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The Turn to Fact or Fiction: Ad Hoc Arbitration in the Draft Amendment to PRC Arbitration Law

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The proposed Article 91 in the **Draft Amendment to PRC Arbitration Law** (the "Draft Amendment"), which was issued by the PRC Ministry of Justice in July 2021, introduces ad hoc arbitration: "The parties to a commercial dispute involving foreign elements may agree on an institutional arbitration or directly agree that it shall be arbitrated by a specially established arbitration tribunal". According to the PRC Ministry of Justice, the **main consideration** for permitting ad hoc arbitration is that the PRC has acceded to the **New York Convention**, and foreign-administered ad hoc awards can be recognized and enforced in PRC—and domestic-administered and foreign-administered arbitration should be treated equally. Nevertheless, considering the current national situation, the Ministry of Justice is proposing to limit the scope of ad hoc arbitration to domestic arbitration with foreign elements in PRC.

This introduction of ad hoc arbitration is expected to be a breakthrough development for the **PRC Arbitration Law** (the "Arbitration Law"). This post will analyse ad hoc arbitration in the context of current PRC law and in the global context to consider whether ad hoc arbitration will become a reality in the PRC or remain a fiction. This post does not explicitly address the separate **issue** of differentiating between purely domestic arbitration and domestic arbitration with foreign elements.

Ad Hoc Arbitration Under the Current PRC Law

Since officially recognizing arbitration as a means of ADR, the PRC only admitted institutional arbitration domestically. Under Article 16 of the existing Arbitration Law, which was promulgated in 1994, a valid arbitration agreement must contain three elements: (1) the parties' intention to arbitrate; (2) the specific matter for arbitration; and (3) a designated arbitration commission. Thus, an arbitration agreement that does not designate an institution administering the arbitration procedure will be voided. During the 26 years since the promulgation of the Arbitration Law, more than **4 million cases** have been completed through institutional arbitration in PRC, while ad hoc arbitration is not commonly contemplated by parties and arbitrators. The PRC Supreme People's Court in 2016 promulgated the **Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones**, among other purposes, to promote awareness and potential application of ad hoc arbitration as a pilot measures in certain Free Trade Zones. However, due to **many barriers** posed by the legal framework and unique practising environment, reported ad hoc arbitration cases in those Free Trade Zones were rare.

The Draft Amendment has **relaxed** the statutory requirement on validity of arbitration agreement, particularly Article 16 of the existing Arbitration Law. It can be reasonably expected that more arbitration agreements will be given effect, at least those that stipulate institutional arbitration. But it still needs to be observed if ad hoc arbitration would indeed increase in PRC, given the historical dominance of institutional arbitration in PRC.

Comparative Analysis

Ad hoc arbitration has been facilitated by modern arbitration laws in some countries that have a longer track-record of arbitration, for instance, the **English Arbitration Act** and **Singapore International Arbitration Act**, as well as by the UNCITRAL, in particular the **UNCITRAL Arbitration Rules**, which are often referenced in arbitration clauses providing for ad hoc arbitrations. Compared to these rules and national arbitration laws, the existing Arbitration Law features more on institutional arbitration than on ad hoc arbitration.

First, most of the provisions are mandatory. Fifty-three out of the 80 provisions in the existing Arbitration Law uses mandatory expression, such as “should” or “ought to”. On the other hand, most provisions of the UNCITRAL Arbitration Rules are optional, which allows parties to opt out and facilitates ad hoc arbitration. The English Arbitration Act explicitly lists its mandatory provisions in Schedule 1, and the majority of provisions are considered non-mandatory.

Second, the contents of most provisions in the existing Arbitration Law refer directly to institutional arbitration. For example, Chapter 2 is named as “Arbitration Commissions” and focuses on arbitration institutions. Chapter 4 on arbitration procedure is also dominated by provisions related to arbitration institution, and even the commencement of an arbitration procedure is to be decided by the arbitration commission. On the other hand, the UNCITRAL Arbitration Rules, English Arbitration Act, and Singapore International Arbitration Act do not have a strong focus on institutional arbitration.

The Draft Amendment does not deviate from this general focus on institutional arbitration. This leads to the question of whether the ad hoc provisions in the Draft Amendment could effectively facilitate and sustain ad hoc arbitration in practice. Apart from Article 91, the Draft Amendment also incorporates Articles 92 and 93 to specifically regulate ad hoc arbitration, which provides basic norms, such as tribunal formation, arbitrator challenge, and court supervision over ad hoc arbitration, namely that awards shall be filed in the court of the place of ad hoc arbitration.

These three articles are all in the Chapter 7 on domestic arbitration with foreign elements, and Article 88 in this Chapter stipulates that “The provisions of this Chapter shall apply to the arbitration of disputes involving foreign factors. Where there are no provisions in this Chapter, other relevant provisions of this Law shall apply”. But, like the exiting Arbitration Law, the “other relevant provisions” in the Draft Amendment generally concern institutional arbitration and may be hard to apply to ad hoc arbitration. Therefore, it may be doubtful whether the three articles in the Draft Amendment could adequately facilitate ad hoc arbitration.

The Global Popularity of Institutional Arbitration

Traditionally, advantages of ad hoc arbitration are thought to be: (1) **low costs**; (2) speed; (3) flexibilities of rules of procedure; and (4) international acceptance.[1)]

While ad hoc arbitration remains an important arbitration model, it is also noted that more parties prefer institutional arbitration as opposed to ad hoc arbitration. According to research by **PwC and Queen Mary University of London** in 2008, 86% of awards were rendered by arbitration institutions rather than through ad hoc arbitrations.

The same trend could also be observed in recent statistics from major arbitration hubs in Asia. For instance, of the 1,080 cases filed in 2020 at the **Singapore International Arbitration Centre**, 1,063 cases (98%) were administered by the institution and the remaining 17 (2%) cases were ad hoc appointments; of the 318 filings in 2020 at the **Hong Kong International Arbitration Centre**, 203 (64%) were administered by the institution.

The reason for the dominance of institutional arbitration is considered to be that arbitration has become increasing complex, thus requiring more effort to organize an international arbitration efficiently.[2)] Arbitral institutions have endeavoured to adapt to these challenges. In addition, the traditional advantage of ad hoc arbitration is less obvious than before, as cases have become more legally, contractually, and financially complicated. The situation is particularly obvious in some emerging markets without a long history of arbitration, like in the MENA (Middle East and North Africa) region, where ad hoc arbitration has not succeeded in gaining popularity.[3)] By and large, ad hoc arbitration in the MENA region suffers from lack of process, a shortage of arbitrators to undertake ad hoc work, and the abundance of jurisdictional challenges.[4)] Similar to MENA in the history of arbitration usage, the PRC may also face challenges in developing ad hoc arbitration.

Concluding Remarks

Given the history and tradition in arbitration usage, the dominance of institutional arbitration under the existing Arbitration Law and the Draft Amendment, and popularity of institutional arbitration worldwide, particularly in Asia, it is likely that more efforts in the Draft Amendment and related frameworks are needed before ad hoc arbitration in scale may become a reality.

References

?1 Harry L. Arkin, "International Ad Hoc Arbitration: A Practical Alternative", *International Business Lawyer*, Vol. 15, No. 1 (January 1987).

?2 Ulf Franke, "Arbitral Institutions: Trends and Developments", *2009 Asian DR*, p. 115.

?3 Essam Al Tamimi, "International Commercial Arbitration in the MENA: Institutional v Ad Hoc: A Wealth of Choice", *83 Arbitration*, Issue 1 (2017), p. 19.

?4 *Id.*