Law.[84] The parties to the contract were a French national, Pelissier du Besset, and an English company, the Algiers Land and Warehouse Co. Ltd.[85] Parties had agreed on paying rent in pounds sterling yet, Pelissier' heirs talked themselves out of paying for two reasons:

(a) the disfavor of the French franc compared to the British pound; and
(b) based on the gold clause set forth in the contract that they deemed invalid under French Law.[86]

On the other hand, the Algiers Land and Warehouse Co. Ltd. argued that the clause was valid, given the involvement of parties from different countries which made the contract of an international kind.[87] Therefore, the court was left deciding whether the contract was of an international nature, and one of the judges, Judge Matter, came up with a statement that has made *Pelissier du Besset* the most relevant French arbitration case before 1981.[88] Judge Matter set forth that as to operate as an international contract, it must play out as an ebb and flow of movement above borders.[89] This economical definition of international transactions granted the application of French law to Pelissier du Besset: since the lease agreement between the two parties did not result in the entry of money or goods into France, all the operations conducted in Algeria were local and therefore subject to French Law.[90]

The Court of Cassation kept scrutinizing the issue of international transactions several times, e.g., in cases like *Mardelé* (1930) and *Dambricourt* (1931).[91] *Mardelé v. Murley* involved an arbitration over a contract concluded in France between two French merchants regarding the sale of Chilean wheat.[92] The Court of Cassation held the contract international, for the following reasons:

(a) the goods were of foreign origin;
(b) the seller was a subsidiary of a Dutch company;
(c) the contract was to be administered under the rules of the London Corn Trade Association;
(d) arbitration was to be conducted in London.[93]

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[84] "The American approach to the notion of international contract," *Le Blog du Droit International des Affaires,* June 1, 2006, https://intercomlaw.typepad.fr/droitinternational/la_notion_de_contrat_international/.
[85] *Id.* at 79.
[86] Philippe Fouchard, Berthold Goldman, *Fouchard, Gaillard, Goldman on International Commercial Arbitration,* (Kluwer Law International, 1999).
[87] *Id.*
[88] Bergé Jean-Sylvestre, "Cross-Border Movement and the Law, For an Epistemological Approach," in *Ritsumeikan Law Review,* No. 34, (July 6, 2017), 31-52.
[89] *Id.*
[90] *Id.*
[91] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.
[92] Christopher R. Seppala, *French Domestic Arbitration Law*, 16 (International Lawyer L. 749, 1982).
[93] *Id.*

In this dispute, the Court of Cassation switched from the "ebb and flow movements" definition to the international subject matter one, pointing out that a dispute is international if it calls into play interests of international commerce.[94] In *Dambricourt v. Rossard*, the Court repeated itself by setting out the international commerce interests definition once more. The contract was held international given that the parties to the dispute were a French company and multiple Italian companies, and the subject matter was the sale and shipment of quantities of barley from France to Italy.[95]

The foregoing cases were all part of a process that led to the establishment of a much more favorable setting for international commercial arbitration in France.[96] This was, indeed, the lead-up to the Decree of May 12, 1981, which kept this distinction among domestic and international arbitration cases, allowing the latter to enjoy more freedom.[97] The Decree was also confirmed by the Decree January 13, 2011.[98]

After the First World War, the urge to maintain peaceful and successful relationships among commercial entities from foreign countries became stronger. This was the lead-up to the establishment of many institutions, such as the International Chamber of Commerce.[99] Founded in 1920, its establishment followed up the 1919 Atlantic City Conference and is the most remarkable event that occurred for the field of international commercial arbitration between 1920 and 1950.[100] The Atlantic City Conference represents a pivotal moment for international business cooperation, ending up having the most important business leaders from all countries among the participants.[101] The ICC Arbitration Court was established three years later and started administering arbitration cases soon thereafter.[102] Those years stood for the beginning of the age of Institutionalization, given the establishment of numerous permanent institutions whose aim has always been to keep under control economic relations among entities from different countries. This was the perfect and flourishing ground for the development of international commercial arbitration.

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[94] *Id.* at 91.
[95] *Id.* at 91.
[96] *Id.* at 91.
[97] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," in *The Three Ages of International Commercial Arbitration,* (Cambridge University Press, 2021), 96-153.
[102] Schinazi Mikaël, "The Arbitration Clause Saga in French Law and the Emergence of a Special Regime for International Commercial Arbitration," *67-86*.

The Founding

The idea of a permanent institution dealing with international business came up during the 1919 Atlantic City Conference.[103] According to the *New York Times*, a business establishment was among the list of things to accomplish during the Atlantic City Conference.[104] A special Committee on Permanent Organization started dealing with the details thereof, including which countries should be founding members and which should not.[105] They agreed on having the five nations that attended the aforementioned Conference to be the founding members: Belgium, France, Italy, the United Kingdom and the United States.[106] Germany will join the organization shortly thereafter, in 1925.[107] With regard to the location, Paris was picked out as the "meeting spot" where all members would meet up to sort the institution out.[108] This choice needs to be "blamed" onto the figure of Étienne Clémentel, one of the minds behind the establishment of the ICC and its arbitration court.[109] Nonetheless, Clémentel became ICC's first president.[110] The ICC's location in Paris ended up being a great upside for the French Arbitration regime, thanks to all the scholars and practitioners that found in Paris a place where to practice international commercial arbitration at its best.[111]

The Organization meeting for the establishment of the ICC began on June 23, 1920, and the official establishment occurred on June 28, 1920, in Paris.[112] The most important themes of those days were first, the ICC's independence toward states and second, private business and industrial leaders as its members.[113] It took the ICC just three years to figure out how appealing could be to deal with international commercial arbitration and therefore, the set-up of an arbitration court became one of the goals.[114] First and foremost, under the Committee on International Commercial Arbitration's supervision, Roberto Pozzi, the legal advisor to the Italian Cotton Association, was asked to draft a general report on the usefulness of arbitration and conciliation to be presented soon thereafter.[115] In his report, Pozzi carved out arbitration and conciliation as wide-spread means of dispute resolution, and claimed the ICC as "a sort of

[103] *Id.* at 100.
[104] "Wants a Business League for World, Eugene Schenider of Creusot Works Urges a Great Chamber of Commerce," *New York Times,* October 15, 1919, https://timesmachine.nytimes.com/timesmachine/1919/10/15/118164441.pdf?pdf_redirect=true&ip=0.
[105] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," *96-153.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," *96-153.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

Supreme Court of International Commerce" in the aim of pushing the ICC toward the establishment of an arbitration court.[116]
The ICC Court of Commercial Arbitration was finally established on January 19, 1923.[117] The meeting was held at the Tribunal de Commerce de la Seine, as to show the aim of the ICC to work side by side domestic courts.[118]

When World War II broke out, the Court of Arbitration moved from Paris to Stockholm, which kept its neutrality during the conflict.[119] Only fifteen arbitration cases were administered between 1940-1943.[120] Following the war and its end, the usual international conference was held at the ICC' s headquarters, during which the inadequacy of the arbitration framework - laid down by the two Geneva Conventions - was pointed out. [121] Despite the usefulness of both the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Awards, the set-up was not sophisticated enough to back up the needs of the international arbitration community.[122] Therefore, the ICC was strongly hands on a new legal instrument capable of bearing the needs of a strong arbitration regime and cover up the gaps left by the Geneva Framework. Along with the International Institute for the Unification of Private Law (hereinafter "UNIDROIT"), the ICC kept working on a draft thereof, which was brought up multiple times over the following years but never developed until the 1958 United Nations Conference on International Commercial Arbitration occurred.[123] The underlying idea was based on the ICC Draft Convention, which was yet balanced out with the other interests that came into play.[124] The New York Convention was later signed by ten states and represents today the cornerstone of international commercial arbitration.[125]

The Set-up

As aforementioned, the ICC is the first among the most preferred arbitral institutions. The follow-up question is: What brought the ICC to the top? The answer is threefold. First, the ICC Arbitration Court has established itself among the international arbitration law practice

[116] *Id.*
[117] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," *96-153.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," *96-153.*
[124] Schinazi Mikaël, "The Construction of a Coherent Framework for International Commercial Arbitration," *96-153.*
[125] *Id.*

via its scrutiny and quality control system.[126] Second, the Secretariat's initial reviewing system plays out as a time-saver and a quality check, screening out all the arbitration requests that do not meet the conditions set forth by the ICC.[127] Third, the ICC terms of reference, i.e. documents that parties are required to fill in as to provide a general yet specific framework to the arbitration, guarantee that the arbitral proceedings will be kept on track.[128] Worth mentioning is also the structure on which the ICC is based: its national committees, the Arbitration Court and the above mentioned Secretariat laid the ground for a coherent development of the institution as a whole on an international level. The ICC national committees are spread over 90 countries: each proposes its own nationals either as members of the Court or as "candidates" to the list of ICC arbitrators to be appointed.[129] However, the Court is not compelled to pick out an arbitrator among the ones brought up by one of its national committees.[130]

As one might have guessed, the distinctive feature of ICC Arbitration is its Arbitration Court. Even though its name might trick most people up, the ICC International Court of Arbitration has no role or power of a court, since it does not intervene substantively in the decision-making progress of arbitration proceedings conducted by the ICC.[131] Its aim is to supervise arbitration proceedings conducted under the ICC Arbitration Rules, always backing up the quality of legal services provided to parties to the arbitration.[132] The Court's first task springs at the outset of the proceedings: it scrutinizes whether there is a prima facie agreement to arbitrate and other procedural matters.[133] Further, the Court is made up of experts in legal fields and international arbitration, amounting to 120 people all from different countries.[134] Court's Weekly sessions are held twice a week as to promote debate.[135] Last but not least, the Secretariat assists the Court consistently and works under the guide of its Secretary General.[136] Made up of 80 members, of which roughly half are lawyers, the Secretariat represents more than 28 different nationalities.[137] Its lawyers are divided up in eight teams, each with a different area of expertise based on different regions: North America, Latin America, Europe, France and so on.[138]

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[126] Simon Greenberg and Anders Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," in *International Commercial Arbitration Different Forms and their Features*, ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 204-216.
[127] *Id.*
[128] Article 23 of the ICC 2021 Arbitration Rules.
[129] *Id.* at 125.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Greenberg and Ryssdal, "Rules of Arbitration of the International Chamber of Commerce", *204-216.*
[134] *Id.*
[135] *Id.*
[136] Article 1 of the ICC 2021 Arbitration Rules.
[137] Greenberg and Ryssdal, "Rules of Arbitration of the International Chamber of Commerce", *204-216.*
[138] *Id.*

The Arbitration Rules

The ICC Arbitration Rules came out in 1922, one year earlier the Arbitration Court's establishment.[139] Deemed as the gold standard of the international arbitration practice, these rules have been revised more than once to keep up with new trends. The 1998 Rules stood the test of time for long, until the revised 2012 Rules were published.[140] The 2012 Rules carried along the introduction of provisions regarding multiple parties, multiple contracts and the consolidation of claims.[141] Other revisions followed up in 2017 and as of today, in 2021.[142] The former brought up rules on expedited arbitration procedures for small claims, while the latter, according to the ICC Court President Alex Mourre, *"[m]arks a further step towards greater efficiency, flexibility and transparency of the Rules, making ICC Arbitration even more attractive, both for large, complex arbitrations and for smaller cases*."[143] Despite the hype, the 2021 ICC Arbitration Rules are not the biggest innovation. Rather, they introduce small on-trend changes and confirm that the 2017 Rules set up an almost perfect and effective framework.[144]

This set of rules is widely known for its flexibility, which opens the way up to fitting in almost every commercial dispute regardless of the contractual or non-contractual nature thereof.[145] Further, they provide parties a neutral framework as to solve complex, cross-border disputes.[146] The 2021 revised rules entered into force on January 1, 2021 and regulate all disputes from that day onwards.[147] All the cases registered with the ICC before January 1, 2021, fell under the 2017 Arbitration Rules.[148]

The Arbitration rules can be divided up into 8 sections – each dealing with a different aspect of the proceedings – and six appendices.[149] The order is the following:

(a) Introductory provisions (Article 1-3);
(b) Commencing the Arbitration (Article 4 to 6);
(c) Multiple parties, multiple contracts and Consolidation (Article 7 to 10);
(d) The Arbitral Tribunal (Article 11 to 15);
(e) The Arbitral Proceedings (Article 16 to 30);

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[139] Aceris Law LLC, "ICC Arbitration Rules," *Aceris Law LLC,* August 27, 2018*,* https://www.acerislaw.com/icc-arbitration-rules/.
[140] *Id.* at 136.
[141] *Id.* at 138.
[142] Greenberg and Ryssdal, "Rules of Arbitration of the International Chamber of Commerce", *204-216.*
[143] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[144] *Id.*
[145] *Id.* at 141.
[146] "2021 Arbitration Rules," Dispute Resolution Services, ICC, accessed July 17, 2022, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.
[147] *Id.*
[148] *Id.* at 142.
[149] *Id.* at 145.

(f) Awards (Article 31 to 36);

(g) Costs (Article 37 and 38);

(h) Miscellaneous – a set of various provisions on different aspects – (Article 39 to 43).[150]

The first Appendix consists of the statute of the International Court of Arbitration, setting out the functions and structure thereof. The second one sets forth the internal rules governing the functioning of the Court, while the remaining appendices respectively deal with: Arbitration Costs and Fees, Case Management Techniques, Emergency Arbitrator Rules and Expedited Procedure Rules.[151]

Introductory Provisions

The first article presents the International Court of Arbitration as the ICC independent arbitration body whose statute is set forth in Appendix I. As aforementioned, the Court does not deal with solving disputes itself, but rather administers the resolution of those disputes by the arbitral tribunals. Its task is to make sure the ICC Arbitration Rules are enforced throughout the entire proceeding.[152] Further, it detains the power to set up its internal rules. The Court's President gets the power to take urgent decisions, and one of the Vice-presidents gets such power in the case the President is unable to do so. All urgent decisions taken on behalf of the Arbitration Court must be referred to the next Court's session.[153] Articles II sets forth some definitions e.g., the one of claimant, party, arbitral tribunal and so on. Article III now clears up that all pleadings and communications, regardless of which party they are submitted from, must electronically be sent to the other party, all arbitrators and the Secretariat.[154]

The Court consists of a president, a vice-president and members, who are appointed by the ICC World Council based on what national committees and groups have proposed.[155] All members have a three-year term, with the option to be renewed once. The work of the Court is generally done on a voluntary basis, besides the President, who receives an allowance for his/her duties and responsibilities.[156] Mostly lawyers with an expertise in international commercial arbitration or investment arbitration play out as all the other members of the Court.[157] Since the number of requests to arbitrate before the ICC has ramped up over the last few years, a committee empowered to take day-to-day decisions was established, besides the

[150] "2021 Arbitration Rules," Dispute Resolution Services, ICC, accessed July 17, 2022, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.
[151] *Id.*
[152] Article 1 of the ICC 2021 Arbitration Rules.
[153] Article 1 of the ICC 2021 Arbitration Rules.
[154] Article 3 of the ICC 2021 Arbitration Rules.
[155] Article 3, Appendix I of the ICC 2021 Arbitration Rules.
[156] Verbist Herman, "*ICC Arbitration in Practice*," (Aalphen aan den Rijin: Wipf and Stock Publishers, 2016).
[157] *Id.*

monthly plenary sessions of the Court.[158] According to Article 4 of the Internal Rules of the Court, the Court can indeed work divided up in committees, made up of three members and one among them will be its president.[159] Committees decide unanimously and when it is not achievable to get to an unanimous decision or there is an abstention, the issue is referred to a Special Committee.[160] Special Committees are made up of the President and six other court members, and they might be called out to work to:

(a) Decide matters under Article 14 and 15(2) of the Rules;
(b) scrutinize arbitral awards in the presence of dissenting opinions;
(c) scrutinize draft arbitral awards if a state or a state entity happens to be among the parties to the arbitration;
(d) decide on matters that were first handled by a Committee which could not get a decision or abstained;
(e) commit to what the President requests.[161]

As aforementioned, the Court is assisted by the Secretariat, which runs under the supervision of its Secretary-General. By the same token, the Secretary-General is assisted by a Deputy Secretary General.[162] The aim of both is to plan out all operations.[163] While the General Counsel provides legal assistance to both the Court and the Secretariat, the Managing Counsel's task consists of assisting the Secretary General and the Deputy Secretary General in handling the caseload.[164]

Commencing the Arbitration

Any party wishing to start an arbitration before the arbitration Court needs to forward a request to the Secretariat, whose task will then be notifying both the claimant and the respondent of the request and its date.[165] The request's date represents the start date of the arbitral proceeding and must present the following information:

(a) Name, address and all the contact details of both parties;
(b) Name, address and all the contact details of the person representing the claimant;
(c) A clear description of the facts on which the disputes is based along with the claims that aroused out of them;

[158] *Id.*
[159] Article 4, Appendix I of the ICC 2021 Arbitration Rules.
[160] Article 4, Appendix II of the ICC 2021 Arbitration Rules.
[161] Article 5, Appendix I of the ICC 2021 Arbitration Rules.
[162] Verbist Herman, "*ICC Arbitration in Practice*," (Aalphen aan den Rijin: Wipf and Stock Publishers, 2016).
[163] *Id.*
[164] *Id.*
[165] Article 4 of the ICC 2021 Arbitration Rules.

(d) The relief sought, the amounts of all claims if quantified and an estimate of those not quantified;
(e) The arbitration agreement (s) and all the other relevant agreements if any;
(f) All the arbitration agreements if claims are based upon multiple and different ones;
(g) All details concerning arbitrators' proposal according to these rules;
(h) All details concerning the place of arbitration, the applicable rules of law and the language of the arbitration.[166]

It is up to the respondent to submit an "Answer" within 30 days from receipt of the request to the Secretariat. The information the respondent should set forth in the Answer mirrors the ones set out in the claimant's request, adding up the counterargument or any document or information deemed appropriate or helpful to solve the dispute.[167] The counterargument needs to set forth:

(a) A clear description of the facts on which the counterargument is based on;
(b) The relief sought along with quantified claims and an estimate of those not quantified;
(c) The arbitration agreement and any other relevant agreement;
(d) The multiple arbitration agreements if the counterclaims are based upon those.[168]

One noteworthy aspect is the introduction of electronic service submissions, according to the foregoing articles: since the start of the Covid-19 pandemic, there was the urge to adjust the arbitration practice to this newborn needs. This led up to cutting off hard copies of any request, counterclaim or request of joinder unless the claimant or the respondent specifically asks for it.[169] Every piece of documentation shall be sent by email, representing quite a big contrast if compared to the 2017 rules which set forth that the transmission of documentation had to be done both via email and hard copy.[170]

Article 6 carves out:

(a) the effect of the arbitration agreement; and
(b) the prima facie examination on whether a valid arbitration agreement exists.

First, the article points out that if parties had agreed on arbitration under the ICC Rules, they are deemed to have chosen the rules that were in effect on the start date of the arbitration.[171] Via the agreement, parties also agreed on the administration by the Court.

[166] Article 4 of the ICC 2021 Arbitration Rules.
[167] Article 5 of the ICC 2021 Arbitration Rules.
[168] Article 5 of the ICC 2021 Arbitration Rules.
[169] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[170] *Id.*
[171] Article 6 of the ICC 2021 Arbitration Rules.

Coming to the prima facie examination on whether there is a valid arbitration agreement between the parties, this is only triggered if:

(a) The party against whom a claim is made does not respond with an Answer;
(b) If any party raises pleas against the existence, validity or scope of the arbitration agreement or concerning multiple claims that can be determined in a single arbitration.[172]

At this point, all the above-mentioned issues are to be decided by the arbitral tribunal. This is the established default rule, unless the Court' s Secretary General decides to refer the case to the Court.[173]

If the Court's jurisdiction is triggered, it gets the power to decide:

(a) Whether the arbitration agreement exists;
(b) To what extent the arbitration must proceed.[174]

The arbitration might proceed only if the Court is prima facie satisfied that an arbitration agreement, according to its rules, really exists. This can be so if:

(a) The Court figures that the arbitration agreement exists at least between some parties to the agreement, including additional ones;
(b) claims are made under multiple arbitration agreements, and those claims are found by the Court to be prima facie compatible with their arbitration agreements and all parties agreed to determine all of them under a single arbitration.[175]

It is clear how the Court's Secretary General is the one leading the prima facie examination before the Arbitration Court: it is up to the Secretary, indeed, to decide whether the Court's intervention is required. This operates as a time-saver tool and boosts efficiency, instead of wasting the Court's time on claims that can be easily handled by arbitral tribunals.[176] Further, all parties that were "left out" of the arbitration - because the Court did not find the agreement to be valid toward them - keep the right to ask any court whether, and to what extent, there is a valid arbitration agreement.[177] Whatever decision the Court has taken, this does not talk any party out of reintroducing "refused" claims at a later date or in other proceedings.[178]

[172] Article 7 of the ICC 2021 Arbitration Rules.
[173] Article 6 of the ICC 2021 Arbitration Rules.
[174] Article 6 of the ICC 2021 Arbitration Rules.
[175] Article 6 of the ICC 2021 Arbitration Rules.
[176] Verbist Herman, "*ICC Arbitration in Practice*," (Aalphen aan den Rijin: Wipf and Stock Publishers, 2016).
[177] Article 6 of the ICC 2021 Arbitration Rules.
[178] Article 6 of the ICC 2021 Arbitration Rules.

Multiple parties, multiple contracts and consolidation

Article VII starts off with a joinder provision, which gives the arbitral tribunal the power to allow an additional party to the dispute.[179] The party that wants to add the additional one to the arbitration needs to submit a request against the latter to the Secretariat. Further, among the conditions to meet to join the arbitration – acceptance of the constitution of the arbitral tribunal along with an agreement on the terms of reference – there is no mention of all parties' consent, therefore entitling the arbitral tribunal alone to decide on a joinder in an ongoing arbitration.[180] The arbitral tribunal must base its decision upon:

(a) all the relevant circumstances;
(b) the tribunal's prima facie jurisdiction over the additional party;
(c) the timing of the joinder's request;
(d) all conflicts of interest, if any;
(e) the way a joinder will affect the ongoing arbitration.[181]

Moreover, the arbitral tribunal's decision on the additional party does not affect the tribunal's decision on its jurisdiction over that same party.[182] Despite the broad spectrum of power the arbitral tribunal is given by this provision, it turns out as an upside for complex disputes that involve multiple parties.[183]

When it comes down to arbitrations involving multiple parties, each of them is allowed to bring any claim against the other. [184] However, none of the parties to the arbitration is allowed to bring new claims when the terms of reference have been already signed by all parties to the arbitration.[185]

According to Article 9, if all claims aroused out or in connection with the same contract, it is allowed to proceed with a single arbitration despite having more than one arbitration agreement.[186] Going forward, Article 10 carves out the consolidation of multiple, pending arbitration proceedings into one single proceeding.[187] If one party applies for consolidation, the Court can grant it only if:

(a) there is the parties 'agreement on consolidation;
(b) all of the disputed claims are derived from the same arbitration agreement or agreements;

[179] Article 7 of the ICC 2021 Arbitration Rules.
[180] Article 7 of the ICC 2021 Arbitration Rules.
[181] Article 7 of the ICC 2021 Arbitration Rules.
[182] Article 7 of the ICC 2021 Arbitration Rules.
[183] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[184] Article 8 of the ICC 2021 Arbitration Rules.
[185] Article 8 of the ICC 2021 Arbitration Rules.
[186] Article 9 of the ICC 2021 Arbitration Rules.
[187] Article 10 of the ICC 2021 Arbitration Rules.

(c) even though the disputed claims do not belong to the same arbitration agreement or agreements, the underlying dispute arises out of the same legal relationship and the arbitration agreement are found to be compatible.[188]

While figuring out whether to proceed to consolidation, the Court will also consider any relevant circumstances that might happen to be relevant for the arbitration.[189] When multiple arbitrations are consolidated, they are consolidated into the one that had an earlier commencement date.[190]

The Arbitral Tribunal and the Dutco Principle

Duties posed upon arbitrators are not difficult to figure out: independence, impartiality, commitment and so on. Article 11 is no exception and sets forth that all arbitrators must be independent and impartial throughout the entire arbitration proceeding. First, arbitrators are compelled to sign a statement regarding those duties before any appointment or confirmation is made.[191] Second, they must report to the Secretariat any circumstance that might lead to parties' reasonable doubts about their independence and impartiality.[192]

If a circumstance like the one above mentioned pops up during the proceedings, the duty of disclosure still bears on the arbitrators.[193] One aspect worth mentioning is Article 11 (7), which was recently introduced via the 2021 revision of the Arbitration Rules. It is set forth that all parties are compelled to disclose the presence of a third-party founder, who has agreed on funding the claims and detains an interest on the arbitration's outcome.[194]

Generally, any arbitration can either have a sole arbitrator or an arbitral tribunal made up of three arbitrators. If parties have designated neither a solo arbitrator nor three arbitrators, the Court will appoint a sole arbitrator, unless the nature of the dispute requires otherwise.[195] If the parties' agreement provides for an arbitration to be solved by a sole arbitrator, parties can proceed to nominate one for confirmation. If they fail do so within 30 days from the commencement of the arbitration, the appointment of the sole arbitrator will be up to the Court.[196]

On the other hand, when parties had agreed on an arbitration conducted by three arbitrators, they shall nominate one each for confirmation. If they fail to do so, the same scheme applies:

[188] Article 10 of the ICC 2021 Arbitration Rules.
[189] Article 10 of the ICC 2021 Arbitration Rules.
[190] Article 10 of the ICC 2021 Arbitration Rules.
[191] Article 11 of the ICC 2021 Arbitration Rules.
[192] Article 11 of the ICC 2021 Arbitration Rules.
[193] Article 11 of the ICC 2021 Arbitration Rules.
[194] Article 11 of the ICC 2021 Arbitration Rules.
[195] Article 12 of the ICC 2021 Arbitration Rules.
[196] Article 12 of the ICC 2021 Arbitration Rules.

it will be up to the Court to proceed with the appointing of arbitrators.[197] As one might have guessed, the third arbitrator operates as president of the tribunal and shall be appointed by the Court, unless the parties have provided otherwise. However, despite every other appointment procedure parties might have agreed on, the nomination is still subject to the Court's confirmation.[198] If the procedure designated by the parties turns out to be unsuccessful, the third arbitrator will be appointed by the Court.[199] In a nutshell, every time parties to the arbitration are either unable or have failed to appoint an arbitrator, the Court will help them out and appoint the best person for the job as to boost the efficiency and speed of the arbitral proceedings.

What is noteworthy is also that under exceptional circumstances, the Court is allowed to appoint each member of the arbitral tribunal, regardless of any parties' agreement.[200] The aim of Article 12 (9) is to cut off the odds of any unequal treatment or unfairness that might result on the final arbitral award. This last part of Article 12 sets out ICC's efforts toward the achievement of equality and integrity among parties to the arbitration. This principle is based upon the landmark ruling on the matter, *Siemens v. Dutco*. In *Siemens*, the French Cassation Court faced a multiparty arbitration before the ICC.[201] The parties to the arbitration were respectively Bangladesh Knowledge Management Initiative (hereinafter "BKMI"), Siemens and Dutco Construction who had entered into a consortium agreement for the construction of a factory in the Middle East.[202] The above-mentioned agreement provided for ICC Arbitration and a three-arbitrator tribunal. The tribunal was to be made up of one arbitrator nominated by the respondent, one by the claimant and the president thereof nominated by both.[203] Dutco filed a claim against both Siemens and BKMI, which then questioned whether they needed to appoint an arbitrator jointly, even though Dutco's claims against each of them were separate.[204] The ICC responded that if they had failed to appoint one arbitrator, the arbitral institution would have taken care of the appointment by nominating one itself.[205] Therefore, Siemens agreed on the arbitrator appointed by BKMI, despite expressing some reservations

[197] Article 12 of the ICC 2021 Arbitration Rules.
[198] Article 12 of the ICC 2021 Arbitration Rules.
[199] Article 12 of the ICC 2021 Arbitration Rules.
[200] Article 12 of the ICC 2021 Arbitration Rules.
[201] Hamish Lal, Léa Defranchi, "Party Nomination of Arbitrators: Égalité of Parties and the 'Dutco Principle'," *Akin Gump Strauss Hauer & Feld LLP,* October 21, 2020, https://www.akingump.com/en/news-insights/party-nomination-of-arbitrators-egalite-of-parties-and-the-dutco-principle.html.
[202] Hamish Lal, Léa Defranchi, "Party Nomination of Arbitrators: Égalité of Parties and the 'Dutco Principle'," *Akin Gump Strauss Hauer & Feld LLP,* October 21, 2020, https://www.akingump.com/en/news-insights/party-nomination-of-arbitrators-egalite-of-parties-and-the-dutco-principle.html.
[203] *Id.*
[204] *Id.*
[205] *Id.*

on the matter.[206] Soon thereafter, Siemens challenged the arbitral tribunal's jurisdiction and brought a recourse for annulment before the Cour d'appel de Paris, but both requests were rejected.[207] The Cour d'appel held that the choice of a single arbitrator for Siemens and BKMI as both respondents was reasonable and valid under the ICC Rules.[208] The Cour's reasoning was twofold: first, the parties had agreed on a consortium, therefore the choice of a single arbitrator for the both of them shed light on the contractual nature thereof; second, that choice was not a restriction imposed on parties' autonomy in their defense.[209] Notwithstanding the Cour d'appel's stance, the French Cassation Court found that its decision violated the public policy's principle.[210] The Cassation Court went on and held that parties have to be equal in their power to appoint arbitrators, given its importance in arbitration.[211] Further, the Cassation Court pointed out that an asymmetrical appointing mechanism will likely lead to a violation of the law of the seat of arbitration.[212] The right to appoint arbitrators cannot be waived beforehand, therefore a party can give up such right only after the dispute has arisen.[213] This landmark decision has had an impact even on an international level, and the principle brought up by the French Cassation Court became known as the *Dutco principle*.[214]

As to point out the importance of *Siemens v. Dutco* ruling, it is worth mentioning the *PT Ventures v. Vidatel* case.[215] The parties to the dispute were PT Ventures SGPS, S.A., a Portuguese telecommunication company - owned by Sonangol EP, the Angolian state oil company - and Vidatel.[216] The dispute aroused out of a shareholders' agreement in Unitel S.A.[217] Vidatel, as one of the Unitel S.A. shareholders, has challenged the ICC award – that granted PT Ventures US$646,544,968 - before the Cour d'Appel de Paris.[218] Vidatel's first

[206] Hamish Lal, Léa Defranchi, "Party Nomination of Arbitrators: Égalité of Parties and the 'Dutco Principle'," *Akin Gump Strauss Hauer & Feld LLP,* October 21, 2020, https://www.akingump.com/en/news-insights/party-nomination-of-arbitrators-egalite-of-parties-and-the-dutco-principle.html.
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] Stefan Kröll, "Siemens – Dutco Revised? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases," *Kluwer Arbitration Blog*, October 15, 2020, http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/.
[212] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[213] *Id.* at 205.
[214] *Id.*
[215] Hamish Lal, Léa Defranchi, "Party Nomination of Arbitrators: Égalité of Parties and the 'Dutco Principle'," *Akin Gump Strauss Hauer & Feld LLP,* October 21, 2020, https://www.akingump.com/en/news-insights/party-nomination-of-arbitrators-egalite-of-parties-and-the-dutco-principle.html.
[216] White & Case, "White & Case Secures Victory for PT Ventures," *White & Case Press Release,* January 28, 2021, https://www.whitecase.com/news/press-release/white-case-secures-victory-pt-ventures#:~:text=White%20%26%20Case%20successfully%20represented%20PT,effort%20to%20annul%20the%20award.
[217] *Id.*
[218] *PT Ventures SGPS S.A. v. Vidatel Ltd., Mercury Servicos de Telecommunicacoes S.A. and Geni SA, ICC Case No. 21404/ASM/JPA (C-21757/ASM),* Judgment of the Paris Court of Appeal (26/01/2020) and Judgment of the High Court of Justice of the British Virgin Islands (13/08/2020), https://jusmundi.com/en/document/decision/en-pt-ventures-sgps-s-a-v-vitadel-ltd-

argument was that the arbitral tribunal had not been constituted according to the arbitration agreement, given how the ICC arbitral tribunal ran the appointment of the arbitrators.[219] The arbitration agreement provided for four arbitrators to be appointed by each party and the fifth to be picked out by the four arbitrators themselves.[220] What the ICC did instead, according to Vidatel, was appointing all the five arbitrators itself.[221]

The request that PT submitted to the ICC pointed out that if each party was to nominate one arbitrator, as set forth in their arbitration agreement, this would have led to the violation of the *Dutco principle*, ending up with three arbitrators against the one nominated by PT Ventures.[222] PT's argument was that nominating all arbitrators in accordance with the shareholders agreement would have disrupted the equality that must reign upon parties in the process of appointing arbitrators.[223] That is the reason why the ICC talked itself out of violating the *Dutco principle* and nominated five arbitrators itself.[224] The Paris Cour d'Appel agreed with the ICC, and in a decision granted by the beginning of 2021, it dismissed the annulment action brought up by Vidatel. The Court held that the ICC made no mistake in appointing all five arbitrators, since doing otherwise would have led to a breach of the *égalité* and *Dutco* principle, stressing out that the principle of equality of the parties in the appointment of arbitrators is fundamental.[225]

Regarding the appointment and confirmation of arbitrators, Article 13 provides that the Court should consider arbitrators' nationality, residence and any other relationship with the parties beforehand. Most important, the Court needs to see their capability of conducting the proceedings through.[226] When the Court is asked to appoint a sole arbitrator or the president of the arbitral tribunal, it shall pick a person of a different nationality than that of the parties, unless the circumstances suggest doing otherwise.[227]
If the arbitration agreement arises out of a treaty, no arbitrator can be of the parties' nationality. Article 13 (6) strengthens the tribunal's neutrality where public interests of states are involved.[228]

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mercury-servicos-de-telecomunicacoes-sarl-and-geni-sarl-judgment-of-the-high-court-of-justice-of-the-british-virgin-islands-thursday-13th-august-2020.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.* at 214.
[226] Article 13 of the ICC 2021 Arbitration Rules.
[227] Article 13 of the ICC 2021 Arbitration Rules.
[228] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.

If any of the parties wants to challenge an arbitrator, it shall do so via a request to the Secretariat, along with a written statement setting forth the facts and circumstances on which the challenge is based.[229] The challenge is admissible only if:

(a) it is submitted by the party within 30 days from the notification of the appointment of such arbitrator; or

(b) it is submitted by the party within 30 days from the date on which the party found out about those circumstances and facts on which the challenge is based, if the date differs from the notification's date.[230]

The Secretariat must provide to any member of the arbitral tribunal and all parties a sufficient time window to come out with a written comment on the matter. After that, the Court is allowed to decide on the challenge and on its merits.[231]

An arbitrator might be replaced only in the following scenarios:

(a) upon death;

(b) upon the Court's acceptance of the arbitrator's resignation;

(c) upon the Court's acceptance of the arbitrator's challenge;

(d) upon the Court's acceptance of all parties' request;

(e) upon the Court's own initiative when it figured out the arbitrator's incapability *de jure* or *de facto* to pull the job off or the arbitrator's violation of the Rules.[232]

In the last scenario, all parties and the arbitral tribunal's members must be given an opportunity to provide a written comment on the matter within a sufficient time window.[233] After the replacement occurred, the Court can either opt for a different nominating procedure or consider whether the remaining arbitrators shall continue the arbitration, depending on the specific circumstances.[234]

The arbitral proceedings and Trade Usages

The Secretariat bears the burden to send the dispute file to the arbitral tribunal, so long as all costs were paid beforehand.[235] All parties to the arbitration are compelled to disclose any change in representation to the arbitral tribunal, the Secretariat and all other parties sooner rather later.[236] If a change in representation has occurred and the arbitral tribunal finds out any

[229] Article 14 of the ICC 2021 Arbitration Rules.
[230] Article 14 of the ICC 2021 Arbitration Rules.
[231] Article 14 of the ICC 2021 Arbitration Rules.
[232] Article 15 of the ICC 2021 Arbitration Rules.
[233] Article 15 of the ICC 2021 Arbitration Rules.
[234] Article 15 of the ICC 2021 Arbitration Rules.
[235] Article 16 of the ICC 2021 Arbitration Rules.
[236] Article 17 of the ICC 2021 Arbitration Rules.

conflict of interest, it is empowered to take any measure to avoid such conflict. The arbitral tribunal might do so by excluding the new party counsel either entirely or in part.[237] The aim of this provision is to put the arbitration on a path of integrity, avoiding unnecessary delays based on parties' wrong choice of counsel.

When it comes to the place of arbitration, if the parties did not designate one beforehand, the Court will set one up.[238] However, according to the parties' will, the arbitral tribunal might hold hearings or any other meetings in different locations.[239]

Article 19 sets forth the rules that apply to the arbitral proceedings. The order is the following:

(1) the ICC Arbitration Rules;
(2) if the aforementioned rules are silent, any rules which the parties had agreed on;
(3) if the parties have not agreed on a set of rules, the arbitral tribunal will pick out the rules of the proceedings, regardless of any reference to a certain procedure of a national law on arbitration.[240]

Even though parties will normally designate the language of the proceedings, the arbitral tribunal is called out to pick one whenever parties have failed to do so. The arbitral tribunal will likely rely on the language of the contract.[241]

According to the freedom that governs the regime of arbitration, parties are free to designate the law that the arbitral tribunal shall apply to decide the merits of the dispute.[242] As one might have guessed, if parties have failed to select the rules of law the arbitral tribunal will step in and pick out the most appropriate one to the dispute.[243] The arbitral tribunal has to reflect on a few factors in its choice, such as:

(a) any provision of the contract governing the parties' agreement;
(b) any relevant trade usage.[244]

The only condition under which the arbitral tribunal is allowed to decide *ex aequo et bono* is when parties have agreed to give it such power.[245]

[237] Article 17 of the ICC 2021 Arbitration Rules.
[238] Article 18 of the ICC 2021 Arbitration Rules.
[239] Article 18 of the ICC 2021 Arbitration Rules.
[240] Article 19 of the ICC 2021 Arbitration Rules.
[241] Article 20 of the ICC 2021 Arbitration Rules.
[242] Article 21 of the ICC 2021 Arbitration Rules.
[243] Article 21 of the ICC 2021 Arbitration Rules.
[244] Article 21 of the ICC 2021 Arbitration Rules.
[245] Article 21 of the ICC 2021 Arbitration Rules.

As above-mentioned, *usages* are among the elements the arbitral tribunal shall consider while deciding over a case.[246] *Usages* can be defined as practices constantly repeated over time, ending up bearing a normative force given their constant repetition.[247] Many legal systems divided those up from *customs*, which are categorized as usages that became binding rules of law.[248] However, those are *usages'* and *customs'* general views, and this analysis is focused on international commercial arbitration. Many ICC awards have opened up the door to identify a twofold meaning of *usages*:

(a) "trade usage" as the industry-specific constant practice;
(b) A broader definition that entails both trade usage and general principles of the law of many legal systems.[249]

The analysis will now focus on those ICC awards - rendered between 2000 and 2011 - that brought up the application of usages. In a nutshell, usages can be applied by:

(a) Article 21 of the ICC Arbitration Rules; or
(b) The explicit reference made to usages by the law applicable to the merits of the dispute, as the *lex contractus*.[250]

The following cases regard usages as binding business practices that must be either proved by the parties that want to rely on them or be independently known by the arbitrators.[251] The other side of the coin reads that usages can be used only to bridge the gaps of the contract between the parties.[252]

The ICC Case No. 14748 of 2009 involved a delivery of goods not conforming to the sale agreement.[253] The claimant was unable to prove the unconformity of the goods, having no evidence of defects. However, the respondent filed a counterclaim arguing on the time the vessel had spent in the port, which was beyond what parties have agreed on.[254] Since all charges for an extended stay – *surestaries* – were on the claimant, he argued that nonworking days could not be calculated in the total amount.[255] The arbitrator turned to an international trade usage that is worded as follows: " *Une fois en surestaries, toujours en surestaries,*"

[246] Article 21 of the ICC 2021 Arbitration Rules.
[247] Jolivet, Emmanuel Bernard and Marchisio, Giacomo and Gelinas, Fabien, "Trade Usages in ICC Arbitration" in *Trade Usages and Implied Terms in the Age of Arbitration*, ed. Fabien Gelinas, (Oxford University Press, 2016), 211-32.
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] Jolivet, Emmanuel Bernard and Marchisio, Giacomo and Gelinas, Fabien, "Trade Usages in ICC Arbitration", *211-32.*
[254] *Id.*
[255] *Id.*

which carves out that non-working days have to be counted for extra charges.[256] The arbitrator, who based the arbitral award on his own knowledge of the industry-specific rule, finally ordered the claimant to restore the respondent for the contractual breach.[257]

The ICC Case No. 13834 of 2008 concerned the registration of a pharmaceutical compound.[258] The arbitral tribunal, made up of a sole arbitrator, was called to decide under the law of the state of Illinois about the violation of a non-competition covenant between the parties to the arbitration.[259] The respondent had previously registered a pharmaceutical compound with the aim of selling it, and the arbitrator found in its favor because of an usage of the pharmaceutical trade. That usage was based on the facts that registration of a medicine is a prerequisite as to start selling it, and that is why many pharmaceutical companies proceed to do so even though they do not eventually procedure, manufacture or sell those medicines.[260] Therefore, the respondent's action aligned with the pharmaceutical usage and did not violate the non-competitive
covenant.[261]

As aforementioned, arbitrators - and the arbitral tribunal as a whole - have peculiar duties such as those of impartiality, independence, fairness but also a duty of diligence and performance throughout the entire arbitral proceeding. Article 22 clarifies that the tribunal is asked to perform its task diligently and in a cost-effective manner, bearing in mind both the dispute's value and the overall costs.[262] An effective case management was among the 2021 Rules revision's goals, and therefore, the arbitral tribunal *shall* adopt all measures deemed necessary as to run the proceeding efficiently.[263] Needless to say, those measures must be appropriate and meet the parties' agreement.[264] As to carry out the proceedings according to parties' needs, the arbitral tribunal is asked to order confidentiality or protect confidential information linked to the arbitration.[265]

Article 23 illustrates the well-known ICC Terms of Reference, which will be discussed later in this chapter.

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[256] Jolivet, Emmanuel Bernard and Marchisio, Giacomo and Gelinas, Fabien, "Trade Usages in ICC Arbitration", *211-32.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] Article 22 of the ICC 2021 Arbitration Rules.
[263] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[264] Article 22 of the ICC 2021 Arbitration Rules.
[265] Article 22 of the ICC 2021 Arbitration Rules.

The arbitral tribunal is given the task to draw up the Terms of Reference, and while it does so it should also hold a case management conference - along with the parties - on any procedural matters adopted under Article 22(2).[266] This conference can be held in person as well as by other means, either what the parties have chosen or what the arbitral tribunal will opt for.[267] The aim of this conference is to allow the tribunal to set up the proceeding timetable: it must do so either during or after the conference has taken place.[268] If anything needs to be modified, those modifications must be reported both to the Court and the parties to the arbitration.[269] Further, according to the parties' needs, the timetable can be amended.[270]

The shorter, the better: the arbitral tribunal is asked to establish the facts of the case in a tiny window of time.[271] It might also hear witnesses, parties' experts or any other person. This must be so in parties' presence or in their absence under the condition that they were properly summoned.[272] The tribunal is allowed to get and hear experts on the facts of the case, so long as it has consulted the parties about it.[273] Parties to the arbitration keep the right to consult any such expert at a hearing.[274] Unless one of the parties requests a hearing, the arbitral tribunal shall decide the merits of the case only based on the submitted documents.[275]
The arbitral tribunal can hold hearings either if it decides so on its motion or if one of the parties requests it.[276] The tribunal must give proper notice of the time and place of the hearing, while it is expressly given more freedom when it comes down to the mean by which the hearing is to be held. Article 26 specifically points out that a hearing can take place also remotely by videoconference, which happens to be a nice innovation given the Covid-19 pandemic.[277] If one of the parties misses the hearing without a valid reason, the tribunal is free to go on.[278] The standard arbitration practice allows for private hearings: that is why Article 26 clears up that if parties and the tribunal agreed on it, people that are not involved in the proceedings will not be admitted to the hearings.[279]

After all proceedings are closed, the arbitral tribunal must:

[266] Article 24 of the ICC 2021 Arbitration Rules.
[267] Article 24 of the ICC 2021 Arbitration Rules.
[268] Article 24 of the ICC 2021 Arbitration Rules.
[269] Article 24 of the ICC 2021 Arbitration Rules.
[270] Article 24 of the ICC 2021 Arbitration Rules.
[271] Article 25 of the ICC 2021 Arbitration Rules.
[272] Article 25 of the ICC 2021 Arbitration Rules.
[273] Article 25 of the ICC 2021 Arbitration Rules.
[274] Article 25 of the ICC 2021 Arbitration Rules.
[275] Article 25 of the ICC 2021 Arbitration Rules.
[276] Article 26 of the ICC 2021 Arbitration Rules.
[277] Daniel Sharma LL.M., "The Revised New 2021 ICC Arbitration Rules," *DLA Piper,* April 15, 2021, https://www.dlapiper.com/en/italy/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules/.
[278] Article 26 of the ICC 2021 Arbitration Rules.
[279] Article 26 of the ICC 2021 Arbitration Rules.

(a) declare the proceedings' closing on the dispute matters;
(b) provide the date on which the arbitral award will be submitted to the Court to both the Secretariat and the parties.[280]

Parties are denied the chance to submit further documents or applications once the tribunal declares closed the proceeding, unless is the tribunal itself that requests so.

As soon as the arbitral tribunal gets the dispute file, it may, if a party so requests, order any interim or conservatory measure that deems appropriate.[281] Such measure can either take the form of:

(a) an order, providing the reasons on which it is based; or
(b) an arbitral award.[282]

The arbitral tribunal will likely ask for a security from the requesting party before granting any interim measure.[283] However, one of the parties to the arbitration might also ask before a court as to get the interim or conservatory measure. According to Article 28, this is not an issue for the arbitration agreement between the parties: any measure taken by the judicial authority will just be referred to the Secretariat which will then notify the arbitral tribunal.[284]

Appointment of an Emergency Arbitrator

If one of the parties needs an urgent interim or conservatory measure and the arbitral tribunal has not been constituted yet, there are two options:

(a) referring the dispute to an emergency arbitrator according to the rules set forth in the fifth Appendix;
(b) seeking the same measure before the competent judicial authority, an act that would not violate the arbitration agreement.[285]

If the party wants to have recourse to an emergency arbitrator, the first step is to send the application to the Secretariat.[286] The application's elements mirror the ones of an arbitration request under Article IV of the ICC Rules. Therefore, the application shall contain the party's contact details along with its counsel's ones, a clear description of the circumstances on which the application is based and so on.[287] The application may also come with all the documentation that the party deems necessary as to solve its examination smoothly.[288]

[280] Article 27 of the ICC 2021 Arbitration Rules.
[281] Article 28 of the ICC 2021 Arbitration Rules.
[282] Article 28 of the ICC 2021 Arbitration Rules.
[283] Article 28 of the ICC 2021 Arbitration Rules.
[284] Article 28 of the ICC 2021 Arbitration Rules.
[285] Article 29 of the ICC 2021 Arbitration Rules.
[286] Article 1, Appendix V of the ICC 2021 Arbitration Rules.
[287] Article 1, Appendix V of the ICC 2021 Arbitration Rules.
[288] Article 1, Appendix V of the ICC 2021 Arbitration Rules.

The President of the Arbitration Court is the one entitled to appoint the emergency arbitrator, and this must be done within two days from the Secretariat's receipt of the application.[289] However, if the arbitral tribunal has been already constituted, no emergency arbitrator can be appointed.[290] It is worth mentioning that every emergency arbitrator must comply with duties of impartiality, independence and diligence as much as "standard" arbitrators must do.[291] Once the appointment has occurred, the Secretariat shall notify all parties to the arbitration and from then on, all communications will take place directly between the parties and the arbitrator.[292]

If the other party is willing to challenge the emergency arbitrator, this must be done within three days from the day that same party got the receipt of the arbitrator's appointment or from the date the party became aware of the circumstances on which the application is based on.[293] The Secretariat shall give to both the emergency arbitrator and the other party a sufficient window of time to provide a written comment on the matter, while the Court has the final say on the arbitrator's challenge. [294]

If parties had agreed on the place of arbitration beforehand, that must be the place of the "emergency arbitration".[295] If parties have failed to do so, it will be up to the Court's President to pick out the place of arbitration. As one might have guessed, emergency arbitrator rules pose upon the Court's President lots of power relating to the administration of emergency arbitrator proceedings.[296]

Despite the short amount of time the emergency arbitrator is given, a proceeding timetable must be set up within two days from the transmission of the file.[297] The emergency arbitrator's final say on the matter comes out as an order in writing, setting forth:

(a) whether the application was admissible under Article 29(1) of the ICC Arbitration Rules;
(b) whether the arbitration has jurisdiction over the matter;
(c) the reasons it is based upon.[298]

[289] Article 2, Appendix V of the ICC 2021 Arbitration Rules.
[290] Article 2, Appendix V of the ICC 2021 Arbitration Rules.
[291] Article 2, Appendix V of the ICC 2021 Arbitration Rules.
[292] Article 2, Appendix V of the ICC 2021 Arbitration Rules.
[293] Article 3, Appendix V of the ICC 2021 Arbitration Rules.
[294] Article 3, Appendix V of the ICC 2021 Arbitration Rules.
[295] Article 4, Appendix V of the ICC 2021 Arbitration Rules.
[296] Article 8, Appendix V of the ICC 2021 Arbitration Rules.
[297] Article 5, Appendix V of the ICC 2021 Arbitration Rules.
[298] Article 6, Appendix V of the ICC 2021 Arbitration Rules.

It must be published within 15 days from the day the emergency arbitrator got the dispute file and later sent to the Secretariat and both parties.[299] However, the arbitral tribunal is empowered to modify, terminate or annul any emergency arbitrator's order, which holds no binding force on the arbitral tribunal itself.[300] If any questions arise out of the emergency arbitrator proceedings, the arbitral tribunal must decide upon them.[301] There are four conditions under which emergency arbitrator provisions cannot be applied:

(1) the arbitration agreement was concluded before January 1, 2012;
(2) the parties' agreement opts out of such provisions;
(3) the arbitration agreement is based upon a treaty.[302]

The emergency arbitrator proceedings are anything but affordable. According to Article 7 of the Appendix on Emergency arbitrator measures, the applicant must pay an amount of US$ 40,000 and the President is empowered to increase such amount at any time during the proceeding. That sum includes both the ICC administrative expenses and the costs of the emergency arbitrator's work.[303]

Expedited Procedure Rules

If parties have agreed on the Rules, they also agreed on the application of the Expedited Procedure Rules, which will outrun any contrary provision set forth in the arbitration agreement.[304] The Expedited Procedure rules apply if:

(a) the parties so agreed;
(b) the amount in dispute does not exceed US$ 2,000,000 if the arbitration agreement under the rules was concluded on or after March 1, 2017 and January 2021;
(c) the amount in dispute does not exceed US$ 3,000,000 if the arbitration agreement under the rules was concluded either on or after January 1, 2021.[305]

As soon as the Secretariat gets the arbitration request under Article 5 of the ICC Arbitration Rules, it will inform the parties that the Expedited Procedure Rules apply to their proceeding.[306] However, this path might change if one of the party requests to opt out of the application of the Expedited Procedure Rules or if the Court decides so on its own motion.[307] The arbitral tribunal must be consulted on the matter beforehand.[308]

[299] Article 6, Appendix V of the ICC 2021 Arbitration Rules.
[300] Article 29 of the ICC 2021 Arbitration Rules.
[301] Article 29 of the ICC 2021 Arbitration Rules.
[302] Article 29 of the ICC 2021 Arbitration Rules.
[303] Article 7, Appendix V of the ICC 2021 Arbitration Rules.
[304] Article 30 of the ICC 2021 Arbitration Rules.
[305] Article 1, Appendix VI of the ICC 2021 Arbitration Rules.
[306] Article 1, Appendix VI of the ICC 2021 Arbitration Rules.
[307] Article 1, Appendix VI of the ICC 2021 Arbitration Rules.
[308] Article 1, Appendix VI of the ICC 2021 Arbitration Rules.

Parties can nominate a sole arbitrator, but as one might have guessed, if they fail to do so the Court will step up and nominate the sole arbitrator.[309]

When it comes down to the proceedings, Article 23 of the ICC Rules does not apply here. Unless the arbitral tribunal has authorized the parties to the arbitration to do so, no new claims can be brought up once the arbitral tribunal has been constituted.[310] The case management conference must take place 15 days from the day on which the arbitral tribunal received the dispute file.[311] The arbitral tribunal keeps its discretion over taking any procedural measure it deems appropriate, e.g., limiting the number, length or scope of written submissions from the parties to the arbitration.[312] After having consulted the parties, the tribunal might also opt for deciding the entire dispute based only on the documents submitted by the parties, without any hearing or examination of experts and witnesses.[313] Finally, the arbitral tribunal is given six months from the day of the case management conference to render its final arbitral award.[314]

Terms of Reference: a deal-breaker?

Given the topic's importance, it is necessary to illustrate the Terms of Reference, set up by Article 23 of the ICC Arbitration Rules, separately from the other Arbitration Rules. The ICC Terms of Reference have as long a story as the ICC itself. [315] Made up in 1923, they are based on the law of the time: pre-war French law only allowed referral of ongoing disputes to arbitration.[316] Therefore, their aim was to get around this prohibition and allow parties to set up a future arbitration masked up as a current one.[317] Despite all the doubts that have been raised on their usefulness, the ICC Terms of Reference stood the test of time and are deemed as a cornerstone of ICC Arbitration. Their aim, in general, is to provide a framework to the arbitration, likely pointing out that parties' sides of the dispute are not that different from one another. Moreover, terms of reference set up the dispute from the outset with clarity, undergoing a "judicial supervision" over the dispute.[318] Although one could think that via the terms of reference the arbitral proceeding might lose flexibility and freedom, this is not the case: most of the time the terms of reference will just shed light on issues that parties had not

[309] Article 2, Appendix VI of the ICC 2021 Arbitration Rules.
[310] Article 3, Appendix VI of the ICC 2021 Arbitration Rules.
[311] Article 3, Appendix VI of the ICC 2021 Arbitration Rules.
[312] Article 3, Appendix VI of the ICC 2021 Arbitration Rules.
[313] Article 3, Appendix VI of the ICC 2021 Arbitration Rules.
[314] Article 4, Appendix VI of the ICC 2021 Arbitration Rules.
[315] Marco Paoletti, "Summaries and Issues in the ICC Terms of Reference: The Right Level of Case Management," *Kluwer Arbitration Blog,* February 24, 2019, http://arbitrationblog.kluwerarbitration.com/2019/02/24/summaries-and-issues-in-the-icc-terms-of-reference-the-right-level-of-case-management/.
[316] *Id.*
[317] *Id.*
[318] *Id.*

foreseen and that must be solved throughout the arbitral proceedings.[319] Therefore, despite the criticism the terms of reference have been getting over the last few years, their usefulness and importance are still present today. Framing the dispute in detail helps out the arbitral tribunal in tailoring the proceedings onto parties' needs.

One last aspect worth mentioning is that in most cases, terms of reference are completed within a month.[320] Therefore, drawing them up might not be as time consuming as it is deemed to be, so long as the arbitral tribunal is an experienced one.[321]

First and foremost, as soon as the arbitral tribunal gets the dispute file from the Secretariat, it must proceed to draw up the terms of reference along with the parties to the arbitration – by the end of the terms of reference making process both need to have signed this document.[322] The final document is based on all the documents and submissions by the parties and is generally drew up in their presence.[323] Terms of reference's content is the following:

(a) parties' and their counsels' contact details along with their addresses;
(b) a brief of parties' claims, the relief sought by each, all quantified claims along with an estimate of those unquantified;
(c) a list of the issues to be solved;
(d) arbitrators' contact details;
(e) the place of arbitration;
(f) the procedural rules to set up for the dispute, specifically clearing up whether the arbitral tribunal detains the power to decide *ex aequo et bono.*[324]

The arbitral tribunal gets a 30 days time window from the day it received the file to forward everything to the Court, which gets the power to extend such time window if it deems necessary to do so.[325]

In the case one of the parties has talked itself out of drawing up the Terms of Reference or to sign them, the Court will step in to approve them.[326] Once the Terms of Reference get the Court's approval, the arbitral proceeding can finally begin and no new claims can be brought up by the parties to the arbitration, unless the arbitral tribunal has authorized them otherwise.[327] During the terms of reference draw-up, the arbitral tribunal is also asked to hold

[319] *Id.*
[320] Simon Greenberg and Anders Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," in *International Commercial Arbitration Different Forms and their Features*, ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 204-216.
[321] *Id.*
[322] Article 23 of the ICC 2021 Arbitration Rules.
[323] Article 23 of the ICC 2021 Arbitration Rules.
[324] Article 23 of the ICC 2021 Arbitration Rules.
[325] Article 23 of the ICC 2021 Arbitration Rules.
[326] Article 23 of the ICC 2021 Arbitration Rules.
[327] Article 23 of the ICC 2021 Arbitration Rules.

the case management conference, facing parties on procedural measures they want to adopt under Article 22(2) of the Rules.[328]

The Rules make no mention on the amendment of the Terms of reference.[329] The motive is threefold:

(a) if any change is needed, it would occur via an easy exchange of correspondence or via an order by the arbitral tribunal;
(b) The Secretariat has always taken the view that the need to amend the terms of reference is rather rare;[330]
(c) The arbitral tribunal is entitled to allow in new claims parties to the arbitration brought up despite the completion of the terms of reference drawing up process.[331]

Awards

Among the provisions on Awards, Article 34 of the Rules stands out as it carves out the Award scrutiny process, which might be deemed as the ICC's most remarkable feature. According to Article 34, before any award is signed by the arbitral tribunal, the draft must be submitted to the Court, which will undertake its scrutiny process.[332] Although the Court is empowered to prevent any arbitral award to be rendered until its approval is confirmed, its power is limited to:

(a) Lay down modifications as to the form of the award;
(b) Draw the tribunal's attention to points of substance;[333]
(c) Take into account the elements set forth by the mandatory law at the place of arbitration.[334]

Therefore, the arbitral tribunal cannot be compelled to undergo a review of the facts or a change to the award's substance.[335] The arbitral tribunal – which gets six months to render the draft award – remains free to act and decide as it deems appropriate under the Rules.[336] Once it has taken its decision, it must put it into a draft to be sent first to the Secretariat.[337] The counsel in charge of the case will review the draft award, that will be later reviewed by both the Deputy Secretary General and the Secretary General.[338] Soon thereafter, the award is

[328] Article 24 of the ICC 2021 Arbitration Rules.
[329] Aceris Law LLC, "The terms of Reference in ICC Arbitration," *Aceris Law LLC,* January 18, 2019, https://www.acerislaw.com/the-terms-of-reference-in-icc-arbitration/.
[330] *Id.*
[331] Article 23 of the ICC 2021 Arbitration Rules.
[332] Article 34 of the ICC 2021 Arbitration Rules.
[333] Article 34 of the ICC 2021 Arbitration Rules.
[334] Article 7, Appendix II of the ICC 2021 Arbitration Rules.
[335] Simon Greenberg and Anders Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," in *International Commercial Arbitration Different Forms and their Features*, ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 204-216.
[336] Article 34 of the ICC 2021 Arbitration Rules.
[337] *Id.* at 334.
[338] *Id.*

submitted to the Court whose review would be final.[339] Court members will review the award and if it goes to a plenary session or to a committee session, one of the Court members might end up to be assigned to report the case to the Court as a whole.[340] As one might have guessed, once the award has been approved by the Court is binding on both parties, which shall carry it out without further delay.[341] The arbitral tribunal might also correct any error - such as computational, clerical or of a similar nature - if it requests to do so within 30 days from the notification of the award by the Secretariat as carved out by Article 35.[342]

Once the scrutiny award process has begun, there are multiple scenarios that might play out. First, the Court might:

(a) Approve the award without further comments;
(b) Do not approve the award as a whole;
(c) Approve the award so long as the arbitral tribunal clears up "details" to it.[343]

Some numbers from the ICC might be of help to illustrate this process a bit better. In 2011, the Court approved a total amount of 508 awards.[344] Among those 508 awards, the Court approved 496 awards yet pointing out some details of substance to the arbitral tribunal's attention.[345] Only 12 awards were approved by the Court without further comments.[346] Court's most common comments can be divided up in three categories:

(a) Comments of form, aka comments on the seat of arbitration, the parties' agreement or their counsels' details, or typographical errors;
(b) Quasi-substantial;
(c) Substantial.[347]

Quasi-substantial comments involved matters on whether all the dispute's topics were decided (*infra petita)* or if the arbitral tribunal went beyond its competence by deciding over topics not brought up by the parties (*ultra petita).*[348] Substantial matters involved instead clear contradictions in the arbitral tribunal's reasoning or the weakness of the analysis the arbitral tribunal came up with.[349]

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[339] *Id.*
[340] *Id.*
[341] Article 35 of the ICC 2021 Arbitration Rules.
[342] Article 36 of the ICC 2021 Arbitration Rules.
[343] Simon Greenberg and Anders Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," in *International Commercial Arbitration Different Forms and their Features*, ed. Giuditta Cordero-Moss, (Cambridge University Press, 2013), 204-216.
[344] *Id.*
[345] *Id.*
[346] Greenberg and Ryssdal, "Rules of Arbitration of the International Chamber of Commerce," *204-216.*
[347] *Id.*
[348] *Id.*
[349] *Id.*

One noteworthy aspect is how careful the Court is in carrying out its scrutiny over arbitral awards without stepping onto the arbitral tribunal's competence.[350] And this is what made the ICC "brand" so strong as to the enforcement of its arbitral awards, given the diligence that is carried along from the outset of the arbitral proceeding.

An eye on others

Some arbitration institutions have taken on the ICC's scrutiny award process, even though none of them brough it up to the ICC level. One of them is the China International Economic and Trade Arbitration Commission (hereinafter "CIETAC"), which has established a low-key form of scrutiny on awards.[351] According to article 51 of the CIETAC Arbitration Rules, the arbitral tribunal is asked to submit any award before it is signed off.[352] So long as the arbitral tribunal's independence goes untouched, the CIETAC can point out any issue addressed in the award.[353] It is evident how Article 51 of the CIETAC Arbitration Rules aims to mirror the aforementioned Article 34 of the ICC Rules. Whatever the exact aim was, the results is a low-key form scrutiny exercised over CIETAC arbitral awards.

By 2013, the Danish Institute of Arbitration (hereinafter the "DIA") has in introduced a soft form of scrutiny as well.[354] According to Article 24 of the DIA Arbitration Rules, the arbitral tribunal is compelled to submit the draft form of the arbitral award to the DIA Secretariat.[355] Moreover, Article 28 of the aforementioned rules allows the Secretariat to:

(a) Scrutinize the award;
(b) Propose any modification to the award's form;
(c) Point out to the arbitral tribunal's attention any other issue regarding the validity, enforcement or recognition of such award.[356]

The German Arbitration Institute (hereinafter "DIS") has followed the trend – even though not that many arbitral institutions did – and has introduced provisions on the scrutiny of awards in 2018.[357] According to Article 39 (3) of the DIS Arbitration Rules, the arbitral

[350] *Id.*
[351] Article 51 of the CIETAC 2015 Arbitration Rules.
[352] Article 51 of the CIETAC 2015 Arbitration Rules.
[353] Article 51 of the CIETAC 2015 Arbitration Rules.
[354] James Hope, "Awards: Form, Content, Effect," *Global Arbitration Review,* June 8, 2021, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-form-content-effect.
[355] Gary B. Born, "The Danish Institute of Arbitration Updates Its Arbitral Rules," *Kluwer Arbitration Blog,* May 28, 2013, http://arbitrationblog.kluwerarbitration.com/2013/05/28/the-danish-institute-of-arbitration-updates-its-arbitral-rules/.
[356] *Id.*
[357] *Id.* at 353.

tribunal shall send a draft award to the DIS for review.[358] Although the arbitral tribunal is the only body responsible for everything the arbitral award sets forth, the DIS gets the power to:

(a) Point out anything regarding the award's form;
(b) Recommend non-mandatory modifications.[359]

Even though it is not a complete innovation, the Bulgarian Chamber of Commerce and Industry (Court of Arbitration at the BCCI) has introduced a mechanism that recalls the ICC Scrutiny of Awards.[360] However, this scrutiny mechanism regards only cases in which the award was drafted by arbitrators that were not among the arbitrators listed by the Court of Arbitration at the BCCI.[361] Therefore, it could be classified as an exception to the rule rather than a step toward the development of a scrutiny award process. Anyhow, there is another arbitral body in Bulgaria that has done things differently: the Court of Arbitration at the Confederation of Employees and Industrialists (hereinafter the "KRIB Court of Arbitration") has introduced a scrutiny award mechanism in full.[362] It is set forth that before any arbitral award is signed off, the arbitral tribunal must submit it to the Secretariat, which deals with submitting it to the Commission of the Arbitration Panel.[363] The Commission of the Arbitration Panel is empowered to undergo the award's scrutiny and is allowed to:

(a) Make recommendations as to the form of the award;
(b) Bring up procedural or substantive matters.[364]

The arbitral tribunal must be given some time to review all those recommendations from the Commission of the Arbitration Panel, if any.[365] Only once the award is approved the arbitral tribunal might grant it.[366]

Costs

According to Article 38 of the Rules, the costs of arbitration shall cover:

(a) The ICC administrative expenses;
(b) the arbitrators' work;
(c) any additional costs for the consultation of experts throughout the proceeding.[367]

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[358] Article 39 of the German Arbitration Institute (DIS) Arbitration Rules.
[359] Article 39 of the German Arbitration Institute (DIS) Arbitration Rules.
[360] Martin Zahariev, "The Scrutiny of the Award: The Bulgarian Arbitral Institutions' Perspective," *Kluwer Arbitration Blog,* October 29, 2015, http://arbitrationblog.kluwerarbitration.com/2015/10/29/the-scrutiny-of-an-award-the-bulgarian-arbitral-institutions-perspective/.
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.*
[367] Article 38 of the ICC 2021 Arbitration Rules.

The arbitral tribunal is empowered to review such costs set up by the Court during the proceedings and order payment.[368] If any review is made, the arbitral tribunal shall base it off all relevant circumstances, including whether parties have helped to conduct the proceeding in an effective and prompt manner.[369]

Miscellaneous

The last provisions of the Rules regard various matters. For the sake of this analysis, it is worth mentioning a few of them.

Under Article 42, all matters that are not disciplined under the Rules fall within the Court's and the arbitral tribunal's power, which shall both act in accordance with the spirit of the Rules and toward the goal of obtaining an enforceable award.[370]

Article 43 deals with the Governing Law and Settlement of Disputes: this provision states that French Law governs any claim arising out of the administration of the arbitral dispute by the ICC Court under the Rules.[371] Moreover, all such claims will be settled by the *Tribunal Judiciarie de Paris*, which detains exclusive jurisdiction on them.[372]

The ICC as an Appointing Authority

As to the give the reader a full perspective on the ICC, it is necessary to illustrate a separate and distinct set of rules from the Arbitration Rules that the ICC offers. The rules to deal with are the *ICC Rules as Appointing Authority in UNCITRAL or other arbitration proceedings*. Those rules offer services provided by the International Court of Arbitration of the ICC in arbitral proceedings governed by either the Arbitration Rules of the United Nation Commission on International Trade Law (hereinafter "UNCITRAL"), aka ad hoc arbitration proceedings conducted under the UNCITRAL Arbitration Rules or other sets of arbitration rules i.e., ad hoc arbitration proceedings not governed by any specific institutional rules.[373]

This set of rules came into force on January 1, 2018.[374] The preparatory work was based off the 2013 UNCITRAL Arbitration Rules, the 2017 ICC Arbitration Rules and the ICC Court's expertise as an appointing authority.[375] But what is the role of an appointing authority? When

[368] Article 38 of the ICC 2021 Arbitration Rules.
[369] Article 38 of the ICC 2021 Arbitration Rules.
[370] Article 42 of the ICC 2021 Arbitration Rules.
[371] Article 43 of the ICC 2021 Arbitration Rules.
[372] Article 43 of the ICC 2021 Arbitration Rules.
[373] Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[374] Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[375] Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.

parties opt for institutional arbitration, this choice triggers the automatic application of the arbitration rules thereof.[376] However, parties can also pick an ad hoc arbitration without designating a set of rules as to the appointment of arbitrators, slacking off all matters regarding the arbitral tribunal.[377] In this scenario, parties are compelled to reach out to a competent institution that is capable of handling the arbitrators' appointment, acting as either an appointing authority, designating an appointing authority or requesting a State Courts' intervention.[378]
Therefore, parties' choice to reach out to an appointing authority results from either the lack of agreement or its failure.[379]

Anyhow, the real upside of the ICC Rules as Appointing Authority is the opportunity given to the ICC to go beyond ICC Arbitration and expand toward any arbitration in which parties seek out ICC's expertise and brand in dispute resolution.[380] Many would claim this a huge benefit just on parties' side, however it also increases the ICC chances to broaden its views and get ahead of new dispute resolution practices.

Acting as an appointing authority in a nutshell

As all introductory provisions, Article 1 of the rules sets forth the competence of the ICC Court as appointing authority if parties' agreement provides so or if designated by the Secretary-General of the Permanent Court of Arbitration.[381] The appointing authority function can be carried out exclusively by the ICC Court.[382] As one might have guessed, the ICC Court is asked to perform this task in accordance with its internal rules, which apply *mutatis mutandis.*[383] As aforementioned, the Court's work is backed up by the Secretariat, supervised by the Secretary-General.[384] Finally, this provision shapes the ICC role as appointing authority: first, the ICC Court has to proceed to the appointment of arbitrators and second, carry on with all the other services described therein.[385]

[376] Aceris Law LLC, "ICC as Appointing Authority in UNCITRAL or Other Ad Hoc Arbitration Proceedings (2018 ICC Rules)," *Aceris Law LLC,* January 22, 2019, https://www.acerislaw.com/icc-as-appointing-authority-in-uncitral-or-other-ad-hoc-arbitration-proceedings-2018-icc-rules/.
[377] *Id.*
[378] *Id.*
[379] *Id.*
[380] Rules of the ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[381] Article 1 of the Rules of the ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] *Id.*

The first step for a party that wants the ICC Court as appointing authority is the submission of an application to the Secretariat.[386] The date on which the application is received marks the start date of the ICC's work as requested by the parties to the arbitration.[387] The application must present the following elements:

(a) All the contact details of each parties;
(b) All the contact details of parties' counsels;
(c) The contact details of all arbitrators, if any;
(d) The notice of arbitration and the response thereof, as set out by Article 3 and 4 of the UNCITRAL Arbitration Rules or as provided in other sets of rules parties have agreed on;
(e) The arbitration agreement along with any other relevant agreement;
(f) A timetable, if applicable;
(g) All proposals or observations regarding the place of arbitration, the applicable rules of law and the language of the arbitration;
(h) A description of the services parties asked for;
(i) In the event of the challenge of an arbitrator, the reasons on which the challenge can be based upon;
(j) All requests for fixed costs regarding additional services provided;
(k) Other information that the submitting party deems appropriate and relevant.[388]

Along with the above-mentioned application, the submitting party is asked to submit a certain number of copies thereof and make a payment of the filling fee.[389] The filling fee is non-refundable and amounts to US$5000.[390]

If the submitting party fails to comply with those two requirements, the dispute file will be closed.[391] However, a closed file does not talk the submitting party out of submitting the same request later on.[392]

When the ICC Court is requested to act as appointing authority, it shall do so only if there is clear certainty that parties have agreed so in their arbitration agreement.[393] If an arbitrator has

[386] Article 4 of the Rules of the ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[387] *Id.*
[388] *Id.*
[389] *Id.*
[390] Article 12 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, in force as January 1, 2018.
[391] *Id.* at 385.
[392] *Id.* at 385.
[393] Article 5 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.

been already appointed or if there is a strong disagreement between the parties to the arbitration, the Court might refused to perform the required services.[394]

The discussion will now focus on UNCITRAL Arbitration Proceedings, since the NON-UNCITRAL Arbitration Proceedings follow the same pattern, with the only difference that the rules are not the UNCITRAL Arbitration Rules. The services the Court can provide in NON-UNCITRAL Arbitration Proceedings mirror, indeed, those set out in Article 6 on UNCITRAL Arbitration Proceedings.[395]

UNCITRAL Arbitration Proceedings

There are multiple tasks the ICC Court might be asked to perform. If parties have agreed on an arbitration disciplined by the UNCITRAL Arbitration Rules, the ICC Court will be asked to perform all duties set forth in the arbitration agreement according to that set of rules. Article 6 carves out all the likely tasks that might be posed upon the Court:

(a) Appoint a sole arbitrator or more arbitrators;
(b) Appoint the presiding arbitrator the entire arbitral tribunal;
(c) Constitute the arbitral tribunal;
(d) Decide on the challenge of an arbitrator;
(e) Appoint the substitute arbitrator;
(f) Decide whether to authorize arbitrators on the substitution of another arbitrator;
(g) Review or adjust the arbitral tribunal's proposals and determinations on fees and expenses;
(h) Provide recommendations and comments to the arbitral tribunal regarding the appropriate amounts or any deposits or supplementary deposits;
(i) Perform any other services the parties have required;
(j) Act as a repository of published information under the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration;
(k) Publish on its website or make available information regarding the parties' dispute if subject to transparency rules or regulations.[396]

As set forth by Article 6(7) of the UNCITRAL Arbitration Rules, there are rules to follow while appointing an arbitrator.[397] The Court shall, indeed, consider the independency,

[394] *Id.*
[395] Article 7 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.
[396] Article 6 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.
[397] *Id.*

impartiality and nationality of the figure it wishes to appoint as an arbitrator.[398] Moreover, before the appointment, the prospective arbitrator is required to sign a statement of acceptance, availability, impartiality and independence.[399] The prospective arbitrator is compelled to disclose any facts or circumstances that might end up to question his or her independence on his impartiality toward the parties.[400]The Court still gets its discretion over the arbitrators' appointment.[401]

In a way that seems to mirror the ICC Arbitration Rules, Article 6(7) of the ICC Rules as Appointing Authority carves out that if the challenge of an arbitrator has started, parties and the other arbitrators – if any – must be given a suitable time to provide a written comment on the matter.[402] After the Secretariat has taken care of giving each a suitable time, the Court might decide to either appoint a substitute arbitrator or authorize the remaining arbitrators to carry on the proceeding.[403]

Administrative Services Provided in UNCITRAL and NON-UNCITRAL *Ad Hoc* Arbitration Proceedings

As master of the proceeding, the Court deals also with administrative matters, always keeping its discretion and following the parties' agreement and any rules contained therein.[404] Those services include:

(a) maintaining the file;
(b) provide logistical arrangements for meeting and hearings;
(c) assist with notification and correspondence of documents;
(d) administration of the funds for either arbitrator, secretaries, experts, hearings and escrow accounts;
(e) revise draft documents of the arbitral tribunal to get rid of any type of errors;
(f) perform any other task the parties have specifically asked for.[405]

[398] *Id.*
[399] Article 10 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.
[400] *Id.*
[401] *Id.* at 395.
[402] *Id.* at 395.
[403] *Id.* at 395.
[404] Article 8 of the Rules of ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.
[405] Article 8 of the Rules of the ICC as Appointing Authority, in UNCITRAL or Other Arbitration Proceedings, as in force as January 1, 2018.

The Uncertainty of The Forthcoming Future

The articulated legal framework for arbitration in Mainland China has been the main topic of this work. What has been messing up with the international arbitration practice is how foreign arbitral awards have been treated over the years: Chinese Courts have most often adopted the so-called Institution Standard – which makes the award of the same nationality as the institution that granted it – instead of the Seat Standard, which determines the award's nationality based on the country chosen as the arbitral seat.

This is so because the PRC Arbitration Law makes no mention of the "seat of arbitration" speaking more of arbitration commissions.[1] While the Institution standard has its upsides - e.g. avoiding the application of Chinese laws if the arbitral dispute is seated in China and a foreign arbitral institution is administering the case – it ended up to be at odds with the widely recognized Seat standard, to which reference is made by the New York Convention as well. Article I (1) of the Convention is, indeed, worded as follows:

"*This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."*[2]

The first line of this provision is self-explanatory: an award is foreign when its enforcement is sought in a country other than the one where the award was rendered. Hence, an award gathers the country's nationality simply by being rendered in that country, or at least that is what the Seat Standard provides. As aforementioned, Mainland China is a State Party to the New York Convention, even though it entered it with two reservations. For a reason or another, Chinese courts have often adopted the Institution Standard, yet keeping the dilemma among arbitration practitioners: it is never certain what Chinese Courts will come up with when dealing with the enforcement and recognition of foreign arbitral awards. The issue of the enforcement and recognition of foreign related awards does not involve only the International Chamber of Commerce (ICC), since all foreign arbitration bodies have encountered trouble in the Mainland. However, as pointed out throughout the Second chapter, the ICC has a long story of great work in the arbitration field, which has made its brand more powerful than others, a power that can be used to spring a wave of reform. That is why the

[1] Ing Loong Yang, "Seat of Arbitration and enforcement of awards," *China Business Law Journal,* October 16, 2017, https://law.asia/seat-arbitration-enforcement-awards/.
[2] Article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958).

following judicial cases all involve the ICC, whose presence in Asia, is, by the way, one of the strongest among European arbitral institutions.

After a brief introduction on the Seat Standard, this final chapter aims to illustrate the key Chinese judicial cases on:
The issue of the validity of an arbitration clause;
The laws governing the arbitration agreement;
The recognition and enforcement of foreign arbitral awards by Chinese Courts.

The Seat of Arbitration

The seat of arbitration can be easily defined as the location picked out by the parties as the legal place of arbitration, which then makes up the procedural framework of the dispute.[3] Hence, the seat of arbitration has a key role in any arbitration proceeding: it will determine which courts have jurisdiction over the arbitration itself and the protection and enforceability of the arbitral award.[4] To sum up, the choice of the seat ends up being the choice of the law applicable to arbitration.[5] In general, parties to the arbitration do not pick out the applicable laws to the arbitration agreement, but rather they care about the arbitral seat and what follows from that.[6]

Up until very recently, many parties have slacked this choice off, ending up in trouble. However, parties have started to realize the importance of this choice and now spend longer on picking out the best seat. The seat of arbitration, indeed, has an impact on:

(a) Arbitrability;
(b) Determination of the governing law, either substantive or procedural;
(c) Determination of the place for either the annulment of the award or the court's supervisory functions.[7]

First and foremost, the seat of arbitration must be distinguished from the *venue* of the arbitration. While the former refers to the legal domicile of an arbitration, i.e. the legal system that applies to the arbitral proceeding, the latter refers to the location were hearings are

[3] Milica Savić, Anastasiya Ugale, "Seat of Arbitration,"*Jus Mundi,* February 8, 2022, https://jusmundi.com/en/document/wiki/en-seat-of-arbitration.
[4] David Hesse (Clyde & Co.), "The Seat of Arbitration is Important. It's that Simple," *Kluwer Arbitration Blog,* June 10, 2018, http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/.
[5] Ali Tunçsav, "*The Gravity of the Seat* and Seat Designation in International Commercial Arbitration with a focus on London, Singapore and Istanbul Legislation & Practice," (Master's Thesis, Tilburg University, 2017), 7-27.
[6] *Id.*
[7] Alexander J. Belohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth," in *ASA Bulletin, Volume 31, Issue 2,* 2013, https://doi.org/10.54648/asab2013030.

physically held.[8] The *venue* of arbitration, indeed, is a geographical matter rather than a legal one.[9]

When it comes down to the choice of the seat of arbitration, many parties take time before making their choice. The most significant factors happen to be first, the legal framework of the seat – the national arbitration law and the laws on the enforcement and recognition of arbitral awards – along with the seat' impartiality and courts' promptness.[10] From a more practical perspective, aspects like the location, costs, good transporting connections and professionals' availability are all considered as well.[11]

As of today, London has been confirming itself as the most preferred arbitral seat, even though the competition with Paris or New York is still present.[12] Many would wonder how London managed to be the most preferred arbitral seat despite Brexit. This is to be so because the English legal framework for arbitration has never been based on EU law, but rather developed on its own.[13] The 1996 English Arbitration Act aims strongly attempts to boost the validity of an arbitration agreement, without giving up too much power to English Courts.[14] Its most remarkable feature is having made the English arbitration framework a pro-arbitration, impartial and effective one, attracting even parties that have no connection with London itself but crave this high level of efficiency.[15]

Nuts and Bolts of the Seat Standard

The choice of the arbitral seat represents the great autonomy parties enjoy throughout arbitration. In general, parties are free to pick out the arbitral seat they want. One exception is the ICSID Additional Facility Rules (2006), which limit the choice of the arbitral seat to the State parties to the New York Convention.[16] Under the ICSID Additional Facility Rules, if parties have failed to pick out an arbitral seat, the arbitral tribunal will meet up at the seat of ICSID, Washington D.C.[17]

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[8] Sarah Morreau, "Defining the seat of arbitration: when 'venue' means legal seat," *Allen & Overy,* October 22, 2019, https://www.allenovery.com/en-gb/global/news-and-insights/publications/defining-the-seat-of-arbitration-when-venue-means-legal-seat.
[9] *Id.* at 3.
[10] Loukas Mistelis, "Arbitral Seats: Choices, Risk Management and Planning," *Clyde & Co,* May 11, 2022, https://www.clydeco.com/en/insights/2022/05/arbitral-seats-choices-risk-management-and-plannin.
[11] *Id.*
[12] *Id.*
[13] Srishti Jain, Keidan Harrison, "UK: Why London Continues To Be An Attractive Seat For International Arbitration Post-Brexit," *Mondaq Connecting Knowledge and People,* June 23, 2021, https://www.mondaq.com/uk/arbitration-dispute-resolution/1082072/why-london-continues-to-be-an-attractive-seat-for-international-arbitration-post-brexit.
[14] *Id.*
[15] *Id.*
[16] Milica Savić, Anastasiya Ugale, "Seat of Arbitration".
[17] *Id.*

The seat standard provides that once parties have chosen the arbitral seat, that will connect the arbitration to the legal system of that given state.[18] This view, indeed, combines the *lex loci arbitri* with the *lex fori,* setting forth that the national law of the seat of arbitration shall govern the arbitration agreement.[19] As the doctrine that equates the *lex loci arbitri* and the *lex fori,* it is based on the assumption that a solid bond exists between the governing law of the arbitration and the arbitration laws of the country chosen as the arbitral seat.[20]

Among the upsides carried along by the Seat Standard, it is necessary to mention the following:

(a) Courts at the seat have the best expertise with regards on the laws of that jurisdiction; whereas courts from another country might struggle or take longer to apply a foreign body of law;
(b) The award will get the same nationality as the seat, which allows to cut off all risks of failure on enforcing or setting it aside;
(c) Holding hearings or meeting in the same country as the seat is way less costly than arranging those in another one.[21]

As aforementioned, the Seat Standard is also the one brought up by Article I of the New York Convention: this has enabled its recognition in many state parties to the Convention and might continue to do so.

Despite the hype, there is always another side of the coin. In this case, the other side of the coin reads that the Seat Standard presents some downsides as well, such as:

(a) A lack of discretion left to the parties to the arbitration, since they end up being bound by the laws of the seat;
(b) An oversimplification of the arbitral dispute, which nowadays gathers generally more locations or seats.[22]

The *Lex Loci Arbitri*

The *lex loci arbitri* refers to the national law of the seat of arbitration, taken from the arbitral tribunal's perspective.[23] This Latin term literally means "law of the place where arbitration is to take place."[24] The *lex loci arbitri* differs from state to state and yet, the issues governed by it are the same almost everywhere:

[18] Belohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth."
[19] *Id.*
[20] *Id.* at 5.
[21] Ali Tunçsav, "*The Gravity of the Seat*," 7-27.
[22] *Id.*
[23] Brekoulakis, Stavros, "Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," *ARBITRABILITY: THE INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, L. Mistelis, S. Brekoulakis, eds., pp. 99- 119, Kluwer 2009, Queen Mary School of Law Legal Studies Research Paper No. 21/2009, Available at SSRN: https://ssrn.com/abstract=1414323.
[24] "Lex Loci Arbitri," Lawyerment Legal Dicitonary, last visited July 31, 2022, https://dictionary.lawyerment.com/topic/lex_loci_arbitri/.

(a) the formal validity of the arbitration agreement;
(b) the arbitrability of the dispute;
(c) the arbitral tribunal's composition;
(d) procedural guarantees;
(e) the extent to which courts can intervene on the proceedings;
(f) the awards' judicial review.[25]

The *Lex Fori*

The *lex fori* refers to the national law of the given jurisdiction, taken from the court's perspective.[26] Since the perspective taken is the court's one, the *lex fori* does not really fit into this analysis. While any court has its law that will proceed to apply to any case, the same does not apply to arbitral tribunals, who are called out to apply either the rules requested by the parties or those that of the seat if parties have failed to do so. Hence, arbitral tribunals are requested to apply different rules each time, whereas courts must always apply the rules of their jurisdiction.[27]

The Interplay

There is something to be said about the number of legal systems that one might encounter in an arbitration agreement. It is known how multiple legal systems can interact within a single arbitration proceeding, if parties set out different laws as to regulate different aspects of their arbitration agreement:

(a) The law that governs parties' capacity to enter into an agreement;
(b) the law applicable to the arbitrability of the dispute;
(c) the law governing the arbitration agreement;
(d) the *lex arbitri* aka the law governing the arbitral proceedings;
(e) the law applicable to the merits of the dispute;
(f) the law on the recognition and enforcement of the final arbitral award.[28]

Many believe that the *lex loci arbitri* which ends up as the *lex arbitri,* plays out as a gap-filling mechanism, in a two-fold scenario:

(a) if parties have failed to designate the *lex arbitri* to their arbitration agreement;

[25] Belohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth."
[26] *Id.* at 23.
[27] "Laws applicable to an International Arbitration," Aceris Law, the International Arbitration Law Firm, June 2, 2021, https://www.acerislaw.com/laws-applicable-to-an-international-arbitration/.
[28] Belohlávek, "Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth."

(b) if the arbitration rules they have chosen do not designate any.[29]

The next, logical step for any party to an arbitration would be to set up as the arbitral seat an arbitration-friendly state, whose laws are not too tight and do not provide for strong courts' intervention. Furthermore, parties shall seek out a state whose jurisdiction they have knowledge of, in order not to be surprised by an undesirable outcome, e.g. ending up with an unenforceable agreement because of the lack of knowledge of the laws governing the validity of an arbitration agreement in the designated jurisdiction. But there is more: if parties slack off the choice of the arbitral seat, this will be chosen either by the arbitral tribunal or the arbitral institution.[30] Arbitrators are compelled to pick a seat that suits parties' interests, being mindful of the specific circumstances of the case.[31] Most likely, arbitrators will end up choosing as the seat of the arbitration either the place where the arbitral tribunal is located or where most hearings were held.[32] Furthermore, the seat of arbitration ends up being the place where the arbitral award is made, determining first, the arbitral award's nationality and second, whether the award is foreign or domestic.[33] Since the enforceability of the award is essential to the arbitral proceeding's success, parties are advised to pick out as the seat of arbitration one of the State parties to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[34] To sum up, parties to an arbitration should always look up the following factors:

(a) whether a state is a state party of the 1958 New York Convention;
(b) whether the state is an arbitration-friendly one;
(c) the level of control courts are allowed onto arbitral proceedings;
(d) the efficiency of the courts' system if a court's intervention is needed.[35]

The *Lex Arbitri*

Also known as the procedural law of the arbitral proceedings, is the body of rules that sets up the arbitration's framework.[36] Most likely, it is the law of the seat of arbitration.[37] As aforementioned, each country sets forth its own *lex arbitri*, and many states have based their

[29] Milica Savić, Anastasiya Ugale, "Seat of Arbitration,"*Jus Mundi,* February 8, 2022, https://jusmundi.com/en/document/wiki/en-seat-of-arbitration.
[30] *Id.* at 28.
[31] *Id.* at 28.
[32] *Id.* at 28.
[33] *Id.* at 28.
[34] *Id.* at 28.
[35] "Why the seat matters," Paris Arbitration, Home of International Arbitration, last visited July 31, 2022, http://parisarbitration.com/en/why-the-seat-matters/.
[36] "Laws applicable to an International Arbitration," Aceris Law, the International Arbitration Law Firm, June 2, 2021, https://www.acerislaw.com/laws-applicable-to-an-international-arbitration/.
[37] *Id.*

own onto the 1958 UNCITRAL Model Law on International Commercial Arbitration, granting a sort of uniformity throughout the different jurisdictions.[38]

The *Lex Contractus*

The *lex contractus* can be identified as the law governing the merits of the arbitral dispute.[39] It governs the existence, validity and interpretation of the main contract.[40] Parties are empowered to choose whatever law they want as the one governing their contract, with the door open to pick out also trade usages, the 2016 UNIDROIT Principles of International Commercial Contracts, the *lex mercatoria* and so on.[41] Parties can empower arbitrators to decide *ex aequo et bono* as well.[42]

As one might have guessed, it is fundamental for parties to an arbitration to determine the *lex contractus* beforehand, as to avoid any undesirable outcome. If parties have failed to designate the *lex contractus,* either the court or the arbitral tribunal might be called out to do so. Most likely, both will end up picking out the law that has the strongest connection with the arbitral case at issue.[43]

How to determine the law governing the arbitration agreement

As one might have guessed, each jurisdiction presents different arbitration laws. Since parties to international arbitration often forget to pick out the law governing their agreements, arbitration laws of the given jurisdiction come into play and becomes the legal regime of the arbitration agreement. Hence, it does not sound surprising to hear that there has been some controversy over how different jurisdictions have identified the law governing the arbitration agreement.[44] In a report from the Chartered Institute of Arbitrators (hereinafter "CIArb") London Branch, Professor Dr. Maxi Scherer illustrated first the English Supreme Court's holding in *Enka v. Chubb [2020] UKSC 38* and second a more detailed comparative research among different jurisdictions' approach.[45] In *Enka*, the contract between the parties was based on the construction for a power plant in Russia with an arbitration agreement therein

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Ibrahim Amir, "The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIArb London's Branch Keynote Speech 2021, *Kluwer Arbitration Blog,* May 21, 2021, http://arbitrationblog.kluwerarbitration.com/2021/05/21/the-proper-law-of-the-arbitration-agreement-a-comparative-law-perspective-a-report-from-the-ciarb-londons-branch-keynote-speech-2021/.
[45] *Id.*

providing for ICC Arbitration seated in London.[46] However, the arbitration agreement failed to set out both:

(a) the law governing the main contract;

(b) the law governing the arbitration agreement.[47]

When the relationship between the parties broke down because of US$400 million in damages due to a fire at the power plant, Enka brought the case before the English Court of Appeal.[48] The English Court of Appeal held that the law governing the arbitration agreement was the law of the seat, i.e. English law. The Supreme Court upheld the Court of Appeal's decision, yet it came up with a different reasoning, as it identified different criteria to follow regarding the law governing the agreement.[49]

First, the Supreme Court held that the *lex contractus* – the law governing the main contract – is the law governing the arbitration agreement when parties have chosen both the seat of arbitration and the law governing the main contract but not the law governing the arbitration agreement.[50] Second, when no governing law is set forth for both the arbitration agreement and the contract, the law presenting the closest connection to the dispute is to be applied.[51] Hence, the English Supreme Court spoke up regarding its preference toward the *lex contractus* – where possible and if not under any exception – to be the governing law of the arbitration agreement.[52]

However, the comparative research by Professor Scherer pointed out that there is no such thing as a preference toward the *lex contractus* as the law governing the arbitration agreement.[53] Accordingly, the research shows that 51% of the countries favor the law of the seat, and only 34% the *lex contractus.*[54]

Catching up with Mainland China

As aforementioned, what parties to the arbitration end up choosing as the arbitral seat establishes a connection with the legal regime thereof. As the first chapter clearly set out, the AL sets out strict requirements as to allow institutions to arbitrate:

[46] *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb Chubb,* UK Supreme Court, October 9, 2020, https://www.supremecourt.uk/cases/uksc-2020-0091.html.
[47] *Id.*
[48] *Id.* at 44.
[49] *Id.* at 44.
[50] *Id.* at 44.
[51] *Id.* at 44.
[52] *Id.* at 44.
[53] *Id.* at 44.
[54] *Id.* at 44.

(a) the arbitral body needs to be registered with the Central Government;[55]

(b) the arbitration agreement shall set forth a designated arbitration commission.[56]

Moreover, parties often fail to carve out the law governing their arbitration agreement, which opens up the way to the application of the law of the seat to parties' agreement. This is what has brought Chinese courts to hold numerous arbitration agreements and clauses invalid: if the PRC law applies and no arbitration commission was clearly mentioned in the agreement, this will be a deal-breaker, with no leeway. What Chinese Courts have been doing in practice is adopting the "Institution Standard" rather than the classic "Seat Standard". As aforementioned, the Seat Standard provides for the arbitral award to get the same nationality as the place where it is rendered. On the other hand, the Institution Standard provides that the arbitral award nationality is established based on the arbitral institution's nationality that is handling the case.[57] This has been helping out those who wanted to avoid the application of PRC law to their dispute, and rather getting for the same award the same nationality as the arbitral institution administering the case. Despite the hype, the Institution standard is at odds with the standard international arbitration practice, that married the Seat Standard a while ago. Chinese Courts are anything but predictable and have often taken different stances on the matter in a short window of time.[58]

In *German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd (2004),* parties have picked out an arbitration administered under the ICC Rules, with the underlying inference that the ICC was the institution handling the case. Despite the effort, the Supreme People's Court, applying PRC Law, held the arbitration clause invalid.[59] The same scenario repeated itself in *Changzhou Donghong Packaging Materials Co. Ltd v. DMT Company of France (2006),* in which the parties had agreed on arbitration conducted according to the ICC Rules and to be seated in Beijing.[60] The Higher People's Court of Hebei, followed up by the Supreme People's Court, held the arbitration agreement invalid under PRC Law because of the lack of the designation of a specific arbitration commission.[61] Even though the ICC was not the institution at issue in the case, it is worth mentioning *Jiangmen Farun Glass Co. Ltd v. Stein Heurtey Company and Shangai Stein Heurtey Mecc Industrial Furnace Co. Ltd (2006).* The above-mentioned dispute involved two arbitration agreements,

[55] Article 10 of the Arbitration Law of the People's Republic of China.
[56] Article 18 of the Arbitration Law of the People's Republic of China.
[57] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land?" – Part I," *Kluwer Arbitration Blog,* October 12, 2020, http://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-no-mans-land-part-i/.
[58] *Id.*
[59] Yang F., "Specific Issues Arising From Cases" in *Foreign-related Arbitration in China: Commentary and Cases,* (Cambridge University Press, 2016), 293-353.
[60] *Id.*
[61] *Id.*

which the Higher People's Court of Guangdong held invalid because they both did not mention a specific arbitration commission.[62] The Supreme People's Court had a different say on the matter and established that the arbitration agreement to be looked at under PRC law provided for the CIETAC Arbitration Rules. Even though parties have failed to pick out an arbitral commission, Article 4 (4) of the CIETAC 2015 Rules carves out that:

"Where the parties agree to refer their dispute to arbitration under these Rules without providing the name of the arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CIETAC."[63]

Thanks to this reference made clearly by Article 4 of the CIETAC Arbitration Rules, the Supreme People's Court ended up holding the arbitration clause valid.[64] *Jiangmen* provides food for thought: if the ICC Rules have provided the same framework, *German Züblin* and *Changzhou* would have ended with valid clauses and therefore, a doable arbitration.[65]

The foregoing disputes were all an example of Chinese Courts behavior. Some steps ahead (or behind) were carried along by cases such as *Longlide and Brentwood,* whose analysis is going to be among the last steps of this "journey". The aim is to illustrate which option would be the best among those available as to make international arbitration run smoother in Mainland China.

The Validity of the Arbitration Clause and the Governing Law of the Agreement

Before providing the reader with the author's most likely solutions to arbitrate "peacefully" in Mainland China, the analysis starts out with the most remarkable ICC cases in which the validity of the arbitration clause was at issue. The aim is to point out how strict Chinese Courts are: a clear, specific designation of the arbitral commission and of the law governing the arbitral agreement or clause is the only certain path that can talk parties out of ending with empty hands.

[62] *Id.*
[63] Article 4 (4) of the CIETAC 2015 Rules.
[64] Yang F., "Specific Issues Arising From Cases" in *Foreign-related Arbitration in China: Commentary and Cases,* (Cambridge University Press, 2016), 293-353.
[65] *Id.*

German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd (2004)

In *German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd,* parties to the arbitration concisely agreed on an ICC Arbitration to be seated in Shanghai.[66] However, parties have failed to pick out the law governing the arbitration agreement, which lets the law of the seat to kick in and govern the agreement.[67] Hence, the PRC law was to be applied and made the arbitration agreement between the parties invalid, given that no arbitration commission was chosen clearly by the parties.[68]

Changzhou Donghong Packaging Materials Co. Ltd v. DMT Company of France (2006)

In *Changzhou Donghong v. DMT Company of France*, parties to the arbitration repeated the same scheme: they agreed on ICC arbitration to be seated in Beijing, China.[69] Donghong had entered into a sale contract with the DMT Company of France.[70] Article 20 thereof was worded as follows:

"*For 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 Beijing, China, and the arbitration shall proceed according to the relevant rules of the International Chamber of Commerce. Both Chinese and English shall be the supporting languages. The arbitration shall be final and binding on both parties, the cost of arbitration shall be borne by the losing party unless it is ruled or awarded otherwise by the arbitration commission."*[71]

Despite the effort, parties have clearly failed to pick out either the law governing the agreement and an arbitral institution to administer the case, and failed to back those up via a second agreement according to Article 18 of the AL.[72] Donghong has argued that since Beijing was both the arbitral seat and the place of the contract's performance, the closest law

[66] *German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd,* Supreme People's Court (8 July 2004).
[67] *German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd,* Supreme People's Court (8 July 2004).
[68] *German Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd,* Supreme People's Court (8 July 2004).
[69] *Changzhou Donghong Packaging Materials Co. Ltd v. DMT Company of France,* Supreme People's Court, (26 April 2006).
[70] *Changzhou Donghong Packaging Materials Co. Ltd v. DMT Company of France,* Supreme People's Court, (26 April 2006), in Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases* (2015), Part IV.
[71] *Id.*
[72] *Id*.

– and therefore the one to be applied – was Chinese Law.[73] On the other hand, DMT Company of France argued that the choice of the ICC Arbitration Rules clearly meant to have an ICC Arbitration in Paris.[74] Notwithstanding the defendant's argument, the Supreme People's Court held the arbitration clause invalid, since parties failed to pick out a specific law governing the agreement and an arbitral institution; hence, PRC was to be applied.[75]

Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L. (2013)

The *Longlide* decision has been spreading hope among international arbitration practitioners. The follow-up question is: why? This case involves a dispute on the validity of an arbitration clause, which set out an ICC arbitration to be seated in Shanghai, China.[76] Parties to the arbitration were the applicant, Anhui Longlide Wrapping and Printing Co. Ltd. (hereinafter "Longlide") and the respondent, B.P. Agnati S.R.L. (hereinafter "Agnati") and SUMEC International Technology Co., Ltd. (hereinafter SUMEC).[77] All the parties to the arbitration have entered into a sale contract, with an arbitration clause that provided for ICC Arbitration for any dispute arising out or related to the aforementioned contract.[78] The arbitral proceeding were to be conducted in Shanghai under the ICC Arbitration Rules.[79] Longlide, as the applicant, brought the arbitration clause before the Court claiming it invalid under PRC law.[80] Longlide's claims were based on the following reasons:

(a) the ICC Court could not be deemed as an arbitration institution in the Mainland according to Article 10 of the PRC Arbitration Law and therefore parties' agreement to submit the dispute to it was invalid;
(b) the arbitral proceedings ran by the ICC were against China's public interest;
(c) even if the award rendered by the ICC was enforceable, it should have been regarded as a domestic arbitral award according to PRC Law and therefore not subject to the New York Convention.[81]

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[73] *Id.*

[74] *Id.*

[75] *Changzhou Donghong Packaging Materials Co. Ltd v. DMT Company of France,* Supreme People's Court, (26 April 2006).

[76] *Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L.,* Supreme People's Court (25 March 2013), in Fan Yang, Foreign-Related Arbitration in China: Commentary and Cases (2015), Part IV.

[77] *Id.*

[78] *Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L.*, Supreme People's Court (25 March 2013), in Fan Yang, Foreign-Related Arbitration in China: Commentary and Cases (2015), Part IV.

[79] *Id.*

[80] *Id.*

[81] *Id.*

The Intermediate People's Court of Hefei, the one having jurisdiction over the case, first referred to the *Interpretation of the Supreme People's Court Concerning Some Issues on Application of the 'Arbitration Law of the People's Republic of China'".*[82] The Supreme People's Court Interpretation sets forth that the examination of an arbitration agreement – and therefore an examination of the validity thereof – that carves out foreign elements shall be:

(a) governed by the laws parties provided for it;

(b) governed by the laws at the place of arbitration if parties have failed to pick out the above-mentioned laws;

(c) if parties have failed to indicate both (a) and (b), the laws at the locality of the court (i.e. the *lex fori*) will apply.[83]

In the case at issue, parties have failed to provide the laws governing the agreement.[84] What parties have agreed on though was the place of arbitration: Shanghai, China.[85] Hence, the PRC law applied.[86] Parties also agreed on an arbitration conducted by the ICC.[87] However, the problem sprinted from Article 10 of the AL which carves out that any arbitration commission in the Mainland has to be registered with the administrative department of justice of the relevant province, autonomous region or municipality under the Central Government.[88] Therefore, a foreign arbitral institution – not likely registered with the Chinese Central Government – is in general not authorized to administer an arbitration in Mainland China. For the foregoing reasons, the Intermediate People's Court of Hefei held the arbitration clause invalid.[89]

The Supreme People's Court, according to the aforementioned pre-reporting system, got to review the case.[90] Whereas it agreed on the issue raised by Article 10 of the AL - which ends up cutting off foreign arbitral institutions from administering in the Mainland – the Supreme Court was split into two over the validity of the arbitration clause.[91] The Court's majority took

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[82] *Id.*

[83] Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L., Supreme People's Court (25 March 2013), in Fan Yang, Foreign-Related Arbitration in China: Commentary and Cases (2015), Part IV.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Article 10 of the Arbitration Law of the People's Republic of China.

[89] Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L., Supreme People's Court (25 March 2013), in Fan Yang, Foreign-Related Arbitration in China: Commentary and Cases (2015), Part IV.

[90] Anhui Longlide Wrapping and Printing Co., Ltd v. BP Agnati S.R.L., Supreme People's Court (25 March 2013), in Fan Yang, Foreign-Related Arbitration in China: Commentary and Cases (2015), Part IV.

[91] *Id.*

a more "modern" stance: the sale contract between Longlide, Agnati and Sumec contained a clause establishing that any dispute needed to be submitted to the ICC Court of Arbitration.[92] Further, the contract provided for the arbitration to be seated in Shanghai under the ICC Rules. Therefore, looking closely to Article 16 of the AL – which carves out all the elements of a valid arbitration agreement in the Mainland – it is possible to verify that the sale contract embraced all of them.[93] Hence, the Court's majority claimed the validity of the arbitration clause and rejected Longlide's take on the matter.[94] On the other hand, the minority of the Court claimed that Article 10 of the AL is pretty straightforward and demands for any arbitral commission to be registered with the Central Government. Hence, according to the Law, there is no leeway for an institution not registered with the Central Government to administer an arbitral proceeding in Mainland China. Even though the Supreme People's Court remained silent over issues (b) and (c) raised by Longlide, this represents a remarkable event for international arbitration in China, which also spread hope over the international arbitration community that China would loosen up those strict requirements as to boost a more harmonious arbitration practice. This case also started off Chinese Courts' practice to allow foreign arbitral institutions to arbitrate in the Mainland, still messing practitioners with regard to the criteria to apply: is it going to be the Institution Standard or the Seat Standard?

Amoi Technology Co., Ltd v. Société de Production Belge AG (2009)

Amoi Technology Co. entered into a Distributorship Agreement with Société de Production Belge in 2016.[95]

Article 11, paragraph (j) thereof provided for mediation to be used to solve any dispute arising out of the agreement and further, arbitration as a back-up plan if mediation proved unsuccessful.[96] Further, paragraph (k) thereof provided that:

"*Any dispute arising from this agreement should be ultimately resolved by arbitration according to the Arbitration Rules of the International Chamber of Commerce; the place of arbitration shall be either Xiamen or Brussels. The arbitral award shall be final and binding on both parties and a court ruling enforcing the award can be requested at any court with jurisdiction."*[97]

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Amoi Technology Co., Ltd v. Société de Production Belge AG,* Supreme People's Court, (20 March 2009), in Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases* (2015), Part IV.
[96] *Id.*
[97] *Amoi Technology Co., Ltd v. Société de Production Belge AG,* Supreme People's Court, (20 March 2009), in Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases* (2015), Part IV.

The last noteworthy paragraph (i) of the same agreement set forth the Laws of China as the substantive applicable law to the resolution of contractual disputes, without clearing up whether those should be applied to conflict of laws as well.[98] Given the fact that Société de Production Belge AG is a legal person of Belgium, foreign-related case law should be applied, and since one of the arbitral seat parties picked out was Xiamen, China, the laws of China were deemed to be the most appropriate.[99] Hence, when the validity of the aforementioned arbitration clause started to be an issue, the High People's Court of Fujian started scrutinizing the foregoing elements of the Distributorship Agreement between the parties.[100] Since no arbitral institution had been picked out and no supplementary agreement was reached by the parties, the High People's Court of Fujian held the arbitral clause invalid, according to Article 4 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"* and Article 18 of the AL.[101] The Supreme People's Court agreed with the High People's Court of Fujian, for the following reason:

(a) paragraph (i) of the Distributorship Agreement provided for the laws of the PRC as the applicable substantive law of the agreement, and hence the application of the AL;
(b) if PRC law is the applicable law to the agreement, parties have violated Article 18 of the AL which clearly sets out parties' duty to reach a supplementary agreement to cover up the fact that an arbitral institution was not picked out;
(c) anyhow, given the application of PRC law, parties have failed to designate a specific arbitral institution, which renders the arbitration clause invalid given the violation of Article 16 of the AL.[102]

Taizhou Hope Investment Co. Ltd v. WICOR Holding AG (2012)

In *Taizhou Hope Investment Co. Ltd v. WICOR Holding AG,* parties to the arbitration entered into an agreement providing for the old ICC 1998 Rules of Conciliation and Arbitration as their arbitration rules, yet failing to mention:

(a) a specific arbitral institution to administer the case;
(b) the law governing the arbitration clause;
(c) the arbitral seat.[103]

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[98] *Id.*
[99] *Id.*
[100] *Amoi Technology Co., Ltd v. Société de Production Belge AG,* Supreme People's Court, (20 March 2009), in Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases* (2015), Part IV.
[101] *Id.*
[102] *Amoi Technology Co., Ltd v. Société de Production Belge AG,* Supreme People's Court, (20 March 2009), in Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases* (2015), Part IV.
[103] *Taizhou Hope Investment Co. Ltd v. WICOR Holding AG,* Supreme People's Court (1 March 2012).

As the High People's Court of the Jiangsu Province pointed out, parties have indeed failed to pick out the law governing the arbitration clause, yet they did agree on PRC law as the law governing the contract as a whole.[104] Therefore, given the above-mentioned lack of mention of any law governing the arbitration, this fell under the law of the main contract, and could be held invalid given the violation of Article 16 of the AL.[105] Article 16 of the AL sets out that parties are compelled to pick out a designated arbitral institution to administer the case, and an arbitral institution is among the elements Taizhou Investment and WICOR Holding forgot to present in their clause.[106] Hence, the SPC agreed with the High People's Court of the Jiangsu Province and held the arbitration clause invalid.[107]

Zhangjiagang Xinggang Electronics Company v. Brose International GmbH (2006)

In this dispute, parties entered into a joint venture contract, providing for an arbitration to be seated in Zurich, Switzerland under the ICC Mediation and Arbitration Rules in the case any dispute arises out thereof.[108] The Higher People's Court of the Jiangsu Province held the arbitration agreement invalid claiming that:

(a) PRC Law was the law governing the main contract;
(b) Since parties failed to designate a specific arbitral commission, the arbitration agreement was invalid under the AL.[109]

Surprisingly – given the number of cases in which the SPC has held arbitration agreements invalid – the SPC did not agree with the Higher People's Court of the Jiangsu Province.[110] The SPC argued that PRC law was not the governing law of the joint venture contract: since the arbitral seat was Zurich, Swiss law was the one to apply to the contract.[111] Finally, under Swiss law the agreement was completely valid.[112]

A Troublesome Relationship: Chinese Courts and Foreign Arbitral Awards

As aforementioned, one more hurdle to overcome when speaking of international commercial arbitration in the Mainland is whether Chinese Courts tend to lean more toward the application of the Seat Standard or the Institution Standard. While there are a few cases

[104] *Taizhou Hope Investment Co. Ltd v. WICOR Holding AG,* Supreme People's Court (1 March 2012).
[105] *Taizhou Hope Investment Co. Ltd v. WICOR Holding AG,* Supreme People's Court (1 March 2012).
[106] *Id.*
[107] *Id.*
[108] *Zhangjiagang Xinggang Electronics Company v. Brose International GmbH*, Supreme People's Court, (9 March 2006).
[109] *Zhangjiagang Xinggang Electronics Company v. Brose International GmbH*, Supreme People's Court, (9 March 2006).
[110] *Id.*
[111] *Id.*
[112] *Id.*

regarding this issue, e.g. *Duferco* or *Wei Mao International,* the issue has deepened, involving the application of Article V of the New York Convention as well. As set forth in the first Chapter, Article V of the New York Convention sets out the judicial review or refusal grounds on the recognition and enforcement of foreign arbitral awards.[113] In a nutshell, according to the foregoing provision, the enforcement of a foreign arbitral award might be refused only if:

(a) Certain procedural requirements are not met;
(b) The subject matter of the dispute is non-arbitrable under the that country's law;
(c) The recognition of the award would go against that country's public policy.[114]

Wei Mao International (Hong Kong) Co. Ltd v. Shanxi Tianli Industrial Co. Ltd (2004)

In *Wei Mao International (Hong Kong) Co. Ltd v. Shanxi Tianli Industrial Co. Ltd,* the matter at issue was the ICC arbitral award No. 10334/AMW/BWD/TE resulting from an arbitration seated in Hong Kong.[115] First, a request to refuse the enforcement and recognition of the ICC Award was sent to the High People's Court of Shanxi.[116] When the case was brought up to the Supreme People's Court, it established:

(a) That the agreement was not subject to the Arrangement on the Mutual Recognition and Enforcement of Foreign Arbitral Awards in the Mainland and the Hong Kong Special Administrative Region;
(b) That since the ICC is a foreign arbitral institution, founded in France, and because both France and the PRC are state parties to the New York Convention, this shall apply to the arbitration agreement at issue.[117]

Put it in a nutshell, the Supreme People's Court claimed that the ICC arbitral award No. 10334/AMW/BWD/TE was first to be governed by the New York Convention and hence, could be regarded as foreign despite the arbitration being seated in the Mainland.[118] As one might have guessed, this represents yet another case of application of the aforementioned Institution Standard, allowing an arbitral award to get the same nationality - in this case, French – as the arbitral institution that has administered the case.[119]

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[113] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[114] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[115] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land?" – Part I," *Kluwer Arbitration Blog,* October 12, 2020, http://arbitrationblog.kluwerarbitration.com/2020/10/12/arbitrations-in-china-administered-by-foreign-institutions-no-longer-a-no-mans-land-part-i/.
[116] *Wei Mao International (Hong Kong) Co. Ltd v. Shanxi Tianli Industrial Co. Ltd,* Supreme People's Court, (5 July 2004).
[117] *Id.*
[118] *Id.*
[119] *Id.* at 115.

Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd (2008)

This case evolved around the ICC award Nos. 14005/MS/JB/JEM and 14006/MS/JB/JEM that came out of an arbitration seated in Beijing and was later categorized as a non-domestic award under the New York Convention.[120] The Ningbo Intermediate People's Court found that the awards fell under the non-domestic type, hence enforceable under Article I of the New York Convention.[121] Article I of the New Convention sets out that arbitral awards that are not considered domestic in that State party are to be enforced in that state under the Convention.[122] The Ningbo Intermediate People's Court held that since the ICC award was not a domestic award in the Mainland, it fell under the application of the New York Convention.[123] Although this has been deemed as great news for the enforcement of foreign arbitral awards under the New York Convention, the Ningbo Intermediate People's Court has failed to clarify why that arbitral award – came out of an arbitration seated in Beijing – was to be deemed as non-domestic in the Mainland.[124] This event strengthens the Institution Standard, even though there is the need to shed light on the reasons on which the Ningbo Intermediate People's Court based its decision of classifying the ICC award as non-domestic.

TH&T International v. Chengdu Hualong Automobile Parts (2002)

This dispute involved an ICC Arbitration – arbitral award No. 10512/BWD/SP – seated in Los Angeles.[125] The parties to the arbitration were respectively a Chinese and an American company who agreed on ICC Arbitration in the United States.[126] The agreement provided for Longhua's production of certain auto parts and some exclusive distribution rights for North America.[127] Some terms of the contract were breached and when the ICC rendered an award in favor of TH&T, it went before the Sichuan Higher People's Court to get the recognition and enforcement of the ICC award.[128] The Sichuan Higher People's Court turned out to apply the Institution Standard and held that the agreement was French, falling under the application of the New York Convention and hence, enforceable in the Mainland.[129] What is remarkable about this case is that the seat of arbitration – Los Angeles, hence the United States – was not

[120] *Id.* at 115.
[121] *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Corp.,* Ningbo Intermediate People's Court, Zhejiang Province, Case No. 4 (2008), Judgment dated 22 April 2009, published in A.J. van den Berg, *Yearbook of Commercial Arbitration, Volume XXXVIII* (The Hague, 2013), Pt V, 347-50.
[122] Article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1998).
[123] *Id.* at 121.
[124] *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Corp.,* Ningbo Intermediate People's Court, Zhejiang Province, Case No. 4 (2008), Judgment dated 22 April 2009, published in A.J. van den Berg, *Yearbook of Commercial Arbitration, Volume XXXVIII* (The Hague, 2013), Pt V, 347-50.
[125] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I."
[126] Yang F., "Specific Issues Arising From Cases" in *Foreign-related Arbitration in China: Commentary and Cases,* (Cambridge University Press, 2016), 293-353.
[127] *TH&T International Corp. v. Chengdu Hualong Auto Parts Co., Ltd ,* Sichuan High People's Court, December 12, 2003, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1494.
[128] *Id.*
[129] *Id.* at 126.

taken into account, since the Sichuan Higher People's Court only cared about the ICC's nationality.

Hemofarm DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd

This case deals with the application of the aforementioned Article V of the New York Convention. After a brief introduction to the facts of the case, the focus will be on the Supreme People's Court *Reply to the Shandong Higher People's Court's Request for Instruction regarding the Non-recognition and Non-enforcement of the Arbitral Award rendered by the International Chamber of Commerce*. The parties to the arbitration were, respectively:

(a) Hemofarm DD, Mag International Trading Company;
(b) Sulam Media Co. Ltd;
(c) Jinan Yongning Pharmaceutical Co. Ltd.[130]

By 1995, Hemofard and Jinan signed a Joint Venture Contract – Sulam will join in 2000- and articles 57 and 58 thereof set forth:

(a) The laws of China as the governing law of the agreement;
(b) Parties' duty to first solve any dispute via amicable negotiations or, if that proved unsuccessful, via ICC Arbitration in Paris.[131]

By 2002, Yongning brought before the Jinan Intermediate Court a lawsuit against the joint venture company.[132] The lawsuit was based on rent in arrears and one of the joint venture property's assets that was rent out to the joint venture, Yongning had also applied to get a property preservatory measure along with a guarantee.[133] The Jinan Court granted Yongning the preservatory measure and froze that joint venture's asset.[134] On the one hand, the Jinan Intermediate Court did so claiming to have violated no arbitration clause: since the clause involved the three signatories parties and not the joint venture itself, Yongning was deemed to have acted according to the agreement.[135] On the other hand, Hemofard and Sulam kept arguing that according to Article 58 of the Joint venture contract, any dispute should have been submitted to ICC arbitration in Paris and hence, Yongning had violated their arbitration

[130] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[131] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

clause.[136] The dispute before the Jinan Intermediate Court kept going for a while, whereas all the three parties to the agreement kept filing lawsuits against one another.[137] In 2004, Hemofarm, along with Sulam, brought before the ICC an application to start out the arbitration, according to Article 58 of the joint venture contract.[138] Among the many things the two applicants have requested, it is worth mentioning the fact that they wanted an arbitral award stating that:

(a) Yongning has violated its duty under the Joint Venture Contract;
(b) The violation of Article 58 of the above-mentioned Joint venture contract;
(c) That Yongning has based its claim for rent in arrears on falsified evidence and hence those were not due;
(d) A return of the lost investment in value – due to the frozen property's assets – was due;
(e) A compensation for all costs occurred during the litigation.[139]

Yongning opted for filing a counterclaim to the arbitration court and during the arbitration, Hemofarm and Sulam kept claiming the ICC jurisdiction over the case based on Article 58 of the Joint Venture contract, Article 257 and 111(2) of the PRC Civil Procedure Law and Article 5 of the AL.[140] Soon thereafter, the arbitral tribunal held that the respondent had surely violated Article 58 of the contract by turning to Courts to get a property preservatory measure, which ended up as an inescapable hurdle to Hemofarm and Salum to keep the business alive.[141] Last, the arbitral tribunal awarded the joint applicants 30% of the total amount of costs incurred throughout litigation.[142] This ending was followed up by Yongning's request neither to enforce nor recognize the ICC award, and its argument was mostly based on the application of Article V of the New York Convention, to which China is a party.[143] Yongning claimed that first, the arbitration clause of the joint venture contract set out only disputes related to it and involving the shareholders of the joint venture.[144] According to Article V of the New York Convention, those matters that do not fall under the arbitration agreement's

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[136] *Id.*
[137] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[138] *Id.*
[139] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Hemofarm DD, MAG International Trade Company Ltd., Suram Media Company Ltd. v. Jinan Yongning Pharmaceutical Corporation Ltd., ICC Case No. 13464/MS/JB/JEM,* Supreme People's Court, September 3, 2004.
[144] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.

terms cannot be arbitrated.[145] Second, the arbitral award dealt with matters that are not arbitrable under Chinese Law.[146] The right to ask for a property preservatory measure is a civil right, granted by Civil Procedure Law, a non-arbitrable matter in Mainland China, which happens to be protected by the aforementioned Article V of the New York Convention.[147] This provision, indeed, provides that the recognition and enforcement of an award have to be refused if the settlement of such dispute via arbitration is not allowed under that country's law.[148] Last, Yongning argued that the enforcement of such award was against China's public policy, therefore violation Article V once more.[149]

The Supreme People's Court, in its response, married Yongning's main arguments which will be laid down once more for the sake of clarity. The SPC started off by stating the award's nationality and therefore the laws applying to it.[150] Since the arbitral institution administering the case was the ICC, whose place of arbitration is in Paris, the award was of French nationality.[151] Given the fact that both France and China are state parties to the New York Convention, this had to be applied to the dispute and therefore, according to it, this ICC award was held unenforceable by the SPC.[152]

First, parties to the agreement had agreed on the laws of China as the laws governing the agreement.[153] According to Chinese law:

(a) The contracting parties to the joint-venture contract have to be the Sino-foreign investors;
(b) An arbitration clause can only bind those that have signed it.[154]

For the foregoing reasons, adding up the fact that the joint venture company itself was not one of the signatory's parties, the arbitration clause had no binding force toward it.[155] Hence, the arbitral award regarded matters outside the scope of arbitration. Moreover, this ended up violating Article V of the New York Convention, whose aim – among many – is to avoid the enforcement of arbitral awards that do exceed the scope of arbitration.[156]

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[145] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[146] *Id.* at 143.
[147] *Id.*
[148] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[149] Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[150] *Id.* at 143.
[151] *Id.*
[152] *Id.*
[153] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[154] *Hemofard DD, MAG International Trading Company and the Sulam Media Co. Ltd v. Jinan Yongning Pharmaceutical Co. Ltd,* Supreme People's Court, (2 June 2008), in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (2015), Part IV.
[155] *Id.*
[156] *Id.*

Second, as aforementioned, the right to ask for a property preservation measure lies on civil procedure, and is not among those contractual disputes between citizens, legal persons or economic organizations that are deemed arbitrable in Mainland China.[157] Therefore, besides violating Chinese laws, the ICC award dealing with this matter ended up violating Article V of the New York Convention as well.

Third, the ICC award, by overcoming the Jinan Intermediate Court's ruling on the matter, infringed China's public policy and its judicial sovereignty. Even though there were enough violations of the New York Convention as well, this led to another violation of what Article V of the Convention prescribes: no foreign arbitral award that violates a country's public policy can be enforced.[158]

For the foregoing reasons, the Supreme People's Court held the ICC award refused the enforcement and recognition of the ICC award, rendering a judgment in favor of Yongning.[159]

Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd and Others (2015)

Finally, it is time to discuss the most remarkable – and latest – case involving Chinese Courts and foreign arbitral institution, it this case, the ICC. The parties involved were respectively a U.S. company – Brentwood – and two Chinese companies, Guangdong Fa'anlong and Guangzhou Zhengqi.[160] The three parties entered into a Sales Agreement, which set forth the following arbitration clause:

"*Any dispute arising from or in relation to the agreement shall be settled by amicable negotiation. If no agreement can be reached, each party shall refer their dispute to the International Chamber of Commerce for arbitration at the site of the project in accordance with international practice."*[161]

[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I."
[161] Sophia Tang, "Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd. – A third way to enforce China-seated arbitral awards made by foreign arbitration institution," *Conflict of laws. Net,*https://conflictoflaws.net/2020/brentwood-industries-v-guangdong-fa-anlong-machinery-equipment-co-ltd%EF%BC%9Aa-third-way-to-enforce-china-seated-arbitral-awards-made-by-foreign-arbitration-institution/.

The project happened to be located in Guangzhou, hence establishing China as the arbitral seat.[162] First, Brentwood brought before the Guangzhou Court an application to invalidate the foregoing arbitration clause, but the Court confirmed its validity.[163] Later on, due to the two Chinese companies' delay in payment, Brentwood submitted an application before the ICC as to start out the arbitral proceedings.[164] The arbitral tribunal rendered an award in favor of Brentwood, and when Guangzhou Fa'anlong and Guangzhou Zhengqui refused to act accordingly, the former turned to the Guangzhou Court to get the award's recognition and enforcement.[165] Brentwood's submission to the Guangzhou Court was based on the following:

(a) The ICC award had to be enforced under the New York Convention, as it constituted a foreign arbitral award rendered by a foreign arbitral institution;
(b) As an alternative solution, the ICC award was still enforceable under the *Arrangement on the Reciprocal Enforcement of Arbitration Awards by Mainland China and the Hong Kong Special Administrative Region* since the Hong Kong branch of the ICC was the one which administered the case.[166]

By 2020, the Guangzhou Court came out with its decision, imposing the Seat Standard above the Institution standard, previously adopted in other disputes involving the ICC as a foreign arbitral institution. The Guangzhou Court held that the award was to be deemed as a foreign-related *Chinese* award, hence governed by the AL and the PRC Civil Procedure Law rather than international treaties or the Mainland China-Hong Kong Arrangement.[167] The Court pointed out its willingness to exercise jurisdiction over a "French" award, being the ICC a French arbitral institution.[168]

To sum up, Brentwood stands for a change in practice of Chinese Courts. Despite all the effort put in, this case might either represent a turning point – which would be happily welcomed by the international community – or an exception to the old-fashioned Institution standard rule. However, it is fundamental to bear in mind that the Guangzhou Court's decision has no power over other courts, since a SPC' ruling or interpretation would be the only mean to get a binding intervention on the matter.[169]

[162] *Id.*
[163] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I."
[164] *Id.* at 161.
[165] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I."
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

The Final Take

People tend to say that once a problem has been identified, it gets easier to solve it. Does the same apply to the Legal Arbitration Framework in Mainland China? The answer might be tricky. There are multiple ways in which the arbitration set-up of the Mainland could be improved, as many within the international arbitration community are hopeful that either an amendment of the PRC Arbitration Law or a change in the Chinese courts' approach will come up shortly.

As of today, it is noteworthy to point out what was highlighted during the 7th ICC Asia Pacific Conference on International Commercial Arbitration. The recurrent themes were for the most part transparency, costs, efficiency, along with all the arbitral institutions – such as the Australian Centre for International Commercial Arbitration ("ACICA"), the Asian International Arbitration Centre ("AIAC"), the Japan Commercial Arbitration Association ("JCAA") and the Philippine Dispute Resolution Centre Inc. ("PDRCI") – that have followed up the ICC in revising their arbitration rules as soon as the new 2021 ICC Rules came out.[170] Moreover, it was pointed out how the number of arbitrations in Mainland China has skyrocketed over the last few years, building up the hope for China's arbitration market to widen up even more.[171] Given the above-mentioned information, it would be reasonable to assume that the Chinese legislator is currently thinking of making something so successful even better. It is in the author's opinion that only time will tell whether a change in the Chinese Legal Framework for Arbitration will occur. As for now, it is sufficient to illustrate more carefully those options that are both available and viable.

A way around a designated arbitration commission

As to first address the problematic requirement of a designated arbitration commission for every arbitration agreement in the Mainland, it is necessary to start off with a case previously mentioned that might put the analysis on the right track. In *Jiangmen Farun Glass Co. Ltd v. Stein Heurtey Company and Shangai Stein Heurtey Mecc Industrial Furnace Co. Ltd (2006),* the issue regarded two different arbitration agreements.[172] First, it was determined that the law governing the agreements was PRC Law.[173] Second, notwithstanding the lack of mention of a designated arbitration commission, one of the agreements set forth the application of the

[170] Irene Mira, "In Recap: ICC Asia – Pacific Conference on International Arbitration 2022 (Part I)," *Kluwer Arbitration Blog,* June 30, 2022, http://arbitrationblog.kluwerarbitration.com/2022/06/30/in-recap-icc-asia-pacific-conference-on-international-arbitration-2022-part-i/.
[171] *Id.*
[172] *Jiangmen Farun Glass Co. Ltv v. Stein Heurtey Company and Shanghai Stein Heurtey Mecc Industrial Furnace Co. Ltd,* Supreme People's Court, (16 May 2006).
[173] *Id.*

CIETAC Arbitration Rules to the dispute.[174] As above-mentioned, Article 4(4) of the CIETAC Arbitration Rules provides that if parties have chosen those Rules but failed to pick out a specific arbitration commission, then CIETAC has to be regarded as the institution administering the case.[175] What needs to be pointed out from this case is that if most Arbitration Rules set up this same framework, many arbitration agreements and clauses would be safe from being held null in Mainland China.

By looking closely to cases like *German Züblin, Changzhou Donghong* and *Amoi Technology,* it becomes straightforward how a provision as such would have saved the validity of the arbitration clauses or agreements, simply by establishing the ICC as the institution administering the case if no other had been picked out by the parties. It might be smart for other institutions to follow up CIETAC, rather than keep waiting for either one of the SPC's interpretations or the Chinese legislator to ease things up. While this shortcut is not aimed to solve the issue regarding the choice of the arbitral seat, it would at least guarantee parties to the arbitration a way to get what they have bargained for: an arbitral proceeding. Hence, the ICC, which has gathered enough recognition and importance to establish a new trend, should take on this challenge and come up with a clause that imposes its jurisdiction onto parties that have picked out its arbitration rules but forgot to sort the arbitral institution out. This would talk the ICC out of the time-consuming issue of always dealing with Chinese law requirements, taking a step ahead of all other arbitral institutions.

The adoption of a special arbitration clause

As set forth at the beginning of the second chapter, the ICC has been recommending a "special" arbitration clause to those parties willing to have an arbitration seated in Mainland China. That special clause stresses out the ICC as the arbitral institution chosen by the parties to administer their arbitration. This is what parties need to get done as to meet the requirement of a "designated arbitration commission" under PRC Arbitration Law. Although this would only clear up the issues regarding the validity of the arbitration clause because of the lack of a designated arbitration commission, it would still provide more "definition" to a framework that does everything but run smoothly. In a nutshell, it is fundamental for parties to an arbitration to customize the arbitration clause based on both:

(a) their needs;
(b) the requirements set forth under the arbitration law of the country picked out as the arbitral seat.

[174] *Id.*
[175] *Id.*

Nowadays, parties to an arbitration are always advised to pick out an arbitral institution in their arbitration clause, regardless of the conduction of arbitration in Mainland China. The arbitration institution must be precisely identified, avoiding any mistake or the mention of another institution that does not administer arbitration proceedings.[176]

Therefore, among the elements that an arbitration clause should set out, there are the following:

(a) Parties' *clear* intention to commit to arbitration;
(b) The arbitral seat;
(c) The law governing the contract;
(d) The language of the arbitration;
(e) The arbitral institution administering the case.[177]

The road toward amending the Arbitration Law

As to the PRC Arbitration Law, an ideal amendment would involve:

(a) Article 10, whose aim is to keep under control arbitration institutions performing in the Mainland by being signed with the Central Government; however, it must be pointed out as a positive note that the ICC has been recognized as an authorized arbitral institution under the *Mainland China-Hong Kong Arrangement,* placing the institution as a whole much better off within the Chinese arbitral framework;
(b) Article 16 and Article 18, which completely ban ad hoc arbitration yet, thanks to both the *Interpretation on Several Issues concerning the Application of the Arbitration Law* by the SPC and the *Draft Amendment* by the PRC Ministry of Justice, there are solid expectations that this will be changed up. This would mean a lot for China as an arbitral seat, given the widespread importance of ad hoc arbitration worldwide. Ad hoc arbitration is, indeed, a really popular dispute resolution mean under private contracts.[178]

As one might have noticed throughout this work, the framework made up by the AL and the PRC Civil Procedure Law are anything but modern. An easy way to amend further the AL could be to:

(a) Bring in more relaxed requirements as to the validity of the arbitration agreement, e.g. asking only for an arbitration agreement in writing that clearly sets out parties' intent to submit the dispute to arbitration;

[176] Chan Leng Sun, SC, at Baker & McKenzie, "Arbitration clauses do's and don'ts", *India Business Law Journal,* October 2015, https://www.bakermckenzie.com/-/media/files/locations/india/dsc114486iblj-october-2015--arbitration-clauses-dos-and-donts.pdf?la=en.
[177] *Id.*
[178] Dr. Falk Lichtenstein, Roxie Meng, "New Draft for Modernising China's Arbitration Law – Signal for Internationalization Instead of Decoupling?", *CMS Law – Now,* September 28, 2021, https://www.cms-lawnow.com/ealerts/2021/09/new-draft-for-modernising-chinas-arbitration-law?cc_lang=en.

(b) Get rid of the Government registration requirement and introducing a softer form of control over arbitration proceeding involving foreign arbitral bodies;
(c) Empower the arbitral tribunal to grant and enforce interim measures;

In 2020, as what seems to be the follow-up of the Guangzhou Court's holding in *Brentwood,* the PRC State Council issued a reply on some reforms to open up the PRC's market and boost the Beijing business environment.[179] Via its reply, the PRC State Council approved this joint application by the Beijing Municipal Government and the PRC Ministry of Commerce.[180] It is noteworthy to point out this part of the reply, and its wording:

"*Allowing well-known foreign arbitration and dispute resolution institution to set up, after registering with the administrative department of justice of the Beijing Municipality and filing with MOFCOM, operational entities in designated areas of Beijing, to provide arbitration services for civil and commercial disputes in international business and investment sectors."*[181]

It leads to many doubts when and how the Chinese Legislator will take on the challenge and provide a well-functioning arbitration legal framework. As of today, a sort of hesitance keeps reigning upon those foreign parties that either want or need to have their arbitration seated in Mainland China.

A New Chinese Courts Approach

Despite the challenge, a uniform standard as to the nationality of the award would really help out foreign parties to arbitration in the Mainland. As we have seen in cases like *Duferco, Weimao* or *Longlide,* Chinese Courts were "nuts" about the Institution Standard. Then, when *Brentwood* happened – taking five years for the Guangzhou Court to come up with its holding – the uncertainty started doubling size again.[182] Although the SPC has expressed its preference toward the Seat Standard rather than the Institution Standard, it does not seem like Chinese Courts will adapt to what it is deemed as the basic standard practice on an international perspective.[183] On the one hand, from the author's point of view, it would be

[179] Yves Hu, Clarisse von Wunschheim, "Opening of Mainland China Arbitration Market to Foreign Institutions: Is It Happening, Really?" *Kluwer Arbitration Blog,* September 24, 2020, http://arbitrationblog.kluwerarbitration.com/2020/09/24/opening-of-mainland-china-arbitration-market-to-foreign-institutions-is-it-happening-really/.
[180] *Id.*
[181] *Reply of the State Council on the Work Plan or Deepening the New Round of Comprehensive Pilots for Expanding and Opening Up the Service Industry in Beijing and Building a National Comprehensive Demonstration Zone for Expanding and Opening up the Service Industry,* Chinese State Department, August 28, 2020, http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm.
[182] Tereza Gao, "Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I."
[183] *Id.*

risky yet productive to try out on a legislative level the introduction of the Seat Standard, by simply referring to what the New York Convention sets forth, as China has been a State party to the Convention for a while. If the legislator could impose onto courts the Seat Standard, this would allow the recognition and enforcement of foreign arbitral awards to run smoothly, instead of having parties to the arbitration "crumbling" in the uncertainty of what will happen to their award. On the other hand, if *Brentwood* was just Guangzhou Court's uncommon holding and nothing more than that, the Chinese Legislator could try out the Institution Standard instead, yet still giving to foreigners the clarity they have been seeking out for decades as to arbitrate in the Mainland. Having mentioned the Chinese Legislator – whose come into play would be the most impactful yet helpful – there could be an easier path to take on to impose either one of the two standards. The SPC could strengthen the one it favors the most – apparently the Seat Standard – and by starting to apply it whenever reviewing a case, winning lower courts out. Via one of its *interpretations*, lots of work could be done toward the establishment of the Standard that suits the Chinese arbitration practice the most. However, since any *interpretation* or *amendment* is anything but up to arbitration practitioners, the one thing one can do is wait and hope that the SPC and Chinese legislators will grasp the hints left to keep up with the international arbitration practice. Yet, it is important to bear in mind the promises brought up the above-mentioned *Draft Amendment,* whose pro-arbitration aim seems pretty clear. Among the many promises, there is one allowing foreign arbitral institutions to establish permanent branches in the Mainland and the adoption of the Seat Standard.[184]

[184] Cui Quiang, "The pro-arbitration trend continues to grow in China," *Legal Business,* April 22, 2021, https://www.legalbusiness.co.uk/disputes-yearbook-2022/sponsored-briefing-the-pro-arbitration-trend-continues-to-grow-in-china/.

Conclusion

This work's aim is to provide the reader with a view on Arbitration in the People's Republic of China when foreign arbitral institutions are involved. The foreign arbitral institution that has been taken as an example – and as a guide – is the ICC, whose work has been outstanding both outside and within the Mainland. As of today, the author believes that there is a threefold road that can be taken to finally change China's situation:

A. Taken from the ICC perspective, more safeguards can be provided to parties to an ICC Arbitration seated in the Mainland. The easiest option would be to set up - among the ICC Rules - a provision establishing the ICC as the administering arbitral body each time parties have not provided for a suitable one under Chinese Law but still have chosen the ICC Rules;
B. Taken from the Chinese Legislator's perspective, an amendment of the Arbitration Law, as set forth in the *Draft* – and including both the acceptance of ad hoc arbitration and more relaxed requirements as to the validity of the arbitration agreement – would easily get rid of most hurdles still present to this day;
C. Taken again from the Chinese Legislator's perspective, imposing the application of the internationally recognized Seat Standard would avoid the uncertainty connected with the involvement of Chinese courts in Arbitration.

At the end of this work, it seems pretty straightforward what features need to be introduced or amended into the Chinese Arbitration legal framework. While the mean to solve the problem has been identified, it remains unclear whether the Chinese Legislator is really willing to put in the effort required to level up. The author is hopeful that the aforementioned *Draft* is a great symptom of the will to change, but still needs to be brought to life. As of today, it is essential to keep an eye on China, as to see whether changes will – hopefully – come up within the Chinese Arbitration Regime.

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