Foreign Institutional Arbitration in Mainland China

Is it Possible to Appoint a Foreign Institution when Recognition and Enforcement might be sought in Mainland China?

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Abbreviations

BAC Beijing Arbitration Commission
CCP Chinese Communist Party
CIETAC China International Economic and Trade Arbitration Commission
HPC Higher People’s Court
ICC International Chamber of Commerce
ICCA International Council for Commercial Arbitration
IPC Intermediate People’s Court
PRC Peoples Republic of China
SCIA Shenzhen Court of International Arbitration
SCIETAC South China International Economic and Trade Arbitration Commission
SIETAC Shanghai International Economic and Trade Arbitration Commission
SHIAC Shanghai International Arbitration Center
SPC Supreme Peoples’ Court
UNCITRAL United Nations Commission on International Trade Laws
WTO World Trade Organization
Summary

Even though China is a world leading trade nation, few choose to arbitrate in Mainland China. In the Chinese Arbitration Law it is stated that a commission must be appointed in an arbitration clause for the clause to be valid. The Arbitration Law sets out a large amount of requirements regarding what organizations have to do in order to qualify as arbitration commissions. It was previously unclear whether arbitration clauses where foreign institutions were appointed were valid as foreign institutions arguably cannot live up to the requirements set out in the Arbitration Law. However, in the Longlide case the Supreme People’s Court stated that arbitration clauses where foreign institutions were appointed could be valid. Unfortunately parties cannot rely on a uniform application of the precedent in lower courts as it is unclear whether Supreme People’s Courts rulings are binding for lower courts.

Currently the most pressing matter is whether awards from foreign institutional arbitration in China can be recognized and enforced there. Internationally, the seat of arbitration is used to determine where awards come from. In China the seat of the institution is used to label awards from foreign institutional arbitration in China as foreign. For foreign awards to be recognized and enforced in China it is required that support for such action is found in China’s international commitments or the principle of reciprocity. The New York Convention, which is the principal instrument regarding recognition and enforcement of arbitral awards in trade disputes in China, generally apply to non-domestic and foreign awards. Awards from foreign institutional arbitration in China have been labeled as non-domestic by Chinese courts but such application of the Convention is not compatible with the country’s reciprocity reservation to the Convention. Therefore it is necessary to examine whether relevant awards can be seen as foreign under the Convention. In China it is unclear how it is determined where arbitral awards are made but according to the most recent case it seems as if awards are made at the seat of arbitration. Thus, if relevant awards neither can be labeled as non-domestic or foreign the Convention is not applicable and parties have to rely on the few contracts and judicial assistance treaties with provisions regarding recognition and enforcement of arbitral awards that China has. Therefore, it stands to reason that in many cases it would not possible to appoint a foreign institution for arbitration in China when recognition and enforcement might be sought there.
1 Introduction

1.1 Background

China is a world leading trade nation that has a tradition of promoting alternative dispute resolution instead of court proceedings. This tradition has been inspired by Confucianism and the aim has been to achieve harmony through avoidance of conflicts. In ancient times there was a saying:

*It is better to die from starvation than to become a thief: it is better to get so vexed that you die rather than going to court.*

Arbitration, a kind of alternative dispute resolution, has four distinctive traits:

- it is an alternative to national courts,
- it is a private mechanism for dispute resolution,
- it is chosen by and controlled by the parties; and
- there is a final award which is binding for the parties.

There are several benefits of choosing arbitration instead of litigation. Arbitration proceedings can often be adapted to the needs of the parties, they can be more cost effective and the awards are often confidential. The greatest advantage might however be the possibility of recognition and enforcement of arbitral awards internationally. The Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) has been ratified by 155 countries.

Even though there is a lively trade exchange between foreign and Chinese parties, few choose to arbitrate in Mainland China. If the parties nevertheless were to agree on

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3 K. Fan, Arbitration in China p. 3.
4 Kröll, Lew, Mistelis, Comparative International Commercial Arbitration, p. 3.
5 K. Fan, Arbitration in China, p. 3.
8 K. Fan, Prospects of Foreign Arbitration Institutions Administering Arbitration in China, p. 343
arbitrating in Mainland China, the next question is whether to arbitrate through a Chinese commission or a foreign institution as *ad hoc* arbitration is not allowed there.  

The question of whether foreign institutions are able to provide their services in China is not regulated by statutory provisions and few cases have emerged from the Chinese courts regarding foreign institutions administering arbitral proceedings in Mainland China. Whether foreign institutional arbitration is possible in Mainland China is of practical importance for a large amount of companies trading with Chinese parties. As new case law has emerged only recently, the subject requires academic attention, especially regarding the application of the New York Convention in Mainland China. Therefore, this thesis will investigate the possibility of appointing a foreign institution in Mainland China when the parties might apply for recognition and enforcement there.

### 1.2 Purpose and Delimitation

As mentioned above is the aim of this thesis to investigate whether it is possible to appoint a foreign institution for arbitration in Mainland China if recognition and enforcement might be sought there. Due to the limited scope of the essay will the focal point be recognition and enforcement under the New York Convention and investment disputes will not be discussed as the Convention is not applicable to such disputes in China. The Convention is a highly successful instrument regulating recognition and enforcement of international arbitral awards. Many of Mainland China’s other international commitments regulating recognition and enforcement refer to the Convention or have similar provisions. Currently, it is unclear whether the New York Convention can be applied to awards from foreign institutional arbitration in Mainland China. Internationally, this is generally more straightforward as many countries use the seat of arbitration to determine whether the Convention can be applied.

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10 See Section 4 Why Choose a Foreign Arbitral Institution.

11 See Article I (3) of the New York Convention, Article 2 of the *New York Convention Implementation Notice* by the Supreme People’s Court (SPC) from 1987 and C. Von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 90.

12 K. Fan, Arbitration in China, p. 86.

13 Internationally, it is generally the seat of arbitration that is used to determine whether arbitral awards are foreign and thus whether the New York Convention can be applied, Dr. B. Ehle, Article I (Scope of
In order to fulfill the purpose of this thesis, the following questions will be examined:

1. Does the Arbitration Law of China permit foreign arbitral institutions to provide their services in Mainland China?
2. Can an award resulting from foreign institutional arbitration in Mainland China be recognized and enforced under the New York Convention in Mainland China?

In this thesis there will be no discussion regarding how the Chinese legal system should be reformed. The Chinese legal system is complex and it is difficult to predict how legal changes would affect what is practiced. There are also extensive structural issues such as the connection between the state and the judiciary. Therefore, due to the limited scope of this thesis, there will be no discussions as to how the law should be reformed.14

1.3 Methodology and Material

1.3.1 General

In this thesis a legal dogmatic approach has been used in order to fulfill the purpose.15 Therefore, traditional legal sources such as statutes and case law have been used, but also economic and sociological analysis have been incorporated in an attempt to give a more holistic understanding of possible future developments.16 In compliance with legal dogmatism, an analysis of the current legal situation, de lege lata, will be made.17

1.3.2 International Arbitration

International arbitration is a complex area of law for several reasons. It combines civil law and common law, thus requiring practitioners to have knowledge of special procedural rules.18 There is a great variety of legal sources, such as the intentions of the parties, international conventions, rules of the arbitral institutions, precedents and

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14 For a general discussion on what could be changed to improve recognition and enforcement of arbitral awards in China see C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 323 f.
17 C. Sandgren, Rättsvetenskap för uppsatsförfattare, p. 61.
18 S. I. Strong, Research and Practice in International Commercial Arbitration p. 3.
national legislation. At the same time, there are few precedents available, as arbitration is a private dispute resolution mechanism. Furthermore, as the parties are from different countries, there might be variations in national legislation regarding questions such as that of jurisdiction.

1.3.3 China’s Legal System

The Chinese Court Structure

Supreme People’s Court (SPC)

Higher People’s Courts (HPC)

Intermediate People’s Courts (IPC)

People’s District Courts

Other courts

In 1978 the Chinese Communist Party adopted a more positive attitude towards legislation and due to the previous lack of legislation, much inspiration was sought abroad. Initially, China was inspired by the Soviet Union but when the financial reforms increased in the 1980s, legal inspiration was found in North America, Europe

20 S.I. Strong, Research and Practice in International Commercial Arbitration, p. 4.
21 P.B. Potter, China’s Legal System: Globalization and Local Legal Culture, p. 4.
and international organizations such as the United Nations. Parties unversed in Chinese law may presume that norms and legal concepts have the same meaning and importance as in more liberal countries. However, Potter warns that such an uncritical acceptance might lead to extensive legal costs and other issues. The application of foreign legal concepts in China is affected by local customs and rules. Another factor affecting the application of law is that the Chinese Communist Party (CCP) has an instrumentalist view of law, namely that the purpose of laws is means to an end rather than to restrict the Party. The CCP also has a large influence over the judiciary, thus making it possible for the Party to influence the legal system at all levels. Therefore, the laws, regulations and institutions are not to limit the power of the Party but rather to catalyze it.

When approaching a legal problem, it is necessary to look at the hierarchy of legal sources. The relationship between international treaties and domestic legislation is unclear in China when there is a conflict between the two sources of law. However, for the scope of this thesis there are no such conflicts. Regarding national sources of law, the norms are ranked based on the importance of the entity that has enacted them. Even though China is a civil law country, economic and commercial laws are purposefully put in very loose terms in order to allow problems that arise to be solved on a case to case basis. There is also the issue of discrepancies between what is stated on paper and practiced, a situation which calls for the view of practitioners. Courts are not allowed to enact law in China but the SPC is allowed to solve certain legal interpretation issues. The interpretations can take different forms, one form being replies to questions of interpretation asked by lower courts.

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22 P. B. Potter, China’s Legal System, p. 4 (footnote 4-6).
23 P. B. Potter, China’s Legal System, p. 1.
24 P. B. Potter, China’s Legal System, p. 6.
25 P. B. Potter, China’s Legal System, p. 10.
28 C. Sandgren, Rättsvetenskap för uppsatsskrivande, p. 36.
30 Xu, Lu and Siang, Insurance Law in China, p. 8
32 K. Fan, Arbitration in China p. 5.
33 Xu, Lu and Siang, Insurance Law in China, p. 9.
34 C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 15.
whether the interpretations of the SPC are binding but as the SPC supervises the lower courts, it has to some extent the ability to keep the case law in check.\textsuperscript{35}

\subsection*{1.3.4 Material}

As this thesis is about if it is possible to appoint a foreign institution in China, Chinese statutes and cases, as well as international treaties will be used in discussing Chinese law. The UNICITRAL Model Law and doctrine regarding international arbitration will also be used, in an attempt to highlight how certain concepts can be used in other systems. Much of the development regarding foreign institutional arbitration in China has happened in the last few years. Unfortunately, the SPC only publishes a few of its preliminary rulings.\textsuperscript{36} Currently there are two books in English written on the subject of arbitration in China that are relatively up to date and that discuss the subject of foreign institutional arbitration in China. The first one; \textit{Arbitration in China- A Legal and Cultural Analysis} by K. Fan is from 2013. The second book; \textit{Enforcement of Commercial Arbitral Awards in China} by C. von Wunschheim is from 2011. Due to the need of an updated perspective on recent developments, articles, rulings and surveys, but also less conventional material such as law blog posts has been used to some extent. Some of the material for this thesis has been produced by authors that are connected to law firms. Law firms producing blog posts might have other motives than purely academic but the use of such material is motivated by it in studies of Chinese law being important to accurately consult practitioners.\textsuperscript{37}

As has been described in the previous section China’s legal system is deeply influenced by the CCP which, especially for an outside viewer, creates a legal situation that may seem unpredictable. Therefore, it is relevant to discuss what incentives the Party has for promoting international commercial arbitration in China. In doing so, the economic impact of international commercial arbitration will be discussed. Few studies have been

\textsuperscript{35} Wunschheim even claims that SPC decisions are binding due to to the report system applied to foreign arbitration cases, C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 15.

\textsuperscript{36} K. Fan, Arbitration in China p. 5.

\textsuperscript{37} Ibid.
made regarding the impact international commercial arbitration has on the economy, making it difficult to state with certainty that there is an impact.38

1.4 Terminology

The Arbitration Law of the People’s Republic of China’s (1995) will be referred to as the “Arbitration Law” and the “People’s Courts” is used as a synonym to the Chinese courts. The CCP will at times be referred to as the “Party” and “China” will be used to describe Mainland China since Macao, Hong Kong, Taiwan and Tibet are seen as foreign jurisdictions under Chinese law.39

The term ”arbitral institution” is normally seen as synonymous to ”commission”, though in this thesis the term “commission” will mainly be used to describe Chinese institutions that fulfill all the requirements set out in the Arbitration Law.40 Later in this thesis when the condition of the Chinese arbitration commissions is discussed will the feud within China International Economic Trade Arbitration Commission (CIETAC) be examined. The feud within CIETAC involved two subsidiaries to the commission breaking loose and renaming themselves. CIETAC South China changed their name to South China International Economic and Trade Arbitration Commission (SCIETAC) and also gave themselves a second name; Shenzhen Court of International Arbitration (SCIA). CIETAC Shanghai changed their name and is now called Shanghai International Economic and Trade Arbitration Commission (SIETAC). They too took a second name; Shanghai International Arbitration Center (SHIAC). For the sake of clarity former CIETAC South China will be called SCIA and former CIETAC Shanghai will be called SHIAC in this thesis.

Also recognition and enforcement will be discussed in this thesis. A court recognizes an award when it acknowledges the existence of an award as well of its legal force and effect.41 Enforcement is instead when the court orders the relevant party to behave in

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39 Stipulations on Certain Issues regarding Judicial Jurisdiction over Foreign-related Civil and Commercial Cases issued by the SPC, 1 Mars 2003 and K. Fan, Arbitration in China s. 9.
41 C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 112.
accordance with the award. As the concepts often are often used as interchangeable terms, enforcement will sometimes be used to refer to both of the concepts. Awards from arbitration in China that have been administered by foreign institutions are labeled as foreign awards under the Civil Procedure Law Article 283. It is important to keep in mind that awards that are seen as foreign under the Civil Procedure Law do not necessarily qualify as foreign awards under Article I (1) of the New York Convention.

1.5 Disposition

First it will be discussed why parties want, or do not want to appoint China as the seat of arbitration. Then, there will be a short summary of the historical development of international arbitration in China. Possible reasons as to why parties to a dispute might want to appoint a foreign arbitral institution in China will be provided. After that, it will be examined whether the Arbitration Law allows foreign arbitral institutions to operate in China and how the law was interpreted before 2014. The Longlide case and its impact on the situation will then be examined. In Section 6 it will be discussed whether awards resulting from foreign institutional arbitration in China can be recognized and enforced. Following this, there will be a final discussion where it will be analyzed whether the Longlide precedent can be trusted and whether the New York Convention can be applied to relevant awards. In the conclusion there will be an attempt to answer the question of whether it is possible to appoint a foreign institution in cases where recognition and enforcement might be sought in China.

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42 C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 112.
43 See Section 6 and 7.3.
2 Choosing China as Seat of Arbitration

2.1 Introduction

Parties that choose to arbitrate in Asia normally do not do this in China.\textsuperscript{44} When choosing which country to arbitrate in, a number of factors might be considered. For example, the condition of the local courts is relevant since a need may later arise to approach a court in order to solve issues in connection with the arbitral proceedings. In this section, arbitration in Asia will briefly be discussed. The concept of the rule of law will then be applied in order to demonstrate why foreign parties appear to display apprehension in appointing China as an arbitral seat. The close ties between the state and the judiciary will be discussed, as well as how authoritarian states may view international commercial arbitration.

2.2 Arbitration in Asia

Parties that choose to hold arbitration proceedings in Asia normally do this in Hong Kong or Singapore, not in China.\textsuperscript{45} These countries, as according to Tao, seen as an attractive seat of arbitration as the United Nations Commission on International Trade Law (UNCITRAL) Model Law has been incorporated in their national legislation.\textsuperscript{46} The Model Law has been implemented by over 50 countries, creating somewhat of an international standard for arbitration with extended party autonomy and a restricted possibility for the national courts to interfere.\textsuperscript{47}

In a study from 2008, companies mentioned China as one of the countries they found most likely to encounter problems in arbitration proceedings.\textsuperscript{48} Furthermore, they mentioned China as a place where it would be difficult to have their arbitral awards

\textsuperscript{44} J. Z. Tao s. 2008 p. Xx f.
\textsuperscript{45} J. Z. Tao 2008 p. Xx f.
\textsuperscript{46} J. Z. Tao, Arbitration Law and Practice in China, 2008 p. Xx f.
\textsuperscript{48} Queen Mary, University of London and PricewaterhouseCoopers, International Arbitration: Corporate attitudes and practices 2008, p. 3.
recognized and enforced.\textsuperscript{49} This negative view is according to Cheng and Liu contradicted by statistics from the SPC which show that 74 % of the applications for recognition and enforcement of foreign arbitral awards were approved between 2010 and 2012.\textsuperscript{50}

Even though foreign parties might be unwilling to arbitrate in China, it can be difficult to convince Chinese parties, especially state owned entities, to arbitrate abroad.\textsuperscript{51} Arbitration in a country that is not the domicile of either party might be perceived as more neutral. Although many parties, according to Dietz, choose their home state as they feel it gives them an advantage.\textsuperscript{52}

2.3 Rule of Law in China

During the 18\textsuperscript{th} party congress 2012, a campaign to strengthen the morals in the Chinese society was introduced.\textsuperscript{53} It was declared that among other things, “rule of law” constituted a “socialist core value”, therefore to be seen as a moral and ideological foundation in the Chinese society.\textsuperscript{54} There is no uniform definition of what is required of a society that is under the “rule of law”.\textsuperscript{55} In Western countries, the term has been given both a substantial and a formal interpretation.\textsuperscript{56} A formal interpretation of the concept involves requirements regarding how laws are created, their form and how they are applied, whilst a substantial interpretation focuses on the content of the laws.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{49} Queen Mary, University of London and PricewaterhouseCoopers, International Arbitration: Corporate attitudes and practices 2008, p. 3.
\item \textsuperscript{50} The statistics was first presented at a seminar with the topic of “Arbitration in Mainland China: Law and Practice” on the 22\textsuperscript{nd} of October 2013 and were provided by T. Cheng and J. Liu, Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends, Journal of International Arbitration Vol 31 Issue 5 2014 p. 653.
\item \textsuperscript{51} P. Zheng and P. Billiet, Chinese Arbitration- A Selection of Pitfalls, p. 58 and D. Harris, How to Win a China Arbitration, Above the law 07-04-2015 http://abovethelaw.com/2015/01/how-to-win-a-china-arbitration/
\item \textsuperscript{53} Xi stresses socialist core values, Chinadaily USA, 04-06-2015 http://usa.chinadaily.com.cn/china/2014-02/26/content_17305163.htm
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} However, according to C. Murphy, Lon Fuller and the Moral Value of the Rule of Law, Law and Philosophy Vol. 24 2005, p. 240 it is generally believed that Fuller’s eight principles captures the essence of the rule of law. The concept of rule of law has later been developed further by authors such as J. Raz.
\item \textsuperscript{56} N. Parpworth, Constitutional & Administrative Law, p. 34.
\item \textsuperscript{57} Ibid. p. 35.
\end{itemize}
According to Raz, a formal interpretation of the rule of law requires the legal system to be independent and for the laws of the country to be open, stable and clear.\textsuperscript{58}

According to the Chinese Constitution, the courts should be independent, but it only regulates interference from some actors.\textsuperscript{59} In China, there is not independent commission that appoints judges and decides the budget for the individual courts, something that according to Wang can affect the quality of the courts.\textsuperscript{60} Another issue of the Chinese legal system, as Fan points out, is the big difference between “paper laws” and what is practiced in reality.\textsuperscript{61} In discussing the legal system, Tao mentions issues such as an undereducated judiciary, lacking procedural rules, inconsistent application of such rules and increased protectionism by the state.\textsuperscript{62} These factors in combination with the close connection between the local government and the judiciary make it, according to Tao, reasonable to question the efficiency, independence and objectivity of the Chinese legal system.\textsuperscript{63}

Therefore, even without applying a substantial definition of the term “rule of law”, it is difficult to find support for the conclusion that a Western definition of the term can be seen as descriptive of the Chinese legal system of today. Peerenboom states that the rule of law that is discussed in China is a “socialist rule of law”.\textsuperscript{64} There is no consistent definition of what a “socialist rule of law” is, but it could be said to mean that creating institutions and laws is positive but that the law should promote the rule of the Party.\textsuperscript{65} Regardless of what definition is used, it is difficult to refute the position that China’s legal system has grave issues and that parties considering appointing China as the seat of arbitration should have serious concerns.

\textsuperscript{59} Article 126.
\textsuperscript{60} Y. H. Wang, When do Autocrats Build Clean Courts- Sub-national Evidence from China, p. 9.
\textsuperscript{61} K. Fan, Arbitration in China p. viii.
\textsuperscript{63} J. Z. Tao 2008 p. Xx.
\textsuperscript{65} Y. Y. Shen, Conception and Reception of Legality- Understanding the Complexity of Law Reform in Modern China, Limits of Rule of Law in China- CI, p. 24 f.
2.4 Authoritarian States and International Commercial Arbitration

The lack of separation between the judiciary and the CCP can make the legislative development seem unpredictable. It is very difficult to predict legal development in China as there are many aspects to take into consideration, such as what groups are promoting a change, financial aspects, interest group politics amongst others.  

Massoud submits that it is reasonable for authoritarian states to promote arbitration in order to increase foreign contribution to the economy of a state. Whereas the alternative, consisting of making national courts more independent, is said to be against the very nature of an authoritarian state. There are however conflicting theories as to whether international commercial arbitration can impact international trade. Hale uses the New York Convention to measure the impact transnational commercial arbitration has on trade. His research shows that countries that have acceded to the New York Convention have had large boosts in their international trade, especially countries with weak judicial systems. Dietz on the other hand denies that transnational commercial arbitration can have a significant impact on cross-border trade. He states that the case load of major institutions is not proportionate to the amount of companies trading internationally for arbitration to be as widespread as people believe it to be. Dietz also claims that the reliance arbitration has on national courts decreases the effect arbitration may have on international trade. In the last few years there has been a decrease in the speed of the development of the Chinese economy. There are those that claim that the CCP is relying on the living standards of the Chinese people to

68 M. F. Massoud, International Arbitration and Judicial Politics p. 1 f.
70 Ibid. p. 198.
71 T. Dietz, Contending Theories and Evidence p. 222.
72 Ibid.
73 T. Dietz, Contending Theories and Evidence p. 222.
improve in return for the people’s compliance. Therefore, it could be reasoned that if promoting international commercial arbitration does have an effect on trade, it could be seen as an incentive for the Chinese state to promote arbitration.

2.5 Summary

In this Section it has been shown that most parties who choose to arbitrate in Asia prefer Hong Kong and Singapore over China as the seat of arbitration. The rule of law is an interesting example that demonstrates how difficult it can be to approach the Chinese legal system. Potter advises caution in applying Western definitions to concepts in China can be deceiving. It is difficult to sustain that a Western definition of the rule of law can be said to apply to the Chinese society. The condition of the legal system in China should cause serious concerns for anyone considering appointing China as the seat of arbitration.

Foreign parties might find it difficult to trust the legal development in a country where the state has a close connection with the legal system. Parties might fear that what is said today will no longer be valid tomorrow. Massoud claims that it is natural for authoritarian states to promote arbitration in order to increase foreign contribution to their economy. There is little research and discussion on the topic of what impact international commercial arbitration has on trade and it is not conclusive. However, if an effect can be proved, it could be reasoned that such arguments would provide an incentive for the Chinese state to adopt an arbitration friendly image.

3 International Arbitration in China

3.1 Introduction

If the parties choose China as the seat of arbitration, they need to be aware of the legal framework that regulates the process. Previously in this thesis, China’s legal system was discussed in general terms and in this Section there will be an introduction to the historical background of international arbitration in China. The background will show the legal framework and the thoughts behind the system that regulates international arbitration in China today. In this Section, institutional and ad hoc arbitration will be discussed in order to provide the reader with a better understanding of the two concepts.

3.2 Historical Background of International Arbitration in China

The earliest prominent development of international arbitration in China can be said to have been in 1954. This is when the State Council decided that CIETAC was to be created in order to bring Chinese arbitration closer to international standards. Between 1954 and 1978 there was a principle of “Only Arbitration, No Litigation” that generally applied to economic matters. When the Chinese market was opened to the outside world in 1978, arbitration was set out as the dispute resolution tool in legislation regarding the new international trade. An important step in promoting foreign trade for China was when the country acceded to the New York Convention in 1985, which made it possible for foreign arbitral awards from member states of the convention to be recognized and enforced in China. In 1994 the Arbitration Law was created with the purpose of promoting implementation of international arbitral principles. In 1995, SPC issued *Notice on Handling of Issues Regarding Foreign-Related and Foreign Arbitration* which established a report system making lower courts obliged to report, level by level, up to the SPC if they refused recognition or enforcement of foreign

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76 K. Fan, Arbitration in China p. 18.
77 K. Fan, Arbitration in China p. 18.
80 K. Fan, Arbitration in China s. 20.
arbitral awards.\textsuperscript{81} The system, however, did not work very well in the beginning due to the lack of a time frame for how long the courts could take in processing the matter before reporting it.\textsuperscript{82} The SPC solved this in 1998 by issuing \textit{Provisions Concerning the Question on the Fees and Time Limit}. Later, the report system was extended to cover all cases where lower courts set aside foreign or foreign-related awards.\textsuperscript{83} China has tried to provide a stable base for foreign investment and to promote economic growth ever since they joined the World Trade Organization in 2001.\textsuperscript{84} Despite attempts to adapt to international arbitral standards, Chinese arbitration law keeps what Fan calls “Chinese features”.\textsuperscript{85} Examples of such features are the ban on \textit{ad hoc} arbitration as well as the disregard for the principle of Competence-Competence; concepts that will be discussed in Sections 3.3 and 4.2.

Today, arbitral awards and proceedings are treated differently depending on if they are classified as domestic, foreign or foreign-related.\textsuperscript{86} There are several benefits with having arbitration proceedings categorized as non-domestic such as it is possible to choose the substantive law applicable to the case, court interference is more restricted and the report system is applied.\textsuperscript{87}

### 3.3 Institutional and \textit{Ad hoc} Arbitration

Internationally, it is common for the parties to be able to choose between institutional and \textit{ad hoc} arbitration. In China it is instead mandatory to appoint an arbitral institution.\textsuperscript{88} In institutional arbitration there is already a set of procedural rules available and the arbitral process is supervised by a group of professionals.\textsuperscript{89} This leads, according to Born, to a decreased risk of technical procedural issues and less risk of the process breaking down.\textsuperscript{90} Born also states that it can be easier to fix fees, appoint

\begin{footnotes}
\item[81] T. Cheng and J. Liu, Enforcement of Foreign Awards in Mainland China, p. 652.
\item[83] C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 50.
\item[84] K. Fan, Arbitration in China p. 9.
\item[85] Ibid.
\item[86] K. Fan, Arbitration in China p. 21, see for example Section 6.
\item[87] K. Fan, Arbitration in China, p. 25 f.
\item[88] The Chinese Arbitration Act, Art. 16
\item[90] Ibid.
\end{footnotes}
suitable arbitrators and to resolve challenges of arbitrators. Ad hoc arbitration is however more flexible, it can be less expensive and potentially more confidential as it involves fewer parties. There are also sets of procedural rules available that parties can choose to apply to ad hoc proceedings without having an arbitral institution supervising the proceedings. Furthermore, ad hoc arbitration can be used to decrease unwelcomed influence that states may exert over arbitral institutions. Since ad hoc arbitration is forbidden in China, it is important to know where the seat of arbitration is in order to determine whether the Chinese prohibition of ad hoc arbitration is applicable or not. If the seat of arbitration is not in China, then ad hoc awards can be enforced under the New York Convention. Even though the Arbitration Law does not recognize ad hoc arbitration, such proceedings still take place in China despite the parties facing the risk of their arbitration clause being invalid and it not being possible to enforce their award in China.

3.4 Summary

Perhaps the most prominent early development of international arbitration in China was the creation of the CIETAC in the 1950’s. There have been attempts to bring Chinese arbitration law closer to international standards but it keeps “Chinese features”. One of these “features” is the ban of ad hoc arbitration and parties that choose ad hoc arbitration in China would face the risk of having their arbitration clause declared invalid and for their award not to be enforceable by a Chinese court. Institutional arbitration can bring several benefits according to Born such as the risk of the proceedings breaking down due to technical issues decreases. However, when standing before the choice of which arbitral institution to appoint, there are certain matters parties should consider, matters that will be discussed in the following section.

92 Ibid. p. 151.
93 Ibid..
94 C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 56.
95 K. Fan, Arbitration in China p. 40 f.
97 K. Fan, Arbitration in China p. 40 f.
4 Why Choose a Foreign Arbitral Institution?

4.1 Introduction

If the parties choose China as the seat of arbitration, the ban on *ad hoc* arbitration can be said to provide a strong incentive to appoint an arbitral institution. The choice then stands between appointing a Chinese arbitration commission or a foreign arbitral institution. Only parties of disputes that have a foreign element appoint a foreign arbitral institution. If parties of a domestic dispute were to choose a foreign institution, the award would be rendered unenforceable in China. A foreign element can include the following:

- at least one party is from another state, is stateless or is a company that has its domicile abroad,
- the legal facts that have established, changed or terminated the civil legal relationship between the parties have taken place abroad; and/or
- the subject matter of the dispute is situated in a foreign country.

The purpose of this Section is to provide the reader with a better understanding of factors that might be considered when put before the choice of whether to appoint a Chinese commission or a foreign institution.

4.2 Chinese Arbitration Commissions

4.2.1 Chinese Commissions Adapting to Chinese Rules

Chinese arbitration commissions have, unlike many foreign institutions, had the opportunity to adapt to Chinese law regulating arbitration. One example is how the lack of the principle of Competence-Competence has been handled by the arbitration

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98 See Article 16 of the Arbitration Law.
99 The Chinese Contract Law Article 128.
100 Ibid.
commissions. Internationally, arbitral tribunals themselves have the authority to decide over matters regarding interpretation, validity and enforceability of the arbitration clause, which is known as the principle of Competence-Competence. In China it is instead the institutions and the People’s Courts that have the right to decide the validity of the arbitration clause as the principle of Competence-Competence is not acknowledged in the Arbitration Law.

Article 20 (1)

If a party challenges the validity of the arbitration agreement, such party may request the arbitration commission to make a decision or apply to the People’s Court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the People’s Court for a ruling, the People’s Court shall give a ruling.

Not applying the principle of Competence-Competence is problematic as some disputes concern both the jurisdiction of the tribunal and material questions as well as facts of the case. In such cases, the decisions of the institution or court can conflict with the decision of the arbitral tribunal. The two biggest arbitration commissions, CIETAC and Beijing Arbitration Commission (BAC), have incorporated provisions in their rules that state that they will discuss the matter of jurisdiction with the arbitral tribunal before making a decision.

Another example of where foreign institutions might want to adapt to Chinese law is in how they construct their model clauses. Article 16 of the Arbitration Law sets out requirements for what an arbitration clause must contain in order for it to be valid. One of the requirements is that the clause has to appoint an arbitral institution. In some cases, parties who are less familiar with Chinese law fail to appoint an institution. In order to cater to this need, Chinese arbitration commissions have written model clauses

104 C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China, p. 60.
105 Ibid.
106 CIETAC Rules 2012 Article 6 and BAC Arbitration Rules (2004) Article 6(4). However, it can be questioned whether that is compatible with Article 20. See C. von Wunschheim, Enforcement of Commercial Arbitral Awards in China p. 61 for a discussion on the subject.
107 See for example the Züblin case Section 5.3.
that appoint them as the relevant institution. The ICC has also construed a special model clause for China, but most foreign institutions have not yet done this. The Chinese arbitration commissions have had time to adapt to the Chinese legal system and thus it could be argued that they are better suited for arbitration in China.

### 4.2.2 Independence and Stability of Chinese Arbitration Commissions

In Articles 8 and 14 of the Arbitration Law, it is stated that arbitration is to be carried out without interference from administrative organs, public organizations and individuals, and that arbitration commissions are not subordinate to administrative organs or other commissions. When arbitration commissions are created, they are established by the local government, thus making it possible for the local government to exert influence over the commissions. Article 14 stipulates that the commissions should be independent from administrative organs, but due to lack of implementation rules under the Arbitration Law, administrative organs made rules that enabled them to exert influence over the appointment of arbitrators.

The local governments tend to have more influence over smaller arbitration commissions than over larger commissions such as CIETAC. Government officials as well as staff connected to the local administration often hold positions in the smaller arbitration commissions and many of the institutions are dependent on subsidies from the government. Even if a commission might be self-sufficient, their profits still have to undergo the scrutiny of local administrative organs. Whilst larger institutions have a higher degree of independence, other issues might surface.

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108 CIETAC model clause 27-05-2015
http://www.cietac.org/index/applicationForArbitration/47601fd59fcac97f001.cms
BAC model clause 27-05-2015
http://www.intracen.org/Model-Clause-Beijing-Arbitration-Commission-BAC/


112 K. Fan, Arbitration in China, s. 135.


In 2012, two CIETAC subsidiaries left the CIETAC after new rules had been issued which gave the Beijing office more power than before.\(^{115}\) After leaving, CIETAC South China changed their name to SCIA and CIETAC Shanghai changed its name to SHIAC.\(^{116}\) In addition to changing their names, the subsidiaries also issued their own sets of rules and claimed that all disputes stemming from contracts that referred to CIETAC Shanghai and CIETAC South China were still to be handled by them.\(^{117}\) CIETAC Beijing opposed this and claimed that SHIAC and SCIA no longer had jurisdiction over such cases.\(^{118}\) This conflict put parties of contracts that appointed either CIETAC Shanghai or CIETAC South China as the relevant arbitration commission in a difficult position. A party wanting to delay the proceedings could easily object, claiming that the commission handling the matter did not have jurisdiction.\(^{119}\) There was also the problem of the requirement in the Arbitration Law stating that for an arbitration clause to be valid, it has to clearly appoint an arbitration institution.\(^{120}\) In addition to this, it was also unclear whether awards made by SHIAC and SCIA would be recognized and enforceable in other parts of China than Shanghai and South China.

On the 4\(^{th}\) of December 2013 the SPC issued *Notice on Relevant Issues Concerning Correct Handling of Judicial Review of Arbitration Matters* which instructed lower courts to refer any dispute relating to the disagreement between the CIETAC subsidiaries to the SPC. In the case of *Hu Er Zhong Min Ren Zi Di 5 Hao*, the Intermediate People’s Court (IPC) No. 2 in Shanghai concluded, on 31\(^{st}\) of December 2013, that an arbitration clause where it was referred to “CIETAC Shanghai sub-commission” gave jurisdiction to SHIAC. Analyzing the verdict in the *Hu er Zhong Min Ren Zi Di 5 Hao* case, Liu and Wunschheim found it to be probable that just as CIETAC Shanghai related disputes were to be sent to SHIAC, CIETAC South China disputes were to be referred to SCIA.\(^{121}\) Despite there being no published comment

\(^{115}\) J.Z. Tao and M. Zhong, Picking the Right Arbitration Institution in China, September/October 2014, China Law and Practice, p. 28.

\(^{116}\) Ibid.

\(^{117}\) Ibid.

\(^{118}\) Ibid.

\(^{119}\) M. Dresden, Will the Real CIETAC Please Stand Up? China Law Blog, 2015-02-11

[http://www.chinalawblog.com/2013/05/will-the-real-cietac-shanghai-please-stand-up.html](http://www.chinalawblog.com/2013/05/will-the-real-cietac-shanghai-please-stand-up.html)

\(^{120}\) Article 18.

\(^{121}\) Liu and Wunschheim, The CIETAC Feud: Big Brother is Watching- But is it also Settling the Fight? Kluwer Arbitration Blog, 2015-02-10.

[http://kluwerarbitrationblog.com/blog/author/learliu/](http://kluwerarbitrationblog.com/blog/author/learliu/)
from the SPC, Liu and Wunschheim claimed that the verdict was approved by the SPC since there was nothing in the verdict that contradicted such conclusion.\(^\text{122}\)

In a matter of days after the verdict in the above mentioned case was given, CIETAC announced that it intended to open new subsidiaries in Shanghai and Shenzhen, naming them CIETAC Shanghai and CIETAC South China. Thus the question of jurisdiction was once again unclear. The latest development is that the IPC Shanghai No. 2 in several rulings from January 2015 have yet again clarified that it is SHIAC and not CIETAC Beijing that has jurisdiction over matters referring to CIETAC Shanghai.\(^\text{123}\)

Thus, parties would be wise to first consider the stability and neutrality of a commission before appointing it.

### 4.3 Foreign Arbitral Institutions

In a study from 2013 international companies stressed the importance of neutrality of arbitral institutions, as the companies considered it to be easier to explain how they lost if the arbitration fulfilled this requirement.\(^\text{124}\) Some Chinese arbitration commissions can be seen as less neutral, thus providing a reason for parties to turn to foreign arbitral institutions.\(^\text{125}\) Parties that have previous experience of arbitrating through a specific institution and therefor are familiar with the institution and its rules can also feel a sense of security in appointing the same institution for arbitration in China.\(^\text{126}\) The parties should however keep in mind that foreign arbitral institutions might not have sufficient knowledge of local rules which can affect the enforceability of awards produced.\(^\text{127}\) If for example the parties use a model clause of a foreign institution that is not adapted to Chinese circumstances that could result in the clause being declared invalid in China.

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122 Liu och Wunschheim, The CIETAC Feud.
124 PWC, Queen Mary University and School of International Arbitration, Survey of International Arbitration 2013, Corporate Choices in International Arbitration- An Industry Perspective, p. 9.
125 See Section 4.2.
126 Greenberg, Kee and Weeramantry, International Commercial Arbitration; An Asia-Pacific Perspective, p. 82.
127 For example, if the arbitration clause is deemed to be invalid, the arbitral award resulting from proceedings based on that clause will not be recognized or enforced in China, see for example the Züblin case.
4.4 Summary

When choosing China as the seat of arbitration, the parties will be faced with the choice of whether to appoint a Chinese commission or a foreign institution. Some commissions suffer from a lack of independence from the local authorities and the largest commission has proven to be unstable. The feud within CIETAC has taken three years to resolve and by opening new offices that have the same names as the previous subsidiaries, CIETAC has shown itself unwilling to facilitate putting an end to the dispute. Therefore parties not only have to worry about similar events taking place in the future but also if the commission will handle it as poorly as the last dispute. However, one potential benefit of appointing a Chinese arbitration commission is their knowledge of local rules. For example CIETAC has compensated for the lack of the Competence-Competence principle in the Arbitration Law and has adapted its model clause to Article 16 of the Arbitration Law. There are foreign institutions that parties could perceive as more neutral and stable. Even though it might seem appealing to appoint a foreign institution it could, until last year, be questioned if arbitration clauses where foreign institutions were appointed for arbitration in China, were compatible with the Arbitration Law.
5 Can a Foreign Arbitral Institution Be Appointed in China?

5.1 Introduction

For a long time it has been discussed whether parties can appoint a foreign arbitral institution to administer arbitration in China. Some were of the opinion that clear permission from the government was needed whilst others were of the opinion that there was nothing stopping foreign arbitral institutions from providing their services in China. In this Section, both the situation before and after 2014 will be discussed by examining relevant provisions of the Arbitration Law as well as case law and opinions of experts on whether foreign institutional arbitration is compatible with the Arbitration Law.

5.2 Statutes

If the parties have not chosen otherwise, the law governing the validity of the arbitration clause is Chinese law.

\textit{Article 16}

The law as agreed by the parties shall apply to the examination over the validity of the foreign-related arbitration agreement; where the parties concerned have not agreed on the applicable law but have agreed on the place of arbitration, the law of the place arbitration shall apply; and where neither the applicable laws nor the place of arbitration is agreed or the agreement on the place of arbitration is not clear, the laws of the place where the court is located shall apply.

In the Arbitration Law the terms “institution” and “commission” are used interchangeably but in an attempt to make it clear which one is being referred to, the Chinese arbitral institutions will mainly be referred to as “commissions”. Articles 16 and 18 of the Arbitration Law stipulate that unless an arbitration commission has been appointed, the arbitration clause will be void.

\begin{itemize}
  \item [128] See Section 5.3.
  \item [129] See for example the verdict from the Hefei District Court in the Longlide case.
  \item [130] The Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the People’s Republic of China, 2006, Article 16.
\end{itemize}
Article 16

(...) An arbitration agreement shall contain the following particulars:

(1) an expression of the intention to apply for arbitration
(2) matters for arbitration; and
(3) a designated arbitration commission.

Article 18

If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such agreement can be reached, the arbitration agreement shall be void.131

The question then becomes whether foreign arbitral institutions qualify as an arbitration commission under the Arbitration Law.

Article 10

Arbitration commissions may be established in municipalities directly under the central government and in municipalities that are the seats of the People’s Governments of provinces and autonomous regions. They may also be established in other municipalities with districts, according to need. Arbitration institutions shall not be established at each level of the administrative divisions... The establishment of an arbitration commission shall be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the central government.132

Sun points out that the word “may” is used instead of “shall” in the first part of the article which would not exclude the possibility of a commission having their seat outside of China.133 However, Sun continues by stating that the registration requirement is mandatory and that the charter of the commission has to be in accordance with the Arbitration Law.134

Article 11

An arbitration commission shall meet the conditions set forth below:

(1)To have its own name, domicile and charter;

131 Översättning av K. Fan, Arbitration in China, s. 276.
132 Översättning K. Fan, Arbitration in China, s. 274.
133 W. Sun, SPC Instruction Provides New Opportunities for International Arbitral Institutions to Expand into China, Journal of International Arbitration, Vol. 31 Issue 6, p. 684.
134 Ibid.
(...) 
The charter of an arbitration commission shall be formulated in accordance with this Law.

Sun also mentions Article 15 which requires arbitration commissions to be members of the Chinese Arbitration Association and submit to the rules of the association.

**Article 15**

(...)Arbitration commissions shall be members of the China Arbitration Association.

(...) [The Arbitration Association] shall supervise arbitration commissions and their members and arbitrators as to whether or not they breach discipline, in accordance with its charter.

Sun concludes that since the Arbitration Law has several articles regulating what an arbitration commission may or may not do, it becomes unlikely that a foreign institution would fulfill all the requirements set out in the law. Since it is stated in Article 16 that an arbitration commission must be appointed for the arbitration clause to be valid, it can be reasoned that the Chinese arbitration commissions have monopoly over arbitration in China as they are the only ones that fulfill all the requirements set out in the Arbitration Law.

Fan interprets Article 16 differently. She claims that article 10 does not provide a sole definition of the term “arbitration commission”. The purpose of Article 16 is instead, according to Fan, to prohibit ad hoc arbitration rather than preventing foreign arbitral institutions from providing their services in China.

### 5.3 The Situation Before 2014

Before 2014 the case of *Züblin International v. Woke Rubber (2006)*, *Wuxi IPC, [2004]* 锡民三仲字第1号 (Wuxi IPC) & [2004] 新民二初字第154号 (Wuxi High-tech Zone BPC) & [2003] 民四他字第23号 (SPC) & [2003] 苏民三立他字第006号 (Jiangsu HPC), 19 July 2006 was the main case used in the debate of whether foreign institutional arbitration was possible in China. A German company, Züblin, was to build a factory for a Chinese company, Woke. The standard contract that the parties had used

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135 W. Sun, SPC Instruction Provides New Opportunities. p. 685.
137 Ibid.
had an arbitration clause where it was stated that “Arbitration 15.3 ICC rules Shanghai apply”. The parties disagreed about the payment of the construction and Woke sued Züblin before a district court in Wuxi. Züblin contested the jurisdiction of the Wuxi court and initiated proceedings before the ICC. The ICC gave an award in favor of Züblin. Meanwhile the case moved from the Wuxi district court to IPC Xiamen. The IPC declared the arbitration clause void and the ICC award non-enforceable. The IPC applied Chinese law and stated that the arbitration clause was void due to the contract not clearly naming an arbitration commission. The SPC agreed with the IPC.

Despite it not being discussed in the case whether a foreign arbitral institution might qualify as an arbitration commission many still believed the case to indicate that China did not want to see foreign arbitral institutions administer arbitration in China.\(^\text{138}\) Due to the unclear situation, the ICC chose to arbitrate in China only if it was clearly stated in the arbitration clause that the arbitration was to take place in China.\(^\text{139}\) This resulted in that the ICC only administered arbitration in China 16 times between 1992 and 2010.\(^\text{140}\)

Before 2014 there was no clear answer to the question of whether foreign institutional arbitration was possible in China. There were nevertheless people, such as the judge, Zhang Fuqi, and the former general secretary of CIETAC, Wang Shengchang, who claimed that it was indeed possible.\(^\text{141}\) There were also those who thought that China was not ready to accept foreign jurisdiction over arbitration in China.\(^\text{142}\)

### 5.4 Anhui Longlide Packaging

The case of *Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L.* (2014) finally gave the SPCs view on whether foreign arbitral institutions are allowed to provide their services in China. The Chinese company Longlide and the Italian company BP Agntai had a contract with the following arbitration clause:

> “...any dispute arising from or in connection with this contract shall be submitted to arbitration by the International Chamber of Commerce (‘ICC’)”

\(^{138}\) Herbert, Smith, Freehill, Dispute resolution, The Longlide Case and its Impact, or Non-Impact, on Sino-Foreign Arbitration Clause Drafting, Hong Kong Arbitration E-bulletin, 07-02-2015.

\(^{139}\) K. Fan, Arbitration in China s. 51.

\(^{140}\) K. Fan, Arbitration in China s. 51.


\(^{142}\) W. Sun, SPC Instruction Provides New Opportunities, p. 686 f.
Court of Arbitration according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English.”

Longlide questioned the arbitration clause in the District Court of Hefei. The company claimed that the ICC was not to be considered as an arbitration commission under Article 16. It also claimed that allowing the ICC to provide their services in China would be against Chinese policy as it would weaken Chinese jurisdiction over arbitration there. Furthermore, the company argued that there would be no point in allowing ICC to arbitrate in China as an award from such proceedings would not be recognized or enforceable in China due to the Chinese reciprocity reservation to the New York Convention.

The District Court in Hefei concluded that Chinese law was applicable but that the Arbitration Law did not clearly state whether foreign institutional arbitration was possible in China or not. As the arbitration was to take place in China, the Hefei court concluded that the requirement in Article 10 of the Arbitration Law applied, namely that arbitration commissions have to register in accordance with the article. Since the ICC was not registered and no official statement from the government had been made stating that the Chinese arbitration market was open to foreign institutions, the Hefei court decided to declare the arbitration clause void.

The majority in the IPC Anhui also applied Chinese law but stated that only the requirements in article 16 applied. Therefore, it was not necessary for an institution to fulfill all the requirements set out in the Arbitration Law in order for the arbitration clause to be valid. The minority found that an express permission from the government was required before foreign institutional arbitration could be allowed in China.

The case was referred as a question to the SPC which agreed with the majority of the IPC Anhui, namely that only the requirements in Article 16 were of relevance. Thus, according to the SPC, the Arbitration Law does not exclude foreign institutional arbitration. However, the requirements in the Arbitration Law still apply to foreign institutions that set up a structure in China.143 What still might be considered as worrisome is the fact that it is unclear whether replies from the SPC are binding for

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143 C. Von Wunschheim, Enforcement of Commercial Arbitral Awards, p. 66.
lower courts and that the legal development is particularly open to policy changes due to the lack of separation between the state and the judiciary.\textsuperscript{144}

5.5 Summary

The Arbitration Law contains a rather large amount of provisions that seem to set out requirements of what an institution must do in order to qualify as an arbitration commission. Before 2014 it was unclear whether foreign institutional arbitration was compatible with the Arbitration Law. The one case that, according to some, represented the view of the SPC did not expressly answer the question of whether a foreign institution could be seen as an arbitration commission. Later, in the Longlide case, the SPC clarified that arbitration clauses where foreign arbitral institutions are appointed for arbitration in China are valid. Even though the Longlide case is opening up for foreign institutional arbitration in China there is one rather pressing problem left, namely the issue of recognition and enforcement in China of foreign institutional arbitral awards from China.

\textsuperscript{144} See Section 1.3.3, 2.3 and 2.4.
6 Recognition and Enforcement

6.1 Introduction

Even if the seat of arbitration is China, it does not mean that recognition and enforcement will be sought in China since for example relevant assets can be situated elsewhere. The possibility of recognition and enforcement internationally is arguably one of the most fundamental reasons as to why many favor arbitration in international trade.\(^\text{145}\) The question of this thesis, however, is whether it is possible to appoint a foreign institution to administer arbitration in China in cases where recognition and enforcement might be sought there.\(^\text{146}\) Previously it has been discussed whether appointing a foreign arbitral institution is compatible with the Arbitration Law. In this Section, recognition and enforcement under the New York Convention in China will be examined. Internationally, it is often the seat of arbitration that is used in determining where an award comes from, which in turn determines whether the New York Convention can be applied.\(^\text{147}\) In China it is unclear whether foreign institutional arbitral awards from China fall under the Convention.

In China, awards are labeled under the Civil Procedure Law based on which institution that has administered the proceedings.\(^\text{148}\) Thus, if the seat of the institution is outside of China it is a foreign institution, and if a foreign institution has administered the proceedings, the award is labeled as foreign in accordance with Article 283 of the Civil Procedure Law.\(^\text{149}\) For an award that is labeled as foreign under the Civil Procedure Law to be recognized and enforced in China, it is required that support for such action is found in China’s international commitments or the principle of reciprocity.\(^\text{150}\)

The principle of reciprocity entails that China shall recognize and enforce awards that come from places where Chinese awards are recognized and enforced. It is very rare for the Chinese courts to apply the principle of reciprocity as many of Chinas major trading

\(^\text{146}\) As mentioned in the Delimitation chapter, S. 1.2, is this because China has a way of labeling awards which does not conform to the international standard and therefore needs academic attention.
\(^\text{147}\) H. Kroenke, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary, p. 22.
\(^\text{148}\) See Articles 237, 274 and 283 of the Civil procedure Law.
\(^\text{149}\) Article 283 Civil Procedure Law.
\(^\text{150}\) Ibid.
and partners have acceded to the New York Convention and have bilateral treaties with China regulating judicial assistance.\textsuperscript{151} Fan even claims that the principle has never been used to enforce arbitral awards in China.\textsuperscript{152} China has bilateral treaties regulating judicial assistance with more than 30 countries but most of these treaties refer to the New York Convention regarding questions of recognition and enforcement of commercial arbitral awards.\textsuperscript{153} China also has contracts with Hong Kong and Macao that regulate recognition and enforcement of foreign arbitral awards, contracts that are similar to the New York Convention.\textsuperscript{154} Therefore, the New York Convention or similar provisions are often used in determining whether foreign awards can be enforced or not and it will be the focus of this Section.

The New York Convention is according to Article I (1) applicable to foreign and non-domestic arbitral awards. It is important to keep in mind that even if an award is labeled as foreign under the Civil Procedure Law it does not mean that it is seen as foreign under the New York Convention. In Chinese case law, foreign institutional arbitral awards from China have been labeled as non-domestic.\textsuperscript{155} However, China has made a reciprocity reservation to the New York Convention which entails that the Convention is only applicable to awards that have been made in another member state of the Convention. Therefore, it should not be possible to apply the Convention to non-domestic awards since they have not been made in another contracting state. The question therefore becomes if it is possible to instead label relevant awards as foreign under the New York Convention.

\section*{6.2 Domestic Classification of Arbitral Awards}

Internationally, commentators generally agree that an award is from the agreed seat of arbitration.\textsuperscript{156} In China, the seat of arbitration is relevant in determining where \textit{ad hoc} awards come from, but that is not the case when it comes to recognizing and enforcing

\begin{footnotesize}
\begin{itemize}
\item[152] K. Fan, Arbitration in China, p. 85.
\item[153] K. Fan, Arbitration in China, p. 85 f.
\item[154] K. Fan, Arbitration in China, p. 86 f.
\item[155] This was both in the Züblin case and Duferco case.
\end{itemize}
\end{footnotesize}
institutional arbitral awards.\textsuperscript{157} Under the Civil Procedure Law, awards are labeled as domestic, foreign-related or foreign, all depending on which institution that has administered the proceedings.\textsuperscript{158} The system of classifying awards based on the nationality of the arbitral institution has, according to Fan, been criticized by Chinese academics who would have preferred to see the seat of arbitration being used to decide if an award is foreign or not.\textsuperscript{159}

In Article 283 of the Civil Procedure Law 2012 it is stated that foreign institutional arbitral awards have to be covered by China’s international commitments or the principle of reciprocity to be recognized and enforced in China.

\textit{Article 283}

\begin{quote}
If an award made by a foreign arbitration institution needs the recognition and enforcement of a people’s court of the PRC, the party shall directly apply to the intermediate people’s court located in a place where the party subject to the enforcement has it’s domicile or where its property is located. The people’s court shall deal with the matter according to the relevant provisions of the international treaties concluded or acceded to by the PRC or on the principle of reciprocity.
\end{quote}

As mentioned above, it can be questioned if the principle of reciprocity ever has been used in China. Many of China’s contracts and judicial assistance treaties are either similar to, or refer to the Convention. Compared to the Convention, is it very few states that have judicial assistance treaties regarding recognition and enforcement which is why only the Convention will be discussed in this Section.

\section*{6.3 Institutional Arbitral Awards from China and the New York Convention}

In the New York Convention, the following is stated:

\textit{Article I (1)}

\begin{quote}
This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of
\end{quote}

\textsuperscript{157} Even though \textit{ad hoc} arbitration is not possible in China \textit{ad hoc} awards from other contracting states are still recognized and enforced in China. See Section 3.3.

\textsuperscript{158} Article 237, 274 and 283 of the Civil Procedure Law.

\textsuperscript{159} K. Fan, Arbitration in China, p. 22.
such awards are sought.... It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

In countries that have not made a reciprocity reservation, the New York Convention is applicable to arbitral awards that are either labeled as foreign or non-domestic.\(^\text{160}\)

\textit{Duferco v Ningbo Arts and Crafts Imp. & Exp. Co. Ningbo IPC’s decision of April 22, 2009} is the only known case where an award from foreign institutional arbitration in China was recognized and enforced in the People’s Republic using the New York Convention. In the Duferco case, a Chinese company refused to pay a Swiss company due to a faulty bill of lading. The Swiss company took the dispute to the ICC and the proceedings took place in China in accordance with the parties’ arbitration agreement. Due to the Chinese company’s lack of participation in the proceedings, the ICC issued an award in favor of the Swiss company. When the Swiss company applied for enforcement of the award before a Chinese court, the Chinese company objected. The IPC Ningbo decided that it could not try whether the arbitration clause was valid or not as the time frame for questioning the validity of the clause already had passed. The court classified the award as non-domestic. Since the court did not consider there to be any reasons as to why the ICC award should not be recognized and enforced by using the New York Convention, the Swiss company won.

Both in the Züblin case that was described in Section 5.3, and in the Duferco case, did the courts come to the conclusion that foreign institutional arbitral awards from China were non-domestic. However, what both the IPC in the Züblin case and the IPC in the Duferco case failed to explain is how such conclusion is compatible with the reciprocity reservation China has made to the Convention.

\section*{6.4 The Reciprocity Reservation}

China has made two reservations to the Convention, one of which is a reciprocity reservation.\(^\text{161}\)

\textit{Article I (3)}

\(^{160}\) See Article I(1) and I(3) of the Convention.  
\(^{161}\) The other one is the commercial reservation, see the SPCs Notice on the Implementation of the New York Convention 10\textsuperscript{th} of April 1987 for both reservations.
When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Hence, it is not possible to label awards as non-domestic as awards have to be from another contracting state to fall under the Convention in China. The question then arises whether it is possible to label awards from arbitration administered by foreign institutions in China as foreign in accordance with the New York Convention.

6.5 When Awards can be seen as Foreign under the New York Convention in China

In Article I(1) of the New York Convention it is stated that foreign awards are those that have been made in another state than the state where recognition and enforcement is sought. There is no definition of “made” in the New York Convention which is why it is necessary to turn to Chinese domestic law.162 There is a lack of guidance in Chinese statues and the Chinese case law regarding the matter is very limited and inconsistent. As shown above have awards from arbitration in China that has been administered by foreign institutions been labeled as non-domestic. Therefore it is necessary to turn to case law regarding arbitration outside of China where it has been discussed where arbitral awards are made.

In Weimao v. Tianli Enterprise (2004), SPC, [2004]民四他字第6号 (SPC) & [2004]晋法民四请字第1号 (Shanxi HPC), 5 July 2004 the court was faced with the question of whether the New York Convention or the agreement between Hong Kong and China was to be used in recognizing and enforcing an ICC award. In the case, the SPC concluded that it was the New York Convention that was to be applied since the ICC that had administered the proceedings was established in France, a member state of the Convention.

The seat of the institution was also used by the Chengdu IPC in the case of TH&T v. Hualong Auto (2003), Chengdu IPC, [2002]成民初字第531号 (Chengdu IPC), 12

162 H. Kroenke, Recognition and Enforcement of Foreign Arbitral Awards, p. 22.
December 2003. In the case, a Chinese company and an American company had agreed to arbitrate through the ICC in the United States. The Chinese party did not participate in the proceedings and the American party won. When the American company later applied to have the award recognized and enforced in China, the IPC Shanghai concluded that the award was to be seen as French since ICC was established in France.

In 2009 the SPC issued *SPC Notice on Enforcing Hong Kong Awards* where it was stated that awards *made* by the ICC and other foreign arbitral institutions *in* Hong Kong are to be enforced under the agreement between China and Hong Kong, not under the New York Convention. This statement can be seen as being compatible with the case *LM Holdings et al. v. Jiashijie Group et al. (2009), SPC, [2009] 民四他字第 38 号 (SPC) & [2008] 津高民四他字第 0004 号 (Tianjin HPC), 5 November 2009.*

In the Jiashijie case, two foreign parties and three Chinese companies had entered a contract regarding the establishment of a furniture retail company in China. The place of arbitration was Switzerland and the agreement provided for three arbitrators. A dispute arose but one of the arbitrators was incarcerated, thus making him unable to participate any further in the arbitration proceedings. The Chinese parties applied to a Chinese court to have the award set aside as it had been made by only two arbitrators. The case was referred through the different court instances until it reached the SPC. Among else, the SPC concluded that the *seat of arbitration*, Switzerland, was deemed to be relevant rather than the seat of the institution in determining where the award had been “made”.

The SPC’s approach in the Jiashiji case shows a new tendency where the seat of arbitration is given priority over the seat of the institution. If the seat of arbitration is used, the New York Convention cannot be applied to foreign institutional arbitral awards from China as they are not seen as non-domestic nor foreign for the purpose of the Convention.

### 6.6 Summary

Awards from arbitration in China that has been administered by foreign institutions are labeled as foreign under the Civil Procedure Law. For such awards to be recognized and enforced in China there must be support for such action in China’s international

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163 Article 283 of the Civil Procedure Law
commitments or the principle of reciprocity. With over 150 member states, the New York Convention is the principal instrument of recognition and enforcement of commercial arbitral awards in China.\textsuperscript{164}

Normally, for the Convention to be applicable an award has to be either non-domestic or foreign.\textsuperscript{165} In both the Züblin case and the Duferco case, the courts labeled foreign institutional arbitral awards from China as non-domestic. Due to China having made a reciprocity reservation to the New York Convention it is not possible to label awards as non-domestic in China. Therefore, the only way the Convention could be applied is if relevant awards were labeled as foreign in accordance with the Convention. Foreign awards are those that have been made in another state than in the one where recognition and enforcement is sought. The Convention does not provide a definition of “made” but in Chinese cases such as the Tianli case and the Hualong Auto case, the seat of the institution was used to determine where arbitral awards were made. This approach has however been rejected in the more recent case of Jiashijie where the seat of arbitration was used to determine where an award came from. If the seat of arbitration is used to determine where awards are made, the Convention could not be used in China to recognize and enforce relevant awards as the awards would be seen as domestic, not foreign. If the Convention is not applicable, only contracts and judicial assistance treaties with provisions regarding arbitration are available for parties wishing for their awards to be recognized and enforced in China. Compared to the amount of states that have acceded to the New York Convention, few countries and places have contracts and judicial assistance treaties with provisions regarding recognition and enforcement with China.\textsuperscript{166}

\textsuperscript{164} K. Fan, Arbitration in China, p. 86.
\textsuperscript{165} Article I(1)
\textsuperscript{166} As stated in the delimitation are investment disputes not being discussed in this thesis.
7 Final Discussion

7.1 Introduction

This thesis is a study of whether foreign institutional arbitration is possible in China. The first part of this thesis was used to provide the reader with a context to the question, by discussing why parties might or might not want to choose China as the seat of arbitration, the legal framework regulating international arbitration in China as well as what one might want to think about when facing the choice of appointing a Chinese arbitration commission or a foreign institution. After that, the recent development regarding foreign institutions and the Arbitration Law was discussed as well as the issue of recognition and enforcement. In this part, the final discussion, several issues will be addressed, mainly:

- Can the Longlide precedent be trusted?
- Can the New York Convention be applied to foreign institutional arbitral awards from China?

7.2 Is the Longlide Precedent Reliable?

The SPC’s preliminary decision in the Longlide case is only binding for the parties. Though Wunschheim claims that SPCs interpretations not being binding has no practical effect, it is necessary to keep in mind the time it could take for a case of non-compliance to move through the courts. 167 The report system does make it possible for the SPC to keep the case law in check, but a party might sustain substantial loss while waiting for a favorable verdict.

7.3 Can the New York Convention Be Applied to Foreign Institutional Arbitral Awards from China?

The possibility of recognition and enforcement can be seen as the raison d’être of arbitration. 168 Internationally the seat of arbitration is generally used to determine whether the New York Convention is applicable or not, thus making it fairly easy to

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know when the Convention can be applied. Regarding the application of the Convention in China, the question is much more complicated.

For the Convention to be applied, awards generally have to be labeled as non-domestic or foreign. In the Duferco case and in the Züblin case, foreign arbitral awards were labeled as non-domestic under the New York Convention and no explanation was given as to how such conclusion was compatible with China’s reciprocity reservation. In order for the Convention to be applicable an alternative solution could potentially be to label awards from arbitration administered by a foreign institution in China as foreign in accordance with Article I(1) of the Convention.

As awards from foreign institutional arbitration in China have been labeled as non-domestic it is necessary to turn to Chinese case law regarding arbitration outside of China. In the Tianli case as well as the Hualong Auto case was the seat of the institution used to determine where arbitral awards were made. However, in the Jiashijie case from 2009, the SPC applied the seat of arbitration and it can be reasoned that a similar approach was taken by the SPC in SPC Notice on Enforcing Hong Kong Awards where it was stated that awards made by the ICC and other foreign arbitral institutions in Hong Kong do not fall under the New York Convention.

Thus, awards from foreign institutional arbitration in China are, if the seat of arbitration is used, domestic or if the seat of the institution is used, foreign. As the seat of the institution already is used to label awards as foreign under the Civil Procedure Law, it could be argued that the same approach should be taken regarding labeling awards as foreign under the New York Convention. To instead apply the seat of arbitration as promoted in the Jiashijie case is however, more in line with the international standard of defining foreign in Article I(1) of the Convention. If the seat of arbitration was used in China to determine where awards are made, parties arbitrating outside of China would not be restricted to appointing institutions that are established in member states of the New York Convention. Considering the amount of states that have acceded to the Convention it would nevertheless most likely be relatively rare that parties would appoint an institution from a non-member state. As the Jiashijie is a more recent case, it stands to reason that it is more persuasive than the Hualong Auto case and the Tianli case. Throughout the years, there have been several attempts to bring Chinese

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169 H. Kroenke, Recognition and Enforcement of Foreign Arbitral Awards, p. 22.
arbitration closer to the international standard and the Jiashiji case is in line with such attempts. 170 There is also the fact that the seat of arbitration already is used in determining where ad hoc awards are made and thus it would be consistent to apply the same approach to institutional awards.

7.4 Summary

When considering appointing a foreign arbitral institution for arbitration in China, some might question how reliable the Longlide case is as it is not a binding precedent. The report system makes it possible for the SPC to, an extent, keep the case law in check but before the dispute reaches a court that produces a verdict compatible with the SPC’s view, the parties might suffer substantial losses.

Another issue facing parties considering appointing a foreign institution for arbitration in China is how such appointment would affect the possibility of recognition and enforcement of an award in China. The focal point of this thesis has been disputes where recognition and enforcement might be sought in China as it is unclear which awards may fall under the Convention. 171 Awards from foreign institutional arbitration in China are labeled as foreign under the Civil Procedure Law and for enforcement of such awards to be possible it is necessary that it is provided for in China’s international commitments or the principle of reciprocity. The New York Convention is the principal instrument regarding recognition and enforcement of commercial awards in China. The Convention generally applies to both non-domestic and foreign awards and in China, awards from foreign institutional arbitration in China have been labeled as non-domestic. The only option left in order for the Convention to be applicable to relevant awards is therefore to label such awards as foreign in accordance with the Convention.

The case law regarding where awards from foreign institutional arbitration are made is inconsistent. In older cases the seat of the institution has been used but in a case from 2009 the seat of arbitration was applied. The first approach is more consistent with Chinese domestic law as relevant awards already are labeled as foreign under the Civil Procedure Law. The second approach is more consistent with the international standard and the way it is determined where ad hoc awards are made. For this reason it is likely

170 See Section 3.2.
171 Compare with H. Kroenke, Recognition and Enforcement of Foreign Arbitral Awards, p. 22.
that it is the seat of arbitration that in China determines where arbitral awards are made. Thus, the Convention is not applicable on foreign institutional arbitral awards from China and parties requiring recognition and enforcement of their foreign arbitral awards from China have to turn to China’s contracts and judicial assistance treaties regarding recognition and enforcement.
Foreign Arbitral Awards

- For arbitral awards from foreign institutional arbitration in China to be recognized and enforced in China, China's international commitments must support such action.
- The choice stands between contracts China has with places such as Hong Kong, judicial assistance treaties and the New York Convention.

The New York Convention

- The Convention is generally applicable to non-domestic awards and awards that have been made in other states, Article I (1).
- China has made a reciprocity reservation to the Convention where it is stated that the Convention is only applicable to awards that have been made in other contracting states.

Non-domestic Awards and China

- In both the Züblin case and the Duferco case were awards from foreign institutional arbitration in China classified as non-domestic.
- This is not compatible with China’s reciprocity reservation.

Foreign Arbitral Awards

- If the Convention is to be applied the only option left is therefore if relevant awards can be seen as having been made in another contracting state, which means to label the awards as foreign
- The Convention does not provide any guidance as to how it is decided where arbitral awards have been made.

Chinese Case Law

- The Chinese case law regarding where arbitral awards have been made is inconsistent.
- In the Hualong Auto case and Tianli case were the seat of the institution used to determine where arbitral awards were made.
- In the more recent case of Jiashijie, the seat of arbitration was used.

Conclusion

- It is likely that the solution in the Jiashijie case, the seat of arbitration, is to be applied. This means that foreign institutional arbitral awards from China are considered as domestic and the Convention can therefore not be applied to those awards.
- Considering that China only has contracts and judicial assistance treaties regarding arbitration with close to 30 states and places, the chance of parties having their awards recognized and enforced in China if they have appointed a foreign institution for arbitration in China are very slim.
8 Conclusion

The Longlide case changed what was previously considered, by some, as a prohibition of foreign institutional arbitration in China. In a sense it can be said that foreign institutional arbitration became possible in China through the Longlide case. However, it can also be argued that it was possible to appoint a foreign institution even before the Longlide case, as it was not illegal to appoint a foreign arbitral institution. It should be noted that the Longlide precedent is not binding for the courts. Even though the SPC has the possibility of keeping the case law in check, such proceedings could take time.

The purpose of this thesis has been to examine whether it is possible to appoint a foreign arbitral institution for arbitration in China when recognition and enforcement might be sought there. It is unfortunate that the seat of the institution is used in the Civil Procedure Law to label awards from foreign institutional arbitration in China as foreign. This way, China’s international commitments or the principle of reciprocity have to provide support for recognition and enforcement of such awards for it to be possible in China. Fan claims that the principle has never been used and the amount of countries China has treaties and contracts with regarding recognition and enforcement of arbitral awards is small compared to how many states that have acceded to the New York Convention. Generally, for the Convention to be applicable, awards have to be foreign or non-domestic. Despite it not being compatible with China’s reciprocity reservation, foreign institutional arbitral awards from China have been labeled as non-domestic. In this thesis it has been discussed whether it instead might be possible to label awards from foreign institutional arbitration in China as foreign under the Convention. Unfortunately, the recent case of Jiashijie contradicts such solution and it is therefore likely that parties that have appointed a foreign institution to administer arbitration in China would have to rely on the rather slim chance of their award falling under a judicial assistance treaty or a contract regarding recognition and enforcement of arbitral awards.

How reliable the Longlide precedent is and whether relevant awards can be recognized and enforced in China, are both elements that present a risk for parties appointing a foreign institution for arbitration in China in cases where recognition and enforcement might be sought there. What is possible or not, is a question of definition and for the
topic of this essay, the crucial factor is how the risks are evaluated. The Longlide case has decreased the risk of arbitration clauses being declared invalid but considering that the principal instrument for recognition and enforcement most likely is not applicable to relevant awards, recognition and enforcement of relevant awards would only be possible in cases where judicial assistance treaties or contracts are applicable. Without support from other instruments, the author deems that the risk of appointing a foreign institution in cases where recognition and enforcement might be sought in China is at a level where it is not possible to appoint a foreign institution to administer arbitration in China in such cases.
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