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ARTICLE

DETERMINING THE VALIDITY OF AD HOC ARBITRATION AGREEMENTS IN CHINA: PAST, PRESENT, AND FUTURE

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Abstract This paper explores the law in China determining the validity of *ad hoc* arbitration agreements. It first points out the particularity of China's attitude toward *ad hoc* arbitration through a textual analysis of key provisions in Chinese laws and the comparison between Chinese law and the law of other jurisdictions. The authors then adopt an empirical approach to analyze Chinese courts' practice in the application of Chinese arbitration laws and conclude that, despite the clear wording employed by the Chinese Arbitration Law, Chinese courts could use two ways to save the *ad hoc* arbitration agreements without disobeying the statutory law. The paper then moves to analyze the Opinion of Supreme People's Court on Providing Judicial Guarantee for the Construction of Free Trade Pilot Zone (hereinafter referred to as "SPC Opinion") issued in December 2016, which is viewed as a tipping point toward a supporting regime of *ad hoc* arbitration. By implementing this SPC Opinion, for the first time, China regionally embraces *ad hoc* arbitration. On the basis of the analysis of this new development, the authors suggest possible facilitations to the SPC Opinion and predict the future reform of *ad hoc* arbitration.

Keywords *ad hoc* arbitration, arbitration agreement, Chinese Arbitration Law

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INTRODUCTION

Ad hoc arbitration, one of the oldest and most flexible dispute-resolution methods, is widely accepted in various jurisdictions. Compared to institutional arbitration, *ad hoc* arbitration keeps its advantage of flexibility, low cost, arguably efficiency, and expertise in history. However, not every country takes the same attitude toward *ad hoc* arbitration, and China is one of the most noticeable examples. The Chinese Arbitration Law is drafted centering on arbitration commissions (*i.e.* arbitration institutions), and it is explicitly provided in Articles 16 and 18 of the Chinese Arbitration Law that a "designated arbitration commission" is one of the mandatory requirements for a valid arbitration agreement. In this regard, China seems to be alone in its negative attitude toward *ad hoc* arbitration.

A historical study of Chinese arbitration reveals the reasons behind this restriction: Arbitration in China was not initiated by merchants but created and supported by the Chinese government through legal transplantation. Given the top-down tradition of the

legal system, it is reasonable for Chinese people to accept that, it is the government's responsibility to steer the kite line and supervise the proceeding rather than endow parties with full autonomy. Although a study of the Chinese history sheds light on why China is so reluctant to accept *ad hoc* arbitration, many Chinese scholars and some open-minded judges and government officials are concerned about this "Chinese exception," and have made recent efforts to "save" certain *ad hoc* arbitration agreements without disobeying the regulations of Articles 16 and 18. Moreover, these scholars and practitioners are waiting for the right opportunity to make larger changes, *i.e.* to negate the mandatory requirement in Articles 16 and 18 and embrace *ad hoc* arbitration. In the Opinion of Supreme People's Court on Providing Judicial Guarantee for the Construction of Free Trade Pilot Zone (hereinafter referred to as "the 2017 SPC Opinion") issued on December 30, 2016[1], *ad hoc* arbitration finally edged its way into Chinese law. Article 9 of the 2017 SPC Opinion is very promising, despite its vagueness and uncertainties, planting the seeds for a complete *ad hoc* arbitration system.

I. AD HOC ARBITRATION: HOW IS CHINA DIFFERENT AND WHY?

A. Chinese Arbitration Law and the Unusual Treatment of Ad Hoc Arbitration

Once parties have decided to arbitrate their dispute, the first question that arises concerns the kind of arbitration to be chosen. In most jurisdictions in the world, the parties can choose between institutional arbitration, in which proceedings are conducted pursuant to institutional arbitration rules and are usually overseen by an administrative authority, and *ad hoc* arbitration, in which, to a large extent, proceedings are conducted by the parties themselves, without the benefit of an appointed administrative authority or preexisting arbitration rules.[2] Compared to institutional arbitration, *ad hoc* arbitration is more flexible in the procedures for resolving parties' disputes and arguably costs less than institutional arbitration, given that the institution fees are saved and the length of the proceedings might be shorter.

To most Western scholars, the study of the validity of *ad hoc* arbitration agreements seems meaningless since their validity is beyond doubt in most jurisdictions. Article 2 of 2006 UNCITRAL Model Law on International Commercial Arbitration defined arbitration as "any arbitration whether or not administered by a permanent arbitral institution." Article V of the 1958 New York Convention on the Recognition and

[1] The Opinions of SPC was issued on Dec. 30, 2016, and was published on the official website of the SPC on Jan. 9, 2017. See SPC, Opinions of the SPC on Providing Judicial Guarantee for the Construction of Free Trade Pilot Zone, available at http://www.court.gov.cn/zixun-xiangqing-34502.html (last visited Dec. 11, 2018).

[2] Gary B. Born, *International Commercial Arbitration* (2nd edition), Kluwer Law International, at 168 (2014).

Enforcement of Foreign Arbitral Awards (hereinafter referred to as "New York Convention") took the same position by not including the lack of a permanent institution as a ground to refuse the enforcement of an arbitration award.

As has been pointed out by many scholars, most jurisdictions do not regulate *ad hoc* arbitration and institutional arbitration separately. In practice, the necessity of distinguishing these two types of arbitration lies in determining the jurisdiction of an arbitration institute; for example, this happens when the name of the institute is not clearly stated but is somehow implied in an agreement or when more than one institution is designated in an arbitration agreement.[3] Even in such cases, a vague or conflicting description of the arbitration institution in an agreement will not become an obstacle for arbitrating the dispute. It therefore seems very odd, in the eyes of non-Chinese scholars, to consider the "validity of *ad hoc* arbitration agreements" as a separate study question from the validity of arbitration agreements in general.

However, when it comes to China, the question of the type of arbitration (institutional or *ad hoc*) is not merely a question of determining the correct forum, but more of the key to the validity of an arbitration agreement.

Key provisions in the Chinese Arbitration Law, namely Articles 16 and 18, make arbitration institutions the only forum for parties who have intentions to arbitrate their disputes. These two provisions provided that, in plain language, valid arbitration agreements should include a designated arbitration commission, otherwise such arbitration agreements would be null and void. The strong and clear language in these two provisions seems to preclude the validity of all *ad hoc* arbitration agreements. Paradoxically, valid *ad hoc* arbitration agreements do exist in China. A number of cases demonstrate that certain *ad hoc* arbitration agreements have been deemed valid by the Chinese courts without violating Articles 16 and 18. In addition, the 2017 SPC Opinion seems to allow *ad hoc* arbitration, although its provisions are so simple that may lead to uncertainties.

B. Reasons behind China's Unusual Treatment of Ad Hoc Arbitration

To understand the reasons behind this unusual attitude, it is necessary to trace its historical background. In Western countries, *ad hoc* arbitration emerged much earlier than institutional arbitration, which can be traced back to 1500 BCE in ancient Egypt. During medieval times, *ad hoc* arbitration is well developed in commercial and maritime fields.[4]

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[3] Most institutional rules provide a *prima facie* test at the stage of determining the jurisdiction of the institutions. For example, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) provides in Article 9 that "the Board shall decide whether the SCC manifestly lacks jurisdiction over the dispute."

[4] ZHANG Tietie, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 Cornell International Law Journal, 361 (2013).

Professional arbitration institutes were not established until modern times to "provide service to parties and arbitrators facilitating the dispute resolution process."[5]

The development of an arbitration system in China followed a completely different path. Because of the heavy reliance on agriculture before Qing dynasty, for a long time the development of commerce was almost completely suppressed in China. Not until the mid-19th century did arbitration arise, as a result of the state bodies' incompetence in resolving commercial disputes and their lack of experience in hearing such cases.[6] The community of merchants never got the chance to find their position in Chinese society, not to mention established their own dispute-resolution mechanism. It was the government that introduced the idea of arbitration to better serve their administrative authority.

Not until the early 1980s did the Chinese government establish a modern arbitration system under which domestic commercial disputes might be resolved. Even then, the administrative bodies continued to be the sole authority.[7] Therefore it has been said that the 1995 Chinese Arbitration Law was an attempt to bring the Chinese arbitration system closer to other jurisdictions' modern principles and practices.[8]

In short, from the historical perspective, the Chinese people understood arbitration as a product introduced by foreigners and adopted by the Chinese public authorities rather than a creature originally from China. In contrast, in Western cultures, arbitration is understood as a useful tool to voluntarily resolve disputes. Consequently, Chinese people's understanding of the concept of arbitration is closer to their view of the meaning of "court" or to a government body. Since the creation and development of arbitration has been government-oriented from the very beginning, historically, Chinese people tended to view judicial awards unconvincing if the proceedings lacked supervision by a public body.

So, what are the holding-back forces in China arguing against *ad hoc* arbitration today? Many scholars in China, fully aware of the differences between the attitudes of China and other jurisdictions toward *ad hoc* arbitration, still believe that Chinese society is not ready to accept and implement *ad hoc* arbitration without government oversight. Typically, they hold that a credit or trust system has not been fully established in Chinese society[9]; the principle of the rule of law has still not been deeply implanted in China. Therefore, those scholars argue that an informal dispute resolution form such as *ad hoc* arbitration is

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[5] Id. at 385.

[6] Id.

[7] Id.

[8] Id. at 383.

[9] LIU Maoliang, 临时仲裁应当缓行 (*Ad Hoc Arbitration Reform Should be Delayed*), 1 北京仲裁 (Beijing Arbitration Quarterly), 8–12 (2005).

unlikely to be accepted as convincing and authoritative by the Chinese people.[10]

The authors agree that it is not suitable for China to completely remove limitations on *ad hoc* arbitration. The majority of Chinese people lack the basic knowledge of the workings of *ad hoc* arbitration, so many still refuse to accept the binding force of *ad hoc* arbitration, since they normally rely on decisions issued by courts and permanent institutions established by government authorities. The lack of formality to them confers a lack of credibility; thus, they prefer to put their faith (and money) into institutional forums that they believe can better take on the responsibility. As an example, in an *ad hoc* arbitration between a Chinese party and a European party in 2017, the Chinese party did not accept the legitimacy of the *ad hoc* arbitration; therefore, the Chinese party completely ignored the procedural orders issued by the arbitral tribunal before they appointed their foreign counsels.[11] This, to some extent, exemplifies many Chinese people's reluctance to rely on *ad hoc* arbitration, in which they believe that there is no guarantee of procedural fairness and due process.

However, the authors disagree with the idea that *ad hoc* arbitration has no place at all in the Chinese legal system. The abovementioned concerns could be largely eased by a tailor-made set of possible measures to be discussed in Part V of this paper.

Some Chinese scholars have pointed out that another obstacle to establishing *ad hoc* arbitration is the lack of arbitration professionals in China. Such argument is unfounded; the Chinese arbitration community has gained sufficient experience in professionally conducting arbitration proceedings since the establishment of an independent (although institutional) arbitration system in 1995. For instance, in 2015, the China International Economic and Trade Arbitration Commission (CIETAC) received 1,968 arbitration cases, including 437 international cases[12] — strong proof that the Chinese arbitration community is highly experienced, reliable, and necessary. The Chinese arbitration practitioners' basic capabilities in handling *ad hoc* arbitration proceedings are not in question.

II. ANTI–AD HOC ARBITRATION PROVISIONS: ARTICLES 16 AND 18 OF THE CHINESE ARBITRATION LAW

Articles 16 and 18 are the two key provisions regulating the validity of *ad hoc*

[10] ZHANG Xinquan & ZHANG Shengcui, 论我国临时仲裁制度的构建 (*Establishment of Ad Hoc Arbitration Regime in China*), 4 华东政法大学学报 (Journal of East China University of Political Science and Law), 149–156 (2010).

[11] The authors learned about this *ad hoc* case when serving as one of the counsels for the Chinese party.

[12] CIETAC, 2015 年贸仲委受案量及争议金额再创历史新高 (*CIETAC Case Number and the Amount of the Claim Have Hit a Historical High*), available at http://www.cietac.org/index.php?m=Article&a=show&id=13629 (last visited Dec. 11, 2018).

arbitration agreements. Both reflect China's negative attitude toward *ad hoc* arbitration.

Article 16 provides, among the other things, "[a]n arbitration agreement shall contain: a designated arbitration commission." Article 18 further reads: "[if] an arbitration agreement contains no or unclear provisions concerning…the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void."

In plain language, a "designated arbitration commission" is a mandatory condition for a valid arbitration agreement. Since the very definition of *ad hoc* arbitration is an agreement where no institutions are specified, the mandatory requirement in Articles 16 and 18 makes it clear that no *ad hoc* arbitration is allowed under Chinese arbitration law.

Following these two provisions, it seems that Chinese courts have no other options but to deny the validity of any arbitration agreement in which the parties have clear intentions to arbitrate but fail to specify an arbitration institution. This was true in *PICC Guangdong Branch v. Guangdong Guanghe Electric Power Co., Ltd.* (2002),[13] *Shanghai Jinlu Construction (Group) Co., Ltd. v. Kunshan Chengkai Jingting Property Co., Ltd.* (2015),[14] *China Hi-tech Wealth Group Co., Ltd. and Beijing Beida Jade Bird Co., Ltd. vs Guangsheng Investment and Development Co., Ltd. and Hong Kong Jade Bird Science and Technology Co., Ltd.* (2006),[15] and *Korean Xinhu Company v. Sichuan Euro–Asian Economy & Trade Corporation and Others* (2000).[16] The Chinese courts unanimously invalidated the *ad hoc* arbitration agreements in all four cases after applying Article 16 and Article 18.

To further elucidate, in *PICC Guangdong Branch v. Guangdong Guanghe Electricity Co., Ltd.*, the parties concluded the following arbitration clause in the insurance policy:

> *[A]rbitration: All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties. In difference or if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in*

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[13] See 中国人民保险公司广东省分公司与广东广合电力有限公司等保险合同纠纷案 (*PICC Guangdong Branch v. Guangdong Guanghe Electric Power Co., Ltd.*), 最高人民法院(2002)民四终字第 29 号民事裁定书 (*Supreme People's Court, (2002) No. 29 Civil Order*).

[14] See 昆山城开锦亭置业有限公司与上海金鹿建设(集团)有限公司建设工程施工合同纠纷管辖权异议上诉案 (*Kunshan Chengkai Jingting Property Co., Ltd. (Appellant, defendant in the case of the first instance) v. Shanghai Jinlu Construction (Group) Co., Ltd. (Appellee, plaintiff in the case of the first instance)*), 最高人民法院(2015)民一终字第 253 号民事裁定书 (*Supreme People's Court, (2015) No. 253 Civil Order*).

[15] See 中国恒基伟业集团有限公司、北京北大青鸟有限责任公司与广晟投资发展有限公司、香港青鸟科技发展有限公司借款担保合同纠纷案 (*China Hi-Tech Wealth Group Co., Ltd. and Beijing Beida Jade Bird Co., Ltd. v. Guangsheng Investment and Development Co., Ltd. and Hong Kong Jade Bird Science and Technology Co., Ltd.*), 最高人民法院(2006)民四终字第 28 号 (*Supreme People's Court, (2006) No. 28 Civil Judgment*).

[16] See 韩国新湖商社诉四川省欧亚经贸总公司、韩国农业协同组合中央会、中国农业银行成都市总府支行信用证欺诈纠纷管辖权异议案 (*Korean Xinhu Company v. Sichuan Euro–Asian Economy & Trade Corporation and Others*), 最高人民法院(2000)经终字第 155 号 (*Supreme People's Court, (2000) No. 155 Civil Judgment*).

writing by each of the parties within one (1) calendar month after having been required in writing to do so by either of the parties or in case the arbitrators do not agree to the decision of an umpire appointed in writing by the arbitrators. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company in respect of quantum.

Under this arbitration agreement, though absent any reference to the arbitration institution or arbitration rules, the mutual intention to arbitrate was clear and manifested, and the parties also agreed on the method of appointing arbitrators. It was a typical *ad hoc* arbitration clause. Applying Chinese arbitration law, the Supreme People's Court (SPC) decided that since the parties failed to designate an arbitration institution in the agreement and to reach a supplement agreement on such an institution after, the arbitration agreement should be deemed null and void.

However, the mandatory condition required by Articles 16 and 18 does not automatically invalidate every *ad hoc* arbitration agreement in China. The next two parts discuss typical scenarios in which Chinese courts can successfully save *ad hoc* arbitration agreements without violating these two provisions.

III. SAVING THE VALIDITY OF AD HOC AGREEMENTS VIA JUDICIAL INTERPRETATIONS

The first way to save *ad hoc* arbitration agreements is straightforward: if the parties have not made clear reference to an arbitration institution, the courts can specify one. Some Chinese courts have viewed *ad hoc* agreements as defective institutional agreements and treated such defects as oversight insufficient to invalidate the agreements. The following sections describe three scenarios in which *ad hoc* arbitration agreements can be thus saved.

A. Ad Hoc Arbitration Agreements Containing Arbitration Rules

In accordance with Article 4 of the Interpretation on Certain Issues concerning the Application of the Arbitration Law of the People's Republic of China issued by the SPC in 2006 (hereinafter referred to as "2006 SPC Judicial Interpretation"), if an arbitration agreement includes arbitration rules and the arbitration institution can be identified through such rules, the parties concerned can be deemed to have agreed indirectly on an arbitration institution.

By including what kind of language can the parties be considered to have indirectly identified the arbitration institution? Judicial practice shows that this depends on the wording of the arbitration rules and the judges' opinions on whether an exclusive linkage exists between such rules and an arbitration institution.

Unsurprisingly, the China International Economic and Trade Arbitration Commission Arbitration Rules (hereinafter referred to as "CIETAC Rules") have been deemed to satisfy such requirement.[17] But when it comes to the International Chamber of Commerce Rules of Arbitration (hereinafter referred to as "ICC Rules") or other rules of international arbitration institutions, things become uncertain. The first case dealing with this problem was the famous *Züblin* case, decided by a local court following the instructions of the SPC in 2003.[18] The arbitration clause said "[a]rbitration: ICC Rules, Shanghai, shall apply." The SPC believed that such an agreement failed to comply with the "designated arbitration commission" requirement under Article 16 of the Chinese Arbitration Law and therefore was null and void. During subsequent proceedings, Züblin moved to enforce the ICC award; the request was again denied by a court judgment stating that the award should not be recognized and enforced since the arbitration clause had been found to be null and void by a Chinese court.[19]

The *Züblin* case shocked the ICC. Later, in 2005, the ICC responded with a specially designed model clause that applied only to Chinese parties:

> *The standard clause can be modified in order to take account of the requirements of national laws and any other special requirements that the parties may have. In particular, parties should always check for any mandatory arbitration. For example, it is prudent for parties wishing to have an ICC Arbitration in Mainland China to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration.*[20]

However, agreements concluded before those instructions from the ICC were still at risk of being invalidated. Following the reasoning in the *Züblin* case, in 2006, the Hebei High People's Court refused to validate an arbitration agreement that said, "[t]he seat of arbitration is Beijing, ICC Rules apply…the arbitration should be final and binding."[21]

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[17] See for instance, 江西安源光伏玻璃有限责任公司诉空气化工产品(中国)投资有限公司申请确认仲裁协议效力案 (*Jiangxi Anyuan PV glass Co., Ltd. v. Air Chemical Engineering Product Co., Ltd.*), 上海市第一中级人民法院(2015)沪一中民认(仲协)字第 8 号民事裁定书 (*No. 1 Intermediate People's Court of Shanghai (2015), No. 8 Civil Order*). When determining the validity of the dispute resolution clause agreed by the parties, the court ruled that, since this clause has mentioned the exact name of CIETAC, though without stipulating the arbitration institution, "either party may submit to arbitration in Beijing according to the rules and procedures of CIETAC" shall be construed in light of its contextual meaning as, the parties have agreed to arbitrate before CIETAC.

[18] See 最高人民法院关于德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力一案的请示的复函 (*Letter of Reply of the SPC to the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement*)**,** promulgated in 2004.

[19] ZHAO Xiuwen, 从旭普林公司案看我国法院对国际商事仲裁的监督 (*The Chinese Courts Supervision on International Commercial Arbitration through Züblin Award*), 6 时代法学 (Presentday Law Science), 3–17 (2007).

[20] ICC, *Arbitration Clause*, available at https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/ (last visited Dec. 11, 2018).

[21] 达利特商务技术有限责任公司与沧州东鸿包装材料有限公司案 (*Dalite Business Technology Co., Ltd. v. Cangzhou Donghong Material Co., Ltd.*), 河北省高级人民法院(2006)冀民三初字 2–1 号 (*Hebei High People's Court (2006), No. 2-1 Civil Judgment*).

The reasons behind the different treatments of the CIETAC Rules and the ICC Rules were the different wordings employed by the two rules and the different impressions that the Chinese judges had with regard to the two institutions. CIETAC is the only institution that is able to administrate cases under CIETAC Rules, while the ICC is not the only institution that can administrate cases under ICC Rules. In other words, the reason for the agreement's failure to meet the requirement of Article 4 of the 2006 SPC Judicial Interpretation was that institutions other than the ICC may administer ICC Rules.

If such logic stands, ICC Rules may be able to meet the requirement after its revision in 2012, since the revised Article 1(2) of the Rules now states that "the Court (the International Court of Arbitration of the ICC) is the only body authorized to administer arbitration under the Rules."[22] In fact, after the 2012 revision, there has been at least one case decided by the Chinese courts that opens the gate for ICC Rules. In the case of *Tianjin Tianhai Technology Co., Ltd. v. Profilator GmbH & Co. KG* in 2013, the *ad hoc* arbitration agreement provided that "…the parties should submit to one or more arbitrators in China to arbitrate according to the rules and procedures of International Chamber of Commerce."[23] The Beijing No. 1 Intermediate People's Court ruled that the ICC Rules chosen by the parties were sufficient to identify the arbitration institution and to render the agreement valid.

Thus, with the help of Article 4 of the 2006 SPC Judicial Interpretation, the Chinese courts are able to transform *ad hoc* arbitration agreements that incorporate certain arbitration rules into institutional arbitration agreements, thereby extending the coverage of valid arbitration agreements. Those lucky enough to find themselves in this zone are those who have chosen the right arbitration rules: CIETAC Rules are usually on the list and ICC Rules have recently found a berth there too, by clarifying the exclusive authority of the International Court of Arbitration of the ICC.

B. The Beijing Arbitration Clause

It has been said that in international maritime transportation the shipping industry is

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[22] Patricia Živković, *Hybrid Arbitration Clauses Tested Again: Can the SCC Administer Proceedings under the ICC Rules?*, available at http://kluwerarbitrationblog.com/2015/06/09/hybrid-arbitration-clauses-tested-again-can-the-scc-administer-proceedings-under-the-icc-rules/ (last visited May 3, 2017).

[23] In this case, the agreement was bilingual and the parties agreed that the Chinese version and the English version had the same effect. However, in the Chinese version of the agreement, parties referred to the wording of "arbitration rules of International Chamber of Commerce," while in the English version, they referred to "arbitration and conciliation rules of CIETAC." The judge in the case decided that the parties had identified the arbitration institution in accordance with Article 4 of the 2006 SPC Judicial Interpretation since both rules could help to identify one arbitration institution. See 天津天海同步科技股份有限公司诉德国维拉机床股份有限公司申请确认仲裁协议效力案 (*Tianjin Tianhai Technology Co., Ltd. v. Profilator GmbH & Co. KG*), 北京市第一中级人民法院(2013)一中民特字第 7424 号 (*Beijing No. 1 Intermediate People's Court (2013) No. 7424 Civil Judgment*).

accustomed to incorporating the standard *ad hoc* arbitration clause by simply saying "London Arbitration" or "Beijing Arbitration."[24] The chances of validating such clauses are small in China but it is not entirely impossible.

To start with, Article 6 of the 2006 SPC Judicial Interpretation provides that "[if] an arbitration agreement states that arbitration shall be conducted by an arbitration institution at a certain place, and there is only one arbitration institution in that place, such arbitration institution shall be deemed the agreed-upon arbitration institution." Theoretically, a broad interpretation of this article may lend some potential validity to the so-called "Beijing Arbitration" clauses and other similar *ad hoc* arbitration agreements.

In 1997, long before the 2006 SPC Judicial Interpretation, the SPC decided in the *M.V. "Long Xu" Demurrage Dispute* that the *ad hoc* arbitration agreement drafted as "Arbitration in Beijing" was valid since the parties' intention to arbitrate was clear upon the conclusion of the contract.[25] The SPC interpreted the clause as a reflection of the parties' intentions to arbitrate in the China Maritime Arbitration Commission in Beijing. However, the decision has not become prevailing practice. In 2009, similar *ad hoc* arbitration clauses were deemed invalid by the SPC in two cases: *Panyu Chu Kong Steel Pipe Co., Ltd. v. Shenzhen Fanbang International Freight Forwarding Co., Ltd.*[26] and *COSCO v. CMEC*.[27] In the first case, the parties agreed that "Beijing arbitration, Chinese law applied," while in the second the arbitration agreement read "the seat of arbitration is Beijing and Chinese law shall apply." The SPC believed that no arbitration institution was designated therefore invalidating the agreement.

Consequently, when it comes to arbitration in China, one suggestion for both parties to conclude an arbitration agreement that will be held as valid must still "always choose an institution." However, if the parties can reach an agreement at least on the seat of the arbitration instead of a precise arbitration institution, should the validity of such *ad hoc* arbitration agreement be contested before the court, one possible option is to invoke Article 6 and show the Chinese courts evidence of the parties' intentions to choose the specific arbitration institution in that place. Despite the inherent uncertainty in Chinese judicial practices, Article 6 provides some leeway for rendering the "Beijing Arbitration"

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[24] PENG Xiawei, *Validity of the "Beijing Arbitration" Clause: A Discussion of Two Landmark Civil Rulings of the Chinese Supreme People's Court*, 28 Journal of International Arbitration, 15 (2011).

[25] Id.

[26] See 最高人民法院关于申请人番禺珠江钢管有限公司与被申请人深圳市泛邦国际货运代理有限公司申请确认仲裁协议效力一案的请示的复函 (*Letter of Reply of the SPC on Request for Instructions Re Arbitration Clause Validity in the Case of Panyu Chu Kong Steel Pipe Co., Ltd. (Applicant) v. Shenzhen Fanbang International Freight Forwarder Co., Ltd. (Respondent)*), promulgated on May 5, 2009.

[27] See Guide on Foreign-Related Commercial and Maritime Trial 85–89 (Fourth Division of the Civil Trial Department of the Supreme People's Court ed., Issue 1, 2009), cited from PENG Xiawei, *Validity of the "Beijing Arbitration" Clause: A Discussion of Two Landmark Civil Rulings of the Chinese Supreme People's Court*, 28 Journal of International Arbitration, 15 (2011).

clause and similar *ad hoc* arbitration agreements valid.

C. Wrongly Named Institution or Involvement of Two Arbitration Institutions

It happens quite often that parties or their lawyers miswrite the name of an arbitration institution or draft a pathological clause where two institutions have been named in the contract. In such cases, parties might have to go *ad hoc* if neither institution finds jurisdiction. Pathological arbitration clauses like this are in risk of being null and void according to Articles 16 and 18 of the Chinese Arbitration Law. However, a Chinese court can try to save such agreements by applying Article 3 of the 2006 SPC Judicial Interpretation.

Article 3 makes it clear that if the name of the arbitration institution agreed upon in an arbitration agreement is not accurately written (*e.g.* misspelled), it can be deemed that an arbitration institution has been selected.[28] However, if there happen to be two institutions with similar names but the parties indicate a name that is accurate for neither of the two possible choices, things are more complicated. A case decided by the Shenzhen Intermediate People's Court in 2016 dealt with just such a situation.[29] The arbitration clause referred to "Shenzhen International Arbitration Commission," but there was no institution by that exact name. Instead, there were two institutions that had similar names: "Shenzhen Arbitration Commission" and "Shenzhen Court of International Arbitration." The court invoked Article 3 of the 2006 SPC Judicial Interpretation, holding that the arbitration agreement was not invalid simply because of the inaccurate specification of the institution's name, as both parties had agreed to the same institution, whatever its actual name. Then, reasoning that the word "international" in the arbitration agreement was crucial in determining the parties' intention, the court ruled that the intended institution selected by both parties was the Shenzhen Court of International Arbitration.

The other tricky scenario arises when two parties have agreed on two different arbitration institutions. The core standard to be applied is still the same: Can one institution be identified at the time of the dispute? For example, the Tianjin No. 1 Intermediate People's Court decided a case in 2014 where both parties agreed that

> *…the parties should submit to arbitration…If Tianjin Baolai is the Respondent, the arbitration should be submitted to CIETAC Shanghai…If Sumitomo Mitsui is the Respondent, the arbitration should be submitted to the Japan International Commercial*

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[28] As an example, the SPC confirmed the validity of an arbitration clause miswriting the Chinese name of CIETAC by applying Article 3. See 最高人民法院关于浙江逸盛石化有限公司申请确认仲裁条款效力一案请示的复函 (*Letter of Reply of the SPC on Request for Instructions Re Arbitration Clause Validity in the Case of Zhejiang Yisheng Petrochemical Co., Ltd. v. Invista Technology Co., Ltd.*), promulgated on Dec. 18, 2013.

[29] See AVIN 与深圳市朝日彩阳电子有限公司申请确认仲裁协议效力一审民事裁定书 (*AVIN v. Shenzhen Wide Road Electronics Co., Ltd.*), 深圳市中级人民法院(2016)粤03民初1177号 (*Shenzhen Intermediate People's Court (2016) No. 1177 Civil Order*).

Arbitration Association. [30]

The plaintiff in the case argued that according to Article 5 of the 2006 SPC Judicial Interpretation, if the parties had failed to reach an agreement on the arbitration institution, the arbitration agreement should be deemed invalid. The court disagreed and ruled that the arbitration agreement was valid since the institution could be determined at the time when the party initiated the arbitration proceeding.

However, it should be kept in mind that the parties are risking the validity of their arbitration agreement if they do not draft it with caution. According to Article 5 of the 2006 SPC Judicial Interpretation, if two or more arbitration institutions are agreed upon in an arbitration agreement, the parties concerned may select, by agreement, one of these arbitration institutions to administer the arbitration; if the parties then fail to reach agreement on the institution, the agreement will be deemed invalid.

To summarize, in cases where parties fail to designate one specific arbitration institution but do (1) include arbitration rules in their agreement or (2) include a seat of arbitration or (3) refer to more than one institution or mis-identify the names, there are still some chances to argue for a valid arbitration agreement based on the 2006 SPC Judicial Interpretations. However, whether such arguments will stand before the Chinese courts remains uncertain, given that the practices of different courts vary at different times. It is therefore suggested that the parties should be careful when drafting arbitration agreements. Specifically, they should pay attention to the name of the arbitration institution and always start the drafting with a model clause.

The three scenarios discussed above show the efforts made by the SPC and some local courts to validate *ad hoc* arbitration agreements. Even if in principle the Chinese Arbitration Law denies the validity of *ad hoc* arbitration agreements, the courts have nevertheless interpreted certain *ad hoc* arbitration agreements as institutional agreements and have thereby validated such agreements.

The remaining parts analyze another alternative employed by some Chinese courts to render *ad hoc* arbitration agreements valid.

IV. SAVING THE VALIDITY OF AD HOC AGREEMENTS VIA CHOICE OF LAW RULES

Another circumstance in which the Chinese courts may give a nod to the validity of *ad hoc* arbitration agreements arises when the courts avoid the application of Chinese law. In that case, the fate of an *ad hoc* arbitration agreement is held in relevant choice of law rules. In the following sections, the authors will analyze the conditions under which non-Chinese arbitration law applies in determining the validity of the *ad hoc* arbitration

[30] 天津市宝涞精密机械有限公司诉三井住友金融租赁株式会社申请确认仲裁协议效力纠纷案 (*Tianjin Baolai Precision Instruments Co., Ltd. v. Sumitomo Mitsui Financial Group*), 天津市第一中级人民法院(2014)一中民五特字第 0016 号民事裁定书 (*Tianjin No. 1 Intermediate Court (2014) No. 0016 Civil Order*).

agreement.

A. "Foreign Elements" and Choice of Law Rules in China

Before moving to the discussion of the provisions of choice of law rules in China, it is important to first introduce the conditions that trigger the application of choice of law rules.

In accordance with Article 6 of Interpretation of the SPC on Certain Issues concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations (I) (hereinafter referred to as "2013 Judicial Interpretation on Application of Laws"), Chinese laws do not explicitly entitle all domestic parties to select non-Chinese laws; only parties of "foreign-related civil relations" have the chance to choose applicable laws.

Article 1 of the 2013 Judicial Interpretation on Application of Laws defined "foreign-related civil relations" as situations where one of the following applies:

> *1. A party or both of the parties concerned is/are a foreign citizen(s), a legal person(s), or other organization(s) in a foreign country or a person(s) without nationality;*
>
> *2. The habitual residence of a party or both of the parties concerned is outside the territory of the People's Republic of China;*
>
> *3. The subject matter is outside the territory of the People's Republic of China;*
>
> *4. The legal facts that establish, change, or eliminate civil relations occurred outside the territory of the People's Republic of China; or*
>
> *5. Other situations that may be recognized as foreign-related civil relations.*

To put it plainly, the relations between parties will be regarded as "foreign-related" if at least one of the parties is not Chinese or the transactions between Chinese parties to some extent involves extraterritorial elements. An important note for non-Chinese readers is that, under Chinese company law, wholly foreign-owned enterprises (WFOEs) and joint ventures established in China are still regarded as Chinese companies.[31] For parties that are not considered to be "parties of foreign-related relationship," the only law applicable to the dispute is Chinese law. In such cases, the possible solutions for saving the validity of an *ad hoc* agreement were those discussed in the preceding parts.

Having foreign elements not only is the precondition that triggers choice of laws rules, but also the precondition for parties to choose a foreign arbitration institution or a foreign *ad hoc* tribunal to decide the dispute.[32] The debate on whether Chinese parties, including

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[31] In accordance with Article 192 of Company Law of China, the nationality of companies is determined by the place of establishment. Accordingly, all WFOEs and joint ventures have Chinese nationality if they have been established and registered in accordance with Chinese law in China.

[32] A civil relation "having foreign elements" holds the same meaning as "a civil relation is foreign-related."

WFOEs and joint ventures, can submit their dispute to foreign arbitral tribunals is ongoing. According to Article 128 of the Chinese Contract Law, parties in a foreign-related contract can agree to arbitrate in a Chinese institution, a foreign institution, or an *ad hoc* arbitration. That provision remains silent for parties of contracts without foreign elements. The silence of Chinese Contract Law on this matter has provoked debate, but the prevailing opinion is that purely domestic disputes cannot be submitted to foreign tribunals.

The famous *Zhaolaixinsheng* Case decided by Beijing No. 2 Intermediate People's Court in 2013 is a typical reflection of this debate.[33] In this case, the parties were a Chinese company and a WFOE owned by a South Korean citizen. The parties agreed to arbitrate in the Korea Commercial Arbitration Board. After the award was delivered, the Chinese company sought to recognize and enforce the award in Beijing No. 2 Intermediate People's Court. That request was denied since both parties had Chinese nationality and there were no other foreign elements in the dispute. The SPC also took this position in another case in 2012. In its reply to a local court, the SPC answered that

> *The Parties to the Agreement are both Chinese corporations, the subject matter is in China and the agreement is concluded and performed in China…the Agreement is not a foreign-related agreement…the law remains silent on parties' right submitting a dispute with no foreign elements to a foreign arbitration institution or to ad hoc arbitral tribunals…Parties in this case cannot arbitrate their dispute before the ICC since it lacks sound legal basis.*[34]

The reasoning behind the Chinese courts' reluctant attitude rests on the concerns of potential problems in the enforcement stage. Under Chinese law, the nationality of an award is determined by the "nationality" of the institution. If two Chinese parties are free to arbitrate outside China, when it comes to the enforcement stage, the Chinese courts will treat the award rendered outside China as a foreign award in which a different standard of judicial review applies. In other words, the abovementioned situation falls in the gray area where parties that had sought to avoid the application of Chinese law later require it for enforcement.

Recently the Chinese courts have embraced a broader scope of foreign elements by extending coverage to parties inside China's pilot free trade zones (hereinafter referred to

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[33] See 北京朝来新生体育休闲有限公司与北京所望之信投资咨询有限公司申请承认和执行外国仲裁裁决案 (*Beijing Zhaolaixinsheng Sports Leisure Co., Ltd. v. Beijing Suowangzhixin Investment Consulting Co., Ltd., referred to as the Zhaolaixinsheng Case*), 北京市第二中级人民法院(2013)二中民特字第10670号 (*Beijing No. 2 Intermediate People's Court (2013), No. 10670 Civil Judgment*).

[34] See 关于江苏航天万源风电设备制造有限公司与艾尔姆风能叶片制品(天津)有限公司申请确认仲裁协议效力纠纷一案的请示的复函 (*Reply Letter of the SPC to the Request for Instructions concerning Determination of the Case between Jiangsu Hangtianwanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Power*), promulgated on Aug. 31, 2012.

as "PFTZs"). In the case of *Siemens International Trade (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd.*[35] (hereinafter referred to as the "Golden Landmark Case"), Shanghai No. 1 Intermediate People's Court ruled that the award made by a foreign institution would be enforced even if the parties involved were Chinese companies (actually, WFOEs) incorporated in Shanghai PFTZ.

The SPC then issued a judicial opinion following the same logic as the Golden Landmark Case. Article 9, Paragraph 1 of the 2017 SPC Opinion provided that if both parties are WFOEs incorporated in a PFTZ, it would be sufficient to make a contract "foreign related" and thus eligible for foreign-seated arbitration. Paragraph 2 of Article 9 in the 2017 SPC Opinion further provided that, if a party opposes the recognition or enforcement of an arbitration award rendered in a foreign-seated arbitration merely on the grounds that there is no foreign-related element, the courts shall not uphold the objection if (a) at least one of the parties to the arbitration dispute is a foreign-invested company registered within a PFTZ; (b) the parties entered into an arbitration agreement submitting disputes to arbitration seated outside of China's mainland; or (c) the opposing party was the claimant who initiated the foreign-seated arbitration in the first place, or the opposing party was the respondent who participated in the foreign-seated arbitration without challenging the validity of the arbitration clause throughout the arbitration.

To summarize, a civil or commercial dispute may be labeled "foreign-related" if one of the parties is not Chinese, or both parties are WFOEs incorporated in the PFTZs, or the transactions between Chinese parties involve extraterritorial elements.

B. The Law Determining the Validity of the Arbitration Agreement

Choice of law rules steps in as soon as a dispute is deemed "foreign-related." This widens the opportunities of parties in a foreign-related dispute, enabling them to freely resort to an *ad hoc* tribunal to solve their dispute, as long as the arbitration agreement is carefully drafted. The logic is simple: Laws that allow *ad hoc* arbitration may become the applicable law by virtue of Chinese choice of law rules, and this validates the agreement. This section examines the choice of law rules in China and describes circumstances in which a Chinese court can apply a non-Chinese law that validates the *ad hoc* arbitration agreement.

Both the 2006 SPC Judicial Interpretation and the choice of law rules — *i.e.* the 2011 Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations (hereinafter referred to as "the 2011 Code of Application of Laws" or "the 2011 Code") — have provided choice of law rules specifically for arbitration agreements.

[35] See 西门子国际贸易(上海)有限公司诉上海黄金置地有限公司申请承认与执行外国仲裁裁决案 (*Siemens International Trade (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd.*), 上海市第一中级人民法院(2013)沪一中民认(外仲)字第 2 号民事裁定书 (*Shanghai No. 1 Intermediate People's Court (2013), No. 2 Civil Order*).

Wordings in these two regulations are slightly different, although the 2011 Code of Application of Laws should prevail because laws adopted by the Standing Committee of the National People's Congress have a higher rank in the hierarchy than a judicial interpretation.

Article 18 of 2011 Code of Application of Laws provides that "[p]arties may agree upon the laws applicable to an arbitration agreement. Where the parties have made no such choice, laws of the domicile of the arbitration commission or laws of the place of arbitration shall apply." Article 14 of the 2013 Judicial Interpretation on Application of Laws added that "[w]here the parties concerned do not select the law applicable to a foreign-related arbitration agreement and do not stipulate the arbitration institution or the place of arbitration or the stipulation is unclear, the people's court may apply the laws of the People's Republic of China to recognize the effect of the arbitration agreement."

In short, Chinese choice of law rules on arbitration agreements provide for a three-step analysis: the first step checks parties' agreement on the governing law of the arbitration agreement; the second step invokes the law of the seat or the law of the domicile of the institution if the parties have not specified the governing law; and the third step applies Chinese law if the parties cannot agree on either the governing law or the seat of the arbitration. An important note for the first step is that the law agreed to by the parties in the 2011 Code refers to a specific agreement on the law governing the arbitration agreement, not the law governing the substantive issue.

Consequently, if the parties intend to avoid the application of Chinese law and validate an *ad hoc* arbitration agreement, they have to either (1) make an express choice of which laws govern the arbitration agreement or (2) agree on a non-Chinese seat.

In practice, few parties agree expressly on the law governing an arbitration agreement. It is hard to imagine that merchants and transaction lawyers will take efforts to stipulate a governing law clause only for the arbitration agreement. In the absence of the parties' expressed choice of law, some jurisdictions tend to take the "substantive law" approach, since "a natural inference [is] that the parties intended the law chosen to govern the substantive contract also to govern the agreement to arbitrate."[36] Some jurisdictions tend to take the law of the seat as the law governing the arbitration agreement, as the Swedish Supreme Court reasoned in the *Bulbank* case:

> *...[N]o particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law.*[37]

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[36] *Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).

[37] *Bulgarian Foreign Trade Bank Ltd. v. Al Trade Finance Inc.*, Case No. T1881–99, Swedish Supreme Court, Oct. 27, 2000, (2001) XXVI YBCA 291.

The provisions in the 2011 Code make it clear that China adopts the "law of seat" approach. Accordingly, for foreign-related disputes, the validity of *ad hoc* arbitration agreements is determined by the laws of the seat of arbitration. As illustrated below, Chinese courts have unanimously validated *ad hoc* arbitration agreements under which the parties agreed on a foreign seat of arbitration:

1. Samsung C&T v. Shanghai Golden Bund Real Estate Co., Ltd.[38] — In this case, after being sued in a Shanghai court, the defendant brought jurisdictional objections contending that the parties should submit their dispute to arbitration. The arbitration clause concerned provided that "[a]rbitration in Singapore, [the] language of arbitration should be English [and] the arbitration should be final and binding." Another clause in the contract provided that the applicable law of the contract was Chinese law. The Shanghai High People's Court nodded to the validity of the clause, reasoning:

> *The law determining the validity of the arbitration agreement is separate from the law governing the contract…Although parties agreed that the law governing the contract is Chinese law, they remained silent on the governing law of the arbitration agreement. In accordance with Article 5 of the New York Convention, the law determining the validity of the arbitration agreement should be the law of seat, which in this case is Singapore law…Under Singapore law, an ad hoc arbitration agreement can also be valid, therefore the parties' arbitration agreement in this case is valid.*

2. PANALPINA World Transport (PRC) Co., Ltd. v. Shanghai Morongbao International Logistics Co., Ltd.[39] — In this case, the defendant objected to the jurisdiction of a Chinese court based on the arbitration agreement. The arbitration agreement provided that the "parties should submit their dispute to London Maritime Arbitration Association in London…" The court applied Article 18 of the 2011 Code and decided that the law governing the arbitration agreement should be the UK law, given that the parties failed to expressly agree on such laws or correctly specify the name of an arbitral institution. By applying English law, the *ad hoc* arbitration agreement concerned was deemed valid.

3. COFCO Wines & Spirits Co., Ltd. v. Gloria Vino[40] — COFCO Wines & Spirits applied to seek recognition of the validity of an arbitration agreement. The arbitration

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[38] See 三星物产株式会社与上海金光外滩置地有限公司建设工程施工合同纠纷上诉案 (*Samsung C&T v. Shanghai Golden Bund Real Estate Co., Ltd.*), 上海市高级人民法院(2001)沪高民终字第 245 号民事裁定书 (*Shanghai High Court (2001) No. 245 Civil Order*).

[39] See 泛亚班拿国际运输代理(中国)有限公司诉默蓉宝国际物流(上海)有限公司航次租船合同纠纷案 (*PANALPINA World Transport(PRC) Co., Ltd. v. Shanghai Morongbao International Logistics Co., Ltd.*), 上海海事法院(2012)沪海法商初字第 82 号民事裁定书 (*Shanghai Maritime Court (2012), No. 82 Civil Order*).

[40] See 中粮酒业有限公司与 Gloria Vino 申请确认仲裁协议效力纠纷案 (*COFCO Wines & Spirits Co., Ltd. v. Gloria Vino*), 北京市第三中级人民法院(2014)三中民(商)特字第 09333 号 (*Beijing No. 3 Intermediate People's Court (2014) No. 09333 Civil Order*).

agreement reads "arbitration in Switzerland." The Beijing No. 3 Intermediate People's Court relied on Article 18 of the 2011 Code and to apply Swiss law since the seat of the arbitration was Switzerland. The court then analyzed the validity of the *ad hoc* arbitration agreement under Swiss law and finally deemed it valid.

4. Ruifeng Grain v. SKE[41] — Similarly, in this case the defendant brought jurisdictional objections to Shanghai Maritime Court based on parties' agreement to arbitrate. The parties had drafted the arbitration clause that reads: "[g]overning rules: GAFTA89/23, Combined London 125 Arbitration if necessary." Following similar reasoning in the above cases, the Dalian Intermediate People's Court pointed out that the core question in the case was whether the parties had agreed on the seat of arbitration. By interpreting the arbitration clause, the court decided that seat of arbitration was London, and therefore the English law applied. Under the English law, the *ad hoc* arbitration agreement between parties was valid.

To summarize, in foreign-related disputes, if the parties have chosen a foreign seat of arbitration in their *ad hoc* arbitration agreement, the courts, by applying Article 18 of the 2011, will apply the law of the seat that validates the *ad hoc* arbitration agreement. On the other hand, if the *ad hoc* arbitration agreement does not provide a governing law or seat of arbitration, Chinese Arbitration Law will likely apply, and the *ad hoc* arbitration agreements will thus be deemed invalid.

5. Guangzhou Yupinxuan Trading Co., Ltd. v. Tek Seng Rice Mill Co., Ltd.[42] — In this case decided before the issuance of the 2011 Code, the Guangdong High People's Court declined to validate the *ad hoc* arbitration agreement that read "…dispute should be submitted to an arbitration committee. Seat of arbitration should be agreed by parties…" The court reasoned that "jurisdictional objection is a procedural matter and therefore the applicable law should be the law of the court, *i.e.* Chinese law." Despite the case predated the 2011 Code, the reasons for applying Chinese law are hardly convincing. Fortunately, this is the only case the authors have found in which Chinese law was directly applied when determining the validity of an *ad hoc* arbitration agreement. It is reasonable to believe that after the promulgation of the 2011 Code, similar decisions will no longer appear.

6. PENG Suhua v. White Tiger (Huizhou) Outdoor Co., Ltd.[43] — PENG filed an

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[41] 大连瑞丰粮谷加工有限公司与 SKE 中西部股份有限公司合同纠纷案 (*Dalian Ruifeng Grain Processing Co., Ltd. v. SKE Midwestern Co., Ltd., referred to as Ruifeng Grain v. SKE*), 大连市中级人民法院(2015)大民四初字第 24 号民事裁定书 (*Dalian Intermediate People's Court (2015), No. 24 Civil Order*).

[42] 广州市御品轩贸易有限公司与德盛米业有限公司国际货物买卖合同纠纷管辖权异议上诉案 (*Guangzhou Yupinxuan Trading Co., Ltd. v. Tek Seng Rice Mill Co., Ltd.*), 广东省高级人民法院(2010)粤高法立民终字第 232 号民事裁定书 (*Guangdong High People's Court (2010), No. 232 Civil Order*).

[43] 彭素华与威泰格(惠州)户外用品有限公司合同纠纷申请案 (*PENG Suhua v. White Tiger (Huizhou) Outdoor Products Co., Ltd.*), 广州市中级人民法院(2012)穗中法仲异字第 25 号民事裁定书 (*Guangzhou Intermediate People's Court (2012), No. 25 Civil Order*).

application seeking recognition of the validity of an arbitration agreement. The arbitration agreement was roughly drafted as "disputes between the parties shall be resolved…via arbitration." Since the parties had chosen neither the seat nor the governing law, the court found that Chinese law applied, rendering the *ad hoc* arbitral agreement invalid.

7. CNPC Bohai Drilling v. Far East Energy[44] — The plaintiff applied to seek recognition of the validity of an *ad hoc* arbitration agreement, which provides "…either party may submit to arbitrate their dispute…[and] the arbitration should be final and binding." Pursuant to Article 18 of the 2011 Code, the Beijing No. 3 Intermediate People's Court held that Chinese law should apply since the parties had failed to designate the seat of arbitration and the governing law of the arbitration agreement. Under Chinese law, such an arbitration agreement was invalid.

For the convenience of readers, Table 1 provides a summary of the cases involving *ad hoc* arbitration agreements in foreign-related disputes (see Table 1).

Table 1 The Validity of *Ad Hoc* Arbitration Agreements in Foreign-Related Cases

Court	Year	Nationality of the applicant	Arbitration agreement	Law governing the contract	Law governing the Arbitration Agreements	Pro/anti arbitration
Shanghai High People's Court	2001	South Korea	·Rules ☒ ·Seat ☑ ·Applicable law ☑ ·Law of Arbitration Agreements ☒	Chinese law	Singapore law	Pro
Shanghai Maritime Court	2012	Other[45]	·Rules ☒ ·Seat ☑ ·Applicable Law ☒ ·Law of Arbitration Agreements ☒	N/A	English law	Pro
Beijing No. 3 Intermediate People's Court	2014	China	·Rules ☒ ·Seat ☑ ·Applicable law ☒ ·Law of Arbitration Agreements ☒	N/A	Swiss law	Pro
Dalian Intermediate People's Court	2015	China	·Rules ☒ ·Seat ☑ ·Applicable law ☒ ·Law of AA ☒	N/A	English law	Pro
Guangdong High People's Court	2010	China	·Rules ☒ ·Seat ☒ ·Applicable law ☒ ·Law of Arbitration Agreements ☒	N/A	Chinese law	Against

(*To be continued*)

[44] 中国石油集团渤海钻探工程有限公司石油工程总承包分公司与远东能源(百慕大)有限公司申请确认仲裁协议效力案 (*Petroleum Engineering General Contracting Branch of CNPC Bohai Drilling Co., Ltd. v. Far East Energy (Bermuda) Co., Ltd., referred to as CNPC Bohai Drilling v. Far East Energy*), 北京市第三中级人民法院(2015)三中民(商)特字第 04910 号民事裁定书 (*Beijing No. 3 Intermediate People's Court (2015), No. 04910 Civil Order*).

[45] The nationality of the applicant in the case was not provided.

(*Continued*)

Court	Year	Nationality of the applicant	Arbitration agreement	Law governing the contract	Law governing the Arbitration Agreements	Pro/anti arbitration
Guangzhou Intermediate People's Court	2012	Hong Kong SAR, China	·Rules ☒ ·Seat ☒ ·Applicable law ☒ ·Law of Arbitration Agreements ☒	N/A	Chinese law	Against
Beijing No. 3 Intermediate People's Court	2015	China	·Rules ☒ ·Seat ☒ ·Applicable law ☒ ·Law of Arbitration Agreements ☒	N/A	Chinese law	Against

Note: ☒ = not specified; ☑ = specified.

Part III and Part IV explain how the Chinese courts can rule an *ad hoc* arbitration agreement as valid in China. Under Chinese arbitration law, the first tool a pro-arbitration judge can use is interpreting an *ad hoc* arbitration agreement as a badly drafted institutional arbitration agreement, and determining the proper institution from the agreement. The other tools are the choice of law rules, under which the parties can carefully draft a valid *ad hoc* arbitration agreement either by specifying the governing law of the arbitration agreement or by agreeing on a non-Chinese seat.

V. A STEP FORWARD FOR AD HOC ARBITRATION PERMISSION: THE 2017 SPC OPINION

On January 9, 2017, the SPC released the 2017 SPC Opinion on its website to "strengthen judicial support" for the development of PFTZs in China. Among all the provisions, Articles 8 and 9 are valued most by the arbitration community.

The 2017 SPC Opinion applies only if a party is incorporated inside the PFTZs; however, its significance cannot be underestimated. Since the first PFTZ was established in Shanghai in July 2013, there are now more than ten PFTZs in China: Shanghai, Guangdong, Hainan, Tianjin, Fujian, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, and Shaanxi.[46] These PFTZs, distributed among over ten provinces and centrally administered municipalities, exert enormous influence on the Chinese economy and law. The idea behind the PFTZs is to select certain areas in China as experiment fields in which new measures and rules will be implemented. Efforts have been made to recognize advanced international rules and standards. Positive "experiment results" inside the PFTZs may further lead to nationwide legal and policy reforms.

Article 8 of the 2017 SPC Opinion illustrated its pro-arbitration purpose. It provided that courts should "encourage the use of alternative dispute resolutions, such as

[46] MOFCOM, *China Pilot Free Trade Zone*, available at http://wzs.mofcom.gov.cn/article/zt_zymysyq/column02/ (last visited Dec. 11, 2018).

arbitration and mediation, to resolve commercial disputes within the PFTZ" and "support the innovation and development of the arbitration institution…to provide judicial convenience for the variety of commercial disputes resolution within the PFTZ."[47]

Notably, in Article 9, the SPC instructed that under some circumstances, an *ad hoc* arbitration could be conducted in China. Besides, the coverage of foreign elements was extended. The following sections will discuss this new development of *ad hoc* arbitration regulation in China.

A. Interpretation of the 2017 SPC Opinion

Article 9, Paragraph 3 of the 2017 SPC Opinion stipulated that an arbitration agreement between two companies registered within the PFTZs, which provides for "arbitration in a specified location in the Chinese mainland…pursuant to specified arbitration rules…by specified arbitrators," may be held valid. Furthermore, if a court decides to invalidate such an arbitration agreement, it should report its intended decision to a higher court for further review. If the higher court holds the same view, it should report its intended decision to the SPC. In other words, only with the SPC's approval could a court rule such an arbitration agreement as invalid.

Pursuant to this textual interpretation, Paragraph 3 of Article 9 provides possibilities for *ad hoc* arbitration seated in China; however, the requirements for making a valid China-seated *ad hoc* agreement are still unclear.[48] First, it is unclear whether all three requirements in Article 9, also known as "the three specifications," are altogether necessary, or one of these conditions would be sufficient for a valid *ad hoc* arbitration agreement. As WANG Shengchang, the former Secretary-General of the CIETAC, pointed out, a broad interpretation of this article suggests that an *ad hoc* arbitration agreement satisfying one of the "three specifications" will be qualified. Nevertheless, how the Chinese courts will interpret "the three specifications" is particularly noteworthy.[49]

The second uncertainty lies in the interpretation of "the three specifications" respectively. The Chinese word "specified" can be understood as either "particular" or "certain." So, Article 9 might be interpreted as, once the parties incorporated in the

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[47] Translation of Article 8 of the 2017 SPC Opinion is selected from Sophia Feng, *China's Path to Ad Hoc Arbitration Emerges from the Free-Trade Zones*, available at http://kluwerarbitrationblog.com/2017/01/28/chinas-path-to-ad-hoc-arbitration-emerges-from-the-free-trade-zones/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29 (last visited Jan. 29, 2017).

[48] Up to Dec. 2018, no *ad hoc* arbitration cases were brought up according to the 2017 SPC Opinion.

[49] See 中国域内临时仲裁的有限度开放 (*Ad hoc Arbitration Partially Allowed in China*), available at http://huizhonglaw.com/cn/news/%E4%B8%AD%E5%9B%BD%E5%9F%9F%E5%86%85%E4%B8%B4%E6%97%B6%E4%BB%B2%E8%A3%81%E7%9A%84%E6%9C%89%E9%99%90%E5%BA%A6%E5%BC%80%E6%94%BE/ (last visited Dec. 11, 2018).

PFTZs have agreed on a seat of arbitration in China, Chinese arbitration rules, and Chinese arbitrators, the *ad hoc* arbitration agreement will be valid; it might also be interpreted as, such an agreement can only be valid if the parties have chosen a particular seat, rules, and arbitrators that are specifically recognized by Chinese law. Even if the second interpretation reflects the precedent, regulations explaining what qualifies as "specified" arbitration rules, arbitrators, or seats still remain to be established.

Third, it is notable that Article 9 adopts the prudent language that *ad hoc* agreements satisfying "the three specifications" "may" be deemed valid, rather than using the bolder and absolute word "shall". In other words, whether to recognize the validity of an *ad hoc* arbitration agreement is still subject to the judges' discretion. Fortunately, the SPC added that if a court intends to invalidate an *ad hoc* arbitration agreement, such an intended decision must be reported through successively higher courts to the SPC. Like the reporting requirements for recognizing and enforcing a foreign award, this may affect the lower courts' decisions concerning the validity *ad hoc* arbitration agreements.

A simply drafted article like Article 9 is insufficient to ensure that *ad hoc* arbitration will be smoothly conducted. Current Chinese arbitration laws are institution-centered. Under the Chinese Arbitration Law, the role of an arbitration committee was vital in every step of the arbitration procedure, from the request for arbitration[50] to the constitution of the arbitral tribunal[51] and the issue of the arbitral award.[52] Thus, Article 9 is far from being sufficient to ensure increased acceptance of *ad hoc* arbitration inside the PFTZs, let alone in the whole country. The next section discusses possible implementing regulations of the 2017 SPC Opinion that may contribute to this acceptance.

B. Facilitation and Implementation of the 2017 SPC Opinion

1. Foreign Legislative Experiences on Ad hoc Arbitration. — Ad hoc arbitrations are conducted without the benefit of an appointing and administrative authority or (generally) preexisting arbitration rules, subject only to the parties' arbitration agreements and applicable national arbitration legislation.[53] As a result, one of the crucial conditions for *ad hoc* arbitration is the support of national arbitration legislation, for instance, allowing parties to freely choose arbitration without institutional administration, but also provide default rules to help the parties successfully conduct the procedure. As mentioned above, current Chinese arbitration law relies heavily on the function of arbitration institutions; therefore, regulation supporting the conduct of *ad hoc* proceedings is still in lack. A comparative study of Swedish Arbitration Act, the German Code of Civil Procedure (*Zivilprozessordnung*) (hereinafter referred to as "ZPO"), and French Code of Civil

[50] See Art. 4, Art. 21 and Art. 22 of Chinese Arbitration Law.

[51] See Art. 32, Chinese Arbitration Law.

[52] See Art. 54, Chinese Arbitration Law.

[53] See Born, fn. 2.

Procedure lends some valuable exemplars for China to establish its own *ad hoc* laws.

First, provisions should be inserted regarding the parties' autonomy in appointing arbitrators and designating appointing authorities. The parties' freedom to choose arbitrators or appoint authorities demonstrates the procedural party autonomy in international arbitration.

Second, default rules on the determination of appointing authorities should be provided to avoid stagnation in the absence of the parties' consent. Article 1460 of the French Civil Procedure Code provides that a party, the arbitral tribunal, or any of the arbitrators can ask the judge to act in support of the arbitration.[54] Both Swedish and German laws take the same position that the court will be the appointing authority if one party fails to appoint an arbitrator within the stipulated time. In Sweden, such appointing authority is the district court[55], and in Germany, the state court.[56]

Third, functions of the appointing authority should be specified. The appointing authority serves mainly for the purpose of the constitution of the arbitral tribunal. Namely, the appointing authority is obliged to ensure the appointment of arbitrators and constitution of arbitral tribunal if parties [have] failed to do so (Article 1452 of French Code of Civil Procedure), and decides the removal of an arbitrator if either party makes such challenges (Article 1456 of French Code of Civil Procedure). Similarly, the function of appointing arbitrators also includes appointing new arbitrators if an arbitrator resigns or is discharged (Section 16, Swedish Arbitration Act). As a supplementary function, the appointing authority can conduct *prima facie* review of the arbitration agreement; if an arbitration agreement is manifestly void or manifestly not applicable, the appointing authority can declare that no appointment need to be made (Article 1455 of French Code of Civil Procedure).

Fourth, other default rules are needed as gaps-filler. In addition to the regulations on the appointing authorities, the *ad hoc* arbitration system is also facilitated by other default provisions guiding the conduct of the arbitration proceedings. Such default rules include the number of arbitrators, initiation of the proceedings, evidence rules, and such. *Ad hoc* arbitration rules also serve the same function as these regulations by filling the gaps of the procedure rules.

2. A Tailor-Made Landing Regulation for Ad Hoc Arbitration inside Chinese PFTZs. — Based on the above comparative study, the missing piece in the current arbitration regulations in China should be filled with facilitating laws and rules tailored to the Chinese reality. Needless to say, complete reform calls for the revision of the Chinese Arbitration Law. However, rewriting the Chinese Arbitration Law, a law promulgated by the Standing Committee of the National People's Congress, will be a long-term run.

[54] See Emmanuel Gaillardetl, *French Law on International Arbitration*, available at http://www.iaiparis.com/pdf/FRENCH_LAW_ON_INTERNATIONAL_ARBITRATION.pdf (last visited May 9, 2017).

[55] See Section 14, Swedish Arbitration Act.

[56] See Section 1034(2), ZPO.

Alternative plans need to be taken in the short term to solve the problems at hand.

First, it is necessary to suspend the implementation of the Chinese Arbitration Law inside PFTZs and issue a new judicial interpretation. More specifically, this judicial interpretation should provide the determination, the role, and the powers of the appointing authorities, together with default rules for *ad hoc* arbitration procedures.

Second, a set of well-drafted *ad hoc* arbitration rules shall be in place. The UNCITRAL Arbitration Rules are the most widely recognized *ad hoc* rules and have proved to be extremely versatile for the resolution of all types of commercial disputes. However, UNCITRAL Arbitration Rules are not generally known by Chinese enterprises.[57] On March 18, 2017, the Hengqin PFTZ *Ad Hoc* Arbitration Rules (hereinafter referred to as "Hengqin Arbitration Rules") was adopted by the Zhuhai Arbitration Commission as the first *ad hoc* arbitration rules in China. These rules entered into force on April 15, 2017.[58]

The Hengqin Arbitration Rules provided, in detail, the determination of appointing authorities, their functions, and the conduct of the arbitration proceedings. At the same time, it limited its application to "*ad hoc* arbitration in PFTZs." In accordance with Article 3 of the Hengqin Arbitration Rules, these rules are applicable only between enterprises incorporated in the PFTZs. This requirement echoes the provisions in the 2017 SPC Opinion. The release of the Hengqin Arbitration Rules paved the way for Chinese enterprises to go *ad hoc* for dispute resolution. However, such rules have been issued by a regional arbitration commission, which hardly has nationwide influence. For companies who want to go *ad hoc* inside other PFTZs, they may be reluctant to choose such rules.

C. Ad Hoc Arbitration in China: What Comes Next?

Chinese *ad hoc* arbitration reform cannot be a simple transplantation of foreign arbitration laws; they must be adapted to the particularity of Chinese realities. On the basis of the above research, some predictions can be made with respect to future legislation on *ad hoc* arbitration.

First, future Chinese *ad hoc* legislation may set limitations on the application scope of *ad hoc* arbitration. The 2017 SPC Opinion provides that the application of *ad hoc* arbitration is only limited to parties that incorporated inside the PFTZs, possibly because legislators believe that the parties and disputes with some foreign connections will be more willing to embrace and more suited to *ad hoc* arbitration. Following the same logic, the authors predict that national legislation is unlikely to allow purely domestic parties to

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[57] See Yuen & Peter, *Arbitration Clauses in a Chinese Context*, 6 Journal of International Arbitration, 581 (2007).

[58] See 横琴自由贸易试验区临时仲裁规则 (*Hengqin PFTZ Ad Hoc Arbitration Rules*), available at http://www.hengqin.gov.cn/hengqin/tzgg/201703/53f4336d2c984c098858e259548409ca.shtml (last visited Dec. 11, 2018).

engage in *ad hoc* arbitration, rather may limit its application to parties in foreign-related disputes.

Second, the legislation might adopt a stricter standard of review for *ad hoc* awards compared to institutional arbitration awards. In most countries, *ad hoc* awards are treated no differently from institutional awards. However, the historical and contemporary preference in China for state control of judicial proceedings may contribute to a uniquely designed *ad hoc* process, under which *ad hoc* awards receive judicial review of a higher intensity. For example, extra grounds of annulment of arbitral awards could be added for *ad hoc* cases compared to institutional ones.

Third, arbitration institutions may play the leading role in *ad hoc* arbitration. A study of Swedish, German, and French arbitration laws shows that it is the national courts that act as appointing authorities. However, in China it will be more suitable for the arbitration intuitions to take the responsibility. Unlike the limited number of arbitration institutions in other countries, in China, almost each city has its own arbitration commission. Therefore, it is practical for those institutions to serve as the appointing authorities. Also, as has been mentioned many times in this article, the Chinese Arbitration Law was designed to be institution-centered; therefore, it is natural for arbitration commissions to continue to play the leading role in the proceedings, at least in the appointment of arbitrators.

Last but not the least, the development of *ad hoc* arbitration will be geographically limited to the PFTZs, since a national implementation requires revision of the Chinese Arbitration Law. Such a revision is unlikely to happen, since it is currently not in the list of priorities for Chinese legislators.

CONCLUSION

In most jurisdictions around the world, *ad hoc* arbitration is not treated separately from institutional arbitration. However, in China, the validity of *ad hoc* arbitration agreements is not a foregone conclusion. The paradox exists in China is that, while key legislations deny the validity of *ad hoc* arbitration, some *ad hoc* agreements somehow survive in judicial practice. Some courts have "saved" certain *ad hoc* arbitration agreements by treating them as defective institutional arbitration agreements, and validating them via interpretation. Another way Chinese courts have given the nod to an *ad hoc* arbitration agreement is by circumventing the application of Chinese law via choice of law rules. The 2017 SPC Opinion represents a new development in the regulation of *ad hoc* arbitration agreements. However, one simple provision is far from enough. The authors argue that facilitating regulations should be introduced to better implement Article 9 of the 2017 SPC Opinion. These regulations may include SPC judicial interpretations and widely accepted *ad hoc* arbitration rules.