Shift Towards International Practice? Key Takeaways from Arbitrations Involving Chinese Parties

Mainland China is not an UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) country. The Model Law is not adopted as a whole, and arbitration practice in Mainland China is perceived to be different from international practice. With the significance of the Chinese economy and rise in outbound investments from China (due in no small part to the Belt and Road Initiative), there has been a surge in international arbitrations involving Chinese parties, both within and outside Mainland China.

Drawing on the authors' experience in arbitrations involving Chinese parties, this commentary aims to examine key measures taken by the Chinese government in recent years to promote arbitration in Mainland China.

Proposed Amendments to Chinese Arbitration Law

The current Chinese Arbitration Law was promulgated in 1994 and remains substantially unchanged to date. On 30 July 2021, the Chinese Ministry of Justice released proposed amendments to Chinese Arbitration Law for public consultation. These amendments are considered to be the most comprehensive and systematic efforts by China to overhaul outdated arbitration legislation and bring the arbitration system in Mainland China in line with international standards and practice.

Notable amendments include the following:

(a) **Expanding the scope of arbitrable matters by removing the requirement that parties to arbitration must be "*equal subjects*":**[1] In an explanatory note, the Chinese Ministry of Justice clarified that the deletion was meant to allow Chinese arbitral institutions to administer investment arbitration cases or investment arbitrations to be conducted in Mainland China. This is in line with efforts by various Chinese arbitral institutions, such as the Shenzhen International Court of Arbitration which amended its arbitration rules to bring investor-state arbitrations within the scope of its administration, and the China International Economic and Trade Arbitration Commission and the Beijing Arbitration Commission which have released investment arbitration rules in recent years.

(b) **Allowing foreign arbitral institutions to "*conduct foreign-related arbitration business*" in Mainland China:**[2] Currently, foreign arbitral institutions, including the Singapore International Arbitration Centre, the Hong Kong International Arbitration Centre (**HKIAC**) and the ICC International Court of Arbitration (**ICC**), have set up offices in Mainland China. However, they mainly provide liaison and business development functions and do not administer cases. This amendment demonstrates China's willingness to expand its arbitration market to allow for more arbitrations to be administered and conducted within the jurisdiction, albeit through foreign arbitral institutions.

(c) **Recognising the concept of a seat of arbitration:**[3] China intends to shift from its previous "institutional standard" (namely, to determine the nationality of an award in accordance with the

1 Article 2 of Chinese Arbitration Law (2021 Amendment) (**2021 Amendment**).
2 Article 12 of the 2021 Amendment.
3 Article 27 of the 2021 Amendment.

nationality of the institution that administers the arbitration) to the internationally recognised "seat standard" where various important matters, including the nationality of the arbitral award and the competent court to supervise the arbitral proceedings and the award, are determined by the seat. This change is significant. Given that, under Chinese law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) (which recognises the concept of a seat of arbitration) is applicable to arbitral awards made in foreign states, the "institutional standard" is potentially problematic. For instance, it may result in: (i) a contest between jurisdictions over supervision of an arbitration where a Chinese arbitration commission administers the arbitration conducted in a foreign jurisdiction; or (ii) an arbitration having no supervisory court where an arbitration conducted in Mainland China is administered by a foreign arbitration institution. This shift to the "seat standard" would resolve such problems, and further harmonise Chinese arbitration law with the New York Convention and international practice.

(d) **Recognising the doctrine of competence-competence:**[4] China intends to recognise this internationally adopted doctrine reflected in the Model Law, which empowers a tribunal to rule on its own jurisdiction. At the moment, Chinese arbitration law does not provide for a tribunal to determine its own jurisdiction, and a party may only have recourse to either the arbitral institution administering the case or the Chinese courts. The proposed amendments expressly empower a tribunal to determine its own jurisdiction and requires that any challenge to the tribunal's jurisdiction be made first to the tribunal. A party may ask the Chinese courts to review the tribunal's decision only where it disagrees with the tribunal's decision on jurisdiction.

(e) **Allowing *ad hoc* arbitration in "*foreign-related commercial disputes*":**[5] Under current Chinese arbitration law, China does not recognise *ad hoc* arbitrations conducted in Mainland China. Only awards issued in foreign-seated *ad hoc* arbitrations are enforceable pursuant to the New York Convention. This amendment widens the scope of *ad hoc* arbitrations recognised in Mainland China. It should, however, be noted that the legislation does not define "*foreign-related*", which could potentially cause controversy in practice. For instance, it is not clear whether disputes involving foreign-owned Chinese incorporated entities would be considered "*foreign-related commercial disputes*". That said, a broad definition of "*foreign-related commercial disputes*" would aid in the expansion of the arbitration market in Mainland China and is consistent with the overall aim of bringing Chinese arbitration law in line with international standards and practice.

(f) **Allowing arbitral tribunals to grant interim measures:**[6] Unlike many major arbitration jurisdictions, Chinese law does not empower arbitral tribunals to order interim relief. The proposed amendments will bring Chinese arbitration practice in line with international standards and practice by giving tribunals seated in Mainland China the power to grant interim measures, including preservation of evidence and property, specific performance and injunctions, and any other measures deemed necessary by the arbitral tribunal. It is expected that parties to arbitrations seated in Mainland China will avail themselves of such interim measures, especially if they are routinely enforced by the Chinese courts.

The proposed amendments to Chinese Arbitration Law have been listed as preparatory legislation for deliberation by the Chinese legislature. These long-waited amendments, if implemented, will significantly

4 Article 28 of the 2021 Amendment.
5 Article 91 of the 2021 Amendment.
6 Articles 43 to 49 of the 2021 Amendment.

facilitate the internationalisation of China's arbitration practice and international dispute resolution involving Chinese parties.

Mainland China's Interim Measures in Support of Hong Kong-Seated Arbitration

Another key development is 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 (**Interim Measures Arrangement**) which came into force on 1 October 2019.

Under the Interim Measures Arrangement, Chinese courts may grant interim measures in Mainland China in support of Hong Kong-seated arbitration administered by a number of Hong Kong institutions and permanent offices including the HKIAC and ICC. This makes Hong Kong the only jurisdiction in the world outside Mainland China to benefit from such support. Prior to the Interim Measures Arrangement, Chinese courts were only able to issue interim measures in support of arbitrations seated in Mainland China (save for maritime arbitrations seated outside Mainland China).

While the Interim Measures Arrangement undoubtedly enhances Hong Kong's attractiveness and effectiveness as a seat for China-related disputes, parties should nonetheless consider whether a different seat of arbitration would be more suitable based on the specific facts in play. For instance, where a party has substantial assets in Mainland China and is more likely to become the defendant in the arbitration proceedings, consenting to Hong Kong as the seat of arbitration may render its assets subject to interim measures requested by the counterparty in reliance on the Interim Measures Arrangement. It must also be borne in mind that the criterion for obtaining interim measures from courts in Mainland China is generally less stringent as compared to international standards and in courts from other popular Asian jurisdictions such as Singapore and Hong Kong — the applicant generally does not need to show a *prima facie* case on the merits or to establish that the balance of convenience lies with it. Instead, the courts in Mainland China will likely grant such interim measures if the applicant provides sufficient security, which in practice, typically takes the form of cash, assets, or letters of guarantee issued by banks or other financial institutions.

As matters stand, it is uncertain whether China will replicate the Interim Measures Arrangement for other jurisdictions such as Singapore, which is a popular choice of seat for Chinese parties as well as foreign investors in China. The Chinese and Singaporean judiciaries have a strong history of mutual respect and cooperation, as evidenced by the signing of the Memorandum of Guidance on Recognition and Enforcement of Money Judgments in Commercial Cases and the Memorandum of Understanding on Cooperation on the Management of International Commercial Disputes in the Context of the Belt and Road Initiative through A Litigation-Mediation-Litigation Framework, and further cooperation between the jurisdictions seems to be on the horizon.

Foreign State Immunity Law

A more recent development which has stimulated interest from the community is China's promulgation of the Foreign State Immunity Law (**State Immunity Law**) on 1 September 2023, which took effect on 1 January 2024 and shifts China's approach from the doctrine of absolute immunity to restrictive immunity in respect of foreign states. As a result, foreign states will not be granted immunity from suit or execution in Mainland China, Hong Kong and Macau in respect of "*commercial activities*".

Under the State Immunity Law, "*commercial activities*" refer to transactions of goods or services, investments, borrowing and lending, and other acts of a commercial nature that do not constitute an

exercise of sovereign authority. In determining whether an act constitutes a commercial activity, Chinese courts must undertake an overall consideration of the nature and purpose of the act. Such an approach is substantially similar to the position in many common law jurisdictions, including the United States of America, the United Kingdom and Singapore. It will be interesting to see how Chinese courts interpret and apply "*commercial activities*" in practice.

It should also be noted that the State Immunity Law only addresses the immunity of foreign states before the Chinese courts, but not the immunity of China itself. It is unclear whether China's existing approach of absolute immunity will continue to apply to itself.

In practice, however, this uncertainty is unlikely to be of significant concern to foreign investors who deal with Chinese state-owned enterprises (**SOE**). The recognition and enforcement of foreign arbitral awards against Chinese SOEs is determined by the New York Convention, including the limited grounds for refusing to recognise and enforce foreign arbitral awards. The authors are also not aware of any decision by a Chinese court refusing to enforce foreign arbitral awards solely on grounds of state immunity because the award debtor is a Chinese SOE.

Indeed, in *TNB Fuel Services SDN BHD v. China National Coal Group Corporation* 2017 HKCU 1439, a letter dated 9 March 2017 from the Hong Kong and Macao Affairs Office of Chinese State Council was produced to the Hong Kong court. The letter set out the Chinese government's position that Chinese SOEs carrying out commercial activities are not entitled to claim state immunity:

> *China National Coal Group Corporation is a wholly state-owned enterprise, an enterprise legal person, established according to the law. According to the relevant legal regulations of our country, a state-owned enterprise is an independent legal entity, which carries out activities of production and operation on its own, independently assumes legal liabilities, and there is no special legal person status or legal interests superior to other enterprises. In the Mainland or in foreign states, all state-owned enterprises of our country respond to litigation arising from their activities of production and operation in the capacity of independent legal persons. Therefore, save for extremely extraordinary circumstances where the conduct was performed on behalf of the state via appropriate authorization, etc, the state-owned enterprises of our country when carrying out commercial activities shall not be deemed as a part of the Central Government, and shall not be deemed as a body performing functions on behalf of the Central Government.*

The rationale behind China's promulgation of the State Immunity Law, according to the Chinese Ministry of Foreign Affairs was to bring Chinese foreign state immunity laws in line with international practice. The implementation of this law seeks to strike the appropriate balance between protecting the legitimate rights and interests of Chinese parties while respecting immunity afforded to foreign states under international law.

In the context of investment arbitration, Chinese investors should expect to benefit from the State Immunity Law, given the increased scope for enforcement of foreign state assets in China.

The State Immunity Law may also indicate China's willingness for Chinese investors to take necessary legal actions against foreign states, including investment arbitration, considering China's significant increase in foreign outbound investment. This is also consistent with the reference guide on the utilisation of investment agreements published by the Chinese Ministry of Commerce on 28 June 2021 to encourage Chinese investors to consider investment arbitration as a means of resolving investment disputes.

While China has ratified more than 100 bilateral investment treaties (**BITs**), only around 30 investment arbitration cases involving Chinese parties, whether as claimant or respondent, have been reported. This is disproportionate to the number of BITs ratified by China.

In particular, Chinese investors appear reluctant to pursue investment arbitration against foreign states. One of the reasons for this could be that Chinese SOEs, as the major driving force of China's outbound investment, may prefer to resolve disputes with foreign states *via* negotiations, as opposed to commencing formal legal proceedings which may adversely affect political relations between China and these states. Such an attitude may change if Chinese SOEs perceive a shift in China's policy following the promulgation of the State Immunity Law. This may result in a significant increase in investment arbitrations brought by Chinese investors.

Conclusion

In the Queen Mary University of London and White & Case International Arbitration Survey 2021, Beijing joined New York as the joint sixth most popular seat for international arbitration, with Shanghai ranked eighth, surpassing Stockholm. This showcases China's increasing influence in the international arbitration space. China's growing influence in the area will only increase with the proposed reforms of its arbitration regime, which could harken a golden age in the development of international commerce and dispute resolution in China.

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