

# Proposed Amendment of the Arbitration Law

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# Introduction

## □ PRC Arbitration Law

- Promulgated in 1994, effective since 1995
- No substantial amendment over 27 years

## □ Proposed Amendment to the PRC Arbitration Law

- Released on 30 July 2021 by the PRC Ministry of Justice
- Likely to be enacted within this year or by early next year

## Key Amendments

- ❑ Relaxing the statutory requirement on the validity of an arbitration agreement (Art. 21)
- ❑ Allowing foreign arbitration institutions to establish case management offices in Mainland (Art. 12)
- ❑ Recognizing the concept of “seat” of arbitration (Arts. 27 and 91)
- ❑ Endorsing the doctrine of *Kompetenz-Kompetenz* (Art. 28)
- ❑ Allowing more flexibility in nomination/appointment of arbitrators (Art. 50)
- ❑ Empowering the arbitral tribunal to order interim relief (Art. 43)
- ❑ Allowing *ad hoc* arbitration in “foreign-related” commercial disputes (Art. 91)
- ❑ Unifying the grounds for setting aside domestic and foreign-related arbitral awards (Art. 77)
- ❑ Limiting the scope of review by the enforcement court (Art. 82)
- ❑ ... ..

# Arbitration Institution

## ❑ Relax the statutory requirement on the validity of an arbitration agreement (Art. 21)

Article 21 of the Proposed Amendment

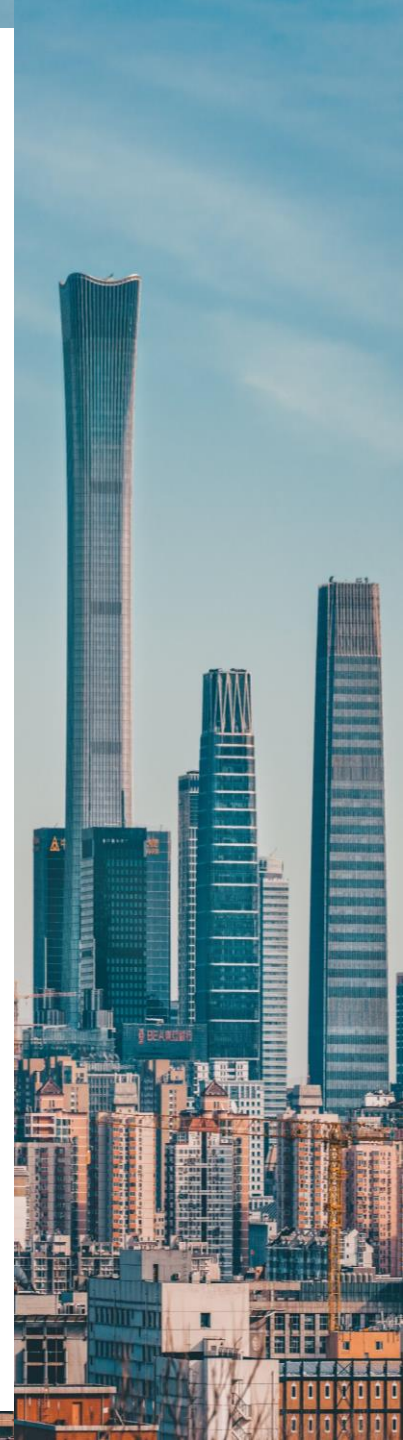
An agreement for arbitration shall include the arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs.

If one party claims in the arbitration that there is an arbitration agreement and the other parties do not deny, it shall be deemed that there is an arbitration agreement between the parties.

~~An arbitration agreement shall contain the following:~~

- ~~1. The expression of application for arbitration.~~
- ~~2. Matters for arbitration.~~
- ~~3. The arbitration commission chosen.~~

- A designated arbitration institution is no longer required.
- Defective arbitration agreements are generally considered valid.



# Arbitration Institution

## ❑ Rules to ascertain the arbitration institution (Art. 35)

### Art. 35.3 of the Proposed Amendment

Where the arbitration agreement does not clearly specify the arbitration institution, but the arbitration institution can be identified according to the applicable arbitration rules agreed upon by the parties, the dispute shall be arbitrated by such arbitration institution; where there is no agreement on the arbitration rules, the parties may conclude a supplementary agreement; in case no supplementary agreement can be reached, the dispute shall be arbitrated by the arbitration institution which first registers the case.

*“Disputes arising from this Contract shall be submitted for arbitration which shall be conducted in accordance with CIETAC Arbitration Rules. ”*



CIETAC will administer the case. (Art 4.4 of CIETAC Rules)

*“Disputes arising from this Contract shall be submitted for arbitration. ”*  
Supplementary Agreement: “Disputes shall be submitted to CIETAC.”

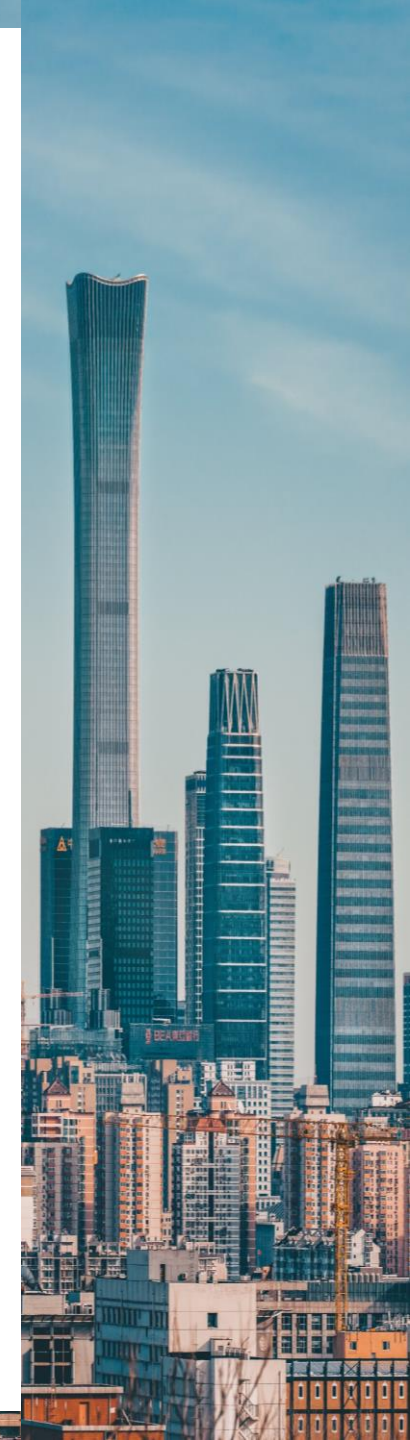


CIETAC will administer the case.

*“Disputes arising from this Contract shall be submitted for arbitration. ”*  
*No supplementary agreement can be reached.*  
CIETAC registers the case first.



CIETAC will administer the case.



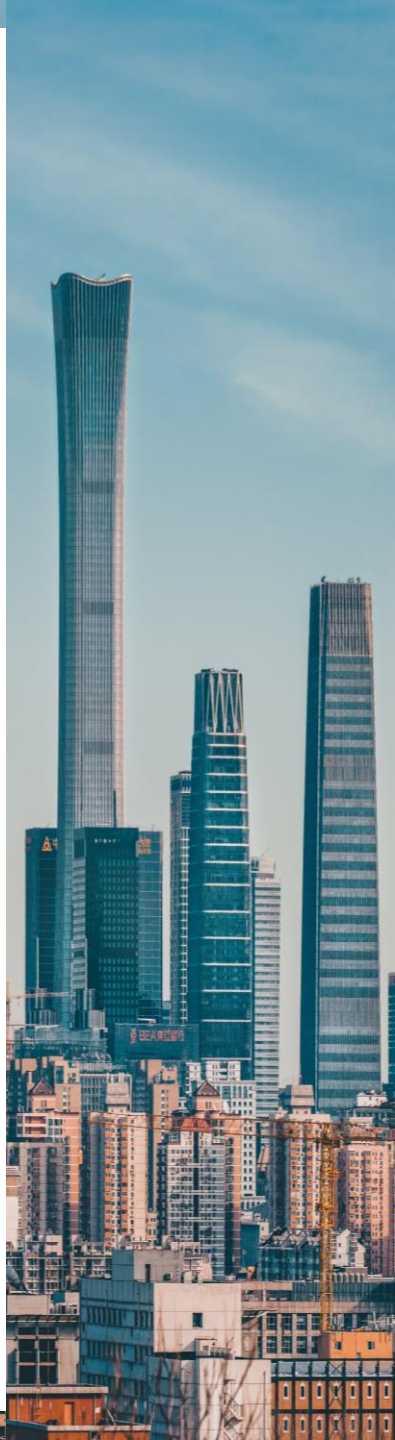
# Arbitration Institution: Case Management Office

## □ Current status

- Establishment of representative office is allowed in FTZ (e.g. ICC, HKIAC, SIAC, KCAB).
- Establishment of case management office is encouraged by local regulations, but by now only WIPO has done so.

## □ Proposed Amendment

- Clear statutory authorization on case management office - “foreign arbitral institutions” may set up offices in Mainland China to “conduct foreign-related arbitration business”. (Art. 12)



## Seat of Arbitration

### □ Current status

- No clear concept of seat, leading to many problems.
- Supervisory court shall be the court where the institution is located.
- Nationality of an award shall be determined per the domicile of the arbitration institution.

## Seat of Arbitration: Problems caused by absence of the concept

### □ Nationality of the arbitral award

- 2004: where the arbitration institution has its headquarter
  - *Weimao International (Hong Kong) Co., Ltd. v. Shanxi Tianli Industry Co.*: ICC arbitral award rendered in HK was **regarded as French arbitral award** as the headquarter of ICC is in France.
- 2009: non-domestic arbitral awards (Article 1.1 of the NY Convention)
  - *Duferco S.A. v. Ningbo Art & Craft Import & Export Co. Ltd.*: ICC arbitral award rendered in Beijing was **regarded as non-domestic arbitral award** under Article I.1 of the New York Convention.
- 2020: PRC arbitral awards
  - *Brentwood Industries, Inc.(U.S.A) v. Guangzhou Faanlong Machinery Engineering Co Ltd.*: ICC award rendered in Guangzhou **may be regarded as PRC foreign-related arbitral award.**



## Seat of Arbitration

- Proposed Amendment: Parties may agree on the seat of the arbitration in the arbitration agreement (Art. 27.1)
  - Many provisions under the Proposed Amendment are related to the “seat” of arbitration.
  - Supervisory court shall be the court of the seat of arbitration.
  - Nationality of an award shall be determined per the seat of arbitration.
  - *Lex arbitri* is still not clearly provided, the general understanding is that the law of the seat shall apply.

## Seat of Arbitration: Domestic vs Foreign-related

- Default rules for deciding the seat of domestic / foreign-related arbitrations are different

### Domestic Arbitration (Art 27.1)

Parties' agreement



Place of the institution

### Foreign-related Arbitration (Art 91.3)

Parties' agreement



Tribunal's decision

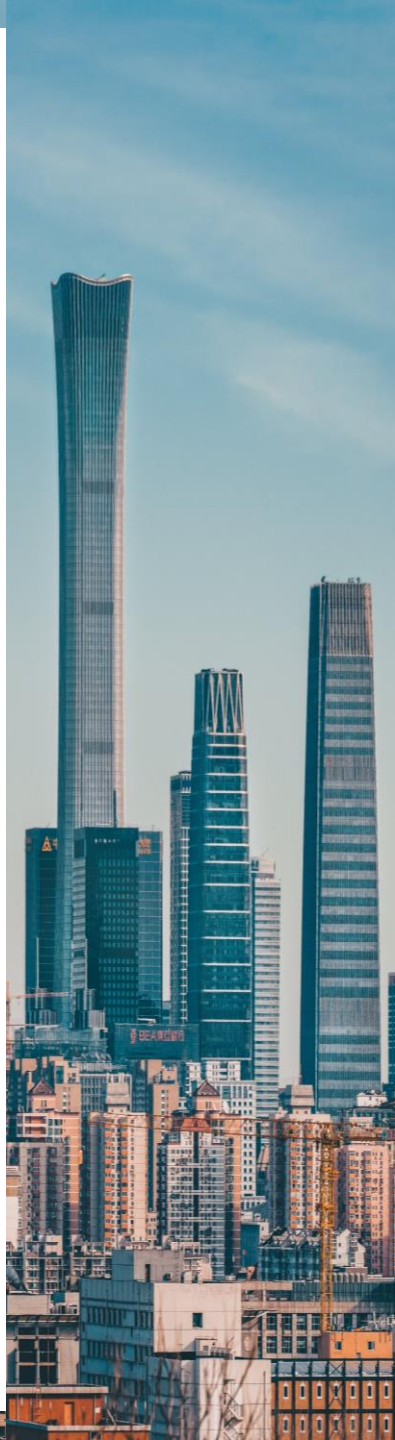
# Arbitral Tribunal: Jurisdiction

## □ Current status

- The Arbitration Law provides that jurisdiction issue shall be determined either by the arbitration institution or by the court.
- Some arbitration institutions, in accordance with their rules, may delegate the power to arbitral tribunals.

## □ Proposed Amendment: endorsing the doctrine of *Kompetenz-Kompetenz* (Art. 28)

- Basically in line with the UNCITRAL Model Law approach.
- Arbitral tribunal has the power to rule on its own jurisdiction.
- Arbitration institution can, prior to the constitution of the arbitral tribunal, decide whether the arbitral proceeding shall proceed based on a *prima facie* review of the evidence.
- Arbitral tribunal's decision may be reviewed by a competent PRC court.



# Arbitral Tribunal: Panel

## □ Current status

- The Arbitration Law has established a mandatory panel system.
- Some Chinese institutions have already accommodated more flexibility (e.g. Article 26.2, CIETAC Rules).

*CIETAC Rules Art. 26.2*

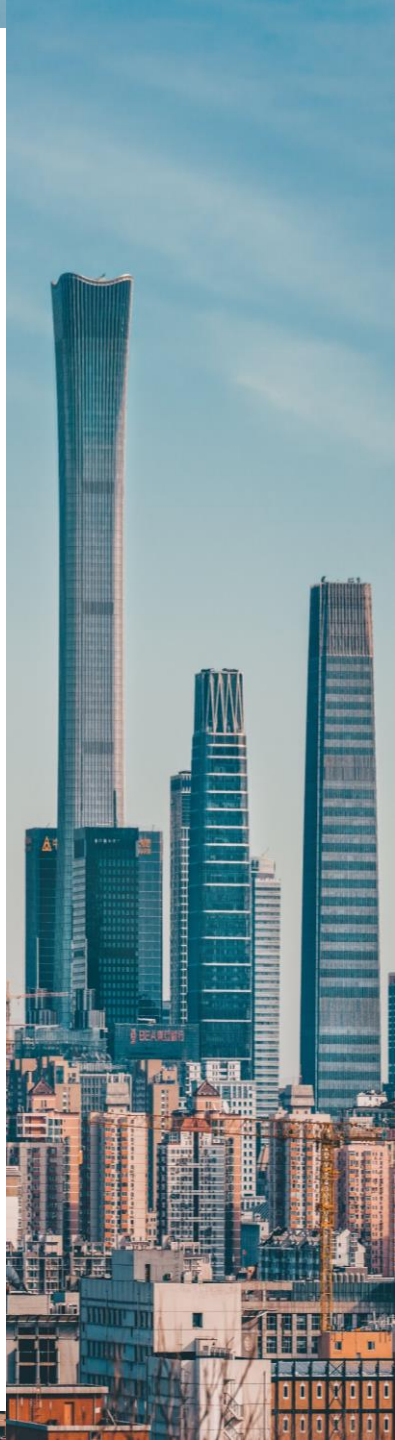
*Where the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC.*

## □ Proposed Amendment: More flexibility on nomination/appointment of arbitrators (Art. 50)

- Parties are allowed to select arbitrators from outside the panel.

Proposed Amendment Art. 50.2

Parties may select arbitrators from the panel of arbitrators, or select arbitrators from outside the panel. Arbitrators selected from outside the panel shall satisfy the criteria stipulated in this Law.



# Arbitral Proceeding

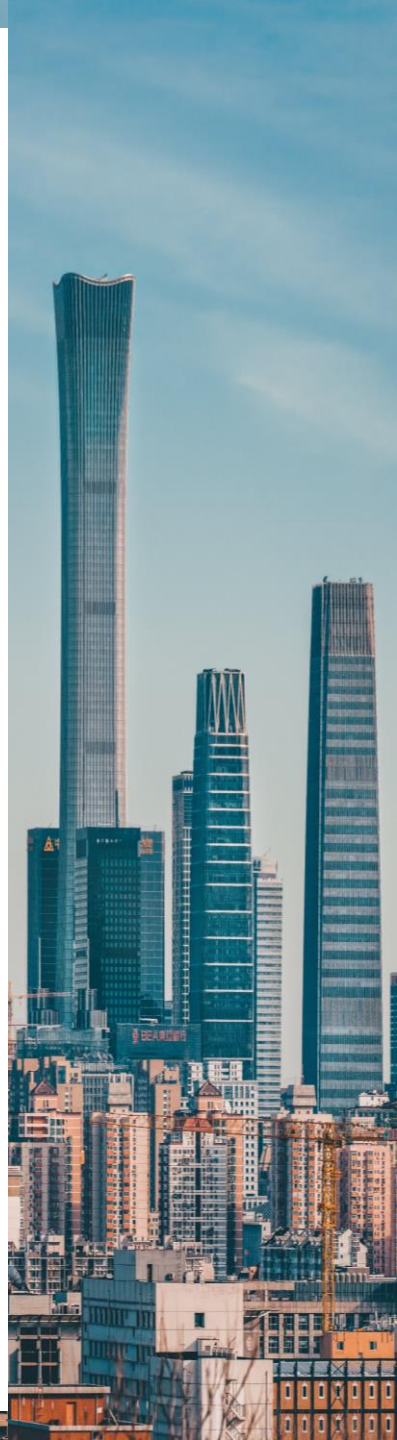
- **Adapt to the post-COVID-19 era**
  - Unless otherwise agreed by the parties, the arbitral tribunal may conduct the arbitration in a way that it considers appropriate. (Art. 30.2)
  - Arbitration may be conducted online. (Art. 30.3)
  - Unless otherwise agreed to by the parties, arbitration documents may be circulated by electronic means such as email. (Art. 34.3)

# Interim Measures

- ❑ Current status
  - Only court-ordered preservation measures under the existing laws.
  - Measures only include property, evidence and conduct preservation.
  
- ❑ Proposed Amendment: The arbitral tribunal empowered to grant order for interim measure (Art. 47.2)
  - Proposed Amendment empowers the arbitral tribunal to order interim measures, including conduct preservation (i.e. injunctions).
  - Measures are no longer limited to the three types (i.e. property, evidence and conduct preservation).

Art. 43.2 of the Proposed Amendment

Interim measures shall include the property preservation, evidence preservation, conduct preservation, and any other short-term measures that the arbitral tribunal deems necessary.



## *Ad hoc* Arbitration

### □ Current status

- *Ad hoc* arbitration agreement/award is invalid - Art. 16 of Arbitration Law provides that a designated institution is one of the three prerequisites of a valid arbitration agreement.
  - Exception: According to a SPC opinion issued in December 2016, the companies registered within FTZ may arbitrate in specific locations, with specific arbitration rules and by specific persons.
- Agreements for *ad hoc* arbitration outside mainland China and awards rendered according to such agreements can however be recognized and enforced by the Chinese court under the New York Convention.

### □ Proposed Amendment

- For foreign-related cases, *ad hoc* arbitration agreement/award is valid. (Art. 91.1)

Art. 91.1 of the Proposed Amendment

Parties to a commercial dispute involving foreign-related elements may agree on arbitration by an arbitration institution or directly by an *ad hoc* arbitral tribunal.

## *Ad hoc* Arbitration

### □ Concerns for *ad hoc* arbitration in Mainland China

- Difficulties re appointment of arbitrator(s).
- Competence of the courts to act as designating authorities.
- Susceptibility to sham arbitrations, etc.

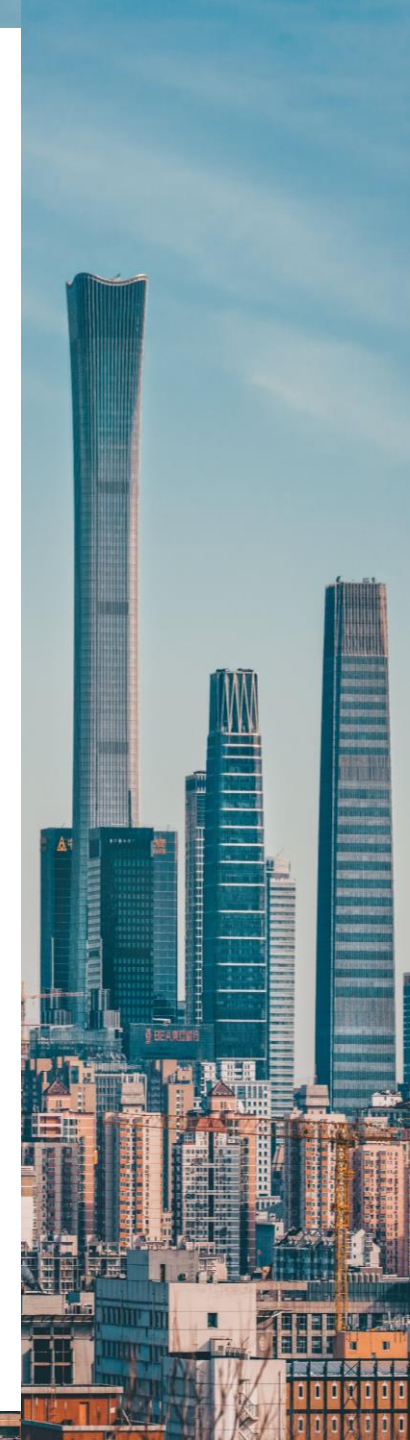


# Judicial Review of Arbitral Decisions: Set-aside

## □ Current status

### ■ Grounds for setting-aside for foreign-related arbitral awards (basically procedural review)

- Upon a party's application
  - ✓ No arbitration agreement;
  - ✓ Non-arbitrable matters (beyond the contractual or statutory scope of arbitration);
  - ✓ Composition of the arbitral tribunal is inconsistent with the parties' agreement or the legal provision; and
  - ✓ Respondent's failure to present its case due to reasons not attributable to itself.
- *Ex officio* review
  - ✓ Violation of public interest.

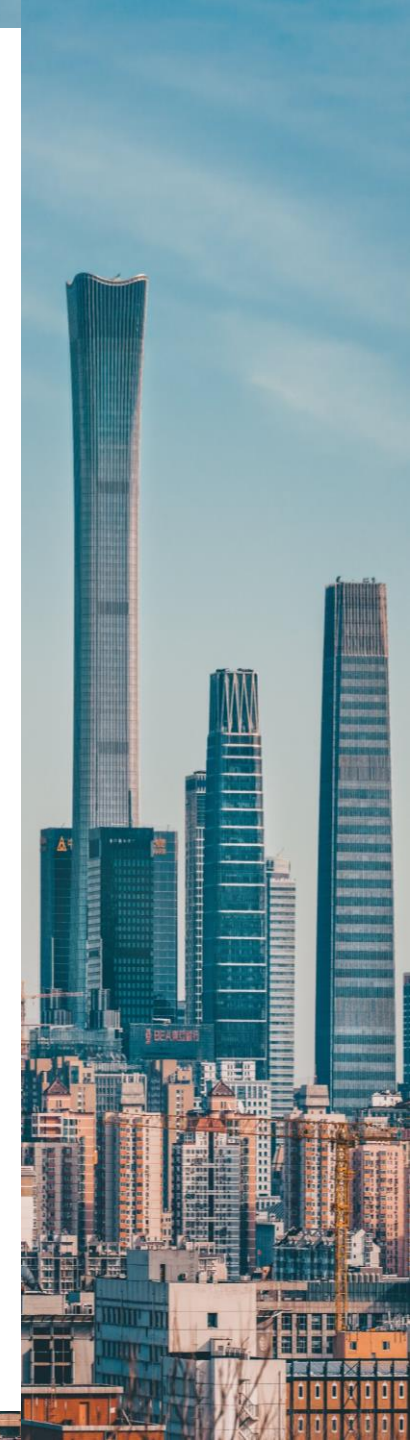


# Judicial Review of Arbitral Decisions: Set-aside

## □ Current status

### ■ Grounds for setting-aside for domestic arbitral awards

- Same grounds for setting-aside for foreign-related arbitral awards, PLUS ---
- Three additional grounds (the first two being grounds for substantive review)
  - ✓ Award is obtained as a result of fabrication of evidence;
  - ✓ The other party conceals evidence that is sufficient to affect impartiality of awards; and
  - ✓ The arbitrators have demanded or accepted bribes, engaged in malpractice for personal gain or perverted the law in making the arbitration of the case.



## Judicial Review of Arbitral Decisions: Set-aside

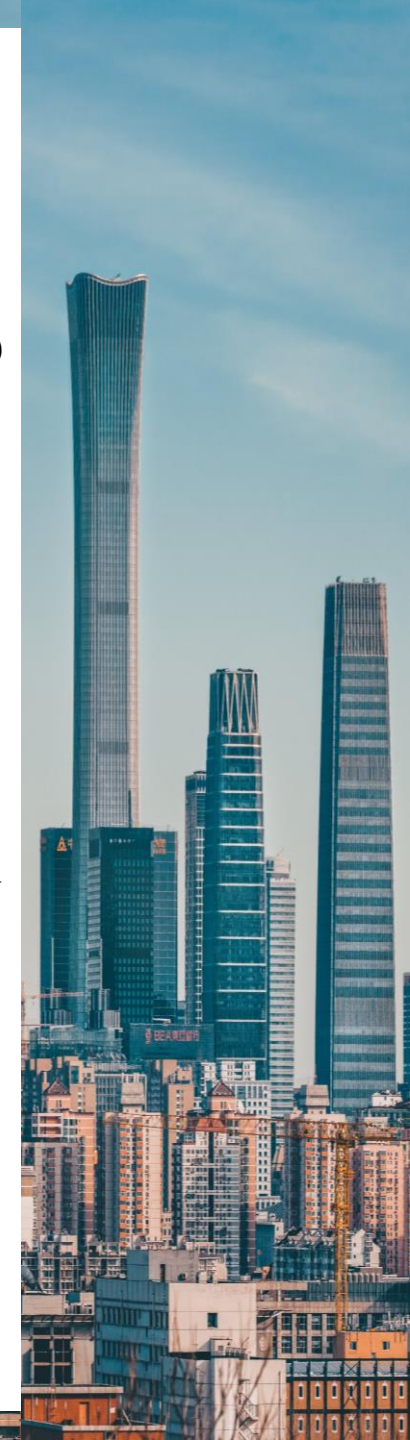
□ Proposed Amendment: Grounds for setting aside domestic and foreign-related arbitral awards are unified (Art. 77)

■ Upon a party's application

- No / invalid arbitration agreement;
- Non-arbitrable matters (beyond the contractual or statutory scope of arbitration);
- Respondent's failure to present its case due to reasons not attributable to itself;
- Composition of the arbitral tribunal is inconsistent with the agreement or the legal provision;
- Award is obtained as a result of malicious collusion, fabrication of evidence or other fraudulent acts; and
- The arbitrators have demanded or accepted bribes, engaged in malpractice for personal gain or perverted the law in making the arbitration of the case.

■ *Ex officio* review

- Violation of public interest.



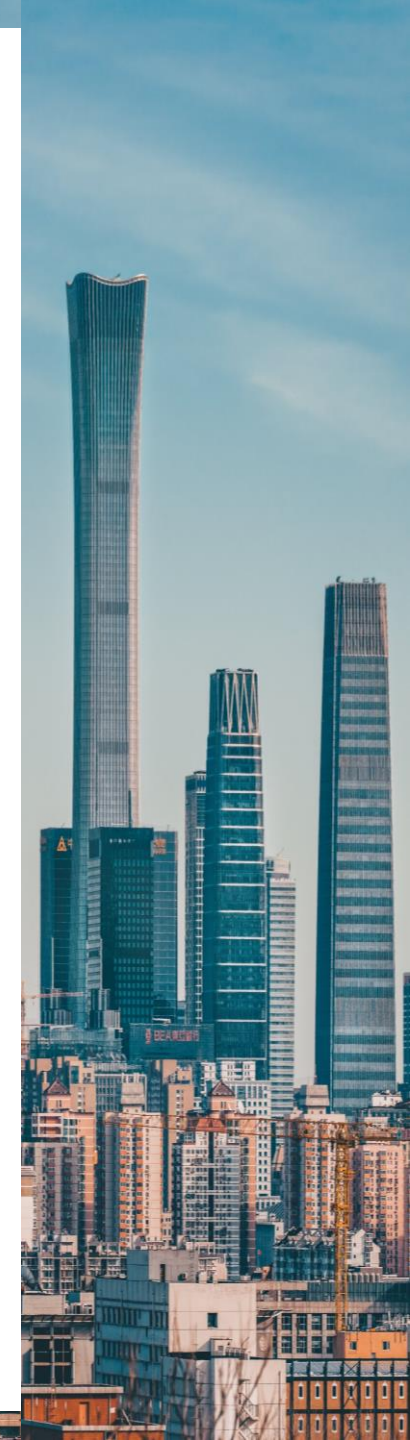
# Judicial Review of Arbitral Decisions: Non-enforcement

## □ Current status

- Same grounds as setting-aside.

## □ Proposed Amendment

- Scope of review limited to *ex officio* review on “public interest” only. (Art. 82)





## Statistics of Construction disputes resolved by way of arbitration

Institution	Proportion of Construction Project Cases (2020)
ICC	20.9%
BAC	13.12%
HKIAC	10.7%
CIETAC	9.3%
SCC	8.5%
SIAC	4%



## Adjudication

- ❑ CIETAC Construction Project Disputes Review Rules (1 Jan 2015)
- ❑ BAC Construction Dispute Board Rules (1 Mar 2009)

Request for Review



Establishment of the Dispute Board (DB)  
*“be professionally knowledgeable and have practical experience in contract management, contract interpretation and the construction industry”*



Written submissions, hearing, etc.



DB's determination



Arbitration / litigation ?



## Special issues: FIDIC adjudication proceeding - mandatory or optional?

### ❑ Wuhan Arbitration Commission case (2002)

- Background: Respondent challenged the arbitral jurisdiction, alleging that Claimant shall not initiate the arbitration without going through adjudication.
  
- Tribunal's opinion:
  - Parties' agreement on adjudication as a pre-arbitration procedure shall be valid.
  - The existence of pre-arbitration procedure should not deprive a party of its right of arbitration.
  - Adjudicator's determination is not as final and binding as the arbitral award.
  
- Tribunal's decision:
  - Parties' initiation of the arbitration without going through adjudication did not violate the mandatory provisions of PRC laws.



## Special issues: FIDIC adjudication proceeding - mandatory or optional?

### ❑ Wenzhou Intermediate Court case (2016)

- Background: Applicant argued that the arbitration clause is invalid without the fulfillment of the prior procedure of arbitration, i.e. adjudication.
  
- Court's opinion:
  - Parties' agreement on adjudication prior to arbitration does not result in invalidity of the arbitration agreement.
  - Party's initiation of arbitration without going through pre-arbitration step (adjudication) does not result in invalidity of the arbitration agreement.
  
- Court's decision:
  - Reject the claim that arbitration agreement is invalid.





## **Special issues: pre-arbitration negotiations - mandatory or optional?**

### **□ Chengdu Intermediate Court case (2005)**

- The court held that initiating an arbitration without going through the agreed negotiation during the 45-day period was inconsistent with the arbitration agreement, thus the court refused to recognize and enforce the overseas arbitral award according to the New York Convention.

### **□ Recent cases**

- The SPC and other courts generally hold that when the provisions of pre-arbitration procedures are ambiguous and difficult to determine the requirement for performance, the jurisdiction over a dispute shall not be affected merely due to unsatisfaction of pre-arbitration procedures.

**THANK YOU**

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