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Arbitration in China

The Arbitration law of People's Republic of China (PRC) was promulgated on 31st August 1994, and it came into effect on 1st September, 1995. It was amended in 2009 and again in 2017. However, there were not any major changes to the original law and the same has become disjointed with the rapid economic growth that PRC has seen over the last few decades. Mainland China courts have lately signaled their support for arbitration and a push for internationalization for arbitration in PRC. Keeping in view the need of the hour, the Ministry of Justice published the Revised Arbitration Law (Draft for Comment) (Revised Draft) on 30 July 2021 for public consultation which seeks to address the major issues in the arbitration law of China.

Arbitration law in PRC prohibits arbitration in disputes arising out of marriage, adoption, custody, succession as well as administrative disputes including those arising out of agreements between the government and private parties related to administrative law obligations and rights.

In order for an arbitration agreement to be valid and binding, Article 16 of the PRC Arbitration Law requires the agreement to contain a designated arbitration institution that will administer the arbitration.

China's current arbitration law has some elementary principles of UNCITRAL Model Law on International Commercial Arbitration 1985 (like those of party autonomy and separability of arbitration agreements). However it must be noted that China cannot be regarded as an UNCITRAL model law country. For example, provisions relating to ad-hoc arbitration, powers of tribunals to grant interim measures, kompetenz-kompetenz and emergency arbitrators are not incorporated under China's arbitration law. However, certain arbitration commissions in China, such as Beijing Arbitration Commission, Shanghai International Economic and Trade Arbitration Commission, China International Economic and Trade Arbitration Commission have made provisions for emergency rules.

Ad-hoc arbitrations are generally prohibited in China. Ad-hoc arbitrations are those where the parties and the arbitrators decide upon the procedure without the involvement of arbitral institutions. However, arbitral institutions may provide logistical or administrative support to ad-hoc arbitration.

As of today, the arbitration law in PRC provides only for institutional arbitrations. However, exceptions to this have been carved out. Ad-hoc arbitrations can be recognized in PRC provided that the arbitration agreement is between entities registered in the Pilot Free Trade Zone. In 2016, the Supreme People's Court issued Opinions of Providing Judicial Safeguard for Development of Pilot Free Trade Zones. As per these Opinions, the courts in PRC can recognize arbitration agreements that provide for specific seat, specific arbitrators and specific arbitration rules, provided that the entities are registered in the Pilot Free Trade Zone. Thus the disputes arising between such registered entities are no longer restricted to only institutional arbitrations. Arbitration law in PRC has traditionally maintained a strict distinction between domestic arbitration and foreign arbitration. Entities in China are more or less restricted from submitting purely domestic disputes to arbitrations outside China. The interpretation of foreign elements has been quite narrow when deciding whether an entity is a domestic entity or foreign entity for the sake of arbitration. If an entity, having foreign investments, is registered under Chinese law, then such an entity is regarded as a domestic entity and even the foreign investments in such an entity are not treated as foreign elements. However, there are two exceptions to these under the Opinions for Pilot Trade Free Zone. Disputes can be referred to foreign arbitrations if (i) the dispute is between wholly foreign owned entities registered in the Pilot Trade Free Zone, irrespective of foreign element; and (ii) the dispute is between one foreign invested entity registered in the Pilot Trade Free Zone and the parties agree to submit the dispute to foreign arbitrations or do not raise an objection to the same during the arbitration.

Generally, the limitation period applicable to arbitration proceedings is three years. The limitation period begins when right to apply for arbitration begins, that is, when the aggrieved party becomes aware of the breach of rights and obligations by the other party and is aware of the identity of the of the breaching party. For foreign invested entities and foreign parties, arbitration is a preferred method of dispute resolution in PRC for a number of reasons. One reason is that most litigations before a PRC court are public and can be accessed by anyone, whereas arbitral proceedings are generally private unless otherwise agreed by the concerned parties. Another reason is that judges in PRC's People's Courts can be inclined to follow the directions of local administrative bodies and favour local parties in disputes involving foreign entities. Also, a major concern is the recognition and enforceability of foreign decisions in PRC due to reciprocity issues between PRC and other countries. Thus, even when the parties agree to submit to the jurisdiction of a foreign judicial authority, it becomes difficult to enforce the same.

Language is also a concern for foreign entities when deciding about dispute resolution mechanisms. All litigation in PRC must be conducted in the local Chinese language and arbitration offers the flexibility to conduct the proceedings in a foreign language. Thus, it is often advised and preferred that foreign entities incorporate arbitration clauses in all agreements/ventures entered into in PRC. Keeping in view the progressive intent of the country towards arbitration, there seems to be hope for a more streamlined and international approach to arbitration in the near future in PRC.