INTERNATIONAL ARBITRATION FOR CHINESE PARTIES: OVERVIEW, TRENDS AND PREDICTIONS

ARBITRAJUL INTERNAȚIONAL CU PĂRȚI CHINEZE: CADRU GENERAL, TENDINȚE ȘI PREVIZIUNI

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ABSTRACT

At the international level, Chinese parties are increasingly confident in utilising means of international arbitration as well as investment arbitration to protect their investment abroad and defend their position. Domestically, China has adopted the legislative plan of amending its existing Arbitration Law to raise China's pro-arbitration profile and promote its arbitration legislation to the same level as that of international arbitration practice. In this context, the authors provide thoughts in relation to an overview, trends and predictions in respect of international arbitration practice for Chinese parties from a comparative perspective.

Keywords: *international arbitration; investor-state dispute; Chinese party; investment treaty arbitration; trends*

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REZUMAT

La nivel internațional, părțile chineze devin din ce în ce mai încrezătoare în utilizarea procedurilor de arbitraj internațional inclusiv arbitrajul de investiții pentru protejarea investițiilor în alte state sau în apărare. La nivel intern, China a adoptat un plan legislativ pentru modificarea Legii Chineze a Arbitrajului pentru a îmbunătăți profilul pro-arbitraj și a promova legislația sa în domeniul arbitrajului la același nivel cu cel al practicii de arbitraj internațional. În acest context, autorii prezintă comentarii privind ansamblul reglementării, tendințe și previziuni în legătură cu practica de arbitraj internațional ce implică părți chineze, din perspectivă comparată.

Cuvinte cheie: *arbitraj internațional; dispute investitor-stat; parte chineză; arbitraj de investiții; tendințe*

International arbitration has become a preferred forum for resolving cross-border disputes over the recent years. This is not surprising given the benefits that international arbitration brings compared to litigation before state courts. Among key benefits, users of international arbitration count a wider enforceability of arbitral awards compared to court judgments in the states which are parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"). At the time of writing, 170 states have adhered to the New York Convention and 157 contracting states have ratified the ICSID Convention which means that award creditors can enforce the New York Convention and ICSID arbitral awards in most of the world.[3]

Often cited benefits of international commercial arbitration include a greater procedural flexibility compared to set national litigation rules which differ from state to state, a better uniformity compared to the common law versus civil law divide in the universe of jurisdictions, party autonomy which gives parties significant control over the conduct of arbitral proceedings and the ability to appoint arbitrators who are experts in a chosen field.

Notably, investment treaty arbitration under bilateral investment treaties ("**BITs**") or treaties with investment provisions has been an effective tool for foreign investors to protect their investments abroad.

In light of these advantages, arbitral institutions and practitioners have witnessed a global rise in international arbitrations worldwide including in Asia,

[3] The Kyrgyz Republic has become the 157th Contracting State which ratified the ICSID Convention on 21 April 2022 and in accordance with Article 68(2) of the ICSID Convention, entering into force for the Kyrgyz Republic on 21 May 2022.

the world's largest economic region. This article focuses on the Chinese market and is divided into the following parts:

(1) Section 1 outlines the increasing confidence by Chinese parties in utilising international arbitration particularly in the field of international investment arbitration as a means of protecting their investments abroad;

(2) Section 2 discusses a shift in the attitude towards international arbitration in China's domestic arbitration law and analyses key changes as proposed in the draft revision to the existing Arbitration Law of the People's Republic of China (2017 Amendment) (the "**PRC Arbitration Law**");[4] and

(3) Section 3 concludes with predictions for Chinese users of international arbitration.

1. Increasing confidence in Chinese parties utilising international arbitration

Historically, Chinese parties have been reluctant to resolve their disputes through formal dispute resolution proceedings often preferring negotiations or mediation to achieve a desirable outcome. However, given the rising level of inbound and outbound direct investment,[5] Chinese parties are becoming more confident in arbitrating their claims.

This is apparent from a surge of investment treaty claims filed by Chinese investors against other states. From publicly available information, there are at least 13 (thirteen) known investment arbitration claims brought by Chinese investors (with 7 (seven) proceedings currently ongoing).[6] Of these, 2 (two) cases

[4] The official Chinese version of Arbitration Law of the People's Republic of China (2017 Amendment) is available at: https://flk.npc.gov.cn/detail2.html?MmM5MDlmZGQ2NzhiZjE3OTAxNjc4YmY4NmU1YjBhNjk%3D , last accessed on 16 June 2022.

An unofficial English version of Arbitration Law of the People's Republic of China (2017 Amendment) is available at: https://www.pkulaw.com/en_law/83c8fbd6da8a6eb8bdfb.html?keyword=arbitration, last accessed on 16 June 2022.

[5] China's overall outbound direct investment reached USD 145.2 billion https://assets.ey.com/content/dam/ey-sites/ey-com/en_cn/topics/coin/ey-overview-of-china-outbound-investment-2021-bilingual.pdf, last accessed on 16 June 2022 and its inbound foreign direct investment rose to USD 334 billion in 2021 https://www.piie.com/blogs/realtime-economic-issues-watch/foreign-corporates-investing-china-surged-2021, last accessed on 16 June 2022.

[6] Among these cases are: (1) *Qiong Ye and Jianping Yang v. Kingdom of Cambodia (ICSID Case No. ARB/21/42)*; (2) *Fengzhen Min v. Republic of Korea (ICSID Case No. ARB/20/26)*; (3) *Wang Jing, Li Fengju, Ren Jinglin and others v. Republic of Ukraine*; (4) *Beijing Everyway Traffic and Lighting Company Limited v. Ghana*; (5) *Sanum Investments Limited v. Lao People's Democratic Republic (ICSID Case No. ADHOC/17/1);* (6) *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30)*; (7) *Wuxi T. Hertz Technologies Co. Ltd., and Jetion Solar Co. Ltd v. Greece*; (8) *Ping An*

have been decided in favour of the Chinese investors.[7] Most recently, the award in *Zhongshan Fucheng v. Nigeria* has come to light.[8] In this case, the tribunal held Nigeria liable under the China-Nigeria BIT for actions of Nigerian state actors and entities, including the police, which effectively deprived the Chinese investor of its contractual rights under various agreements and led to the eviction of the Chinese business and its employees from the Ogun Guangdong Free Trade Zone. This award led to USD 55.6 million in compensation for Nigeria's expropriation of the Chinese investment and to the award of moral damages in the sum of USD 75,000.[9]

Another example of such confidence is the recent ICSID claim by Chinese telecoms company Huawei against Sweden under the China-Sweden BIT reportedly seeking more than USD 625 million in damages.[10] The claim is a response to a ban by Sweden's telecom regulator PTS of Huawei and a fellow Chinese telecoms company ZTE from 5G networks which cited security risks.[11]

These cases demonstrate that Chinese investors are becoming increasingly aware of substantive protections which are afforded to them under international investment treaties.

Among such protections available to Chinese investors are protections against unlawful expropriation, requirement by foreign states to treat their investment fairly and equitably and in a non-discriminatory manner.

The evolution of the international investment treaties which China has concluded also shows the growing appreciation by the Chinese government of the impact of the treaty drafting on the scope of protection of the Chinese investment abroad.

Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium (ICSID Case No. ARB/12/29); (9) *Beijing Shougang and others v. Mongolia, PCA Case No. 2010-20*; (10) *Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6)*; (11) *Huawei Technologies Co., Ltd. v. Kingdom of Sweden (ICSID Case No. ARB/22/2)*; (12) *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Award, 26 March 2021; and (13) *Alpene Ltd v. Republic of Malta (ICSID Case No. ARB/21/36)*. See further at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china/investor, last accessed on 16 June 2022.

[7] *Tza Yap Shum v. Republic of Peru (ICSID Case No. ARB/07/6)*; (11) *Huawei v. Sweden*; and (12) *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Award, 26 March 2021.

[8] *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Award, 26 March 2021, available at: https://jusmundi.com/fr/document/decision/en-zhongshan-fucheng-industrial-investment-co-ltd-v-federal-republic-of-nigeria-final-award-Monday-1st-march-2021, last accessed on 16 June 2022.

[9] Moral damages for the injury and suffering caused by the host state's breaches of the investment treaty are rarely awarded in investment treaty cases.

[10] As reported at: https://globalarbitrationreview.com/huawei-brings-icsid-claim-against-sweden-over-5g-ban, last accessed on 16 June 2022.

[11] *Ibidem*.

At the time of writing, according to the United Nations Conference on Trade and Development ("**UNCTAD**"), China has a total of 106 BITs and 22treaties with investment provisions currently in force.[12]

China is currently negotiating the China-EU Comprehensive Agreement on Investment and the China-US BIT.[13] These represent the so-called "fourth generation" of the Chinese treaties reflecting modernised protection standards and evidence China's intention to redesign its investor-state dispute settlement ("**ISDS**") mechanism in line with the work undertaken by the United Nations Commission on International Trade Law ("**UNCITRAL**") on a multilateral investment court.[14] These negotiations present an opportunity for China to take the role of a rule-maker, rather than a rule-taker, in international investment and trade law and create a more level playing field for European and US investors in China.

In addition, Chinese parties have become active users of international commercial arbitration. This is evidenced by the latest statistics of major arbitration institutions. By way of an example, in addition to India and the US, China continued to top the foreign users rankings in the 2021 annual report of the Singapore International Arbitration Centre ("**SIAC**").[15]

Furthermore, the implementation of China's Belt and Road Initiative ("**BRI**") over the last few years has generated a great number of cross-border transactions and projects. As most of the BRI transactions and projects are large-scale, high-value and involve various parties from different countries and host states, there will, inevitably, be commercial disputes and investor-state disputes which will arise as a result.

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[12] See at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy, last accessed on 16 June 2022.

[13] See at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2541 , last accessed on 16 June 2022, and https://www.uschina.org/advocacy/bilateral-investment-treaty, last accessed on 16 June 2022.

[14] The previous three generations of Chinese BITs and treaties with investment protections underwent an evolution from being overly restrictive to being more permissive and broader in terms of the scope of their ISDS mechanism. The "first generation" of treaties provided either no ISDS provisions at all or a narrowly construed ISDS clauses that only admitted "*the amount of compensation for expropriation*" to arbitration. The "second generation" allowed for admission of legal disputes, or disputes in connection with an investment, or a combination of both, to arbitration. The "third generation" incorporated ISDS provisions that admitted disputes where an investor or its investment has incurred loss or damage arising from breaches of specific treaty obligations. See further Y. Li and C. Beng, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, Netherlands International Law Review, 2020.

[15] See page 20 at: https://www.siac.org.sg/images/stories/articles/annual_report/SIAC-AR2021-Final.pdf, last accessed on 16 June 2022.

2. Development of international arbitration practice in China

Chinese national arbitration law is also undergoing a major modernisation.

On 30 July 2021, the Ministry of Justice ("**MOJ**") of the People's Republic of China[16] ("**PRC**") released a consultation draft revision to the existing PRC Arbitration Law ("**Draft Revision**").[17] In parallel with the Draft Revision, the MOJ issued a legislative statement on initiatives and the revision process, which sought to identify its overall approach as well as the main contents in the Draft Revision ("**Statement**").[18] The MOJ emphasised that the Draft Revision intended to elevate arbitration and related judicial practice to a legislative level.

Unlike the historical background in the context of drafting the existing PRC Arbitration Law, this Draft Revision was widely discussed in the context of Chinese parties and practitioners' frequent and active participation in international economic exchange and arbitration practice. The Draft Revision takes the role of promoting arbitration legislation to the same level as that of international arbitration practice. In particular, one of the purposes of the enactment of the Draft Revision is "*to facilitate international business exchange*"[19] as enshrined in Article 1. Thus, by comparison with the existing PRC Arbitration Law, the Draft Revision provides a 'window' in which to look back and prepare for the forward development of international arbitration in China.

2.1. Response to emerging investor-state disputes

As a response to the emerging investment arbitration practice, some domestic Chinese arbitration institutions attempt to play a proactive role in facilitating the development of investment arbitration practice in China. By way of an example, the China International Economic and Trade Arbitration Commission ("**CIETAC**") and Beijing Arbitration Commission ("**BAC**") issued institutional rules for international investment arbitration in 2017[20] and 2019,[21] respectively, and hold seminars and high-level talks on investment arbitration.

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[16] In this article, "Mainland China" is to distinguish from Hong Kong on a jurisdictional point whilst "China" or "PRC" mentioned also only carries the jurisdictional meaning.

[17] The official Chinese version of the Draft Version (中华人民共和国仲裁法（修订）（征求意见稿）) is available at: http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html, last accessed on 16 June 2022.

[18] The official Chinese version of the Statement (关于《中华人民共和国仲裁法（修订）（征求意见稿）》的说明) is available at: http://zqyj.chinalaw.gov.cn/draftExplain?DraftID=4518, last accessed on 16 June 2022.

[19] This is the authors' translation of the Statement.

[20] http://www.cietac.org.cn/index.php?m=Page&a=index&id=390&l=en, last accessed on 16 June 2022.

[21] http://www.bjac.org.cn/page/tz/guifan.html, last accessed on 16 June 2022.

In addition, the Draft Revision expands its scope of application by removing "*parties on equal footing*" from it so that parties with unequal positions in investment disputes may also refer to arbitration law. It is interesting to note that in the Statement, the MOJ mentions that besides investment arbitration, such expansion also contemplates the development of sports arbitration and intends to provide legislative support accordingly.

2.2. Careful introduction of *ad hoc* arbitration

As the original form of arbitration, *ad hoc* arbitration is universally accepted by many countries in arbitration legislation and practice. According to the statistics released by the London Maritime Arbitrators Association, *ad hoc* arbitration still retains a sizeable caseload and continues to thrive among international and regional leading arbitration institutions.[22] Unlike mediation, which has a deep root in Chinese culture and society, arbitration originates from the Western world and is a transplanted dispute resolution system which emerged alongside China's participation in international economic exchange. Ordinarily, as a method of settling disputes, the Chinese population would seek redress from institutions like the courts rather than from individuals seemingly without official authority. Thus, it was natural to consider institutional arbitration as an example for the development of international arbitration in China. As frequently raised, non-acceptance of *ad hoc* arbitration within Mainland China is one of the characteristic differences between Chinese arbitration practice and most arbitration legislations.

It is noted that *ad hoc* awards made in other contracting states to the New York Convention share the same position as institutional awards in terms of recognition and enforcement in China. Moreover, the Supreme People's Court ("**SPC**") of the PRC emphasised the position on recognition and enforcement of overseas *ad hoc* awards several times in its replies to lower courts, in national meeting minutes on foreign-related matters in trial practice and in writings in relation to the juridical interpretation of the Civil Procedure Law of the PRC, which is now Article 543[23] of the Interpretation of the SPC on the Application of the Civil Procedure Law of the PRC(2022 Amendment) .[24]

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[22] See at: https://hsfnotes.com/arbitration/2021/03/24/ad-hoc-arbitration-continues-to-thrive-in-london-the-latest-statistics/, last accessed on 16 June 2022.

[23] According to Article 543, where a party concerned applies to a people's court for recognition and enforcement of an arbitral award rendered by an *ad hoc* arbitration tribunal outside the territory of the People's Republic of China, such application shall be dealt with by the people's court in accordance with the provisions of Article 290 of the Civil Procedure Law.

[24] Article 543 of Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2022 Amendment), an unofficial English version is available at: https://hk.lexiscn.com/law/content.php?provider_id=1&isEnglish=Y&origin_id=4216482&eng=0&keyword=5rCR5LqL6K%20J6K685rOV5Y%2045rOV6Kej6YeKLOawkeS6i%20ivieiuvOazleino%20mHiizmsJHkuovor4norrzms5Us5rCR6K%20

In fact, as early as 30 December 2016, the SPC issued Opinions on Providing Judicial Guarantees for the Building of Pilot Free Trade Zones ("**FTZ**"),[25] which allows parties registered in the FTZ to conclude an arbitration agreement to submit disputes to arbitration at a specific place in Mainland China according to bespoke arbitration rules by specific arbitrators. Following the SPC's relaxation of *ad hoc* arbitration, Guangdong Hengqin FTZ, jointly with Zhuhai Court of International Arbitration, published the first version of the arbitration rules on *ad hoc* arbitration on 18 March 2017, which took effect on 15 April 2017.[26] However, *ad hoc* arbitrations are still very rare in Chinese practice.

One of the obstacles to the introduction of *ad hoc* arbitration appears to be the requirement for a valid arbitration agreement. According to the current PRC Arbitration Law, for an arbitration agreement to be valid, it has to comply with the following three requirements: (i) demonstrate the parties' intention to arbitrate; (ii) ensure that the matters in question are arbitrable; and (iii) designate an arbitration institution. The Draft Revision now specifically removes the third requirement of designating an arbitration institution in Article 21. In line with this removal, Articles 91, 92 and 93 of the Draft Revision further introduce *ad hoc* arbitration but limit its application only to disputes with foreign elements. Clearly, this is a cautious move and sets foreign-related disputes to test.

2.3. Adopting the universally accepted concept of seat of arbitration

Seat of arbitration is a vital element in an international arbitration agreement and it serves as a major factor in determining: (i) the governing law of an arbitration agreement; and (ii) a competent court exercising judicial review powers. However, the existing PRC Arbitration Law adopts the 'institutional test' given that one of the legal requirements for a valid arbitration agreement is the inclusion of a specified arbitration institution. According to that test, applications for setting aside awards are to be filed with competent courts of the place of the registration office of the agreed arbitration institution and if an arbitration agreement is silent in relation to its governing law, the governing law of that arbitration agreement may be determined as the law of either the registration office of the agreed arbitration institution or as the law of the agreed seat of arbitration. Whist this approach does not cause much difficulty in an arbitration

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J5rOV6Kej6YeKLOWPuOazleino%20mHiizmsJHor4nms5Us6Kej6YeKLOawkeS6iyzor4norrw=&t_kw=5rCR5LqL6K%20J6K685rOV5Y%2045rOV6Kej6YeKLOawkeS6i%20ivieiuvOazleino%20mHiizmsJHkuovor4norrzms5Us5rCR6K%20J5rOV6Kej6YeKLOWPuOazleino%20mHiizmsJ-Hor4nms5Us6Kej6YeKLOawkeS6iyzor4norrw=&prid=727d703f-248d-4e43-9d69-a20bdcf88cdd&crid=cf4a6829-d8b7-4fee-8fe4-c8f97324c07e, last accessed on 16 June 2022..

[25] An unofficial English version of Opinions on Providing Judicial Guarantees for the Building of Pilot Free Trade Zones (最高人民法院关于为自由贸易试验区建设提供司法保障的意见) is available at https://www.pkulaw.com/en_law/441e185f12e602a2bdfb.html, last accessed on 16 June 2022.

[26] http://www.zhac.org.cn/?p=434, last accessed on 16 June 2022.

administered by domestic arbitration institutions, it does have a great influence on arbitration administered by foreign arbitration institutions with a city in Mainland China as the arbitral seat, as these circumstances raise uncertainty in deciding the nationality of awards.

As discussed above, the Draft Revision has removed the designated arbitration institution from the legal requirements of a valid arbitration agreement. Furthermore, Article 27 of the Draft Revision adopts the concept of the seat of arbitration and Article 77 provides that the competent court for setting aside the award shall be the Intermediate Court in the seat of arbitration. It is therefore a welcome change which provides a clarification in relation to the seat of arbitration in contrast with the Law of the PRC on Choice of Law for Foreign-related Civil Relationships[27] which positions the place of institution and the seat of arbitration at the same level for the purposes of determining the choice of law for an arbitration agreement. In line with this change, Article 12 of the Draft Revision expressly allows and encourages foreign arbitration institutions to establish business offices in Mainland China.

Notably, in the recent *Brentwood* case decided on 6 August 2020 by the Guangzhou Intermediate Court, the court held that an arbitral award made under the administration of the ICC in Guangzhou may be regarded as a Chinese foreign-related arbitral award rather than a French award. Additionally, in early January 2022, the SPC released the Minutes of National Foreign-Related Commercial Maritime Trial Work Meeting held on 31 December 2021 ("**Minutes**").[28] In the SPC's Minutes, Item 100 contains a guidance rule which confirms that awards made by foreign arbitration institutions, with a city in Mainland China as the seat of arbitration, shall be regarded as foreign-related awards. The Minutes itself do not constitute the law but do have a persuasive power and are of guidance value to lower courts. Although the Draft Revision is not in its final form, the adoption of the concept of the seat of arbitration is very likely to remain.

According to the *Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world*, Beijing joins New York as the joint sixth most popular seat, with each chosen by 12% of respondents and Shanghai comes in eighth (8%).[29] Looking forward, the acceptance of the test in relation to the arbitration seat at the legislation level would improve popularity of cities in Mainland China to be selected as the seat by arbitration users.

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[27] Article 18 of Choice of Law for Foreign-related Civil Relationships, available at: https://cicc.court.gov.cn/html/1/219/199/200/649.html, last accessed on 16 June 2022.

[28] Minutes of National Foreign-Related Commercial Maritime Trial Work Meeting (全国法院涉外商事海事审判工作座谈会会议纪要), an unofficial English version available at: https://hk.lexiscn.com/law/content.php?eng=0&provider_id=1&origin_id=4198844&isEnglish=Y&prid=29679bdc-7a81-aca7-4fd4-5d58b9ca151b&crid=e2390da2-aece-4657-890b-9ff9e5c5f021, last accessed on 16 June 2022.

[29] See page 7 at: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf, last accessed on 16 June 2022.

2.4. Reflection on development of institutional arbitration

Institutional arbitration has played a major role in Chinese arbitration practice and would remain as such in the future. It is reported that there are more than 270 arbitration institutions established since 1 September 1995, when the existing PRC Arbitration Law took effect. These institutions have handled over four million cases with an estimated claim value in excess of RMB five trillion.[30]

At the end of 2018, the General Office of the Communist Party of China Central Committee and General Office of the State Council of the PRC jointly issued the Opinions on Improving Credibility of Arbitration by Perfecting Arbitration Systems ("**Opinions**"),[31] which render guidance in relation to implementation of arbitration legal systems, potential reforms and improvement of internal governance of arbitration institutions, including innovation of the arbitration system. These Opinions strengthen arbitration's function in serving China's all-round opening up and BRI's initiative and also offer support and supervision. On the institutional side, the Opinions require to strictly regulate establishment and election of arbitration institutions, emphasise their independence, call for professionalism of secretaries and encourage arbitration institutions, among other things, to strengthen cooperation and communication with international and overseas arbitration institutions.

These Opinions have also been written into several articles of the Draft Revision. For instance, Article 13 of the Draft Revision clarifies the legal standing of an arbitration institution as a non-profit legal entity meant to provide public service for resolving contractual and property related disputes; Article 14 emphasises that arbitration institutions shall be independent from administrative departments and should have no affiliations with any administrative department; Article 16 of the Draft Revision sets out requirements in relation to internal governance, supervision and general elections; and Article 17 requires arbitration institutions to establish information disclosure mechanism and disclose its articles, registration status, standards of fees and annual reports promptly to the public. It is therefore likely that arbitration institutions will operate in a well-devised channel under supervision and may further improve their credibility and enlarge their influence on arbitration practice domestically and internationally. It is known that CIETAC continues to lead the way as the first arbitration institution, and it has now been listed as one of the five most preferred arbitral institutions.

In addition, alongside the development of arbitration institutions, the SPC tried to develop international commercial court practice. The SPC established China International Commercial Court ("**CICC**") in 2018 as a permanent adjudication

[30] https://www.ccpit.org/a/20211220/20211220ist7.html, last accessed on 16 June 2022.

[31] The official Chinese version of the Opinions on Improving Credibility of Arbitration by Perfecting Arbitration Systems (关于完善仲裁制度提高仲裁公信力的若干意见) is available at: http://www.gov.cn/xinwen/2019-04/16/content_5383424.htm. last accessed on 16 June 2022.

division for resolving international commercial disputes. CICC serves as a "one stop" platform for dispute resolution, which integrates litigation, mediation and arbitration for international commercial disputes, mainly targeting disputes arising out of BRI projects and international trade transactions. CICC appointed the first group of five arbitration institutions to attend its "one stop" platform including China International Economic and Trade Arbitration Commission, Shanghai International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration, Beijing Arbitration Commission and China Maritime Arbitration Commission on 13 November 2018[32] and the second group of five arbitration institutions including Guangzhou Arbitration Commission, Shanghai Arbitration Commission, Xiamen Arbitration Commission, Hainan International Arbitration Court, and Hong Kong International Arbitration Centre on 22 June 2022.[33]

2.5. Empowering the tribunal to determine its own jurisdiction and order interim measures

In addition to attempts to elevate arbitration practice to the international level, the Draft Revision confers greater authority on the tribunal in aspects of controlling its own jurisdiction (*Competence-Competence*) and ordering interim measures during arbitration proceedings.

The Competence-Competence doctrine operates as an inherent power of the tribunal to decide on its own jurisdiction and rule over the existence and validity of arbitration agreements. This doctrine has been universally accepted by most arbitration legislations, authorities and international rules.[34] However, the existing PRC Arbitration Law confers power to arbitration institutions or competent courts to decide on jurisdictional issues in arbitration.[35] In practice, almost all institutional rules provide that the arbitration institution may authorise the tribunal to decide on jurisdictional objections raised by the objecting party and the tribunal may either make a separate decision on jurisdiction during the arbitral proceeding or include its decision on jurisdiction in the final award.[36]

[32] See https://cicc.court.gov.cn/html/1/219/208/210/1144.html, last accessed on 12 July 2022.

[33] See https://cicc.court.gov.cn/html/1/219/208/210/2215.html, last accessed on 12 July 2022.

[34] See for example Article 16 of UNCITRAL Model Law on International Commercial Arbitration; Article 23(1) of the 2013 UNCITRAL Rules; section 30 of the English Arbitration Act 1996; Article 186(1) of Swiss Private International Law Act (PILA); Article 1465 of the French Code of Civil Procedure.

[35] See Article 20 of the PRC Arbitration Law, an official English version available at https://www.pkulaw.com/en_law/83c8fbd6da8a6eb8bdfb.html, last accessed on 16 June 2022.

[36] See for example Article 6 of CIETAC Arbitration Rules, Article 6 of BAC Arbitration Rules, Article 10 of SCIA Arbitration Rules.

This can be deemed as a flexible operation of the Competence-Competence doctrine, yet such operation lacks legislative support. Particularly, in Mainland China, both courts and arbitration institutions can examine the validity of the arbitration agreement and decide on jurisdiction. Furthermore, in the event one party raises a jurisdictional objection before the arbitration institution while the other party raises that objection before the competent court, the courts have priority to rule on jurisdiction.[37] The objecting party will therefore often utilise jurisdictional objections as a tactic to delay arbitration proceedings by applying to the competent court one day before the arbitration hearing date.

Not only does Article 28 of the Draft Revision empower the tribunal to decide over the existence and validity of an arbitration agreement and its own jurisdiction, but it also prescribes a tight time limit for raising such objections. In addition, it provides that in case a party fails to raise a jurisdictional objection with the tribunal or the arbitration institution prior to the constitution of the tribunal, the court shall not accept such a case.

Another important feature of the Draft Revision is contained in a new section "Interim Measures" specifically dedicated to interim measures and the power of the tribunal to grant them. Under the existing PRC Arbitration Law, arbitral tribunals do not have power to order interim measures, which is reserved to competent courts. In practice, prior to commencing arbitration, the claiming party may apply for interim orders directly to a competent court. During the arbitration proceedings, the party seeking interim measures may submit such an application to the arbitration institution for it to be forwarded to the competent court. It is very difficult to obtain interim orders prior to arbitration as the courts would be more cautious in granting such orders in the absence of ongoing proceedings. Yet, this mechanism for obtaining interim measures during arbitration may defeat the purpose of interim measures, as usually interim measures are applied on an urgent basis.

Under the Civil Procedure Law of the PRC (2021 Amendment) ("**Civil Procedure Law"**), there are three categories of interim measures a party can apply for: (i) asset preservation; (ii) evidence preservation; and (iii) conduct preservation.[38] In addition to granting the tribunal the power to order interim

[37] According to Article 20 of the existing PRC Arbitration Law: "*If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration institution to make a decision and the other party applies to the people's court for a ruling, the people's court shall give a ruling. A party's challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing*."

[38] See Article 84 and Article 103 of the Civil Procedure Law of the PRC (2021 Amendment). The official Chinese version of the Civil Procedure Law of the PRC (2021 Amendment) is available at: https://flk.npc.gov.cn/detail2.html?ZmY4MDgxODE3ZWQ3NjZlYTAxN2VlNmFiOTlhZDFjYmM%3D, last accessed on 16 June 2022. An unofficial English version is available at: https://www.pkulaw.com/en_law/3ce82cb92ee006b6bdfb.html, last accessed on 16 June 2022.

measures, Article 43 of the Draft Revision expands the types of interim measures by including "*other short-term measures deemed necessary by the tribunal*". Whilst this improvement reveals the pro-arbitration attitude of courts, it is still unclear how the court may provide assistance in enforcing the tribunal's order as such order needs to be in a form of a court ruling to be capable of enforcement under the Civil Procedure Law.

2.6. Integrating Oriental wisdom of arb-med and separate commercial mediation

Undoubtedly, mediation has come a long way in China and is deeply rooted in the Chinese mindset as greatly influenced by the Confucian values and the culture of social harmony, face-saving and avoiding disputes in the long run.

Mediation runs in parallel with the whole process of litigation proceedings and judges are more inclined for the parties to mediate the dispute than adjudicate the disputes directly. Drawing on experience of mediation in litigation, most institutional rules introduce a mechanism of mediation in arbitration (arb-med), commonly known as 'Oriental wisdom' which has triggered the ongoing debate on the role and function of the tribunal in international arbitration.

From the authors' experience, mediation in arbitration proposed after the hearing is most effective as parties by this time form realistic expectations and have better understanding in relation to their current and future business interests. In this way, it is easier for the parties to have a constructive dialogue and reach a settlement.

The Draft Revision retains its rules of reference on arb-med and additionally adds a separate mechanism for commercial mediation and a set of rules which provides an integrated mechanism of mediation including arb-med and standalone commercial mediation.[39] This new addition seems to serve as a legislative preparation for or a local response to the need for flexible methods of resolving a dispute in international arbitration. Furthermore, in line with its objective to strengthen the role of mediation as an alternative means of dispute resolution, China signed (although not yet ratified) the Singapore Convention on Mediation[40] on 7 August 2019. The Singapore Convention on Mediation provides a uniform and efficient framework for parties having their international trade and commercial disputes resolved by mediation to easily enforce and invoke such international settlements across borders.

Notably, the *Queen Mary 2021 International Arbitration Survey: Adapting arbitration to a changing world* concludes that international arbitration is still

[39] See Article 69 of the Draft Version.

[40] Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf, last accessed on 16 June 2022.

the preferred method of resolving cross-border disputes for 90% of respondents but it is also interesting to note that among these 90%, 59% of respondents prefer arbitration in conjunction with ADR.[41] Considering the long history of mediation in Chinese culture and the well-operated mechanism of arb-med and litigation-med, the Draft Revision's integration of 'Oriental wisdom' of arb-med and stand-alone commercial mediation is a valuable exportation of that wisdom in response to the calling for a flexible, cost effective and efficient dispute resolution modes by arbitration users.

3. Conclusion: predictions for Chinese users of international arbitration

International arbitration practice has been developing in China for over 20 years.

The Draft Revision in conjunction with the emerging investment arbitration practice and noticeable growth of international arbitration cases with Chinese element offers a good perspective reflecting the evolution of the practice, efforts to enhance China's pro-arbitration image and cement confidence in using international arbitration as a means to resolve commercial and investment disputes by Chinese parties.

In recent years, the Chinese government has emphasised the importance of cultivating legal talents with international vision and as a result, some leading local law schools have established areas of international law and specialised international arbitration programmes. In addition, leading arbitration institutions are active in supporting research initiatives and seminars about international arbitration and exploring the ways in which Chinese arbitration practice may improve its international image.[42] Interestingly, both the newly established institutions and the existing ones include "international" in their names. In addition, China's negotiations of "new generation" BITs are aimed to level the playing field in increasing investor confidence and providing enhanced protection to Chinese investors abroad.

All these efforts at creating legislation, on both governmental and institutional levels, indicate that Chinese international arbitration practice is on a steady and improving track.

[41] Available at: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf, last accessed on 16 June 2022.

[42] See for example Beijing Arbitration Commission held annual seminar about international commercial litigation (information available at: https://annualreport.bjac.org.cn/en , last accessed on 16 June 2022, and CIETAC Hong Kong Arbitration Centre was Invited to Participate in the Webinar "Cross-border Dispute Resolution: Parties' Expectations and the Designing of Dispute Resolution Clauses", information available at: http://www.cietac.org/index.php?m=Article&a=show&id=18361&l=en , last accessed on 16 June 2022.