

Kluwer Arbitration Blog

An Arbitration Paradise? The Importance of Dispute Resolution for Hainan's Development

Joel Evans · Friday, November 27th, 2020

The designation of Hainan province as a [Free Trade Zone \(FTZ\)](#) in 2018 has sparked a great deal of interest for foreign investors. The [proposal for a globally influential free trade port](#), by the middle of the century, makes Hainan an exciting prospect and a potential venue for new foreign investment. Such a proposal demonstrates a strong commitment by the central government, to turn Hainan into a highly developed centre for international trade. China's plans for Hainan reveal that a great deal of thought has been put into dispute resolution, in order to make the island arbitration friendly to further attract foreign investment. The [guiding policy for Hainan's development](#) strongly emphasises the need for effective dispute resolution mechanisms and has specifically called for the "*establishment of multiple dispute resolution institutions such as international economic and trade arbitration institutions and international dispute mediation institutions*".¹⁾ This policy highlights the importance placed on building an effective dispute resolution network, which is needed to safeguard foreign investment.

The Hainan FTZ

Although the [1994 PRC Arbitration Law](#) provides the legislative framework for arbitration in Hainan, the province is subject to several policies that make it unique, when compared to the conventional dispute resolution framework adopted in the mainland.

Firstly, as is the case with the Shanghai Pilot FTZ, the [definition of 'foreign related' arbitration](#) has been expanded in Hainan to permit the enforcement of arbitration awards made outside of China. Such awards may be enforceable in Hainan if they are made between or among FTZ registered wholly foreign owned entities, or between Hainan FTZ registered commercial entities. This policy differentiates arbitration in Hainan from standard practice in China, which provides no legal basis for Chinese domestic entities to submit domestic disputes to arbitration outside of China. The expansion of the term 'foreign related' to incorporate Hainan FTZ entities increases the scope for the enforcement of foreign arbitral awards involving a Hainan FTZ company. The [2018 Supreme People's Court Opinion \(Opinion\)](#) on the provision of legal services in Hainan, appears to take a more flexible approach to the term 'foreign related' than has traditionally been adopted in the past. The Opinion states that extraterritorial arbitration between commercial or civil entities within free trade zones or free trade ports, "*should not be deemed invalid on the grounds of no foreign-related*

factors".²⁾ This Opinion is important because it appears to widen the scope for the enforcement of foreign arbitral awards within the Hainan FTZ. This Opinion follows the trend within China which has seen an expansion of the term 'foreign related' in cases such as *Ningbo* and *Shanghai Golden Landmark*, both of which relate to contracts for the sale of goods in the Shanghai FTZ— more on these decisions can be found in a previous blog post [here](#).

Secondly, in order to improve the efficiency in which foreign related disputes are dealt with, the Hainan government has created multiple tribunals, specifically established to deal with international cases. This policy is testament to the central government's efforts to make Hainan a reliable venue for the resolution of international disputes. These tribunals will centralise the Hainan courts' jurisdiction over foreign related civil and commercial cases, thereby creating a greater harmonisation in how such cases are dealt with. These tribunals are China's first provincial-level cross-regional tribunals specifically created to hear first-instance foreign related cases. The establishment of such tribunals demonstrates that a lot of thought has gone into making Hainan's legal system more international and better prepared for dealing with foreign cases.

Aside from dispute resolution, the Hainan FTZ has adopted several policies in order to further promote foreign investment. Such policies include lower rates of income tax, 30-day visa free access for foreigners and an attractive policy for the recruitment of overseas talent, which are all elements of a strategy, designed to turn Hainan into a centre for global trade. This strategy has also seen the establishment of the Hainan International Arbitration Court (HIAC) (sometimes referred to as the Hainan International Arbitration Commission), a new arbitral institution which was set up in 2018, to facilitate the resolution of international disputes and promote Hainan as a venue for arbitration.

The Importance of the HIAC

The HIAC was set up to administer arbitration and mediation cases through its team of over 60 staff. It has invested heavily into the recruitment of international arbitration practitioners in order to increase its global focus. As a result, the HIAC currently has access to around 600 arbitrators over 200 of which are foreign nationals.

A distinctive feature of the HIAC that differentiates it from other arbitration institutions relates to the permitted use of mediation at any stage of the arbitral process. The HIAC, like the China International Economic and Trade Arbitration Commission (CIETAC) and the Beijing Arbitration Commission (BAC), permits the use of Med-Arb during proceedings in order to facilitate a settlement between the parties. The HIAC follows the trend of dispute resolution in China, which includes the use of Med-Arb as a tool to resolve disputes. The legislative basis for the use of Med-Arb can be found in Article 51 of the [1994 PRC Arbitration Law](#) which states that "[t]he arbitration tribunal may carry out conciliation prior to giving an arbitration award".

Article 48 of the [HIAC's Arbitration Rules](#) states that "[u]pon the request of or with the consent of the parties, the arbitral tribunal may conduct mediation during the arbitral proceedings". If a settlement is reached, the parties can prepare a settlement agreement themselves, or ask the tribunal to either produce one or write an award by consent based on what is agreed in the settlement. If the parties fail to reach a settlement, the tribunal will proceed with issuing an award. However, under the HIAC Rules "[i]f the mediation fails to lead to a settlement, neither party shall be permitted to

adduce evidence of or to refer to or use any statements, opinions, views or proposals expressed by the other party or by the arbitral tribunal during the mediation in support of any claim, defense or counterclaim in the subsequent arbitral proceedings, or as grounds in any judicial or other proceedings". This requirement also extends to the arbitrators, who cannot produce an award based *"on the opinions expressed by the parties during the mediation"*.

A distinctive feature that differentiates the HIAC from arbitral institutions within China relates to the way the HIAC is governed. The HIAC is one of only two arbitral institutions within China that adopts a 'corporate governance' style of management. The other being the Shenzhen Court of International Arbitration Court (SCIA). This corporate governance style of management relates to a structure which incorporates a board of directors (some of whom are non-Chinese nationals) that operates at the core of the institution. Further to this, the HIAC is the only arbitral institution in China that has received **Administrative Measures** from a provincial government, which is the first provincial document released separately to an arbitration institution in China and they specify that the HIAC is a statutory body established for the benefit of the public as a non-profit organisation. The establishment of the HIAC is an important milestone for the development of Hainan, given that a global arbitration institution with a strong international focus would strengthen Hainan's position as a potential venue for foreign investors. Although newly established, the HIAC will foreseeably play a key role in the rapid development of a province which recorded a GDP growth of 5.8% in 2018.

Looking Ahead

Hainan is a tropical island with a significant supply of minerals and over 70 types of natural resources, the island features large coastlines that are typical of any global trading port. It is therefore likely that as the island develops, disputes will arise that reflect the increased volume of investments typically made in the province. The construction, energy and maritime sectors are likely to experience an increase in demand for dispute resolution services as Hainan's development advances. The HIAC's sector specific offices specialising in financial and maritime arbitration are one answer to this trend.

Going forward, the establishment of Hainan specific FTZ dispute settlement rules may be an option in order to further develop arbitration on the island. Hainan could follow a similar path to the Shanghai FTZ in order to make itself more arbitration friendly, this could include the acceptance of foreign arbitral institutions to administer cases with a Chinese seat in the FTZ and the permissibility of *ad-hoc* arbitrations, which if enacted, could further develop arbitration within Hainan.

This is an exciting time for Hainan. The establishment of the Hainan FTZ alongside the HIAC represent significant steps that may well turn the island into an arbitration paradise.

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References

?1, ?2 This is the author's courtesy translation.

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