APPLICABLE LAWS TO ARBITRATION AGREEMENTS UNDER CURRENT ARBITRATION LAW AND PRACTICE IN MAINLAND CHINA

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Abstract This article examines the recent development of mainland Chinese law and judicial practice regarding the law applicable to arbitration agreements. It identifies potential changes to mainland Chinese law and practice that may help to further develop the People's Republic of China (PRC) into a truly international-arbitration-friendly jurisdiction. It argues that in the absence of explicit statutory provisions and a consistent approach in the People's Courts to the determination of the place of arbitration and the law applicable to arbitration agreements, it is important for parties negotiating arbitration clauses with a seat in China and/or for contracts involving mainland Chinese elements to explicitly designate the place of arbitration as well as the law governing their arbitration agreements.

Keywords: applicable law, arbitration agreements, Chinese law, comparative law, recognition and enforcement.

I. INTRODUCTION

Over the years, much has been written on the autonomy or separability of arbitration agreements.[1] In particular, many efforts have been made to explain that in the absence of any agreement, it becomes necessary to determine the law applicable to the arbitration agreement and what the possible choices of law are.[2] Much has also been written on the importance of specifying the place of arbitration and the law governing the arbitration agreement by the parties in their contract and, more importantly, what impacts that specific choice-of-law clause has on the validity of the arbitration agreement.[3] Very

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[1] eg SM Schwebel, 'The Severability of the Arbitration Agreement' in *International Arbitration: Three Salient Problems* (Grotius 1987) 1–60; A Dimolitsa, 'Report: Separability and Kompetenz-Kompetenz' in AJ van den Berg (ed), *ICCA Congress Series No 9 (Paris 1998)* (Kluwer Law International 1999); JD Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (2003) 99–127; GB Born, *International Commercial Arbitration* (2009) ch 3 and 4; N Blackaby, C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 116–19; J Tao, Arbitration Law and Practice in China (Kluwer Law International 2012) 82–4.

[2] eg J Paulsson, N Rawding and L Reed, *The Freshfields Guide to Arbitration Clauses in International Contracts* (Kluwer Law International 2010) 17–30.

[3] eg KP Berger, 'Re-Examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in AJ van den Berg (ed), *International Arbitration 2006: Back to Basics?*

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little, however, has been written on these issues from the perspectives of mainland Chinese law and practice. Given that current mainland Chinese arbitration law and practices are not yet fully compatible with international arbitration law and practices, as reflected in the Model Law,[4] it is vital to understand how the People's Courts decide on the place of arbitration and the law applicable to arbitration agreements and the impact of those decisions on (1) the determination of the validity of arbitration agreements and (2) the recognition and enforcement of arbitration agreements in China.

II. THE AUTONOMY OF THE PARTIES TO CHOOSE THE LAW GOVERNING THEIR ARBITRATION AGREEMENT

There is little doubt that current mainland Chinese law recognizes the parties' autonomy to choose the law governing their international arbitration agreements. Although the PRC Arbitration Law (1995) is silent on this issue, Article 16 of the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006) stipulates that the effect of foreign-related arbitration agreements is governed by the law agreed upon by the parties. What remains uncertain is what constitutes parties' agreement on the law governing the arbitration agreement: when will the People's Courts find that the parties have agreed upon the law governing their arbitration agreement and how can that agreement be ascertained? Must the choice be indicated explicitly? Can it be implied? According to paragraph 58 of the Minutes of the Second National Meeting on Adjudication of Foreign-Related Commercial and Maritime Cases (26 December 2005) issued by the Supreme People's Court (the 'Minutes'),[5] the parties' agreement on the governing law of their arbitration agreement should be explicit ('明确': clear and specific).

It is important to recall that the autonomy of the parties in choice of governing law of their arbitration agreement is enshrined in Article V(1)(a) of the New York Convention, which permits non-recognition of an arbitral award only if the parties' agreement to arbitrate is invalid 'under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'; the same rule is reflected in Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law.

Unfortunately, in practice, parties rarely specifically designate the law that governs their arbitration agreement.[6] Thus, arbitral tribunals and national courts are often called upon to determine the issue. Article V(1)(a) of the New York Convention provides for

International Council for Commercial Arbitration Congress Series 2006 Montreal (Kluwer Law International 2007) vol 13, 302; P Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause' in AJ van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 years of Application of the New York Convention ICCA Congress Series No 9 (Paris 1998)* (Kluwer Law International 1999) vol 9, 197.

[4] 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006.

[5] Minutes of the Second National Meeting on Adjudication of Foreign-Related Commercial and Maritime Cases (26 December 2005) issued by the Supreme People's Court, in Chinese: 最高人民法院《第二次全国涉外商事海事审判工作会议纪要》的通知 (法发[2005]26号), 2005年12月26日.

[6] GB Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 55 : '[I]n most cases, parties do not agree upon a choice-of-law clause specifically applicable to their arbitration agreement (e.g., "This arbitration agreement (Article X) shall be governed by [X] law."), and instead agree only to a general choice-of-law clause, applicable to their underlying contract (e.g., "This contract shall be governed by [X] law.")'.

the law of the country where the award was made. According to Article 31(3) of the Model Law, the award is deemed to be made at the place of arbitration. Support of applying the law of the place/seat of arbitration can also be found in *Redfern and Hunter*.[7] However, according to the UNCITRAL Digest (2012), few cases discuss the law governing the arbitration agreement in greater detail, and that where the main contract contains a choice-of-law clause, it is usually extended to the arbitration agreement without any further discussion.[8] Some have also upheld the validity of an arbitration agreement without reference to any national law, referring instead exclusively to the parties' common intention and general principles applicable to international arbitration.[9] According to ICCA's Guide (2013), the driving force behind the choice of the substantive law appears to be the one more favourable to the validity of the arbitration agreement.[10]

III. THE LAW OF THE SEAT/PLACE OF ARBITRATION

It is submitted that applying the law of the seat of arbitration as the applicable law of the arbitration agreement does not necessarily hold water from a textual analysis of the current PRC law, the development of which in recent years seems to have resulted in complications and uncertainties on several related issues.

No statutory definition of the seat or place of arbitration can be found under the current PRC laws. In fact, the PRC Arbitration Law (1995) makes no reference to the seat or place of arbitration at all. Reference to the 'location of the arbitration' ('仲裁地点') was made in the Supreme People's Court's Letter addressed to the Zhejiang Higher People's Court, dated 19 March 1997. In this Letter, the Supreme People's Court found that the parties in this case had only stipulated the location of the arbitration without designating an arbitration commission in the arbitration clauses of the contract; and that after the dispute arose, the parties were unable to reach a supplementary agreement on the choice of an arbitration institution. Thus, applying Article 18 of the PRC Arbitration Law (1995), the Supreme People's Court found the arbitration clauses concerned were invalid. It did not, however, seem to treat the 'location of the arbitration' ('仲裁地点') as a distinct legal concept. The phrase 'location of the arbitration' ('仲裁地点') also appeared in the Supreme People's Court's Reply on Several Issues concerning the Validity of Arbitration Agreements, dated 21 October 1998.

The very first time that 'place of arbitration' ('仲裁地') had been properly used was in the context of the law applicable to arbitration agreements in paragraph 58 of the Minutes (26 December 2005) issued by the Supreme People's Court,[11] which

[7] *Redfern and Hunter on International Arbitration* (n 1) ch 3, para 3.10.

[8] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 176 at para 20 and fn 966 citing CLOUT case No 740 [*Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another*, High Court, Singapore, 10 May 2006], [2006] 3 SLR 174 (206) para 61.

[9] eg ICC Case No 4131; Lew, Mistelis and Kröll (n 1) 129; see also JD Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', *ICCA Congress Series No 14, 1998, Paris*, 142.

[10] ICCA's Guide to the Interpretation of the 1958 New York Convention (2013) 51.

[11] Minutes of the Second National Meeting on Adjudication of Foreign-Related Commercial and Maritime Cases (26 December 2005) issued by the Supreme People's Court, in Chinese: 最高人民法院《第二次全国涉外商事海事审判工作会议纪要》的通知 (法发 [2005]26号), 2005年12月26日.

seemingly implies that the parties may designate the place of arbitration by agreement. Subsequently, Article 16 of the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006) stipulates that if the parties concerned did not agree upon the applicable law but have agreed upon the 'place of arbitration', the laws of the 'place of arbitration' should apply; if they agreed neither upon the applicable law nor upon the 'place of arbitration', or the 'place of arbitration' is ambiguous, the laws at the locality of the court shall apply. This Supreme People's Court's Interpretation (2006) did not otherwise define 'place of arbitration' or explain whether it is to be regarded as a distinct legal concept, or how to ascertain it.

More recently, Article 18 of the Law on Applicable Law in Foreign-Related Civil Matters (promulgated 28 October 2010 and effective from 1 April 2011) provides that in the absence of parties' agreement on the law governing the validity of the arbitration agreement, the law of the place of the arbitration institution or the law of the place of arbitration shall apply. This provision, however, is silent on when to apply the law of the place of the arbitral institution; when to apply the law of the place of arbitration; and which of the two prevails in case of inconsistency.

On 28 December 2012, the Supreme People's Court issued its Opinion No 1 on Several Issues concerning the Application of the Law on Applicable Law in Foreign-Related Civil Matters (effective from 7 January 2013). Article 14 of that opinion provides that if the parties make no agreement on the law governing the arbitration agreement, or on the arbitral institution or on the place of arbitration, or the parties' agreement on those matters is ambiguous, the People's Court may apply the law of the PRC to determine the validity of the arbitration agreement. However, unfortunately, the Supreme People's Court did not take the opportunity to clarify: (1) what constitutes agreement on the 'place of arbitration'; (2) how to ascertain the 'place of arbitration'; (3) what the exact legal effect of the place of arbitration on the arbitration agreement, on the arbitral procedures and on the resulting arbitral awards is; and (4) what the legal relationship between the place of arbitration and the place of the arbitration institution is.

More importantly, it remains unclear under current PRC law whether an arbitral award is deemed to have been made at the place of arbitration or the place of the arbitral institution, or elsewhere. As we know, the New York Convention itself is silent on how to ascertain where an arbitral award has been made. According to ICCA's Guide (2013), the vast majority of Contracting States considers that an award is made at the seat/place of arbitration. ICCA's Guide (2013) further explains: '[T]he seat of the arbitration is chosen by the parties or alternatively, by the arbitral institution or the arbitral tribunal. It is a legal, not a physical, geographical concept. Hearings, deliberations and signature of the award and other parts of the arbitral process may take place elsewhere.' This of course is in line with Article 20 of the Model Law. According to Article 31(3) of the Model Law, the award shall state its date and the place of arbitration as determined in accordance with article 20 (1); and the award shall be deemed to have been made at that place, ie the place of arbitration. Unfortunately, these crucial provisions are missing from the current PRC Arbitration Law (1995). Note that CIETAC Rules (2012), for example, does specifically fill these gaps in Article 7 (Place of Arbitration).

It is submitted that the PRC should either, through legislation or judicial interpretation (i) define the place/seat of arbitration as a legal concept that is distinct from the place of the arbitration institution or the place where hearings or deliberations

of the arbitral tribunal may be conducted; (ii) clarify that parties may designate the place of arbitration by agreement; (iii) clarify, in the absence of the parties' designation of the place of arbitration, the arbitral tribunal or the arbitration commission may determine the place of arbitration; (iv) clarify that upon the failure of the parties and the arbitral tribunal or the arbitration commission to determine the place of arbitration, the People's Courts may determine the place of arbitration as the place where all relevant actions in the arbitration have taken place or, if this cannot be determined, the place of the last oral hearing.[12]

IV. THE LAW OF THE PLACE OF THE ARBITRATION INSTITUTION

Returning to the issue of applicable law, given that Article 18 of the PRC Law on Applicable Law in Foreign-Related Civil Matters (2011) provides that in the absence of parties' agreement on the law governing the validity of the arbitration agreement, the law of the place of the arbitration institution or the law of the place of arbitration shall apply; it is arguable that the legislative intent here is to apply the law of the place of the arbitration institution as the first choice of default applicable law and to apply the law of the place of arbitration in the absence of the former. This argument can be further supported by (1) the current PRC arbitration law and practice is arbitration-institution oriented;[13] (2) *ad hoc* arbitration agreements have effectively been rendered unenforceable under the current PRC law and practice;[14] and (3) the seat or place of arbitration has not yet been defined, its legal effect on the arbitration process and the arbitral award is simply unclear.

Given that mainland China recognizes only institutional arbitration, it is perhaps understandable that Article 18 of the PRC Law on Applicable Law in Foreign-Related Civil Matters (2011) has stipulated both the law of the place of the arbitration institution and the law of the place of arbitration as the default laws applicable to arbitration agreements; after all, in most domestic arbitration, the place of arbitration and the place of the arbitration institution are often the same. In fact, as the Chinese cases discussed later in this article show, the place of the arbitration commission is easily confused with the place of arbitration in Chinese judicial practices.

The provision, however, neglects the fact that those two laws are not necessarily the same in foreign-related arbitration, eg CIETAC arbitration, or in foreign arbitration such

[12] eg UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 104 referring to *Dubai Islamic Bank PJSC v Paymentech*, High Court, England, 24 November 2000, [2001] 1 LLR 65; and CLOUT case No 374 (also reproduced under CLOUT case No 408) [Oberlandesgericht Düsseldorf, Germany, 6 Sch 02/99, 23 March 2000], also available at <http://www.dis-arb.de/de/47/datenbanken/rspr/olg-düsseldorf-az-6-sch-02-99-datum-2000-03-23-id46>, in an action to set aside an arbitral award under art 34, where the arbitrator had failed to state the place of arbitration in the award, the German court found that the place of arbitration was the actual, effective place of the arbitration, and not simply the address on the award.

[13] For discussions on institutional adherence in Chinese arbitration, see G Weixia, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (Sweet & Maxwell 2012) ch 2, at 2.002

[14] For discussions on the introduction of *ad hoc* arbitration into the PRC Arbitration Law, see Fan Yang, Foreign-related Arbitration in China: Commentary and Cases (Cambridge University Press 2014) Part II at 2.1.4 (forthcoming); see also Jin Huang and Lianbin Song, 'Arbitration Law of the PRC (Modification Suggestions)' Fa Xue Ping Lun 4 (2003).

as ICC arbitration. According to Article 18(1) of the ICC Arbitration Rules (2012), the place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. Thus, although physically headquartered in Paris, the ICC Court of Arbitration can fix the seat of an ICC arbitration anywhere in the world. Similarly, CIETAC Arbitration Rules (2012) provide in Article 7(2), 'where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or its sub-commission/centre administering the case. CIETAC may also determine the place of arbitration to be another location having regard to the circumstances of the case'. With the recent launch of the CIETAC Hong Kong Arbitration Centre (24 September 2012), arbitrations conducted in the CIETAC Hong Kong Arbitration Centre are likely to have their seat in Hong Kong, even though the place of the arbitration commission, arguably, refers to its headquarters in Beijing.

V. REVIEW OF THE SUPREME PEOPLE'S COURT'S DECISIONS

Current mainland Chinese judicial practice, as reflected in the Supreme People's Court's decisions, however, reveals that in most cases, the People's Courts tend to apply the law of the place of arbitration, followed by the law of the court of action (*lex fori*), and rarely applied the law of the place of the arbitral institution or the law governing the underlying contract.

A. Cases Applying the Law of the Place of Arbitration

Despite the absence of a defined legal notion of the place of arbitration and the lack of provisions on its exact legal effect, mainland Chinese judicial practice has often been to apply the law of the place of arbitration to determine the validity of arbitration agreements.[15] In the absence of parties' specific designation of the law governing the arbitration agreement, if the parties have specified the place of arbitration in their contract, the People's Courts will apply the law of that place to determine the validity of the arbitration agreement. Thus, in the German *Züblin* (2004) case,[16] 'Arbitration: ICC Rules, Shanghai' was found invalid pursuant to the law of the place of arbitration, ie the PRC law; and in the *Changzhou Donghong* (2006) case,[17] 'arbitration according to the ICC Rules, with the place of arbitration in Beijing' was also found invalid under the PRC law. On the other hand, in the *Zhangjiagang Xinggang* (2006) case,[18] 'arbitration (according to the ICC rules) in Zurich, Switzerland' was found valid under the law of the place of arbitration, ie Swiss law.

It is interesting to note that in the *Jiangmen Farun* (2006) case, the arbitration agreement concerned was found valid as the designated arbitration rules dictated the arbitration institution (CIETAC). Applying similar logic, it would be arguable that because the arbitration rules of the ICC dictated the designation of the International Court of Arbitration of ICC, the arbitration agreements in the German *Züblin* (2004) and

[15] See eg *Hong Kong Vista Shipping Agency Co Ltd v Shenzhen Tuxuchan Tea Import & Export Company*, No 18 of the Fourth Civil Tribunal of the Supreme People's Court (16 July 2002).

[16] German No 23 of the Fourth Civil Tribunal of the Supreme People's Court (8 July 2004).

[17] *Changzhou Donghong Packaging Materials Co Ltd v DMT Company of France*, No 6 of the Fourth Civil Tribunal of the Supreme People's Court (26 April 2006).

[18] *Zhangjiagang Xinggang Electronics Company v Brose International GmbH*, No 1 of the Fourth Civil Tribunal of the Supreme People's Court (9 March 2006).

Changzhou Donghong (2006) cases should have also been found valid, even under the PRC law. This analysis raised the intriguing question of whether under mainland Chinese law, parties can validly agree to an arbitration administered by non-Chinese arbitration institutions, eg the ICC International Court of Arbitration, where the seat of arbitration is in China. This was indeed one of the key issues that the sole arbitrator had to decide in a recent ICC Beijing arbitration: *Duferco S.A. v Ningbo Arts and Crafts Import and Export Corp, Ningbo Intermediate People's Court, Zhejiang Province*, 22 April 2009.[19]

Perhaps an even more interesting question that should be asked is whether mainland Chinese courts would uphold the validity of an arbitration agreement that stipulates arbitration administered by non-Chinese arbitration institutions, such as the ICC International Court of Arbitration, where the seat of arbitration is in China, but the governing law is non-Chinese law. For example, using the same arbitration clause in the German *Züblin* (2004) case, 'Arbitration: ICC Rules, Shanghai' but at the same time, the parties also stipulate that that arbitration agreement is governed by French law. In that case, it is submitted that the mainland Chinese courts should find that such an arbitration agreement is valid under the governing law, ie French law, as designated by the parties. A careful and specific designation of a proper law that governs the arbitration agreement could have saved it from being found invalid under the current PRC law by the People's Courts.

The importance of specifying both the place of arbitration and the applicable law to the arbitration agreement is further illustrated in the case of *Amoi Technology Co Ltd v Société de Production Belge AG* (2009),[20] The parties stipulated in their agreement that 'any disputes arising from this agreement should be ultimately resolved by arbitration according to the Arbitration Rules of the International Chamber of Commerce; the place of arbitration shall be either Xiamen or Brussels'. The Supreme People's Court in this case found that the PRC laws should apply to determine the validity of the arbitration clauses because the parties stipulated that Xiamen, China could serve as the place of arbitration. As such, because the parties failed to reach an agreement on the choice of an arbitration institution, under the PRC law the agreement to arbitrate was invalid.

The Supreme People's Court did not, however, explain firstly, whether under the PRC law the parties may agree on more than one place of arbitration in an arbitration agreement; and secondly, whether a stipulation to more than one place of arbitration should be construed as no agreement on the place of arbitration. For example, in *Huzhao No 2 Refractory Joint Venture Factory v Minteq International Inc* (2004),[21] it was found that the stipulation to two arbitral institutions, one in China and the other located in Stockholm, did not constitute agreement on any place of arbitration. Similarly, in *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore)* (2010),[22] it was found that the stipulation to two arbitral institutions, 'the Hong Kong International Arbitration Centre and the Grain and Feed Trade Association in London' did not constitute agreement to any place of arbitration.

[19] van den Berg (ed), *Yearbook Commercial Arbitration, Volume XXXVIII* (2013) Pt V, 347–50.

[20] *Amoi Technology Co Ltd v Societe de Production Belge AG*, No 5 of the Fourth Civil Tribunal of the Supreme People's Court (20 March 2009).

[21] *Huzhao No 2 Refractory Joint Venture Factory v Minteq International Inc*, No 42 of the Fourth Civil Tribunal of the Supreme People's Court (30 November 2004).

[22] *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore)*, No 22 of the Fourth Civil Tribunal of the Supreme People's Court (9 June 2010).

More importantly, in the *Amoi* (2009) case, the Supreme People's Court did not consider whether the arbitration clauses could have been found valid under the law of the other agreed place of arbitration (Brussels). Given that the parties agreed on two places of arbitration, the Supreme People's Court failed to explain why Xiamen instead of Brussels should be the preferred or relevant place of arbitration. The parties may have intended that, in the event the arbitration clauses were found invalid in one place of arbitration (Xiamen), they could have still been found valid in the other place of arbitration (Brussels). In the event that the arbitration clauses were indeed found valid under Belgian law, could the parties then seek recognition and enforcement of the resulting Belgian award back in China? Should the People's Court then refuse to recognize or enforce that award, given the Supreme People's Court's prior finding that the arbitration clauses were invalid under the PRC law? Or, should the People's Court recognize and enforce the Belgian award given that the arbitration clauses were valid under the Belgian law?

It is submitted that the arbitration agreement in the *Amoi* (2009) case falls within the scope of the New York Convention. Firstly, although the arbitration agreement provides for the place of arbitration in China, the forum State, it also provides for the place of arbitration in Belgium, a foreign State. Both China and Belgium are contracting States to the Convention. The People's Court in this case should have applied Article II of the Convention to recognize the arbitration agreement and refer the parties to arbitration, unless it found the said agreement was null and void, inoperative or incapable of being performed. Secondly, according to the ICCA's Guide (2013), even though the arbitration agreement provides for a seat in China, the forum State, the People's Court 'must' apply the Convention if the future award will qualify as non-domestic pursuant to the second sentence of Article I(1) of the Convention.[23] Here, arguably, had the People's Court found the arbitration agreement invalid under PRC law, but valid under Belgian law, it should have also found that a future award rendered in Belgium resulting from the arbitration agreement would fall within the scope of the New York Convention. Therefore, the People's Court in this case 'must' apply the Convention and uphold the validity of the arbitration agreement.

Alternatively, as the title of this article suggests, the parties are well advised to carefully choose and specify their agreed place of arbitration, as well as the governing law of their arbitration clauses. Again, as demonstrated in the *Amoi* (2009) case, had the parties specified that Belgian law would govern their arbitration clauses, they would have saved their arbitration clauses from being found invalid under PRC law.

B. Cases Applying the Law of the Court of Action (lex fori)[24]

In *Akzo Nobel Coatings (Dongguan) Co Ltd v Sincere Metal Engineering (Hong Kong) Co Ltd* (2005),[25] a Hong Kong-related case, the parties agreed to 'arbitration at the

[23] ICCA's Guide to the Interpretation of the 1958 New York Convention (2013) 24.

[24] See eg *Davis-Standard Corporation v Ningbo Xiecheng Power Tools Co Ltd*, No 13 of the Fourth Civil Tribunal of the Supreme People's Court (25 June 2004); and *Wuhan Zhongheng New Technology Industry Co Ltd v Jinli Xingye Holdings Co Ltd*, No 19 of the Fourth Civil Tribunal of the Supreme People's Court (27 July 2004).

[25] *Akzo Nobel Coatings (Dongguan) Co Ltd v Sincere Metal Engineering (Hong Kong) Co Ltd*, No 32 of the Fourth Civil Tribunal of the Supreme People's Court (26 July 2005).

Dongguan Arbitration Commission'. The Supreme People's Court found that the parties did not stipulate the law applicable in determining the validity of the arbitration clauses, and that they did not stipulate the place of arbitration. It applied the laws of the court of action, ie, PRC law, and found that because the arbitration institution named by the parties did not exist in Dongguan and because one of the parties had already brought legal proceedings in the People's Court, the parties were unable to reach a supplementary agreement on the choice of arbitration institution. According to Articles 16 and 18 of the PRC Arbitration Law (1995), the arbitration clauses were found invalid.

Given that 'Dongguan' is the name of a specific city in Guangdong province, it may be argued that the choice of the place of arbitration could have been implied from the name of the designated arbitration commission. Although applying the law of the place of arbitration would not have led to a different outcome in this case, the Supreme People's Court in this case took the view that the mere designation of an arbitration commission does not constitute designation of the place of arbitration.

In *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore)* (2010),[26] the parties agreed that 'disputes arising from the performance of the contract shall be submitted to arbitration by either side. If the purchaser is the defendant, the dispute shall be submitted to the Hong Kong International Arbitration Centre; if the vendor is the defendant, the dispute shall be submitted to The Grain and Feed Trade Association in London for arbitration. Disputes arising out of the contract shall be resolved in accordance with English law'. The Supreme People's Court found that because there was neither stipulation concerning the laws applicable to the validity of the arbitration agreement nor a specific stipulation to the place of arbitration, pursuant to Article 16 of the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006), the laws of the forum—ie, the laws of the PRC—would apply. It further found that while the main contract's arbitration clause referred to two arbitration institutions, the clause was still valid because it clearly identified which one of the two would be used. Thus, the People's Courts did not have jurisdiction over those disputes that were subject to the valid arbitration agreement.

The Supreme People's Court in the above *Shenzhen Food Group* (2010) case found that the stipulation to the law governing the disputes ('Disputes arising out of the contract shall be resolved in accordance with English law') did not constitute an agreement on the law governing the arbitration agreement; and that the stipulation to the arbitration institution did not equal the stipulation to the place of arbitration. This decision seemingly suggests that the parties' agreements to the governing law of the arbitration agreement and to the place of arbitration both need to be very clear and specific. Otherwise, the People's Court would be inclined to apply the law of the court of action (*lex fori*), ie PRC law, to determine the validity of the arbitration agreement. Furthermore, arguably, had the parties carefully worded its designation of English law to govern their arbitration clauses specifically, the People's Court should have found those arbitration clauses valid under the English law.

[26] *Shenzhen Food Group Co Ltd v Noble Resources Co Ltd (Singapore)*, No 22 of the Fourth Civil Tribunal of the Supreme People's Court (9 June 2010).

C. Cases Applying the Law of the Place of Arbitral Institution

In *Xiamen Xinjiexing Industry & Trade Co Ltd, and She Wenbin v Xiamen Fengruite Industry & Trade Development Co Ltd* (2009),[27] a Taiwan-related case, the parties agreed to 'arbitration at China's foreign economic and trade arbitral institution or litigation at the local courts'. They did not stipulate in their agreement the governing law to determine the validity of the arbitration clause, but did, however, stipulate to arbitration at China's foreign economic and trade arbitral institution or litigation in the local courts. The Supreme People's Court found that the parties stipulated the mainland as the place of arbitration or place of court ('仲裁地或法院所在地'), and thus, according to Article 16 of the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006), the validity of the arbitration clause in this case should be determined according to the laws of mainland China.

It is submitted that in the above decision, the Supreme People's Court seemingly treated the place of arbitration commission as the place of arbitration. Arguably, on the facts, the parties agreed to arbitration at China's foreign economic and trade arbitral institution or litigation in the local courts ('由中国对外经济贸易仲裁机构进行仲裁或当地法院诉讼解决'), without actually specifying the 'place of arbitration' ('仲裁地') (even though the place of arbitration can be inferred from the choice of the place of arbitral institution).

More importantly, it is arguable that had the People's Court applied the law of the place of the arbitration institution in the German *Züblin* (2004) case, the arbitration clause 'Arbitration: ICC Rules, Shanghai' should have been found valid pursuant to French law, ie the law of the place of the arbitration institution. Similarly, the clauses 'arbitration according to the ICC Rules, with the place of arbitration in Beijing' in the *Changzhou Donghong* (2006) case could have also been saved under the French law. Given that both the German *Züblin* (2004) case and *Changzhou Donghong* (2006) case predated the PRC Law on Applicable Law in Foreign-Related Civil Matters (promulgated 28 October 2010 and effective from 1 April 2011), it would be interesting to see whether the People's Courts would shift from applying the law of the place of arbitration as a norm to applying the law of the place of the arbitration institution more often.

D. Cases Applying the Law of the Underlying Contract

In *Hemofarm DD, MAG International Trading Company and the Sulam Media Co Ltd v Jinan Yongning Pharmaceutical Co Ltd* (2008),[28] Article 57 of the joint venture contract states that 'the conclusion, validity, interpretation and performance of the contract shall be governed by the laws of the People's Republic of China'. Article 58 of the joint venture contract then provides for ICC arbitration in Paris. The Higher People's Court of Shandong, the Court of Appeal in the case, found that the 'governing law'

[27] *Xiamen Xinjiexing Industry & Trade Co Ltd, and She Wenbin v Xiamen Fengruite Industry & Trade Development Co Ltd*, No 4 of the Fourth Civil Tribunal of the Supreme People's Court (26 February 2009).

[28] *Hemofarm DD, MAG International Trading Company and the Sulam Media Co Ltd v Jinan Yongning Pharmaceutical Co Ltd*, No11 of the Fourth Civil Tribunal of the Supreme People's Court (2 June 2008).

clauses in Article 57 applied to the arbitration clauses in Article 58 of the same contract. It further found, 'more importantly, given the fact that the arbitration applicants relied upon the PRC laws in asserting the jurisdiction of the arbitral tribunal, and the fact that the arbitration respondent also relied upon the PRC laws in supporting its interpretation of the arbitration clauses; hence the parties have, in fact, also chosen the PRC laws as the law governing the arbitration agreement'. The Supreme People's Court, in this case, supported the findings of the lower courts without giving any specific comment or opinion on the issue of the applicable law to the arbitration clauses concerned.

It is submitted that the Higher People's Court of Shandong's decision to apply the law that governs the underlying contract as the law that governs the arbitration agreement in this case appears to directly contradict not only Chinese judicial practice but also the explicit provision of Article 16 of the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006). It is important to note that according to paragraph 58 of the Minutes of the Second National Meeting on Adjudication of Foreign-Related Commercial and Maritime Cases (26 December 2005) (the 'Minutes') issued by the Supreme People's Court, the parties' choice-of-law governing the underlying contractual disputes 'cannot' (不能) be used to determine the effect/validity of the arbitration clauses contained in the contract.[29] Although this judicial practice has not been spelled out by the Supreme People's Court's Interpretation of the PRC Arbitration Law (2006) or the more recent PRC Law on Applicable Law in Foreign-Related Civil Matters, the Minutes issued by the Supreme People's Court is currently still a piece of legally effective judicial interpretation and hence binds the People's Courts in deciding foreign-related commercial and maritime cases.

VI. A COMPARISON OF THE PRO-VALIDITY APPROACHES

According to Article 2 of the New York Convention, '[E]ach Contracting State shall recognize an arbitration agreement . . . unless it finds that the said agreement is null and void, inoperative or incapable of being performed' (emphasis added). It is generally accepted that this provision sets forth the presumptive validity, both formal and substantive, of arbitration agreements.[30] Given that the Convention enshrines the pro-enforcement and pro-arbitration principle, it is only natural to expect that a party to an arbitration agreement should be prohibited from going back on its commitment to arbitrate and instead submitting the dispute to court. Born, for example, has famously argued that the determination of the choice of law applicable to the arbitration agreement should be guided by a 'validation principle', ie if the arbitration agreement is valid under any of several laws which are potentially applicable to it, then the agreement will be upheld.[31]

Recognizing that traditional choice-of-law rules are ill-suited to international arbitration agreements and the importance of giving effect to parties' agreement to arbitrate, many countries have adopted the so-called pro-validity approach towards the

[29] Minutes of the Second National Meeting on Adjudication of Foreign-Related Commercial and Maritime Cases (26 December 2005) issued by the Supreme People's Court, in Chinese: 最高人民法院《第二次全国涉外商事海事审判工作会议纪要》的通知 (法发 [2005]26号), 2005年12月26日: 58. 当事人在合同中约定的适用于解决合同争议的准据法,不能用来确定涉外仲裁条款的效力。.

[30] See eg ICCA's Guide to the Interpretation of the 1958 New York Convention (2013) 37.

[31] Born (n 6) 55–6.

issue of the law governing an arbitration agreement. The most quoted example is Article 178(2) of the Swiss Federal Statute of Private International Law, which provides that 'the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law'. Also, Article 9(6) of the Spanish Arbitration Act provides that 'the arbitration agreement shall be valid and the dispute shall be capable of arbitration if it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute or Spanish law'.

Sabrina Pearson in her recent article argued that the English courts have also adopted a consistent pro-validation approach in the recognition and enforcement of arbitration agreements.[32] She pointed out that while traditionally the English courts had applied the law governing the substantive contract to the arbitration agreement, more recent judgments have applied the law of the seat of arbitration. She found, in those cases where the English courts held that the law of the seat was applicable to the arbitration agreement rather than the law of the underlying contract, the English courts avoided the purported invalidity that would have affected the arbitration agreement at the behest of the law governing the underlying contract. She argued that the English courts were motivated by a desire to uphold the validity of the arbitration agreement and to 'save' the arbitration agreement from the law governing the underlying contract which threatened its existence.[33]

Indeed, in the *Sulamérica v Enesa* (2012) case,[34] the English Court of Appeal held that there was no rule of law that the proper law of the arbitration agreement was the law of the place of the seat of arbitration.[35] It then set out the standard three-stage enquiry into (i) express choice, (ii) implied choice and (iii) closest and most real connection. Applying this three-stage test, the English Court of Appeal in this case found that the parties' explicit stipulation that their contract was to be governed exclusively by the law of Brazil is a strong pointer towards an implied choice of Brazilian law as the proper law of their arbitration agreement.[36] However, the English Court of Appeal continued and emphasized two important factors refuting the finding of parties' implicit choice of Brazilian law to govern the arbitration agreement. Firstly, the choice of London as the seat inevitably imports parties' acceptance that the English Arbitration Act 1996 will apply to the conduct and supervision of the arbitration.[37] It was found that this choice also suggests that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators.[38] Secondly, if the consequence of finding Brazilian law as the governing law would be that the arbitration agreement was enforceable only with Enesa's consent, then that was a powerful factor and one which the court must take into account when considering an implied choice of Brazilian law.[39] It was found that the

[32] S Pearson, '*Sulamérica v Enesa*: The Hidden Provalidation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29(1) Arbitration International 115–26. [33] ibid.

[34] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102; [2012] 2 All ER (Comm) 795; [2012] 1 Lloyd's Rep 671; [2012] 2 CLC 216; [2012] Lloyd's Rep IR 405; *The Times*, 24 August 2012; Official Transcript.

[35] ibid para 24; *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001 considered.

[36] Ibid at para. 26; *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530 considered. [37] Ibid at para. 29. [38] Ibid. [39] Ibid at para. 30.

parties did not intend the arbitration agreement to be governed by Brazilian law.[40] Therefore, applying English law as the governing law, the arbitration agreement concerned was found valid.[41]

Compared with the above pro-validity approach adopted in some of the pro-international arbitration jurisdictions, an often mentioned Chinese pro-enforcement measure is the so-called Report System. In 1995, the Supreme People's Court issued an Official Notice on Several Questions in dealing with Foreign-related and Foreign Arbitration (the SPC Notice dated 28 August 1995).[42] Article 1 of that Notice provides:

> When foreign-related, including Hong Kong, Macao and Taiwan-related, economic and maritime commercial dispute cases are brought to the People's Court, if the parties concerned have stipulated to arbitration clauses in the contract or have subsequently reached an arbitration agreement, and if the People's Court is of the opinion that the concerned arbitration clauses or arbitration agreement is invalid or null and void or that its contents are unclear or inoperative, before a decision is made to accept the case, the People's Court must report the case to its Higher People's Court for review. If the Higher People's Court agrees that the lower People's Court should have jurisdiction over the case, the Higher People's Court should report its opinions to the Supreme People's Court for review. Before a final reply is given by the Supreme People's Court, the People's Court may decline jurisdiction and not accept the case.

It is submitted that although the Report System has positive effects in deterring some lower courts from finding a foreign-related or foreign arbitration agreement invalid too easily, its main function, after all, is to double-check the lower courts' decisions in cases where arbitration agreements are found invalid. This double-checking or review mechanism does not necessarily require and in fact is not required to function on the basis of finding the presumptive validity of arbitration agreements.

It is proposed that the PRC Supreme People's Court should further enhance the Report System by explicitly requiring the People's Courts to adopt the 'validation principle' in judicial practice and uphold the validity of an arbitration agreement, as long as the arbitration agreement is valid under any of the several laws which are potentially applicable to it.

In addition to the proposals discussed at the end of section III of this article above, it is further proposed that the pro-validity principle can also be readily integrated into the interpretation of Article 18 of the Law on Applicable Law in Foreign-Related Civil Matters (2011) by (1) clarifying that parties' agreement on the law governing the arbitration agreement can both be explicit and implicit; (2) clarifying that in the event of inconsistency between the law of the place of the arbitration institution and the law of the place of arbitration, the law that will give effect to the arbitration agreement shall apply.

VII. CONCLUSION

As set out in the above analysis, there are inconsistencies between the text of the PRC laws and the People's Courts' judicial practices. There are also conflicting decisions on

[40] Ibid.

[41] Ibid.

[42] See Supreme People's Court's Official Notice on Several Questions in Dealing with Foreign-related and Foreign Arbitration (1995.08.28): 最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知 (1995.08.28); commonly known and referred to as the Report System.

the same or similar issues. From the cases discussed, there is little evidence to support the contention that the presumptive validity of an arbitration agreement is present under current PRC law and practice. Although the unique Report System has exerted positive influence over the recognition and enforcement of arbitration agreements in mainland China since it came into existence in 1995, the time has come for some further improvement of the system. As proposed in this article, in addition to its existing report and review mechanisms, an explicit adoption of the 'pro-validation principle' in judicial practice is needed to ensure that the People's Courts will consistently uphold the presumptive validity of arbitration agreements. In the absence of such a pro-validity principle either provided in law or supported in judicial practice, it would be difficult to view mainland China as a pro-enforcement or pro-arbitration jurisdiction.

It is hoped that the PRC will either through legislation or judicial interpretation define the place/seat of arbitration as a distinct legal concept and clarify how to determine the agreement on place of arbitration and to determine the place of arbitration in the absence of the parties' agreement. It is also hoped that the Supreme People's Court will consider adopting the pro-validity principle in its judicial interpretation of Article 18 of the Law on Applicable Law in Foreign-Related Civil Matters (2011), as proposed in this article.

Last but not least, in the absence of explicit statutory provisions and a consistent approach in the determination of the place of arbitration and the law applicable to arbitration agreements under the current PRC law and practice, it remains crucial for parties negotiating arbitration clauses with a seat in China and for contracts involving mainland Chinese elements, to carefully consider and explicitly designate the place of arbitration and the law governing their arbitration agreements.