The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges Ahead

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Abstract

The increased commercial interaction between China and the rest of the world leads to disputes, many of which are resolved through international commercial arbitration. Whereas the arbitration industry in the "People's Republic of China" (PRC) has been protectionist, recent developments suggest that foreign arbitration institutions may have increasing access to the market, a potential boon to foreign and Chinese parties alike. This article analyses the most recent developments in the area of non-mainland arbitration institutions acting as service providers in mainland China and the potential impact of these developments on Sino-foreign disputes. There have been two notable advancements in foreign arbitration in recent years: (1) the permission given to foreign arbitral institutions to administer foreign-related arbitrations in the Shanghai Lin-Gang Pilot Free Trade Zone, and (2) the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region. Taken together, these developments open the gate to foreign arbitration institution in mainland China, and are signs of progress place at the cusp of the reform of the 1994 China Arbitration Law. Yet there are lingering obstacles to the internationalization of commercial arbitration in China. Accordingly, this article introduces the existing international arbitration regime in mainland China; assesses what the recent developments mean in the context of Sino-foreign disputes; sheds light on possible challenges associated with the changes; and makes recommendations for the on-going reform of arbitration in China.

Keywords: Sino-foreign disputes, PRC arbitration, arbitration institutions, interim measures, Shanghai Free Trade Zone

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Introduction

Since the 1990s, when first the Chinese state-owned enterprises (SOEs) and then the privately-owned enterprises (POEs) started engaging in cross-border business and overseas investment, the dispute resolution industry in the People's Republic of China (PRC or 'the mainland') has been striving to keep up to provide greater legal protections to Chinese outbound capital and cross-border business. In recent years, PRC dispute resolution has entered its own albeit limited 'opening and reform,' to use a slogan that signaled the liberalization of the economy in 1978. This reform, including both doctrinal and institutional aspects, has taken the form of an increasingly outward-looking judiciary that is focused on foreign law and conflicts of law issues, greater acceptance of cross-border business mediation as demonstrated in China's signing the Singapore Mediation Convention, and, most notably, a thriving and hyper-competitive market for international arbitration.

International arbitration in the mainland has seen a particular push to further internationalize; specifically, it has sought to attract foreign parties conducting business with mainland businesses to Chinese forums. However, the arbitration industry in the mainland has been, for most of this period, notoriously protectionist and foreign arbitration institutions[1] had no access to the mainland market. Specifically, foreign arbitration institutions have historically not been able to arbitrate domestic disputes, including, for

[1] By 'foreign arbitration institutions,' we mean any arbitration institution based outside of the PRC, including those institutions based in Hong Kong.

example, between two foreign-invested enterprises (FIEs), which are subject to the same governance structure as PRC domestic companies under relevant PRC law.[2] Recent developments may signal a new direction: a mainland arbitration market increasingly opening to non-mainland arbitration institutions, meaning greater coordination between PRC courts and arbitration institutions and counterparts within the region and beyond. In particular, there have been two notable advancements in foreign arbitration: (1) the permission given to foreign arbitration institutions to administer foreign-related arbitrations in the Shanghai Lin-Gang Pilot Free Trade Zone (Shanghai Lin-Gang FTZ) effective from 1 January 2020 and (2) the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (HKSAR) effective from 1 October 2019.

Taken together, these developments open the gate to foreign arbitration institutions in the mainland. Further, these signs of progress take place at the cusp of the reform of the 1994 PRC Arbitration Law.[3] Yet, a number of problems remain in the opening up of the mainland's arbitration market; these problems exist on top of China's divergence from international norms in its own international commercial arbitration practices, including the centralization of powers in its arbitration commissions (and people's courts) over arbitral tribunals. Accordingly, based on analysis of the relevant documents as well as a selection

[2] Implementation Regulations for the Foreign Investment Law of the People's Republic of China (中華人民共和國外商投資實施條例), promulgated by the State Council on 31 December 2019, art. 6.

[3] PRC Law on Arbitration (中華人民共和國仲裁法), adopted at the 9th Session of the Standing Committee of the National People's Congress on 31 August 1994, as amended at the 29th Session of the Twelfth National People's Congress on 1 September 2017.

of interviews with practitioners, including arbitrators, lawyers, and businesspeople,[4] this article first decodes what these developments mean in the context of Sino-foreign disputes, and then sheds some light on possible challenges associated with the changes and, in so doing, makes recommendations for the on-going reform of arbitration in China.

I, Sino-Foreign Disputes

Over the last years, China has greatly increased its commercial presence on the global stage. To illustrate, by 2018, China was the second largest capital exporting country in the world: 27,000 Chinese enterprises had invested in 188 countries, and had established 43,000 Chinese-invested enterprises overseas.[5] The value of trade between China and the European Union alone is approximately one billion euro a day.[6] The Belt and Road Initiative (BRI), announced initially in 2013 by President Xi Jinping and which seeks to facilitate trade and investment between China and emerging economies across Eurasia has witnessed Chinese investors establishing over 10,000 enterprises in BRI host states, contributing $17.89 billion in investments.[7] The 2020 coronavirus pandemic has slowed down many cross-border projects, but in the long-term, Sino-foreign transactions will likely continue, if at a more modest pace.

[4] Interviews were conducted by one author (Erie) from 2016 to 2020 as part of the "China, Law and Development" project, funded by the European Research Council (No. 803763). In total, over 200 hundred interviews have been conducted to date for the project of which a representative selection have been chosen for this present paper. Given confidentiality concerns, interviewees are anonymized herein.
[5] Ministry of Commerce of the PRC, National Bureau of Statistics, State Administration of Foreign Exchange (中華任命共和國商務部、國家統計局、國家外匯管理局), 2018 China FDI Statistical Bulletin （2018 年中國對外直接投資統計公報） 3 2019.
[6] See European Commission, 'China', *Countries and Regions* (2020) <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> accessed 25 August 2020.
[7] Ministry of Commerce (n 5) 3.

The increase in China's international business has seen a concomitant rise in its cross-border disputes. There are, roughly, three kinds of Sino-foreign disputes: commercial disputes, investment disputes, and state-to-state trade disputes. The first pertains to those disputes between investors (enterprises and individuals); the second refers to disputes between a Chinese investor and the host government, and the third are inter-governmental disputes. This article focuses on the first type of disputes. Following the COVID-19 pandemic, as Chinese investors invoke *force majeure* to excuse themselves from liability during the pendency of non-performance, commercial disputes are likely to further increase.[8]

Depending on the parties, the nature of the dispute, and the dispute resolution provisions of the applicable contract, a Sino-foreign dispute could land in any number of forums. These include the host state's courts, PRC courts, third party courts including 'international commercial courts,' mediation, or international arbitration. Chinese investors' dispute resolution preferences for their cross-border disputes depend on a range of factors including their experience, whether they are state-owned or privately-held, their legal counsel, and the nature of the dispute, among others. Chinese parties, and especially POEs, who are relatively new to cross-border business show a preference for PRC dispute resolution forums, including courts and arbitration, although pursuant to contractual negotiation with the opposing party, often, they settle for international arbitration.[9] Domestic options for Chinese arbitration institutions include *inter alia* the China

[8] Interviews with employees of Chinese companies conducting business in Pakistan, Islamabad, 12 April 2020.

[9] This general observation is based on interviews with Chinese lawyers and senior managers in Chinese companies as well as lawyers who represent Chinese companies overseas conducted from 2016 to 2019. See Matthew S. Erie, 'Chinese Law and Development,' *Harvard International Law Journal* (forthcoming).

International Economic and Trade Arbitration Commission (CIETAC), Beijing International Arbitration Center, Shanghai International Arbitration Center, and the Shenzhen Court of International Arbitration, to name the main houses. Chinese SOEs who have been investing outside of China since the late 1990s tend to prefer arbitration in Singapore and in the HKSAR. [10] Specifically, popular forums include the Hong Kong International Arbitration Center (HKIAC), CIETAC-Hong Kong, the Singapore International Arbitration Center (SIAC), and the International Chamber of Commerce (ICC).

II. International Commercial Arbitration in the Mainland

A. Overview

The central piece of legislation governing arbitration in the mainland is the PRC Arbitration Law (1994, as amended 2017). At the outset, it is important to note that unlike most other jurisdictions in Asia, the PRC Arbitration Law is not modeled after the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006), meaning that the PRC Arbitration Law diverges in important respects from international norms. One of the defining features of the PRC Arbitration Law is that it established a bifurcated regime for Chinese arbitration institutions referring to 'domestic' versus 'foreign-related' arbitration, The bifurcation results in a number of legal consequences, including what types of arbitration institutions can accept which types of disputes.[11]

[10] Interviews with in-house counsel of Chinese SOEs in Shanghai, China, 15 April 2019.
[11] There are additional legal issues affected by this split including: the scope of review of arbitral awards (with domestic awards being more severely scrutinized), the requirement that domestic arbitration is seated

'Domestic' arbitration means both parties are Chinese and the matter under dispute has a nexus with the PRC.[12]. 'Foreign-related' arbitration is understood as having a 'foreign element.' A 'foreign element' is defined as (i) at least one of the parties is a foreign citizen, foreign legal person, or other organization or individual without nationality, (ii) the habitual residence of a party or parties is located outside of the PRC, (iii) the subject matter of the dispute is located outside the PRC, (iv) the legal facts affecting the civil relation take place outside the PRC, or (v) there exist any other circumstances that can be determined as foreign-related civil relations.[13] Arbitration involving Hong Kong, Macau and Taiwan is also understood as 'foreign-related'.[14] Historically, CIETAC had a monopoly over 'foreign-related' arbitration, following the enactment of the PRC Arbitration Law, additional arbitration institutions could also accepted 'foreign-related' cases.[15]

In terms of the types of permissible arbitration institutions, there are both 'arbitration commissions' and 'foreign-related arbitration commissions'. Beginning with the former, the type which were allowed to accept not only domestic but also 'foreign-related' arbitration pursuant to the regime established by the PRC Arbitration Law, chapter

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in the mainland and is administered by a PRC institution, and the limitation for domestic arbitration to apply the PRC law as a substantive law.

[12] Zhiqiong June Wang and Jianfu Chen, *Dispute Resolution in the People's Republic of China: The Evolving Institutions and Mechanisms* (Leiden: Brill, 2019), 173.

[13] SPC Interpretation on Several Issues Concerning the Law of the PRC on the Application of Laws to Foreign-Related Civil Relations (1) (最高人民法院關於使用中華人民共和國涉外民事關係法律使用法若干問題的解釋（一）), promulgated 28 December 2012, effective on 7 January 2013, art. 1, <http://tdxfy.chinacourt.gov.cn/public/detail.php?id=475> accessed 25 August 2020. See also Monika Prusinowska, 'Recent Developments of Chinese Arbitration System and Directions for Further Changes' *Tsinghua China Law Review* 10 (2017), 41; Mo Zhang, 'Codified Choice of Law in China: Rules, Processes and Theoretical Underpinnings,' *North Carolina Journal of International Law & Commercial Regulation* 37 (2011), 85.

[14] Peter Yuen, Damien McDonald, and Arthur Dong, *Chinese Arbitration Law* (New York: LexisNexis, 2015), 79.

[15] Notice of the General Office of the State Council Regarding Some Problems Which Need to be Clarified for the Implementation of the PRC Arbitration Law (國務院辦公廳關於貫徹實施中華人民共和國仲裁法需要明確的幾個問題的通知), promulgated by the State Council on 8 June 1996, effective 8 June 1996, art. 3.

2 of that law specifies that arbitration commissions (*zhongcai weiyuanhui*) are established under municipal governments,[16] meaning that they are not independent dispute resolution institutions,[17] a fact with implications for any party, and particularly for those in dispute with commercial entities that owe some kind of duty to the relevant level government. Further, in 2018, the Central Committee of the Chinese Communist Party (CCP) clarified that the Ministry of Justice would supervise all arbitration commissions in the country.[18] There are over 255 of these arbitration commissions and their caseload is almost exclusively domestic.[19] As for the second type, which are directed to handle 'foreign-related' arbitration, chapter 7 of the PRC Arbitration Law allowed for the establishment of 'foreign-related arbitration commissions' (*shewai zhongcai weiyuanhui*) under the China Chamber of International Commerce,[20] the governing body for CIETAC, meaning that these institutions were also established within the existing PRC arbitration framework, and suggested that non-PRC arbitration institutions would be excluded from such a definition.

[16] See PRC Arbitration Law, art. 10, stating that arbitration commissions may be established in municipalities directly under the central government and in cities that are the seats of the people's governments of provinces or autonomous regions.

[17] See also Interim Measures for the Registration of Arbitration Commissions (仲裁委員會等級暫行辦法), promulgated by the State Council on 28 July 1995 and effective 1 September 1995, <http://www.bjac.org.cn/news/view?id=1024>, specifying the registration authority of an arbitration commission as the judicial administrative department of the province, autonomous region, or municipality. CIETAC is an exception as it was founded under the mandate of the China Council for the Promotion of International Trade. See Decision of the Government Administration Council Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (中央人民政府政務院關於在中國國際貿易促進委員會內設立對外貿易仲裁委員會的決定), promulgated on 6 May 1954, effective on 6 May 6 1954, art. 1, <http://en.pkulaw.cn/display.aspx?cgid=ab4d97919ebc28b9bdfb&lib=law> accessed 25 August 2020.

[18] Explanation of the Administrative Measures for the Registration of Arbitration Commissions (Draft for Soliciting Opinions) (仲裁委員會等級管理辦法（徵求意見稿）), promulgated by the PRC Ministry of Justice on 12 September 2019, <http://www.moj.gov.cn/news/content/2019-09/12/zlk_3231896.html> accessed 25 August 2020.

[19] Wang and Chen (n 12) 173.

[20] PRC Arbitration Law, art. 66.

The implications of the bifurcation were that if arbitration took place in China, then a Chinese arbitral commission would be chosen; not only were domestic *ad hoc* arbitrations not permitted but, for central to our purposes here, non-PRC arbitration institutions have not historically been allowed to administer arbitrations within the PRC even if, as a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, China recognizes the awards of foreign arbitration institutions.[21]

In recent years, courts have shown an increasing openness to expanding the category of permissible arbitration institutions that can administer 'foreign-related' arbitration. So while the status of foreign arbitration institutions in the mainland has been ambiguous, the Supreme People's Court (SPC) has sought to clarify its position over time. For instance, in 2013 the SPC issued a reply to the request for instructions on the application and confirmation of the validity of an arbitration agreement in the case of *Anhui Longlide Packing and Printing Co., Ltd. vs. BP Agnati S.R.L.*[22] In its reply, the SPC upheld the validity of an arbitration agreement seated in Shanghai but administered by the ICC. In doing so, it interpreted a designated 'arbitration commission', a requirement for a valid arbitration agreement under article 16 of the PRC Arbitration Law, to include foreign arbitration institutions.[23] The 2013 SPC reply appears to remove the obstacle to foreign arbitration institutions that the PRC Arbitration Law does not provide them with a legal basis.

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[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 33 U.N.T.S., <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed 25 August 2020.

[22] Reply of the SPC to the Application for Confirmation of the Validity of the Arbitration Agreement regarding Anhui Longlide Packing and Printing Co., Ltd. vs. BP Agnati S.R.L. (最高人民法院關於申請人安徽省龍利得包裝印刷有限公司與被申請人 BP A gnati S.R.L.申請確認仲裁協議效力案的請示的復函), [2013] Minsitazi No. 13, 25 March 2013, <https://www.pkulaw.com/chl/233828.html> accessed 25 August 2020.

[23] See PRC Arbitration Law, art. 16(3).

While the SPC reply was widely heralded by the arbitration community as a landmark decision, it nonetheless fails to address a number of issues. Chief among these is the problem of how courts should categorize an award rendered in the mainland by a foreign arbitration institution, for example, as a 'domestic award' or 'non-domestic award'. If the latter, then such awards face the problem of how they will be enforced within the mainland. Further, the SPC reply does not have the force of law, and is merely persuasive on lower courts, meaning that the question of the validity of foreign-administered arbitral awards within the PRC remains in doubt.

To address the inadequacies of the PRC Arbitration Law, since 2017, the SPC has issued a number of normative documents including notices (*tongzhi*) and judicial interpretations (*sifa jieshi*). The latter fill lacunae in the relevant legislation and have a *de facto* status of law.[24] These judicial documents focus on how cases, including cross-border ones, should be resolved in the PRC by Chinese arbitration commissions.[25] Collectively,

[24] Regulations on Judicial Interpretation Work (最高人民法院發布關於司法解釋工作的規定), promulgated by the Adjudication Committee of the SPC, 11 December 2006 and effective 1 April 2007, art. 5. See also Fan, Kun, 'Supreme Courts and Arbitration: China', *b-Arbitra | Belgian Review of Arbitration* 2, (2019), 589-90.

[25] Notice of the SPC on Relevant Issues Concerning the Centralized Handling of Judicial Review Cases in Arbitration (最高人民法院關於仲裁司法審查案件歸口辦理有關問題的通知), promulgated 28 Dec. 2017, effective 1 January 2018, <http://cicc.court.gov.cn/html/1/218/62/84/804.html> accessed 25 August 2020; Provisions of the SPC on Relevant Issues Concerning Approval and Reporting in the Judicial Review of Arbitration-Related Cases (最高人民法院關於仲裁司法審查案件飽和問題的有關規定), promulgated 29 December 2017, effective 1 January 2018, <http://pkulaw.cn/fulltext_form.aspx?Gid=e471c8c693d39d6eef40099619c78467bdfb> accessed 25 August 2020; Provisions of the SPC on Relevant Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by People's Courts (最高人民法院關於人民法院辦理仲裁裁決執行案件若干問題的規定), promulgated 23 February 2018, effective 1 March 2018, <http://jszx.court.gov.cn/main/ExecuteDivision/1339.jhtml> accessed 25 August 2020; Supreme People's Court Reply to the Application of Laws to Case Filing and Enforcement of "Pre-Dispute Arbitration" Awards or Conciliation Statements Rendered by Arbitration Institutions (最高人民法院關於仲裁機構 "陷於仲裁"裁決或者調節書立案、執行等法律使用問題的批覆), promulgated 28 May 2018 and effective 12 June 2018, <http://jszx.court.gov.cn/main/ExecuteDivision/19435.jhtml> accessed 25 August 2020.

the judicial interpretations demonstrate the SPC's commitment to creating a more arbitration-friendly jurisdiction.

Taken together, the SPC interventions both strengthen the mainland arbitration institutions, particularly in dealing with foreign-related disputes, and also seek to streamline and specialize courts' review of arbitral awards. As such, they provide a foundation for conforming China's arbitration institutions with international expectations, a helpful step forward for Sino-foreign dispute resolution. However, these revisions do not necessarily bolster the position of foreign arbitration institutions in the mainland.

B. Recent Developments

In 2019, the mainland established two initiatives which provide a stronger foothold for foreign arbitration institutions in the mainland and which may, in turn, diversify the forums for Sino-foreign dispute resolution. These two initiatives are the Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (hereinafter, 'Shanghai FTZ Measures')[26] and the Arrangement Between Mainland China and Hong Kong for Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitration (hereinafter, 'Arrangement Concerning Mutual Assistance').[27] Combined, these two initiatives mark a

[26] Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone (境外仲裁機構在中國（上海）自由貿易試驗區臨港新片區設立業務機構管理辦法) promulgated 21 October 2019, effective 1 January 2020, <http://service.shanghai.gov.cn/xingzhengwendangku/XZGFDetails.aspx?docid=REPORT_NDOC_004839> accessed 25 August 2020.

[27] Arrangement Between Mainland China and Hong Kong for Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitration, signed by the SPC and the Hong Kong Special Administrative Region Department of Justice (最高人民法院關於內地與香港特別行政區法院就仲裁程序相互協助報案的安排), signed on 2 April 2019 and effective 1 October 2019, <https://baijiahao.baidu.com/s?id=1645697617949630772&wfr=spider&for=pc> accessed 25 August 2020.

notable development in the internationalization and liberalization of the PRC arbitration market.

1. The Shanghai FTZ Measures

The Shanghai FTZ has emerged as an incubatory space for international dispute resolution in China. Established in 2013, the Shanghai FTZ induces FDI through the application of a negative list to foreign investment and prohibiting forced technology transfers via 'form[ing] a legal framework for investment and trade within the zone.'[28] It does so by tailoring PRC law on customs and trade.[29]

Starting in 2015, foreign arbitration institutions have been encouraged to gain a foothold in the Shanghai FTZ, specifically, by being allowed to set up representative offices within the zone. The HKIAC, SIAC, ICC, and the Korean Commercial Arbitration Board all set up representative offices in the Shanghai FTZ. The following year, the SPC issued the Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones (hereinafter, 'Opinions on Judicial Protection') which confer greater latitude to foreign arbitration institutions established within FTZs, including Shanghai's.[30] Specifically, the Opinions on Judicial Protection specify that FIEs, such as wholly foreign-owned enterprises (WFOEs), which register within an FTZ, will satisfy the 'foreign element' requirement for arbitration by an offshore arbitration institution. While the

[28] China (Shanghai) Pilot Free Trade Zone, <http://en.china-shftz.gov.cn/> accessed 25 August 2020
[29] Regulations of the China (Shanghai) Pilot Free Trade Zone, promulgated by the Standing Committee of the 14th Shanghai Municipal People's Congress, 25 July 2014, <http://english.pudong.gov.cn/2017-07/24/c_88228.htm> accessed 25 August 2020.
[30] Supreme People's Court Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones (最高人民法院關於為自由貿易實驗區建設提供司法保障的意見), issued 30 December 2016 and effective 30 December 2016, <http://en.pkulaw.cn/display.aspx?cgid=441e185f12e602a2bdfb&lib=law> accessed 25 August 2020.

opening up of the market to foreign arbitration is limited—for example, to qualify for the 'foreign element', both parties must be WFOEs—nonetheless, it provides greater assurance to foreign parties that their arbitration agreements that designate foreign arbitration will be recognized under article 18 of the PRC Arbitration Law.[31] Practically, those foreign arbitration institutions that have registered within the Shanghai FTZ can, subsequent to the Opinions on Judicial Protection, administer arbitration disputes for WFOEs within the FTZ.

The Shanghai FTZ has been slowly expanded over time, and in 2019, the Lin-Gang area, consisting of 119.5 square kilometers, was added with the specific aim of facilitating overseas investment and capital flows.[32] A major innovation of the Lin-Gang area is that it allows well-known foreign arbitration institutions to register with the Shanghai Municipal Bureau of Justice to allow them to conduct arbitrations for business disputes.[33] Moreover, within the Lin-Gang FTZ, the parties to arbitration can use English, another milestone in the opening up of PRC arbitration.[34] While Mandarin has been the working language for both courts and arbitration institutions historically in the PRC, the Lin-Gang's opening up to English language for arbitration mirrors similar developments in the nascent internationalization of the judiciary, and which, together, make dispute resolution more accessible to foreign parties.[35]

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[31] PRC Arbitration Law, art. 18.
[32] State Council Notice on Issuing China (Shanghai) Pilot Free Trade Zone on the General Plan of the Lin-Gang New Area (國務院關於引發中國（上海）自由貿易試驗區臨港新片區總體方案的通知), promulgated on 27 July 2019, <http://www.gov.cn/zhengce/content/2019-08/06/content_5419154.htm> accessed 25 August 2020.
[33] Ibid.
[34] Opinions of the Supreme People's Court on Provision of Judicial Services and Guarantee by the People's Courts for the Construction of China (Shanghai) Pilot Free Zone in Lin-Gang Special Area (最高人民法院關於人民法院為中國（上海）自由貿易試驗區臨港區新片區建設提供司法服務和保障的意見), issued 13 December 2019 and effective 13 December 2019, <http://www.lawinfochina.com/display.aspx?id=31976&lib=law&SearchKeyword=&SearchCKeyword=> accessed 25 August 2020..
[35] Erie, Matthew S. "The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution," *Virginia Journal of International Law* 60(2) (2020), 243.

2. Arrangement Concerning Mutual Assistance

The second development refers to the access to interim measures in arbitration, which is important to parties as they help preserve the parties' rights in arbitration. Interim measures can typically be ordered by arbitrators or by state courts. The access to interim measures in support of arbitration makes jurisdictions and institutions more attractive choices. In the case of cross-border disputes, it is also important that state courts offer some level of assistance to proceedings taking place beyond its territories. This practice has been reflected, for example, in article 17J of the UNCITRAL Model Law.[36]

Historically, foreign parties have been concerned about doing business with Chinese parties given the lack of their ability to ensure that the status quo of the assets of the Chinese party in question is not altered pending the outcome of the arbitration and the tribunal's issuance of the final award. In the past, PRC courts would only grant interim measures to arbitration cases administered by PRC arbitration institutions.[37] The Arrangement Concerning Mutual Assistance relaxes this restriction. As the first such mechanism to allow PRC courts to render interim relief to support arbitrations seated outside of the PRC, it provides more comfort to foreign parties to enter into contracts with Chinese parties.

Under the Arrangement Concerning Mutual Assistance, PRC courts may grant interim relief to support Hong Kong-seated arbitration. Qualifying arbitration forums

[36] UNCITRAL Model Law, art. 17J (stating: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.")
[37] PRC Arbitration Law, art. 68.

include the HKIAC, CIETAC-Hong Kong, ICC-Asia, Hong Kong Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre.[38] These arbitration institutions will be even more attractive to foreign parties, as well as the Greater Bay Area, an emergent megaregion linking the mainland, Hong Kong, and Macau.

The Arrangement Concerning Mutual Assistance builds on existing agreements between the mainland and Hong Kong. These include (i) the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements Between Parties Concerned (hereinafter, 'Arrangement on Reciprocal Recognition'),[39] and (ii) the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR (hereinafter, 'Arrangement Concerning Mutual Enforcement').[40] Whereas the Arrangement on Reciprocal Recognition pertains to the mutual recognition and enforcement of judgments between the mainland and the HKSAR and the Arrangement Concerning Mutual Enforcement covers the enforcement of arbitral awards between the mainland and the HKSAR, both agreements are limited in scope to domestic institutions. The Arrangement Concerning Mutual Assistance extends the Arrangement Concerning Mutual Enforcement to foreign arbitration institutions seated in the HKSAR. In an

[38] Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administered Region Contact Details of Institutions and Permanent Offices Which Are Qualified under Article 2(1) of the Arrangement (as of 25 August 2020), <https://www.doj.gov.hk/pdf/2019/list_of_institutions_e.pdf > accessed 25 August 2020.

[39] Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the HKSAR Pursuant to the Choice of Court Agreements Between Parties Concerned, signed on 14 July 2006, <https://www.doj.gov.hk/eng/mainland/pdf/mainlandrej20060719e.pdf> accessed 25 August 2020.

[40] Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, signed on 21 June 1999, <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf> accessed 25 August 2020.

explanatory document, the SPC further clarified that whereas the Arrangement Concerning Mutual Enforcement applies to final awards, the Arrangement Concerning Mutual Assistance applies specifically to interim measures, providing much-needed assistance in preserving the assets of the opposing party.[41]

The Arrangement Concerning Mutual Assistance has already seen significant use by commercial parties. As of the time of this writing, since the Arrangement Concerning Mutual Assistance came into effect on 1 October 2019, the HKIAC has received twenty-five applications.[42] Among these, twenty-four were applications for preservation of assets and one was for preservation of evidence.[43] According to the HKIAC, the total value of assets sought to be preserved was RMB 9.4 billion. Further, the HKIAC has been aware of seventeen decisions issued by the Intermediate People's Courts in the mainland where, upon the applicant's provision of security, the total value of assets preserved amounted to RMB 8.7 billion.[44] Approximately 30% of the applications was made by parties from the mainland and 70% was made by parties from jurisdictions outside of the mainland, including the British Virgin Islands, Hong Kong, Singapore and Switzerland. The half of the applications concerned assets or evidence owned by mainland parties, while another half concerned assets on the mainland owned by non-mainland parties.[45] These initial

[41] Understanding and Application of the Arrangement Between Mainland China and Hong Kong for Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitration (最高人民法院關於內地與香港特別行政區法院就仲裁程序相互協助保全的安排的理解與使用), issued by the SPC on 26 September 2019, <http://rmfyb.chinacourt.org/paper/html/2019-09/26/content_160433.htm?div=-1 (hereinafter, "SPC Note on Understanding the Arrangement"> accessed 25 August 2020.
[42] HKIAC, Hong Kong-Mainland China Arrangement on Interim Measures: HKIAC Update, 27 August 2020 <https://www.hkiac.org/news/hk-prc-interim-measures-arrangement-hkiac-update> accessed 27 August 2020.
[43] Ibid.
[44] Ibid.
[45] Ibid.

figures suggest that the Arrangement Concerning Mutual Assistance will gain traction in mainland-related arbitration that is seated in the HKSAR.

C. Related Challenges

While the Shanghai FTZ Measures and the Arrangement Concerning Mutual Assistance improve the position of foreign arbitration institutions acting in the mainland, they are not entirely free of problems. These problems occur against the backdrop of broader issues in both the Shanghai FTZ and in Hong Kong. The core idea of the Shanghai FTZ, for example, to function as an offshore yuan account for banks free of domestic restrictions, has been largely stymied by capital controls following the central government's concern about capital flight resulted in tight capital controls.[46] In parallel, ongoing political unrest in Hong Kong has started to erode Hong Kong's international reputation as a "rule of law" dispute resolution hub.[47] This section discusses challenges specifically related to these two innovations, including where the innovations are under-inclusive, ambiguous, or fail to go far enough in their reforms.

1. Shanghai FTZ Measures

a. Foreign arbitration institutions that can benefit from the permission. The threshold question is which foreign arbitration institutions can benefit from the permission to establish an office in the Shanghai Lin-Gang FTZ. As of the time of this writing, market

[46] Eugen Tham and Cheng Leng, 'Bankers' Exits and Zombie Accounts: China's Shanghai Free Trade Zone Sputters' *Reuters* 2 September 2019, <https://www.reuters.com/article/us-china-shanghai-ftz/banker-exits-zombie-accounts-chinas-shanghai-free-trade-zone-sputters-idUSKCN1VN01V> (accessed 25 August 2020).
[47] Email correspondence with leading arbitrator in Hong Kong, 8 August 2020.

access does not seem to be an open invitation directed to all foreign institutions. Certain conditions need to be satisfied by a prospective institution.

Article 3 of the Shanghai FTZ Measures specifies that the term of 'overseas arbitration institution' should be understood as 'any non-profit arbitration institution legally established in foreign countries, Hong Kong, Macao and Taiwan, as well as arbitration institutions established by international organizations that China has joined.' Further, article 6 provides more specifically which overseas arbitration institutions can apply for establishing a business office. These are institutions that are: (1) legally established and duly existing overseas for more than five years; (2) conducting substantial arbitration activities overseas and having high international reputation; and (3) whose principal is not subjected to any criminal penalty for any willful offense.

The specifications contain a number of ambiguities, including 'high international reputation' and a prospective institution's 'conducting substantial arbitration activities overseas.'[48] It is unclear how the foregoing qualifications are measured. The Chinese authorities seem to have discretion to decide whether a particular institution conducts substantial arbitration activities beyond the mainland and possesses sufficiently 'high' international reputation. For example, would the Polish Court of Arbitration at the Polish Chamber of Commerce satisfy the requirements and based on which criteria? This arbitration institution handles significantly less international cases and has less international recognition compared to, for example, the SIAC or the HKIAC, both of which obtained the permission to operate in the Shanghai FTZ when they opened their

[48] The original language is '在境外實質性開展仲裁業務，有較高國際知名度'.

representative offices there.[49] Yet, the Polish Court of Arbitration at the Polish Chamber of Commerce could potentially serve a broker for China-Central/Eastern European disputes. Given the ambiguity of terms, the fate of its application seems unknown.

Generally, it is worth noticing that the new measures came into force on 1 January 2020 and remain valid until 31 December 2022.[50] As it is commonly observed in legal practice in the mainland, it is probable that more detailed rules will follow to provide more guidance on how the provisions of the Shanghai FTZ Measures should be understood and implemented.

b. Types of disputes that foreign arbitration institutions can administer. The next problem relates to the types of disputes that a foreign arbitration institution can administer in the mainland. Article 14 of the Shanghai FTZ Measures explicitly refers to foreign-related arbitration services with respect to civil and commercial disputes in the fields of international commerce, maritime, and investment. Further, article 18 stresses that a newly established entity shall not conduct arbitration for any case without a foreign element.

Here again, the division into 'domestic' and 'foreign-related' arbitration becomes relevant. The problem is the uncertainty as to the 'domestic' versus 'foreign-related' distinction. As a consequence, the extent of permission for foreign arbitration institutions is not entirely clear. As mentioned above, in recent years, the understanding of a 'foreign' element has considerably expanded and embraced some—but not all—FIEs. The

[49] In 2018, the Polish Court of Arbitration at the Polish Chamber of Commerce handled seventeen international cases. See Arbitration Court Statistics 2018 (Statystyki Sądu Arbitrażowego w 2018 roku'), <https://biznesciti.com/biznesciti/item/11735-statystyki-sadu-arbitrażowego-w-2018-roku.html>, comparing to 214 international cases handled by the HKIAC in 2018. See HKIAC Annual Report 2018 Reflections <https://www.hkiac.org/sites/default/files/annual_report/annual%20report%203463-7390-6190%20v.4.pdf> and 337 by the SIAC. See SIAC Annual Report 2018 <https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf> all accessed 25 August 2020.

[50] Shanghai FTZ Measures, art. 25.

expansion is limited to FIEs established in the Shanghai FTZ. Those established beyond this FTZ, for example in Beijing, may face the risk of their disputes not being classified as 'foreign-related' and thus may not benefit from access to foreign arbitration institutions. The decision whether a particular case is foreign-related may still depend on the individual assessment by a court in a specific case. It is important for arbitration users and foreign arbitration institutions to know the boundaries as 'domestic' disputes are out of the administrative reach of foreign arbitration institutions. Crossing this boundary would likely result in invalidating an arbitration agreement, the setting aside of an arbitral award, or a refusal to enforce it.

c. Judicial treatment of arbitral awards rendered in proceedings administered by foreign institutions. A second issue pertains to the fate of arbitral awards rendered in proceedings administered by foreign arbitration institutions in the mainland, and specifically to such issues as their being set aside and enforced. Arbitration is, in principle, final. This means that, different from litigation, the option of an appeal is limited. A party dissatisfied with an arbitral award has normally two options of recourse against an award. It can apply to set it aside or resist its enforcement when the winning party seeks to coercively implement it. Neither option equals a traditional appeal on the merits, and the grounds for either option are largely limited to procedural irregularities, such as the lack of proper notice of arbitration.[51]

In addressing such issues, the concept of the seat of arbitration becomes relevant. It is commonly accepted that 'arbitration is governed by the law of the place in which it is

[51] See, for example, UNCITRAL Model Law, art. 34. Other grounds are non-arbitrability of a dispute and an award conflicting with the public policy of a given state.

hold.'[52] The designated 'seat' determines both the court's jurisdiction and grounds for setting aside an award, as well as an award's nationality for enforcement purposes.[53] To illustrate, if Singapore is the seat of arbitration, Singaporean courts will have the power to set aside an award according to the grounds provided by Singaporean arbitration law and the award will be typically considered a 'Singaporean' award, for the sake of enforcement.[54]

In international arbitration, it is generally permissible for both domestic and foreign arbitration institutions to administer arbitration cases and the origin of the institution influences neither the power of courts to set aside an award nor the award's nationality for enforcement purposes. Consequently, it does not make a difference whether, in a Singapore-seated case, the institution administering the dispute is the SIAC or the HKIAC. The award will be considered 'Singaporean' in both instances and Singaporean courts will have jurisdiction to set aside an award applying own law.

China, however, has a different approach. First, the current version of the PRC Arbitration Law provides that for the setting-aside procedure, the court at the *place of an arbitration institution*, and not of the *seat*, should have jurisdiction to set aside an award.[55]

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[52] Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration (6th ed.)* (Oxford: Oxford University Press, 2015), 171.

[53] Other important legal ramifications of the seat includes the competence of courts to the review of the decision on jurisdiction made by arbitrators at the initial stage of the proceeding – see, for example, UNCITRAL Model Law, art. 16(3).

[54] Gary Born, *International Commercial Arbitration* (2nd ed.) (Alphen aan den Rijn: Kluwer Law International, 2014), 2056, 2058.

As for the enforcement, depending on particular circumstances, an award can be enforced based on domestic arbitration law or based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958. Legal standards can differ in the two regimes.

[55] This is reflected in PRC Arbitration Law, art. 58, which reads: 'the intermediate people's court at the place where the arbitration institution resides' should deal with the task of setting aside of an award. =See more on the concept of the seat of arbitration in China in Kun Fan, 'Prospects of Foreign Arbitration Institutions Administering Arbitration in China', *Journal of International Arbitration* 28, (2011), 350-352.

Second, the lack of understanding of the concept of the seat of arbitration in the mainland has caused some degree of ambiguity in enforcement practice. To illustrate, in the case of *Duferco v Ningbo Arts & Crafts Import & Export*, in which the ICC administered arbitration conducted in Beijing, the Ningbo Intermediate People's Court found the award to be a non-domestic one in the context of article I of the New York Convention.[56] Following such reasoning, in the mainland-seated cases administered by foreign arbitration institutions, a foreign court (where the institution is located) should have the power to set aside an award applying its own law. Further, if an award is to be enforced in the mainland, the New York Convention should apply. This approach, however, is not in line with international practice under which the court of the seat of arbitration, and not of the institution, has the power to set aside an award, while an award itself should bear the nationality of the seat for enforcement purposes. The consistent reference to the seat of arbitration is important as it brings certainty and predictability for parties. It is not infrequent that once an arbitration proceeding has been concluded in front of arbitrators and an award has been rendered, the actual proceeding does not finish there and parties may need to either fight the award or seek to coercively enforce it. For that purpose, the clear allocation of power is essential. That is especially important given the inconsistent practice of mainland courts in the past.[57]

[56] Duferco SA v Ningbo Arts & Crafts Import and Export Co., Ltd. (2008) Yong Zhong Jian Zi No. 4, 22 April 2009, the Ningbo Intermediate People's Court. See PRC Civil Procedure Law (中華人民共和國民事訴訟法), adopted 9 April 1991, revised in 2007, 2012 and 2017, art. 269 also contributes to the confusion by stating that: 'If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.'

[57] See, for example, Yuen, McDonald, and Dong (n 14) 88-91.

There have been efforts to cure the shortcomings related to the lack of recognition of the concept of the seat of arbitration in the PRC law. By way of example, the PRC Law on the Laws Applicable to Foreign-related Civil Relations refers explicitly to the seat of arbitration for the purpose of determining the validity of an arbitration agreement.[58] Furthermore, some scholars point to provision 6 of the Opinions of the Supreme People's Court on Provision of Judicial Services and Guarantee by the People's Courts for the Construction of China (Shanghai) Pilot Free Zone in Lin-Gang Special Area as empowering Chinese courts to supervise arbitration seated in the mainland and administered by foreign institutions and, further, as adopting the international approach to classifying awards as domestic ones for the sake of enforcement.[59] Also the current ruling of the Guangzhou Intermediate People's Court's, dated 6 August 2020, is a positive development in line with the above recommendations. The court found that an award rendered in Guangzhou in the proceeding administered by the ICC should be regarded as a Chinese award with a foreign element.[60] Importantly, however, this ruling is not a binding authority for all other courts across the country and therefore, a firm clarification, either by SPC or in the amended version of the arbitration law, is still needed.

[58] See PRC Law on the Laws Applicable to Foreign-related Civil Relations (中華人民共和國涉外民事關係法律使用法) adopted at the 17th session of the Standing Committee of the 11th National People's Congress on 28 October 2010, art. 18 (stating: 'The application for and enforcement of property preservation, evidence preservation, conduct preservation and other interim measures before and during arbitration shall be supported and guaranteed in accordance with the law, judicial examination shall be conducted for arbitral awards according to the law').

[59] Shouzhi Zhang, Tao Huang and Yan Xiong, 'China' in 'Asia-Pacific Arbitration Review 2021', *Global Arbitration Law Review*, 11 2020 <https://globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2021/1227833/china#endnote-012> accessed 25 August 2020.

[60] Guangdong Province Guangzhou City Intermediate People's Court (廣東省廣州市中級人民法院) (Aug. 8, 2016), (2015) Sui Zhong Min Chu Si Zi No. 62 (穗中法民四初字第 62 號) <http://iidps.bit.edu.cn/gatsw/188320.htm> accessed 3 November 2020.

Despite these improvements, the PRC law and practice still do not fully reflect the international approach in allocating the power to set aside an award and deciding an award's nationality for enforcement purposes. Given the individual decisions of courts in individual post-award scenarios, this may lead to uncertainties.

d. Supervision of foreign arbitration institutions. A third issue is whether mechanisms for the supervision of foreign arbitration institutions, some of which are on the books, will be realized in practice. The PRC Arbitration Law provides that all arbitration institutions operating in the mainland are to be supervised by the China Arbitration Association (CAA).[61] The CAA is designed as 'an institutional legal person with all the separate arbitration commissions as its members.'[62] It is intended to be a self-disciplinary organization supervising arbitration institutions and their arbitrators. One of its tasks is formulation of arbitration rules used subsequently by arbitration institutions.

Notably, however, the CAA has not been established, despite the fact that over twenty-five years have passed since the implementation of the PRC Arbitration Law. As to the reasons why it still has not been established, arbitrator Jingzhou Tao has pointed to the lack of agreement in the Chinese arbitration industry as to the necessity of its establishment, its nature, and functions.[63] On the eve of the reform of the PRC Arbitration Law, the establishment of the CAA is once again on the agenda. In the event that the CAA is established, it is unknown whether it will supervise foreign arbitration institutions.

Another aspect of supervision, already faced by local institutions, pertains to the restrictions of the PRC Arbitration Law. These include the inability of arbitrators to decide

[61] PRC Arbitration Law, art. 15.
[62] Ibid.
[63] Jingzhou Tao, *Arbitration Law and Practice in China* (Alphen aan den Rijn: Kluwer Law International, 2012), 41.

on their own jurisdiction or to order interim measures in support of arbitration, both generally available to arbitrators in international arbitration. It is currently unknown whether foreign arbitration institutions will have to face these limitations and adjust their arbitration rules for the mainland market.

To illustrate, typically both national arbitration laws and the rules of leading institutions provide that in case of a challenge to arbitrators' jurisdiction, arbitrators have the power to decide, first, whether they are competent to resolve the dispute.[64] This concept is commonly referred to as 'competence-competence.'[65] The PRC Arbitration Law and judicial interpretations, however, have not recognized this concept. Under existing law, courts have the prerogative to decide a jurisdictional challenge.[66] Such allocation of power is reflected in the arbitration rules of Chinese institutions, as their rules should comply with the PRC Arbitration Law.[67] Arbitration institutions use their administrative rules to govern the proceeding once they were selected. However, the administrative rules of foreign arbitration institutions may not comply with the relevant provisions of the PRC Arbitration Law. By way of example, rule 30 and Schedule 1 of the SIAC Arbitration Rules from 2016 gives arbitrators broad powers to order interim measures in support of arbitration, whereas arbitrators in the mainland cannot grant such measures if they are meant to be enforced in the mainland. It remains to be seen how the discrepancies between the institutional rules

[64] See, for example, UNCITRAL Model Law, art. 16 and Singapore International Arbitration Centre Rules 2016, rule 28. The decision of arbitrators can be subsequently reviewed by the court; nonetheless, arbitrators have the first say on their own jurisdiction.

[65] See, for example, Born (n 54) 1047-1076.; Redfern and Hunter (n 52) 340-341.

[66] See PRC Arbitration Law. art. 20.

[67] The leading arbitration institutions in mainland China, aware of the shortcomings of the PRC Arbitration Law, have sought to innovate in order to remedy the discussed limitation. See, for example, CIETAC Rules 2015, art. 6.

of foreign institutions and the PRC Arbitration Law will be handled; theoretically, the rules should comply with the PRC Arbitration Law.

Finally, there is the issue of whether FTZ Shanghai Measures impose the duty of preserving China's national and social public interest on foreign arbitration institutions.[68] This requirement could endanger the neutrality of arbitration proceedings. Neutrality, the cornerstone of international arbitration, can be particularly relevant when it comes to state-investor disputes.

e. Arbitration beyond the Shanghai Lin-Gang FTZ. The current permission for foreign arbitration institutions to operate in the mainland market is limited to the area of the Shanghai Lin-Gang FTZ. Generally, the Shanghai FTZ has served the function of a laboratory testing innovations, including legal innovations, in order to see whether they should be subsequently implemented across the country.[69]

Due to the current changes to the foreign arbitration regime, Shanghai will likely increase its importance as a dispute resolution hub, also for Sino-foreign disputes. It is, however, worth mentioning that beyond Shanghai, destinations such as Beijing or Shenzhen have also been important places for foreign-related cases. For some types of disputes, it may be more sensible to have a case resolved elsewhere, outside of Shanghai. To give an example, due to the proximity of the Ministry of Commerce and the China Council for the Promotion of International Trade, for some cases, Beijing may be a preferred choice. For now, the permission is restricted to the Shanghai FTZ and whether it will expand beyond the FTZ in the future remains to be seen.

[68] See FTZ Shanghai Measures, art. 5.
[69] See Erie (n 35) 279.

2. Arrangement Concerning Mutual Assistance

a. No equivalent measures in place with any other jurisdiction. The first question the Arrangement Concerning Mutual Assistance raises is its impact on the international commercial arbitration industry in regards to PRC-related disputes. Given the fierce competition between the seats of arbitration and arbitration institutions, it remains to be seen whether, in the future, other jurisdictions and institutions will be given similar benefits as those obtained by Hong Kong and the designated institutions.

China has long been criticized for the limited access to interim measures in support of arbitration.[70] This includes the lack of power of arbitrators to order interim measures, limited types of available interim measures, and no assistance offered to other jurisdictions by mainland courts. The new Arrangement Concerning Mutual Assistance has broadened the scope of assistance, yet it pertains to the HKSAR only, and as elaborated below, only to 'certain institutions.'

b. The limit of the benefits of the Arrangement to 'certain institutions.'[71] As introduced above, the Arrangement Concerning Mutual Assistance is limited to arbitration institutions designated by the Department of Justice of Hong Kong and approved by the SPC.[72] Currently, under article 2 of the Arrangement Concerning Mutual Assistance, other institutions administering cases seated in Hong Kong (which is generally permissible), but

[70] See, for example, Manjiao Chi, 'Are We "Paper-Tigers": The Limited Procedural Power of Arbitrators under Chinese Law', *Journal of Dispute Resolution* 2011 (2), (2011), 279. See also Manjiao Chi, 'Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law', *Asian International Arbitration Journal* 5 (2), (2009), 154-155; Peter Thorp, 'The PRC Arbitration Law: Problems and Prospects for Amendment', *Journal of International Arbitration* 24 (6), (2007), 612.; Jingzhou Tao, 'Salient Issues in Arbitration in China', *American University International Law Review*, 27(4), (2012), 818-820.

[71] It should be also noted that *ad hoc* arbitration, which is arbitration not administered by a particular institution, is beyond the scope of the Arrangement.

[72] This is in addition to mainland-based arbitration institutions.

not having a dispute resolution institution or a permanent office set up in Hong Kong, cannot benefit from the arrangement. It is likely that other jurisdictions and institutions, in particular those handling mainland-related cases, will need to work out their own arrangements with the mainland for the purpose of interim measures. It also remains to be seen whether arbitration institutions without a permanent presence in Hong Kong will seek to incorporate there in order to benefit from the Arrangement Concerning Mutual Assistance.

c. Types of available interim measures and the application procedure. The choice of interim measures available in the mainland is limited when compared to measures available in Hong Kong. Courts in Hong Kong have grown accustomed to granting a wide variety of measures, including injunctive relief. Courts in the mainland, on the other hand, have granted standard preservation of property, conduct, and evidence, but have been more hesitant to order other types of measures.

Not only do the types of interim measures available differ between the two jurisdictions, but the application procedures are also not the same. In the mainland, in order to apply for an interim measure when an arbitration case has already started, the request to a court has to be made through an arbitration institution.[73] That arbitration institution then performs the role of a postman forwarding the application to the relevant court. The institution does not make any decision on the application itself; it also does not scrutinize it. There are possible shortcomings related to this postman role performed by institutions, including potential delays in applying for the measure. It has been reported that the procedure of forwarding an application to a relevant court can take up to a week or even

[73] See PRC CPL, arts. 81, 101, 102 and 272.

more,[74] and may be further prolonged, for example, during a pandemic. This can be problematic, since applications for interim measures are frequently made under the conditions of urgency. A party may seek to dissipate its assets, for example, which can then make the enforcement of an award moot, so that the other party must urgently seek to preserve these assets through an interim measure.

Article 3 of the Arrangement Concerning Mutual Assistance confirms that foreign arbitration institutions are bound by the same requirement: once arbitration has started, an application for an interim measure has to be passed on by the foreign arbitration institution to a local PRC court.[75] However, the SPC Note on Understanding the Arrangement, article 5(1), recognizing time delays, adjusts this requirement and allows parties, instead, to apply directly to a mainland court. As a matter of practice, however, at least in the HKIAC's experience, on occasion, the mainland court will ask for the arbitration institution to submit the application.[76]

d. Business calculations for mainland v. foreign parties.[77] The solutions offered by the Arrangement Concerning Mutual Assistance confer a greater benefit to foreign parties. This difference is a result of the fact that Hong Kong was supportive of interim measures in foreign arbitration before the Arrangement Concerning Mutual Assistance, meaning that the position of mainland parties has not been significantly altered.[78] Mainland

[74] Daniel Fung and Shengchang Wang, *Arbitration in China: A Practical Guide* (Sweet & Maxwell Asia, 2004), 199.

[75] To illustrate, on 1 December 2019, the ICC issued the 'ICC Note on Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of ICC Arbitrations seated in Hong Kong and Administered by the Secretariat Asia Office*'* also addressing the aspect of the institutions' involvement in forwarding the application.

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[77] By 'foreign parties', we mean any parties from outside of the PRC, including Hong Kong parties.

[78] See UNCITRAL Model Law, art. 17J. This is the case, for example, in Singapore and Hong Kong.

parties have already had the opportunity to obtain interim relief against non-mainland parties in some other jurisdictions, including Hong Kong.

However, in case of an interim measure directed against a mainland party, the Arrangement Concerning Mutual Assistance potentially weakens the position of the mainland party as it broadens other parties' access to its assets in the mainland. In the past, these were rather untouchable through the interim measures channel and would only potentially be available once arbitration was over and coercive enforcement was sought by the opposing party.

III. Addressing Challenges

Arbitration, with a number of its advantages, including the effective enforcement mechanism, neutrality, flexibility, and expertise, can be a reasonable choice in the context of Sino-foreign disputes. The enforcement aspect of arbitration, compared to litigation, is particularly salient as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards simplifies the enforcement procedure and limits the grounds based on which courts can refuse the enforcement. The vast majority of states in the world have signed the New York Convention, which significantly increases the prospects of enforcement, although we recognize that obtaining assets in a jurisdiction other than that of a court order is not necessarily a facile process.[79]

The two new developments discussed in this article have significantly extended the choices available to parties in mainland-related disputes. While the results of the actual

[79] See the list of the New York Convention contracting states: <http://www.newyorkconvention.org/list+of+contracting+states> accessed 25 August 2020. Also, the enforcement of a mainland award before a mainland court should not cause many difficulties.

practice of these initiatives are still preliminary, at this early stage, the advancements appear to benefit foreign parties as part of the 'reform and opening' of Chinese dispute resolution while, at the same time, facilitating the onshoring of foreign-related disputes.[80] As mentioned, whereas mainland parties often have strong bargaining power in cross-border disputes and some prefer domestic forums, the Shanghai FTZ Measures create a platform for foreign arbitration institutions to administer arbitrations within the PRC. Similarly, the Arrangement Concerning Mutual Assistance expands foreign parties' access to a mainland party's assets when Hong Kong and the qualified institutions under the Arrangement are selected.

As discussed, however, the advancements are also not free of problems. The reform of the PRC Arbitration Law is an opportunity to further modernize the system and address these challenges. Some of the uncertainties have long existed in Chinese practice and the reform represents an opportunity to address them. However, while announced in 2018, it is yet unknown when the revision will be finalized and whether it will truly promote China as an arbitration-friendly jurisdiction or rather merely introduce cosmetic changes. We suggest that the reform should be along the lines of the former and embrace internationalization. Many of the specific recommendations listed below relate to the PRC arbitration system as such. We argue that implementing them would provide more predictability and efficiency for the system in its entirety and for its stakeholders.

To start with, we suggest that the mainland should keep the bifurcated system of domestic and foreign-related arbitration regimes, albeit with a fine-tuned dual-track. In the current stage of development of arbitration in China, the bifurcated system would allow to

[80] Weixia Gu, 'China's Belt and Road Development and A New International Commercial Arbitration Initiative in Asia', 51 *Vanderbilt Journal of Transnational Law* 1306, 1309-1310.

better address the needs of the two different types of arbitration, given, in particular, the needs of parties and the varying level of professionalism among mainland arbitration institutions. The bifurcated system would likely more realistically respond to, on the one hand, the pressure for further internationalization of foreign-related arbitration and, on the other hand, improving the domestic system.[81]

However, further clarification of discussed regulations is needed in order to provide more transparency and certainty for the functioning of foreign arbitration institutions in the mainland. This includes both the PRC Arbitration Law as well as other policy and SPC documents. Concerning the access of foreign arbitration institutions to the mainland market, we encourage further opening and permitting more competition among the institutions. In case the current criteria for a prospective institution are to be kept (e.g., 'high international reputation' and 'substantial arbitration activities overseas'), they should be clarified to avoid uncertainty as to which institutions can apply to administer cases in the mainland. Further, the expanded scope of permitted actions by foreign institutions conferred within the Shanghai FTZ should be extended to the entire country. Additionally, since currently foreign arbitration institutions can only administer 'foreign-related' cases, we suggest that the understanding of 'foreign-related' arbitration should go in the direction of embracing disputes, which *de facto* involve foreign-elements, but are not clearly categorized as 'foreign-related' cases. This should be the case especially for disputes involving FIEs.

[81] During the seminar part dedicated to the PRC Arbitration Law reform at the Young SIAC/China Young Arbitration Group Seminar held in Beijing on November 7, 2019, the attendees discussed and then voted on the question of whether, following the law reform, the mainland should have one or two systems for domestic and foreign-related arbitration. The majority supported the idea of two systems pointing primarily to the reasons listed above. Also, some of the attendees, in particular those more senior, have not been very enthusiastic about the reform taking place currently, expressing the concern that the changes may be of superficial nature only, and may not improve the situation, especially for foreign-related arbitration, while any subsequent law revision would be in the very distant future.

As for the access to interim measures, we recommend that the assistance provided by mainland courts should be further expanded and reach other jurisdictions and arbitration institutions. We further suggest that applications for interim measures should be directly made to courts. The postman role currently played by arbitration institutions should be entirely eliminated in order to avoid potential delays and thus better protect the interests of the parties.

More generally, major amendments of the PRC Arbitration Law are required to align the mainland with best practices in international arbitration. These includes granting the permission to arbitrators to order interim measures in support of arbitration and recognizing the concept of competence-competence for addressing jurisdictional challenges in arbitration. Other internationally recognized concepts of arbitration should be followed in the mainland, as well. In particular, the seat of arbitration and the nationality of awards should be incorporated into legislation. We argue that arbitral awards rendered in cases administered by foreign arbitration institutions in the mainland should be seen as mainland awards and should be reviewed by mainland courts, but standards of the review should accord with international practice and as such, should not involve substantive review of awards.

Lastly, we advise against affecting the neutrality of foreign arbitration institutions by imposing on them onerous supervision requirements. The existence of the CAA, the body meant to supervise all arbitration institutions in the mainland, as currently envisioned by the PRC Arbitration Law, is most likely unnecessary. Foreign arbitration institutions should not be required to use uniform arbitration rules designed by the CAA. Rather, such

institutions should be permitted to craft their own rules, which will help provide parties with genuine choices they can make in arbitration.

Conclusion

The Shanghai FTZ Measures and Arrangement Concerning Mutual Assistance represent milestones in the internationalization of cross-border commercial dispute resolution, and will facilitate business between mainland and foreign businesses. However, they do not go far enough. The improvements we suggest would offer more certainty as well as more genuine choices that parties can make in the context of Sino-foreign disputes. The impending reform of the PRC Arbitration Law is an opportunity to further cement internationalization. Meanwhile, while waiting for the outcome of the reform, the SPC could act to fill the gaps in the legislation.

Taking the legislative and judicial reform together, we conclude that the key directions for reform are retaining but improving the dual-track system, improving access of foreign arbitration institutions to the mainland market, introducing the concept of the seat of arbitration, avoiding cumbersome state regulation over foreign arbitration institutions in the form of the CAA, and expanding the arbitration tribunals' powers.[82] Our recommendations are in line with international best practices. Such practices appear to have increasing traction in the PRC. It is telling that the Ministry of Justice has recently listed the access of foreign arbitration institutions to the mainland market and the Arrangement

[82] We note that we are not alone in making such recommendations, and neither are these necessarily 'foreign' recommendations. For example, many of these points were made by Dr. Xue Tong, The Deputy Secretary-General of the China Arbitration Institute at the China University of Political Science and Law, discussing what is perceived as of priority in the mainland during the Young SIAC/China Young Arbitration Group Seminar.

for Mutual Assistance among the top five aspects 'worthy of attention' for the mainland arbitration industry.[83] It is hoped that the fate of foreign arbitration institutions in the mainland will be given continuous attention and the changes will take the direction of more clarity and arbitration-friendliness.

[83] Review of China's Commercial Arbitration in 2019 (2019 年度中國商事仲裁熱點回顧) <http://www.chinalaw.gov.cn/Department/content/2020-02/04/612_3240857.html> accessed 25 August 2020.