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Ad hoc Arbitration in China: Progress and Uncertainty

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As the revision of the *Arbitration Law of the People's Republic of China* ("**PRC Arbitration Law**") progresses, *ad hoc* arbitration is gaining more attention in China. This Blog has previously discussed whether *ad hoc* arbitration will truly take root in the country (*see The turn to fact or fiction: ad hoc arbitration in the draft amendment to PRC Arbitration Law*). Recently, there have been notable advancements in the adoption of practical rules surrounding *ad hoc* arbitration in certain regions while on the national level, there appears to be more of a cautious stance in expanding the scope of *ad hoc* arbitration.

This article provides a brief summary of these developments, starting with a national perspective and discussion of the key issues regarding the draft amendments to the PRC Arbitration Law. The article then ends with an overview of regional efforts to introduce *ad hoc* arbitration, including initiatives under the current regional system in Shanghai.

Ad hoc Arbitration in China and Changes in Recent Years

Ad hoc arbitration generally is not recognized as a valid form of arbitration in China under the current Arbitration Law, which remains the authoritative national legislation on the subject. Article 16 of the Arbitration Law provides, "An arbitration agreement must include the following contents: (1) an expression of intent to submit disputes for arbitration; (2) the scope of disputes for arbitration; (3) *a selected arbitration commission*." Therefore, when parties enter into an *ad hoc* arbitration agreement that does not involve an arbitration commission (roughly equivalent to an "arbitral institution" outside of China) to administer the arbitration, such an arbitration agreement will be deemed invalid under the Arbitration Law.

That said, PRC courts will recognize some *ad hoc* arbitration proceedings. In fact, when the governing law of the arbitration agreement recognizes the validity of *ad hoc* arbitration agreements, PRC courts may choose to recognize the proceedings conducted under it. For example, in Case [2021] Shanghai 0115 Civil Frist Instance No.12932-(1), the Shanghai Pudong New Area People's Court found that an *ad hoc* arbitration agreement in dispute was valid under Swiss law, the governing law of the agreement (and the law of the seat of arbitration), and therefore ruled that the arbitration agreement was valid.

Parties in international disputes may even agree on an *ad hoc* arbitration seated in China but introduce the law of another jurisdiction (under which *ad hoc* arbitrations are recognized) as the

governing law of the arbitration agreement. For example, in the first *ad hoc* arbitration case seated in China, even though the place of the arbitration was Qingdao, China, the tribunal ultimately found the *ad hoc* arbitration agreement valid and effective because of the parties' agreement that "the governing law of the arbitration agreement shall be Hong Kong arbitration law."

A foreign *ad hoc* arbitration award is also likely to be recognized and enforced in China if such an award has met the conditions of recognition and enforcement under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("**New York Convention**").

Ad hoc Arbitration in the Recent Draft Amendments of the Arbitration Law

The *Amended PRC Arbitration Law (Draft for Comments)* ("**2021 Draft for Comments**") released by the PRC Ministry of Justice on 30 July 2021 introduced new rules to allow "commercial disputes involving foreign-related factors" to be settled by *ad hoc* arbitration in China (Article 91). Correspondingly, the draft also removed the requirement of an "arbitration commission" to constitute a valid arbitration agreement. These 2021 Draft for Comments demonstrated the ambition to expand the practice of *ad hoc* arbitration to a broader scope and at a national level in China.

However, on 4 November 2024, a new draft of the amended PRC Arbitration Law ("**2024 Draft Revisions**") was released by the PRC Ministry of Justice for public comment. The new draft narrowed the scope of disputes that can be settled by *ad hoc* arbitration to "disputes arising from foreign-related maritime matters" and "disputes with foreign-related factors occurring between enterprises registered in FTZs" only (Article 79). In addition, the 2024 Draft Revisions brought back the requirement of an "arbitration commission" to create a valid arbitration agreement.

Notably, the legislators appear to have changed their position on *ad hoc* arbitrations after debating for three years. The latest 2024 Draft Revisions essentially confirm the existing regime for *ad hoc* arbitration in China, rather than expanding its scope.

In light of the 2024 Draft Revisions, there are several important issues that remain unclear, and which parties may encounter in practice:

Is Asset Preservation Possible? The current draft does not explicitly address this issue. While some may argue that the provisions applicable to an institutional arbitration, such as asset preservation should also apply to *ad hoc* arbitration, the unique characteristics of *ad hoc* arbitration may still pose complexity and uncertainties. For example, in institutional arbitration, a preservation application is typically submitted first to the arbitration institution, which then forwards the application to the court, and a direct submission to the court generally will not be accepted. However, in *ad hoc* arbitration, there is no arbitration institution administering the case, and thus it will be uncertain if and how an asset preservation application can be submitted.

Which Court Conducts Judicial Review? In an institutional arbitration, it is typically the intermediate people's court located in the seat of the arbitration institution that is responsible for confirming or vacating an arbitral award (Article 58 of the PRC Arbitration Law). However, in the case of an *ad hoc* arbitration, there is no arbitral institution, and the 2024 Draft Revisions have not explicitly clarified the competent court for judicial review. That said, the current draft did provide that in an arbitration involving foreign factors (*ad hoc* arbitration falls within this category), the

competent court for judicial review can be determined by the "place of arbitration." The draft also stipulated that if the parties cannot agree on a location as the place of arbitration, it will be determined by the arbitration rules agreed upon by the parties, and if the rules are also silent on this issue, the arbitral tribunal will determine it based on the principle of facilitating the settlement of dispute (Article 78). Therefore, parties should carefully consider their choice of arbitration venue to ensure that a pro-arbitration court conducts the judicial review.

Where Can the Awards be Enforced? If *ad hoc* arbitrations are ultimately incorporated into China's new arbitration law, it is likely that arbitral awards issued through *ad hoc* arbitrations will be enforceable in Mainland China and in member states of the New York Convention. However, uncertainties may arise when parties seek to enforce *ad hoc* arbitral awards made in Mainland China within Hong Kong and Macau.

In the case of Macau, the current Arrangement of the Supreme People's Court on Mutual Recognition and Enforcement of Arbitration Awards Between the Mainland and Macau Special Administrative Region only applies to awards made by Mainland *arbitration institutions*, and thus there might be uncertainty whether awards made by an *ad hoc* arbitral tribunal in Mainland China are recognizable and enforceable in Macau. In the case of Hong Kong, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region requires an enforceable award to be one rendered "under the PRC Arbitration Law," which as explained above currently does not fully recognize *ad hoc* arbitrations.

China's Regional Explorations of *Ad Hoc* Arbitration

Pending amendments to the Arbitration Law, several regions in China have begun exploring *ad hoc* arbitration independently.

China's attempt to explore *ad hoc* arbitration regionally began in 2016 when the Supreme People's Court ("**SPC**") promulgated the *Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones* ("**SPC Opinions**"). The SPC Opinions provide that enterprises registered in free trade zones ("**FTZ**") can reach an *ad hoc* arbitration agreement to settle their disputes if the arbitration has "a specific place of arbitration in Mainland China," "specific arbitration rules," and "specific arbitrators." An FTZ refers to a special economic zone established within the country's borders but with policies akin to those of a foreign trade zone utilizing preferential tax and customs regulatory policies, with the main objectives being trade liberalization and facilitation. Following the promulgation of the SPC Opinions, other regional policies emerged.

On 23 November 2023, the Standing Committee of the Shanghai People's Congress issued the *Regulation of the Shanghai Municipality on Promoting the Initiative for an International Commercial Arbitration Center* ("**Shanghai Regulation**"), which for the first time introduced *ad hoc* arbitration in Shanghai and further authorized the Justice Department to promulgate detailed measures to promote the system.

On 13 June 2024, the Shanghai Bureau of Justice released the *Shanghai Measures for Promoting Ad Hoc Arbitration in Foreign-Related Commercial and Maritime Disputes (For Trial*

Implementation)" ("**Shanghai Promotion Measures**"), which lay out the basic rules of *ad hoc* arbitration in Shanghai. The Measures only cover commercial or maritime disputes that involve "foreign-related factors." Similar to the SPC Opinions, the Measures also have the three "specific" requirements, requiring the place of the *ad hoc* arbitration be Shanghai, specific arbitration rules, and specific arbitrators. The Measures also limit the scope of parties that can engage in *ad hoc* arbitration, but compared to the SPC Opinions, the Measures include certain non-FTZs enterprises in Shanghai and companies outside Mainland China.

In order to provide practical support to *ad hoc* arbitration procedure, the Shanghai Arbitration Association released the *Shanghai Arbitration Association Ad Hoc Arbitration Rules*, and arbitration institutions based in Shanghai such as the Shanghai International Arbitration Centre and the China Maritime Arbitration Commission also have released their own guidelines/rules regarding the assistance service they may provide to *ad hoc* arbitration. In late July 2024, the first maritime *ad hoc* arbitration in China rendered its arbitral award in Shanghai.

Conclusion

Although the latest 2024 Draft Revisions to the PRC Arbitration Law adopted a more conservative view of *ad hoc* arbitration, recent regional developments in *ad hoc* arbitration demonstrate an increasingly open attitude towards *ad hoc* arbitration, providing more options for businesses choosing to arbitrate in China. Given the cautious and slow advancement of the amended PRC Arbitration Law on the national level, Shanghai's active promotion of *ad hoc* arbitration on a more regional scale reflects its ambition to become a global arbitration center. However, it is crucial for parties to ensure compliance with local legal requirements and enforceability of their selected arbitration protocols. Proper legal guidance is essential to effectively navigate this advanced yet complex arbitration landscape.

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