EXTRATERRITORIAL ARBITRATION FOR DOMESTIC DISPUTES IN CHINA: LIBERALIZATION IN THE GREATER BAY AREA AS A PRELUDE TO THE PROCESS OF LEGAL CONVERGENCE

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ABSTRACT

Extraterritorial arbitration, with domestic parties selecting a foreign jurisdiction as the seat for arbitration and applying foreign laws for the proceedings, holds theoretical and practical significance in international arbitration. China's legislative framework imposes restrictions on extraterritorial arbitration in purely domestic cases, diverging significantly from practice in various jurisdictions. Established arbitration hubs like the UK and Singapore have long embraced extraterritorial arbitration, while India, an emerging player in the Asian arbitration market, has recently implemented reforms to support the global reach of its businesses and display its pro-arbitration attitude. This article argues that China needs to relax its restrictions on extraterritorial arbitration to enhance the internationalization and competitiveness of its arbitration mechanism under its ongoing "Foreign-Related Rule of Law" initiative. Despite empirical case analysis and political-legal analysis suggesting that China is unlikely to completely overturn the restrictions in the short term, a significant breakthrough has recently occurred. The Supreme People's Court of China and the Department of Justice in Hong Kong are exploring avenues to ease restrictions on extraterritorial arbitration within the Greater Bay Area (GBA), serving as a valuable testing ground for China's extraterritorial arbitration practice. This article further examines three possible legal frameworks to facilitate extraterritorial arbitration within the GBA and suggests that the most appropriate legal technique is "Regional and Mutual Arrangement." Overall, the pilot initiative to liberalize extraterritorial arbitration within the GBA showcases the institutional advantages of the "One Country, Two Systems" and serves as a precursor to China's future approach towards unrestricted extraterritorial arbitration.

CONTENTS

I. INTRODUCTION 48
II. DOMESTIC DISPUTES AND FOREIGN SEAT: THEORETICAL BASIS OF EXTRATERRITORIAL ARBITRATION 52
A. *Legal Effect of Arbitration Seat*.....52

B. *Party Autonomy in Choosing Seat of Arbitration*.....56
C. *Divergent Opinions of Public Policy Concerns in Extraterritorial Arbitration*.....58
III. COMPARATIVE STUDY OF EXTRATERRITORIAL ARBITRATION IN DOMESTIC DISPUTES 60
A. *The UK and Singapore Practice: Party Autonomy Oriented Approach*.....61
B. *Changing Path in India Practice: From Disallowing to Approval* ..62
IV. CHINA'S STANCE ON EXTRATERRITORIAL ARBITRATION.....67
A. *Legal Framework of Extraterritorial Arbitration* 67
B. *Judicial Treatment of Extraterritorial Arbitration* 73
1. Data Collection and Case Analysis.....73
C. *Policy Implications of China's Approach to Extraterritorial Arbitration*.....79
V. PROSPECTIVE BREAKTHROUGHS IN EXTRATERRITORIAL ARBITRATION IN CHINA 82
A. *Arbitration: Strategic Significance and Comparative Advantages in Hong Kong–Mainland Legal Convergence* 83
B. *Current Statutes of Extraterritorial Arbitration Between the Mainland and Hong Kong Under GBA Legal Convergence* 87
C. *Extraterritorial Arbitration Under GBA Legal Convergence: Possible Roadmaps* 90
VI. CONCLUSION 95

I. INTRODUCTION

It is a truism that "the seat of arbitration" (*lex loci arbitri*) is a concept of central importance to the international arbitral process.[1] The location of the arbitral seat is fundamental to determining legal frameworks for supporting and supervising international arbitral proceedings.[2] The freedom of parties to consensually choose the seat of arbitration is considered an essential element of party autonomy, a fundamental principle underlying international arbitration.[3]

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[1] Gary B. Born, International Arbitration: Law and Practice 125 (3rd ed. 2001).

[2] Alexander J. Bělohlávek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULL. 262, 266 (2013).

[3] U.N. COMMISSION INTERNATIONAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 30, 32 (1985) (amended 2006); Jona than Hill, *Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements*, 63 INT'L & COMPAR. L. Q. 517,

In international arbitration practice, it is not uncommon for domestic parties to choose a foreign seat to arbitrate and apply the foreign law of the seat to conduct and supervise the arbitral proceeding.[4] This is so-called "extraterritorial" (offshore) arbitration.[5]

China's restriction on extraterritorial arbitration in purely domestic cases is a highly contentious issue, but few studies explore it from a comparative law perspective.[6] Concerns about extraterritorial arbitration relate to public policy protection and mandatory domestic regulations.[7] However, leading jurisdictions such as the UK[8] and Singapore[9] allow for the long-standing practice of extraterritorial arbitration; India has also recently introduced reforms to allow for extraterritorial arbitration.[10] Based on a thorough analysis of the theoretical basis and

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518 (2014).

[4] JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 75 (1978); *see also* Gracious Timothy Dunna, *Extra-Territorial Arbitration: Indian Parties Arbitrating Abroad*, 11 INDIAN J. ARB. L. 105, 105 (2023).

[5] Dunna, *supra* note 4.

[6] Yanli Si (司艳丽), Yuè gǎng'ào dà wān qū fǎlǜ guīzé xiánjiē yínán wèntí yán jiū——yǐ duōyuán huà jiūfēn jiějué jīzhì wèi qiērù diǎn (粤港澳大湾区法律规则衔接疑难问题研究以多元化纠纷解决机制为切入点) [Research on Difficult Problems in the Connection of Legal Rules in the Guang dong-Hong Kong-Macao Greater Bay Area——Taking Diversified Dispute Reso lution Mechanism as the Starting Point], Zhōngguó fǎlǜ pínglùn (中国法律评论) [China L. Rev.] (2022), https://fzzfyjy.cupl.edu.cn/info/1035/14321.htm; Weixia Gu (顾维遐), Wú shèwài yīnsù zhēngyì de yùwài zhòngcái wèntí (无涉外因素争议的域外仲裁问题) [Issues of Extraterritorial Arbitration in Non-Foreign-Related Disputes], 30 PEKING UNIV. L. J. 651, 652 (2018) [hereinafter Gu, *Issues of Extraterritorial Arbitration*].

[7] SHU ZHANG, THE PUBLIC POLICY EXCEPTION IN THE JUDICIAL REVIEW OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS 247 (2023).

[8] Olakunle O. Olatawura, *Delocalized Arbitration Under the English Arbitration Act 1996: An Evolution or a Revolution*, 30 SYRACUSE J. INT'L L. & COM. 49, 56 (2003).

[9] International Arbitration Act, ch. V art. 20(1) (1994) (revised 2020) (Sing.) [hereinafter International Arbitration Act]; *see also* Sembawang Eng'rs & Constructors Pte. Ltd. v Covec (Sing.) Pte. Ltd. [2008] SGHC 229 (Sing.), paras. 19–31.

[10] Duncan Speller & Dharshini Prasad, *The Choice of a Foreign Seat in Domestic Disputes – An Opportunity for One More Step Forward in India's Journey to Establish Itself as an Arbitration Friendly Jurisdiction*, 6 INDIAN J. ARB. L. 43, 44 (2018).

institutional practices of extraterritorial arbitration in various countries, this article argues that China's approach deviates significantly from the international norm. Additionally, the policy considerations behind restrictions on extraterritorial arbitration are not aligned with China's development of "Foreign-Related Rule of Law and Legal Service"[11] and "Go Global" policy objectives.[12]

Given that Chinese arbitration law does not explicitly state whether "non-foreign related" disputes can be arbitrated outside mainland China, comprehensive doctrinal and case study is needed to examine judicial attitudes toward extraterritorial arbitration.[13] Although China has made some advancements concerning extraterritorial arbitration in free trade zones, domestic cases arbitrated extraterritorially are generally regarded as invalid in China.[14] As China strives to internationalize its arbitration mechanism and enhance the development of Foreign-Related Rule of Law,[15] it is imperative to recognize that strictly restricting extraterritorial arbitration erodes the competitiveness of China's arbitration service.[16] China must make advancements to further liberalize its extraterritorial arbitration, which is of utmost importance in keeping pace with leading

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[11] *Fazhi Zhongguo Jianshe Jihua (2020–2025)* 中共中央印发《法治中国建设规划 (2020-2025年)》[*Plan for the Construction of China under the Rule of Law (2020-2025)*], *ZHONGGONG ZHONGYANG* [CENTRAL COMMITTEE OF THE CCP], Oct. 1, 2021, at §§I(2), IV(13), https://www.gov.cn/zhengce/2021-01/10/content_5578659.htm. "'Foreign-related Rule of Law' is a field of law that governs the intersection of China's domestic law with foreign law and international law; it calls for building systems that integrate Chinese law and foreign and international law and then promoting China's interests through such system"; *see also* Matthew S. Erie, *The Soft Power of Chinese Law,* 61 COLUM. J. TRANSNAT'L L. 1, 19 (2023).

[12] Paola Bellabona & Francesca Spigarelli, *Moving From Open Door to Go Global: China Goes on the World Stage,* INT'L J.OF CHINESE CULTURE AND MGMT. 93, 93–107 (2007) (explaining China's Go Global Policy).

[13] *See* 2023 Hong Kong Arbitration Week – China Session, *Mission Possible: Non-foreign Related Disputes Under PRC Law Submitted to Hong Kong Arbitration?*, HKIAC, (Oct. 17, 2023), https://hkiac.glueup.com/event/2023-hkaw-china-session-90572/ [hereinafter Hong Kong Arbitration Week]. (In this session, Rimsky Yuen, Co-Chair of HKIAC, Dr. Yanli Si, Deputy Chief Judge of the Research Office of the Supreme People's Court of China, William Wong, SC, Des Voeux Chambers, member of the Basic Law Committee of the Standing Committee of the National People's Congress, Dr. Vincent Mu, Partner, Llinks, Jern-Fei Ng KC, Temple Chamber, and Dr. Ling Yang, Deputy Secretary-General of HKIAC and Chief Representative of the Shanghai Office emphasized the significance of this point and had some discussions about this issue).

[14] *See* discussion *infra* section 4.2.

[15] *Id.*

[16] Yanli Si, *supra* note 6.

arbitration practices and advancing the refinement and internationalization of its arbitration system.

The pilot initiative of liberalizing extraterritorial arbitration in the Guangdong–Hong Kong–Macao Greater Bay Area ("GBA") is a valuable testbed that allows for the accumulation of knowledge and experience in liberalizing extraterritorial arbitration.[17] It can serve as a solid foundation for China's future exploration and development of extraterritorial arbitration. Seeking measures to allow "'Hong Kong-invested enterprises to adopt Hong Kong law' and 'allowing Hong Kong-invested enterprises to choose for arbitration to be seated in Hong Kong'" was a focal point in the Chief Executive's 2023 Policy Address.[18] This is a significant strategic step in developing Hong Kong into a center for international dispute resolution and legal services in the Asia–Pacific region.[19] In this context, the Hong Kong Department of Justice and the Supreme People's Court of the PRC are currently making efforts to legalize wholly Hong Kong enterprises registered in the GBA to secure arbitration in Hong Kong and apply Hong Kong law in 2024 (*gangzi gangfa gangzhongcai*).[20] This step has strategic significance in cross-border arbitration cooperation, which is a focal point in facilitating legal convergence and the connection of talents within Greater China.[21]

However, considering the restrictions on extraterritorial arbitration under China's current regulatory framework, it is of paramount importance to devise innovative legislative mechanisms between the mainland and Hong Kong to facilitate extraterritorial arbitration within these two jurisdictions. Given that studies on inter-regional conflict of law rarely focus on extraterritorial arbitration, this article aims to explore the roadmaps for mainland–Hong Kong

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[17] The Chief Executive's 2023 Policy Address, H.K. SPECIAL ADMIN. REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 25, 2023), https://www.policyaddress.gov.hk/2023/public/pdf/policy/policy-full_en.pdf (discussing extraterritorial arbitration in the Guangdong–Hong Kong–Macao Greater Bay Area ("GBA")).

[18] *Id*.

[19] *Id*.

[20] Press Release, Government of the H.K. Special Admin. Region, DOJ's Guangdong–Hong Kong–Macao Greater Bay Area Task Force Holds Second Meeting to Discuss Work Plan (H.K.) (June 23, 2023), https://www.info.gov.hk/gia/general/202306/23/P2023062300606.htm?fontSize=1 (discussing Task Force's agreement to bring forward a number of specific recommendations, including "actively seeking the expansion to mainland cities in the GBA the measures for Hong Kong–invested enterprises to choose Hong Kong law as the applicable law and to choose Hong Kong as the seat of arbitration, and enhancing the promotion of the measures' advantages and benefits for the development and Construction of the GBA").

[21] Yun Zhao & Hui Chen, *Legal Convergence in the Greater Bay Area through Liberalization of the Legal Services Market and Cooperation in Dispute Resolution Services*, 52 H.K. L. J. 555, 578 (2022).

extraterritorial arbitration under the theoretical framework of legal convergence. This article argues that instead of top–down legislative amendments on the issue of extraterritorial arbitration, a more effective and appropriate method of legalizing arbitrated mainland disputes in Hong Kong involves the implementation of regional and mutual arrangements between Hong Kong and the mainland.

Following the introduction, Part 2 examines the theoretical basis of extraterritorial arbitration, including the legal effect of arbitration seat, party autonomy in the choice of arbitration seat, and public policy concerns. Part 3 selects several jurisdictions for comparative studies regarding their legal practice and policy considerations, which provide valuable references for China's prospective advancements in extraterritorial arbitration. Part 4 offers a meticulous investigation of China's shifting regulatory approach to extraterritorial arbitration, incorporating in-depth case studies and a rigorous examination of pertinent legal and policy issues. Part 5 illustrates prospective advancements in and the strategic significance of liberalizing extraterritorial arbitration in the GBA and suggests the mode of legislative innovation under the framework of legal convergence. The article concludes that the practice in the GBA serves as a prelude to China's future unrestricted approach to extraterritorial arbitration.

II. DOMESTIC DISPUTES AND FOREIGN SEAT: THEORETICAL BASIS OF EXTRATERRITORIAL ARBITRATION

A. *Legal Effect of Arbitration Seat*

The phrases "seat of arbitration," "place of arbitration," "situs of arbitration," and "forum of arbitration" are generally regarded as synonymous.[22] The United Nations Commission on International Trade Law (UNCITRAL) Model Law adopts the term "place," while the term "seat" is used in the English Arbitration Act of 1996 and by most arbitration institutions.[23] Notably, while "seat of arbitration" is geographical terminology, it represents a territorial connection between arbitration and the law of the place where the arbitration is formally (legally) localized.[24] That is, "seat" refers to the legal domicile of an arbitration, rather than the physical place in which the arbitration proceedings are held.[25]

In practice, it is not uncommon to choose one jurisdiction as the seat of arbitration while conducting the proceedings in other jurisdictions.[26] For example, in *PT Garuda Indonesia v Birgen Air*, the parties' agreement designated

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[22] Hill, *supra* note 3, at 519.

[23] *Id*.

[24] Bělohlávek, *supra* note 2, at 266.

[25] *Id.* at 263.

[26] Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration,* 9 HASTINGS INT'L & COMP. L. REV. 235, 243–44 (1985); Hill, *supra* note 3, at 527.

Indonesia as the seat of arbitration, while the hearings were held in Singapore.[27] The Singapore Court of Appeal held that Indonesia remained the seat of arbitration throughout the proceedings, and therefore, the Singaporean courts lacked jurisdiction to entertain the application to set aside the award under Singaporean law.[28] Similarly, in *Naviera Amazonica Peruana SA v Cia International de Seguros*, the British court stressed that arbitral tribunals may hold meetings or hearings in a location other than the designated place of arbitration, for their own or the parties' convenience.[29] However, such moves do not automatically change the seat of arbitration, which remains the place initially agreed by the parties or on their behalf.[30]

If parties do not explicitly choose the seat of arbitration, there is a strong presumption in England that the location specified for the arbitration to take place will serve as its seat.[31] However, in general, there is no necessary connection between the seat and the location of the proceedings.[32] In instances where parties have not made a choice regarding the seat of arbitration, the most prominent institutional rules typically authorize the relevant administering institution or arbitral tribunal to determine the seat.[33] It is also customary for the seat of arbitration to align with the seat of the permanent arbitral institution.[34] Most arbitration institutions provide that institutional rules are adopted that set a default rule designating the seat of arbitration in the absence of a clear selection.[35] For example, Article 18 of the Singapore International Arbitration Centre ("SIAC") Rules of 2007 indicates that where the SIAC Rules apply, the seat of the arbitration shall

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[27] Maskun et al., *Arbitration: Understanding It in Theory and Indonesian Practice* 5 HASANUDDIN L. REV. 220, 229 (2019).

[28] P.T. Garuda Indonesia v. Birgen Air, SGCA 12, paras. 19–27 (2002) (Sing. Ct. of Appeal, Arb.).

[29] Naviera Amazonica Peruana S.A. v. Compania Int'l de Seguros del Peru, 1 Lloyd's Rep. 116, para. 119 (1988) (EWCA (Civ.), Arb.) (quoting NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 3.58 (6th ed. 2015)).

[30] *Id.* at para. 120 (quoting BLACKABY ET AL., *supra* note 29, § 3.60).

[31] A.V. DICEY, J.H.C. MORRIS, & LAWRENCE COLLLINS, DICEY, MORRIS & COLLINS ON CONFLICT OF LAWS 34–35 (Lawrence Collins ed., 14th ed. 2006).

[32] ROBERT M. MERKIN & LOUIS FLANNERY, ARBITRATION ACT 1996: AN ANNOTATED GUIDE 19 (5th ed. 2014).

[33] GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64 (6th ed. 2021).

[34] Bělohlávek, *supra* note 2, at 286–87.

[35] *Id*. (citing Int'l Comm. Arb., ICC Rules of Arb., art. 18 (2012); London Court of Int'l Arb., Arb. Rules, art. 16 (1998); Stockholm Chamber of Com., Arb. Rules, art. 20 (2010); Australian Centre for Int'l Com. Arb., ACICA Rules: Incorporating clauses for arbitration and mediation, art. 19 (2011); China Int'l Econ. and Trade Arb. Comm'n, CIETAC Arb. Rules, art. 7 (2005); American Arb. Ass'n, Com. Arb. Rules and Mediation Procedures, R-11 (2013).; UNCITRAL Model Law on Int'l Com. Arb., art. 14, U.N. Doc. A/40/17 (1985)).

be Singapore unless otherwise agreed.[36] However, Article 21 of the SIAC Rules of 2016 (the latest version) indicates that without the parties' specific agreement, the seat of the arbitration shall be determined by the relevant tribunal, considering all the circumstances of the case.[37] Notably, provisions on the seat of arbitration have become a regular component of arbitration agreements in recent years.[38]

The significance of the seat of arbitration lies in its representation of a territorial link between the arbitration and the law of arbitration's legal domicile or juridical home.[39] While parties do not generally make a direct choice of governing law for the arbitral process, it is assumed that they make a conscious choice of seat, with the associated territorial or state law (the applicable *lex arbitri*) governing the arbitral process.[40] While parties have the capacity to contractually deviate from certain procedural aspects of the applicable law and selectively adopt procedural rules from a foreign *lex arbitri*, they do not possess the flexibility to deviate from the "external" legal constraints at the seat of arbitration. These external constraints comprise compulsory legal obligations and regulations that govern the relationship between the arbitration proceedings and the national courts at the seat.[41] Moreover, parties cannot easily deviate from other compulsory regulations pertaining to the public policy of the seat.[42]

The local law of the seat may significantly influence the law applicable to substantive or procedural issues arising during the course of arbitration.[43] Issues to be determined by the laws of the seat of arbitration include: (a) judicial support from the courts located in the seat of arbitration; (b) the formal validity of the arbitration agreement; (c) the arbitrability of the dispute; (d) the composition of the arbitral tribunal; (e) a fundamental procedural guarantee; (f) the supervisory roles of the courts; and (g) a judicial review of arbitral awards (usually limited to proceedings on annulment of an arbitral award for specific procedural reasons).[44] If a party intends to challenge an arbitral award in court, the party

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[36] Sing. Int'l Arbit. Ctr. R. art. 18 (2007), https://siac.org.sg/siac-rules-2007.

[37] Sing. Int'l Arbit. Ctr. R. art. 21 (2016), https://siac.org.sg/siac-rules-2016.

[38] Alexander J. Belohlavek, *Seat of Arbitration and Supporting and Supervising Function of Courts*, CZECH (AND CENT. EUR.) Y.B. OF ARB. 21, 22 (2015).

[39] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1536 (2nd ed. 2014).

[40] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration: Unravelling the Laws of the Arbitration Process*, 26 SING. ACAD. L. J. 886, 891 (2014).

[41] *Id.* at 906.

[42] *Id.*

[43] BORN, *supra* note 39, at 1536, 1576.

[44] Danilowicz, *supra* note 26, at 259–65; Hill, *supra* note 3, at 526–27; Gabriel M. Wilner, *Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646, 691 (1964); Nudka Ikeyi & Gabriel Onovo, *Re-examining the Legal Basis for the Co-existence*

must do so with the competent court.[45] The general rule is that international jurisdiction is conferred upon the court of the state where the seat of arbitration is located.[46]

The prevailing practice maintains that the seat of arbitration establishes a connection between arbitration and the legal framework of a specific state.[47] Accordingly, the law of the seat of arbitration should govern the arbitration proceedings.[48] In *PT Garuda Indonesia v. Birgen Air*, the Singapore courts posited, or simply assumed, an automatic nexus between the choice of Singapore as the seat of arbitration and the application of Singapore arbitration law,[49] and held that "the selection of a particular place (seat) of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework, with such derogation or variation as may be permitted."[50] Similarly, the English court held that "an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause."[51] By choosing London as the seat of the arbitration, the parties must be assumed to have agreed that proceedings on the award should be only those permitted by English law.[52] Likewise, Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships provides that if parties do not specify the laws applicable to their

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of Federal and State Arbitration Laws in Nigeria, 36 J. INT'L ARB. 755, 762–63 (2019).

[45] Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L. Q. 1, 10–11 (1985).

[46] Bělohlávek, *supra* note 2, at 279. The autonomy of the parties allows them to agree on the rules applicable to the proceedings, and they may choose the procedural rules of a country different from the state of the seat of arbitration. This possibility is envisaged by Article V(1)(e) of the New York Convention, which stipulates that "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

[47] *See* Hill, *supra* note 3, at 518.

[48] This approach has been followed by the UNCITRAL Model Law. UNCITRAL Model Law on Int'l Com. Arb., 18th Sess., U.N. Doc. A/40/17, Annex I (June 21, 1985), *amended by* Rep. of the U.N. Comm'n on Int'l Trade Law, 39th Sess., June 17-July 7, 2006, at pt. 2, para. 47, U.N. Doc. A/61/17, Annex I, U.N. GAOR, 61st Sess., Supp. No. 17 (July 7, 2006).

[49] P.T. Garuda Indonesia v. Birgen Air, SGCA 12, paras. 19-27 (2002) (Sing. Ct. of Appeal), Arb. PT Garuda Indonesia v. Birgen Air [Sing. Ct. of App.] Mar. 6, 2002, 1 SLR 401, at para. 24 (Sing.).

[50] *Id*.

[51] Shashoua v Sharma [2009] EWHC 957 (23) (Eng.) (England and Wales).

[52] *See ICC Case No. 5029, Interim Award* (1987) XII YBCA, at 114 para. 3; Hill, *supra* note 3, at 518.

arbitration in an agreement, the laws at the seat of the arbitral authority or of the arbitration shall apply.[53]

In summary, the seat of arbitration identifies a state or territory whose laws will govern the arbitral process; some national arbitration laws directly impose both mandatory procedural requirements and substantive rules in locally seated arbitrations. Due to the diverse approaches of states toward arbitration, the scope of the *lex arbitri* can vary significantly across jurisdictions.[54] Therefore, practitioners emphasize the importance of thoroughly examining the local legal environment before selecting a specific seat.[55] It is beneficial for parties to choose a seat of arbitration in an arbitration-friendly state, with courts that offer favorable measures for arbitral proceedings.[56]

B. *Party Autonomy in Choosing Seat of Arbitration*

Arbitration, whether domestic or international, grants a significant level of autonomy to parties, surpassing that of court proceedings.[57] Primarily, the parties are endowed with the autonomy to choose the applicable law for their arbitration and the substantive law governing their dispute; similarly, parties also have the discretion to choose the seat of arbitration, thereby indirectly designating the governing law for the arbitration process.[58]

There are certain factors that parties consider in selecting a seat of arbitration. The legal system of the seat can objectively provide an impartial and autonomous framework that fosters the prosperity of arbitration, independent of the parties' influence.[59] Therefore, parties tend to choose a seat that has a pool of qualified legal experts, a predictable and stable legal system, and a reliable court system that supports arbitration.[60] When both parties involved in a dispute come

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[53] 中华人民共和国涉外民事关系法律适用法 [Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relations], 届全国人民代表大会常务委员会第十七次会议通过 [Adopted at the 17th Session of the Standing Committee of the 11th National People's Congress] (Oct. 28, 2010), https://www.gov.cn/flfg/2010-10/28/content_1732970.htm.

[54] Bělohlávek, supra note 2, at 271.

[55] *Id*.at 273.

[56] *Id*. at 276.

[57] Danilowicz, *supra* note 26, at 237.

[58] Hill, *supra,* note 3, at 521.

[59] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L AND COMPAR. L. Q. 21, 22 (1983); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 18 (Martinus Nijhoff ed. 2010).

[60] Park, *supra* note 59, at 22.

from different countries, they may also choose a neutral third country as the arbitration seat to ensure equality of status for both parties.[61]

Most states actively seek to become a preferred seat of arbitration and offer support to make their territory highly desirable for dispute resolution, regardless of the *lex personae* of the parties.[62] This approach greatly enhances the appeal of states for international commerce and investments.[63] For example, Baroness Carr, Lady Chief Justice of England and Wales, emphasized in an address that it is no coincidence that London, one of the most popular arbitration seats, has a reputation both as a global legal center and an international business hub.[64] She noted, "Business requires expert legal advice and a predictable and stable legal system in which to operate, and parties select this seat because of the reputation of the English Courts as a safe and neutral forum overseen by a robust and highly independent judiciary."[65]

The autonomy of the parties in the choice of the seat of arbitration raises the question of whether, in a purely domestic arbitration, parties can choose a foreign seat of arbitration, i.e., in another country.[66] This situation arises, with the laws and judicial decisions of some countries permitting this practice and others not.[67] Pro-arbitration jurisdictions follow the pattern of minimal state intervention and high levels of respect for party autonomy.[68]

Parties arbitrate their disputes extraterritorially, thereby internationalizing their disputes, for the following reasons. First, most popular foreign seats have a pool of qualified legal experts and pro-arbitration traditions.[69] Second, by choosing a foreign arbitration seat and a reputable arbitration institution, parties

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[61] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2215 (3rd ed. 2021).

[62] The lex personae of the parties also refer to personal law. It means the laws that govern a person's family matters, like marriage, divorce, and inheritance, regardless of where they go. In common-law systems, personal law is based on the law of the person's domicile, while in civil-law systems, it is based on the law of the individual's nationality. *See Personal Law*, LSD LAW, https://www.lsd.law/define/personal-law (last visited May 7, 2024).

[63] Bělohlávek, supra note 2, at 272.

[64] Hon. Mrs. Justice Carr, Closing Address for British Turkish Lawyers Association Seminar – The Inner Temple, (Sept. 19, 2013), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/justice-carr-btla-190913.pdf.

[65] *Id*.

[66] Danilowicz, *supra* note 26, at 254–57.

[67] *Id.* at 255–56.

[68] Babatunde Osadare, *Jurisdiction and Powers of Arbitral Tribunals: Who Decides?*, UNIV. OF DUNDEE 1, 11 (2017); George A. Bermann, *What Does It Mean to Be 'Pro-Arbitration'?*, 34 ARBITRATION INTERNATIONAL 341, 343 (2018).

[69] Olu Ojedokun & Dominic Obilor Akabuiro, *The Concept of the Seat in International Arbitration: Unlocking the Judicial Challenge of Interpretation of Conflict of Laws*, 88 ARBITRATION: THE INT'L J. OF ARB., MED. AND DISPUTE MGMT. 654, 660 (2022).

can escalate their disputes to the international level for easy recognition and enforcement of arbitral awards under the New York Convention.[70] Third, parties may favor a court in a foreign arbitration seat for providing more efficient assistance, particularly regarding interim measures, throughout the arbitral proceedings.[71] It is the *lex arbitri* that stipulates a court's competence to grant interim relief to support arbitral proceedings.[72]

Finally, the supervisory function of the court in the foreign seat is a significant consideration.[73] The *lex arbitri* provides the grounds on which an award may be challenged and set aside, as well as the applicable review standards.[74] These grounds vary across jurisdictions, and some foreign jurisdictions may provide fewer options than the parties' home state.[75] This can be attractive for parties seeking smooth recognition and enforcement of their arbitral award.

C. *Divergent Opinions of Public Policy Concerns in Extraterritorial Arbitration*

The issue of extraterritorial arbitration is controversial, particularly concerning the legitimacy of domestic disputants to choose a seat of arbitration abroad. Furthermore, there is debate over whether a dispute that would otherwise be considered domestic—because all of its elements, including the chosen arbitral tribunal, tie the dispute to only one state—could become an international dispute by virtue of choosing a foreign arbitration seat (a subjective international dispute).[76]

Some argue from the technical perspective that the international dimension of a case must be objectively verifiable.[77] Therefore, parties cannot internationalize their arbitration for purely domestic disputes, as the fact of a seat of arbitration

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[70] *Id*.

[71] D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn*, 30 TEX. INT'L L. J., 71, 77 (1995).

[72] BORN, *supra* note 61, at 2645 n. 254 (3rd ed. 2021) (citing *Procedural Order of July 2008 in ICC Case No. 15218, in ICC, Procedural Decisions in ICC Arbitration 79 (2015); Procedural Order of December 2007 in ICC Case No. 14993, in id. at 77; Procedural Order of June 2007 in ICC Case No. 14581, in id. at 86; Procedural Order of December 2006 in ICC Case No. 14020, in id. at 67; Procedural Order of May 2006 in ICC Case No. 13620, in id. at 65; Interim Award in ICC Case No. 8879, 11(1) ICC Ct. Bull. 84 (2000); Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 82 (2000); Interim Award in ICC Case No. 7544, 11(1) ICC Ct. Bull. 56 (2000); Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999, XXVI Y.B. Comm. Arb. 198 (2001); Interim Award in NAI Case No. 1694 of 12 December 1996, XXIII Y.B. Comm. Arb. 97 (1998)*).

[73] Hill, *supra* note 3, at 518.

[74] *Id*. at 519.

[75] *Id*. at 521–27.

[76] Bělohlávek, *supra* note 2, at 284–85.

[77] *Id*. at 285.

in another jurisdiction does not automatically create a distinct international dimension. This counterview also raises a public policy concern, namely that parties may use extraterritorial arbitration to evade the normal supervisory powers of the state over domestic arbitration.[78] Thus, parties agreeing on a foreign seat of arbitration, which transforms a domestic dispute into an international dispute, is seen as an attempt to avoid certain legislative rules, which may be considered as overriding mandatory laws from the conflict-of-laws perspective, or to avoid a matter of public policy in the state where the parties have their seat or residence.[79]

Moreover, the dichotomy in a state's approach to the arbitrability of certain issues is a significant concern in extraterritorial arbitration. For example, in the US, antitrust matters arising from international contracts have been held to be arbitrable under the Federal Arbitration Act of 1925.[80] However, in jurisdictions such as China[81] and India,[82] such issues are not arbitrable, given the public interest involved in domestic antitrust laws. Hence, even if a dispute is not arbitrable in the parties' home jurisdiction, through extraterritorial arbitration, it may still be feasible to obtain a valid foreign award in a foreign seat, where the arbitral award is recognized as valid under its *lex arbitri*. Certainly, states would not willingly permit domestic parties to use extraterritorial arbitration to bypass mandatory rules to which they are subject.[83] However, some scholars argue that it is improper to assert that parties "artificially internationalize domestic arbitration proceedings," because the primacy of parties' private-law autonomy in arbitration indicates that the seat of arbitration is principally determined by the parties' agreement.[84] Moreover, they argue that the selection of a foreign seat of

[78] NADEZDA ROZEHNALOVÁ, ROZHODČÍ ŘÍZENÍ V MEZINÁRODNÍM A VNITROSTÁTNÍM OBCHODNÍM STYKU 47 [Arbitration in International and National Transactions] (2nd ed. 2008).

[79] Bělohlávek, *supra* note 2, at 291.

[80] This stance was confirmed in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[81] *See generally* Qingxiu Bu, *The Arbitrability of Antitrust Disputes: a Chinese Perspective*, 10 J. OF ANTITRUST ENF'T 303, 315 (2022).

[82] *See generally* Abhisar Vidyarthi, *Arbitration, Competition Law and Second Look Doctrine: An Indian Perspective*, 6 RGNUL FIN. & MERCANTILE L. REV. 53, 53–61 (2019).

[83] Gracious Timothy Dunna, *Extra-Territorial Arbitration: Indian Parties Arbitrating Abroad*, 11 INDIAN J. ARB. L. 105, 115 (2023).

[84] Bělohlávek, *supra* note 2, at 287–88 (2013).

arbitration—which is predominantly procedural[85]—does not conflict with public policy.[86]

The procedures regarding the recognition and enforcement of arbitral awards in the states of the joint (common) seat of the parties also provide a necessary safety net.[87] A foreign arbitral award can be refused recognition and enforcement based on a lack of arbitrability and violation of public policy.[88] These legal instruments enable the court to protect its fundamental values and prevent parties from circumventing compulsory local laws by arbitrating extraterritorially. After all, a foreign arbitral award does not have legal effect in the territory of the state in which the joint (common) seat of the parties is located until it is formally recognized.[89] In addition, restricting the choice of seat constrains the parties' autonomy in adapting their dispute resolution provision to the specifics of their commercial relationship. This may, in turn, constrain parties in their commercial dealings.[90]

III. COMPARATIVE STUDY OF EXTRATERRITORIAL ARBITRATION IN DOMESTIC

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[85] Carbone, Giulia, *The Interference of the Court of the Seat with International Arbitration*, J. DISP. RESOL 217, 220 (2012). ("The law of the seat sets both the procedural rules, which govern the arbitral procedure in the absence of a different agreement between the parties, and the choice of law rules, which determine the law applicable to the merits of the dispute"); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 175 (Sweet & Maxwell eds., 4th ed. 2004) ("The agreement to arbitrate is the foundation stone of international arbitration. It records the consent . . . that is indispensable to any process of dispute resolution outside national courts."). For a comprehensive discussion on the role of the seat of international arbitration, see general Jean Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 85 (2d ed. 2007); Fouchard, Gaillard & Goldman on International Commercial Arbitration, 3 (Emmanuel Gaillard & John Savage eds., 1999).

[86] PASL Wind Solutions v. GE Power Conversion India, Civil Appeal No. 1647 of 2021, at paras. 55–58 (2021) (India) (discussing the example of the Benami Transaction Act and its potential violation).

[87] Bělohlávek, *supra* note 2, at 279.

[88] Joel R. Junker, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CAL. W. INT'L L. J. 228, 228 (1977).

[89] *Id.*

[90] "For example, two Indian parties may be more reluctant to transact if they cannot agree to a neutral seat outside India. Alternatively, Indian parties may transact through or involve non-Indian entities to be able to select a seat outside India." *See* Duncan Speller and Dharshini Prasad, *The Choice of a Foreign Seat in Domestic Disputes – An Opportunity for One More Step Forward in India's Journey to Establish Itself as an Arbitration Friendly Jurisdiction?*, 6 INDIAN J. ARB. L. 43, 53 (2017). This point is analyzed in depth in the following section.

DISPUTES

A. *The UK and Singapore Practice: Party Autonomy Oriented Approach*

The UK and Singapore have emerged as preeminent global arbitration destinations, with UK practice often serving as the internationally recognized benchmark for international arbitration.[91]Due to its respect for party autonomy and the unified regulation of domestic and international arbitrations seated in England, English law does not impose restrictions on extraterritorial arbitration.[92] Arbitration in England is governed by the 1996 English Arbitration Act (1996 Act), which does not draw a distinction between domestic and international arbitrations seats in England.[93] Section 3(a) of the 1996 Act defines the "seat of arbitration" as the "juridical seat of the arbitration" designated by, *inter alia*, "the parties to the arbitration agreement"; the general principle of interpretation applicable to this section is that party autonomy is paramount except where the public interest requires safeguards.[94] Additionally, there is no requirement or mandatory obligation to select a seat in accordance with the mandatory provisions of the 1996 Act.[95] Furthermore, no case law suggests that English courts would reject the enforcement of an arbitration agreement or an arbitral award between English parties solely based on the selection of a foreign seat.[96]

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[91] REDFERN & HUNTER, *supra* note 85, at 329; For a general discussion on UK's role as a world leader in dispute resolution, *see* Press Release, Ministry of Justice and Lord Bellamy KC, Modernised Laws to Secure UK as World Leader in Dispute Resolution, (Nov. 22 2023), https://www.gov.uk/government/news/modernised-laws-to-secure-uk-as-world-leader-in-dispute-resolution ("With arbitrations in England and Wales worth £2.5 billion to the British economy each year in fees alone, the Bill will help the UK's world-leading legal services sector to continue to flourish. For a general overview of the UK's position as a global leader in dispute resolution"); Press Release, The Law Society, England and Wales Recognised As the Leading Legal Jurisdiction Internationally, (Oct. 30 2023), https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/england-and-wales-recognised-as-the-leading-legal-jurisdiction-internationally; Yarik Kryvoi, London as the World's Leading Dispute Resolution Hub: Numbers and Challenges, British Institute of International and Comparative Law Blog, (May 17, 2023), https://www.biicl.org/blog/58/london-as-the-worlds-leading-dispute-resolution-hub-numbers-and-challenges?cookiesset=1&ts=1736561453.

[92] *See* MARGARET RUTHERFORD & JOHN SIMS, ARBITRATION ACT 1996: A PRACTICAL GUIDE 47 (1996); *See generally* Van Haersolte-van Hof, Jacomijn J., and Erik V. Koppe, *International Arbitration and the Lex Arbitri*, 31(1) ARB. INT'L 27, 27-62 (2015).

[93] *Id.*

[94] Olatawura, *supra* note 8, at 56.

[95] *Id.*; *see also* Arbitration Act 1996, c. 23, § 4 (U.K.).

[96] See Speller & Prasad, *supra* note 10, at 48 n.28.

Arbitration in Singapore is governed by two distinct yet similar legal regimes: the Singapore International Arbitration Act ("Singapore IAA")[97] and the Singapore Arbitration Act ("Singapore AA").[98] Singapore does not mandate the application of the Singapore AA to domestic disputes, and the Singapore IAA incorporates UNCITRAL Model Law and allows parties to freely agree on the seat of arbitration.[99] Thus, despite the presence of separate regulatory frameworks for domestic and international arbitrations in Singapore, domestic parties generally retain unfettered autonomy in selecting a foreign seat.

This stance was aptly expressed in *Sembawang Engineers and Constructors Pte. Ltd. v. Covec (Singapore) Pte. Ltd.*[100] In this case, the Singapore court stressed that a domestic arbitration can be treated as an international arbitration if the parties agree in writing that Part II of the International Arbitration Act or the Model Law applies to that domestic arbitration.[101] The court also referred to similar practices and provisions in other jurisdictions, including Section 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland)[102], Act 1990 (ch. 40) (UK),[103] and Section 2L of the Arbitration Ordinance (ch. 341) (Hong Kong).[104] The court also considered whether, as a matter of policy, it would be desirable to permit two Singaporean parties to elect to have the dispute dealt with under the "international" arbitration regime when the dispute concerned a purely Singaporean subject matter.[105] The judgment expressly held that "the preference is to permit commercial parties the freedom to agree to have disputes dealt with according to the international arbitration regime (albeit with a lesser degree of curial intervention)."[106]

B. *Changing Path in India Practice: From Disallowing to Approval*

India was selected as the focus of this comparative law study because of its growing prominence within the Asian arbitration community.[107] India has

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[97] See generally International Arbitration Act, *supra* note 9.

[98] Arbitration Act ch. 10 (1985) (Sing.).

[99] See International Arbitration Act, *supra* note 9, at ch. V, art. 20(1) (Place of arbitration: "The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties").

[100] Sembawang Engineers and Constructors Pte. Ltd. v. Covec (Sing.) Pte. Ltd., [2008] SGHC 229, at paras. 20–21, 31.

[101] *Id*. at para. 20.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at paras. 19–31.

[106] *Id*. at para. 31.

[107] *See generally* SNEHA JAISWAL, ARBITRATION LAW IN INDIA – AN OVERVIEW 2–3 (2020).

actively pursued arbitration law reform in recent years, aiming to enhance its competitiveness as a sought-after hub for international arbitration.[108] The insights garnered from India's experience hold significant potential to impart valuable lessons to China.

Arbitration in India is regulated by the Arbitration & Conciliation Act ("Arbitration Act"),[109] which is a composite piece of legislation that stipulates rules regarding domestic arbitration, international commercial arbitration, enforcement of foreign award, and conciliation[110] The Arbitration Act distinguishes between purely domestic arbitration and international commercial arbitration.[111] Its definition of the "international dimension" of arbitration is geography-centric, as Section 2(2) of the Arbitration Act provides for "international commercial arbitration" in the context of the "place of arbitration" being outside India.[112] Accordingly, "extraterritorial arbitration" between two Indian parties is regarded as "international commercial arbitration," and the resulting award would be a foreign arbitral award.[113]

Notably, when the "place of arbitration" is in India, Indian law mandatorily applies to the substance of the dispute (substantive law), and no choice of law is available in case of substantive law."[114] Section 28 states that:

in terms of rules applicable to the substance of the dispute, where the place of arbitration is situated in India, … in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.[115]

One of the controversies concerning this legislation is whether Section 28 of the Indian Arbitration Act only addresses the parties' choice of law in terms of the substance of the dispute, or whether it also regulates the law of the juridical seat and thus regulates the parties' selection of a foreign seat.[116] Such controversies have arisen in judicial decisions.

In 2008, the Bombay High Court held in *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*[117] ("the TDM case") that Indian parties could not choose a foreign juridical seat by conflating the line between the substantive law

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[108] *Id*. at 3.

[109] Arbitration and Conciliation Act, 1996 (India) (as amended by The Arbitration and Conciliation (Amendment) Act, 2019 (India)) [hereinafter Arbitration and Conciliation Act].

[110] *See* Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1 ASIAN INT'L ARB. J. 105, 106 (2005).

[111] *Id.* at 109.

[112] *See* Arbitration and Conciliation Act, *supra* note 109, §2(f).

[113] *See* Dunna, *supra* note 4, at 105-06.

[114] *Id.* at 112.

[115] *See* Arbitration and Conciliation Act, *supra* note 109, §28(a).

[116] *Id*. §28(b).

[117] *See* TDM Infrastructure v. UE Development India Pvt. Ltd., (2008) 14 SCC 271 (India).

(addressed by Section 28) and procedural law in arbitration (the law of the arbitration seat).[118] It further held that there could not be an "international arbitration agreement" between two Indian parties.[119] The TDM case had an impact on the decisions of various high courts. It interpreted Section 2(6) of the Arbitration Act to mean that Section 28 was mandatory and, therefore, that Indian parties could not be allowed to derogate from Indian law.[120] The Bombay High Court in *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd*. ("the Addhar Mercantile case") followed the TDM decision and held that "two Indian parties cannot be permitted to choose a foreign seat because the intention of the legislation is clear that Indian nationals should not be permitted to derogate from Indian law."[121] This is because, under Section 28(1)(a) of the Arbitration Act, it is "part of the public policy of India that Indian nationals should not be permitted to derogate from Indian law."[122] However, the above interpretation is criticized by many scholars. As Speller and Prasad note, "Section 28 is unequivocally only intended to regulate the parties' choice of the law governing the substance of the dispute, that is, the law governing the parties' rights and obligations under contract or tort.[123] This is different from the seat of the arbitration, which determines the applicable arbitral laws and the procedural framework that governs the arbitration."[124]

Significantly, the Supreme Court in India overturned the TDM decision and confirmed the validity of extraterritorial arbitration by Indian parties in the following decisions. In *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* ("the BALCO case"),[125] the Supreme Court unambiguously stated that Section 28 of the Arbitration Act only addresses the substantive law of a dispute[126]

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[118] *Id.* ¶¶ 19–20.

[119] *Id.* ¶ 15.

[120] *Id.* ¶ 20.

[121] *See* B.A. Sujay Prasanna, *Whether Two Indian Parties Can Have a Seat of Arbitration Outside India?*, SCC TIMES (Apr. 10, 2017), https://www.scconline.com/blog/post/2017/04/10/whether-two-indian-parties-can-have-a-seat-of-arbitration-outside-india/.

[122] *See* Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., Arbitration Application No. 197 of 2014 Alongwith Arb. Pet. No. 910 of 2013, ¶ 8 Bombay High Court (2015) (India). *See also* TDM Infrastructure v. UE Development India Pvt. Ltd., (2008) 14 SCC 271, ¶ 20 (India).

[123] *See* Speller & Prasad, *supra* note 10, at 45.

[124] *Id.*

[125] *See* Bharat Aluminium Co. v. Kaiser Aluminium Tech. Serv., (2012) 9 SCC 552 (India) [hereinafter BALCO]. BALCO was decided by a five-judge bench of the Supreme Court and is widely considered a watershed decision in the jurispru dence of Indian arbitration, BALCO may have impacted the court's analysis of Section 28 in Addhar Mercantile, had the court considered it.

[126] *See* Arbitration and Conciliation Act, *supra* note 109, §28(1)(a); *see also* BALCO, 9 SCC para. 123. Section 28(1)(a) makes it clear that in an arbitration brought under Part I to which Section 2(1)(f) does not apply, there is no choice but

and has no application where the parties have chosen a foreign seat.[127] The court further noted, "As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to 'substance of dispute.' In other words, it deals with the applicable conflict of law rules."[128] This ensures that Indian parties do not circumvent the substantive Indian law by resorting to arbitrations.[129]

In *Sasan Power Limited v. North American Coal Corporation (India) Pvt. Ltd.*, the Madhya Pradesh High Court affirmed that Indian parties in disputes concerning Indian subject matter can choose a foreign forum outside India to resolve their dispute, noting that "the choice of a foreign seat – London – does not render the arbitration agreement null and void."[130] This decision was appealed to the Supreme Court, which upheld the High Court's decision.[131] In *Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.* ("the PASL case"), the Supreme Court articulated that Indian parties are permitted to choose a foreign seat of arbitration and to have the arbitral award qualify as "foreign arbitral awards" under the Arbitration Act and subject to the New York Convention.[132] Furthermore, the PASL case signified a milestone in India's endorsement of extraterritorial arbitration for domestic cases.[133]

Notably, the Supreme Court not only opened the door for Indian parties to choose a foreign seat but also permitted domestic parties to choose foreign law rather than Indian law to govern their contract in foreign seated arbitration, notwithstanding that the proceeding may not otherwise qualify as an international commercial arbitration.[134] The court clarified that the restriction in Section 28(1)(a) of the Arbitration Act, which provides that arbitrations seated in India shall be governed by Indian law, applied only to domestic arbitrations and not

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for the tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract." This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law by resorting to arbitrations.

[127] *See* BALCO, 9 SCC para. 123.

[128] *Id.*

[129] *Id.*

[130] Sasan Power Ltd. v. N. Am. Coal Corp. India, (2015) SCC Online MP 7417, at para. 2.

[131] Sasan Power Ltd. v. N. Am. Coal Corp. India, (2016) SCC Online SC 8299.

[132] Pasl Wind Solutions Priv. Ltd. v. GE Power Conversion India Priv. Ltd., (2021) 7 SCC 1 (India).

[133] Steven P. Finizio & Shanelle Irani, *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.: The Indian Supreme Court Clarifies that Two Indian Parties Can Choose a Foreign Arbitral Seat*, WILMERHALE (May 25, 2021), https://www.wilmerhale.com/en/insights/blogs/international-arbitration-legal-developments/20210525-pasl-wind-solutions-pvt-ltd-v-ge-power-conversion-india-pvt-ltd.

[134] *Id*.

to "international commercial arbitrations" (as defined in Section 2(1)(f) of the Arbitration Act).[135]

The Supreme Court emphasized that party autonomy was "the brooding and guiding spirit of arbitration" and that there were no grounds on which to restrict this autonomy by preventing Indian parties from arbitrating abroad.[136] Giving primacy to party autonomy, the court held that "merely because the arbitration was situated in a foreign country it cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement."[137]

As for public policy concerns, the Supreme Court held that "the balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favor of freedom of contract as there is no clear and undeniable harm caused to the public."[138] The court held that Section 48 of the Arbitration Act provides sufficient safeguards against enforcement of an award that is violative of public policy.[139] If Indian parties choose to arbitrate abroad to circumvent Indian public policy, enforcement of such a foreign award may be refused by Indian courts under the public policy exception under Section 48(2)(b) of the Arbitration Act.[140]

This Supreme Court decision clarified the law, particularly concerning the global reach of Indian businesses.[141] It clarified the possibility of offshore arbitration and held that an award in such circumstances would be enforceable in India.[142] Moreover, the court's decision offered a wider menu of available forums for dispute resolution and arbitration, which is consistent with the global reach of Indian businesses.[143] Most Indian international branches have negotiated contracts providing for offshore arbitration.[144] India's latest position regarding extraterritorial arbitration is widely regarded as an important stride toward its becoming an arbitration-friendly jurisdiction.[145]

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[135] Pasl Wind Solutions Priv. Ltd. v. GE Power Conversion India Priv. Ltd., (2012) 7 SCC 1 at para. 33 (India).

[136] Pasl Wind Solutions Priv. Ltd. v. GE Power Conversion India Priv. Ltd., (2012) 7 SCC 1 at para. 60 (India).

[137] M/s Atlas Exports Indus. v. M/s Kotak and Co., (1999) 7 SCC 61 (India).

[138] Shaneen Parikh, Surya Karan Sambyal & Shalaka Patil, *Party Autonomy Reigns Supreme: The Indian Supreme Court Rules That Two Indian Parties Can Choose a Foreign Seat of Arbitration*, KLUWER ARBITRATION BLOG (May 19, 2021), https://arbitrationblog.kluwerarbitration.com/2021/05/19/party-autonomy-reigns-supreme-the-indian-supreme-court-rules-that-two-indian-parties-can-choose-a-foreign-seat-of-arbitration/.

[139] *See id.*

[140] Finizio & Irani, *supra* note 133.

[141] *See id.*

[142] *See id.*

[143] *See id.*

[144] *Id.*

[145] *See id.*

IV. CHINA'S STANCE ON EXTRATERRITORIAL ARBITRATION

A. *Legal Framework of Extraterritorial Arbitration*

The discussions surrounding China's regulation of extraterritorial arbitration in domestic disputes generally address whether Chinese parties, in purely domestic disputes, can contract to choose a foreign arbitration seat and arbitration institution and apply foreign law to resolve their disputes.[146] China's Arbitration Law[147] distinguishes between domestic, foreign-related, and international arbitration.[148] Under this law, arbitration involving Hong Kong, Macau, and Taiwan is categorized as "foreign-related."[149]

China's 1994 Arbitration Law is the first unified and core legislation that governs arbitration in mainland China.[150] Unlike similar legislation in most other jurisdictions in Asia, China's Arbitration Law is not modeled after the UNCITRAL Model Law on International Commercial Arbitration[151] and diverges in some respects from international norms.[152] For example, this law does not elaborately stipulate or define "seat of arbitration" or "extraterritorial

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[146] *See* 2023 Hong Kong Arbitration Week, *supra* note 13. In this session, Rimsky Yuen, Co-Chair of HKIAC, Dr. Yanli Si, Deputy Chief Judge of the Research Office of the Supreme People's Court of China, William Wong, SC, Des Voeux Chambers, member of the Basic Law Committee of the Standing Committee of the National People's Congress, Dr. Vincent Mu, Partner, Llinks, Jern-Fei Ng KC, Temple Chamber, and Dr. Ling Yang, Deputy Secretary-General of HKIAC and Chief Representative of the Shanghai Office emphasized the significance of this point and discussed this issue.

[147] Arbitration Law of the People's Republic of China (Revised in 2017) (promulgated by the Standing Comm. the Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018) 2017 China Law LEXIS 1299 *1, *1-25 [hereinafter "Arbitration Law"].

[148] Specifically, Article 65 of the Arbitration Law describes the special provisions governing foreign arbitration which apply to the arbitration of disputes involving "foreign economics and trade, transport and maritime interests." *See id.*; *See also* Matthew S. Erie & Monika Prusinowska, *The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges Ahead* 28 ASIA PAC. L. REV. 259, 262 (2020), https://doi.org/10.1080/10192557.2020.1866799; Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 339 (1997).

[149] Erie & Prusinowska, *supra* note 148, at 262.

[150] *Id.*; Brown & Rogers, *supra* note 148, at 338.

[151] Weixia Gu, *China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT'L L. 1305, 1325 n.81 (2018) [hereinafter Gu, *China's Belt and Road Development*].

[152] Erie & Prusinowska, *supra* note 148, at 262.

arbitration."[153] However, notably, a significant amendment in the 2023 revisions of the Chinese Civil Procedure Law was the explicit recognition of the seat of arbitration as the determining factor for establishing the nationality of an arbitration award.[154]

Accordingly, legal provisions on the validity of extraterritorial arbitration agreements in China do not appear in China's Arbitration Law,[155] but in China's Contract Law and Civil Procedure Law. Specifically, Article 128 of the Contract Law (effective as of October 1, 1999) provides that Chinese parties to "foreign-related" contracts may arbitrate their disputes before a Chinese arbitration commission or "other arbitration institutions."[156] Article 271 of the Civil Procedure Law (revised in 2017) also provides that foreign parties can submit their disputes to "China's arbitration institution" or another arbitration institution.[157]

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[153] Weixia Gu, *Arbitration in China*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 77, 113 (Tim Ginsburg & Ali. Shahla eds., Juris Publ'g 3rd ed. 2013) [hereinafter Gu, *Arbitration in China*].

[154] Article 297(2) of the CPL 2023 states, "Where a party applies for enforcement of an effective arbitration award which is made within China's territory, ... Article 304 of the CPL 2023 provides that where a legally effective arbitral award which is made outside China's territory requires recognition and enforcement by a Chinese court. . ..". Civil Procedure Law of the People's Republic of China (Amended in 2023) (promulgated by the Standing Comm. the Nat'l People's Cong., Sept. 1, 2023, effective Jan. 1, 2024) 2023 China Law LEXIS 468 *1, *34. For a more detailed discussion, *see* Nie Yuxin, *Overview of the 2023 Amendments to Chinese Civil Procedure Law,* CONFLICT OF LAWS (2023), https://conflictoflaws.net/2023/overview-of-the-2023-amendments-to-chinese-civil-procedure-law/?print=print.

[155] According to Article 16 of the Arbitration Law, an arbitration agreement must contain the following elements: 1) an expression of the parties' intention to submit their dispute to arbitration; 2) a description of the matters subject to arbitration; and 3) a designated arbitration commission. Arbitration Law, *supra* note 147, at *5.

[156] Contract Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) 1999 China Law LEXIS 2612 *1, *44.

[157] Article 271 of the Civil Procedure Law (revised in 2017) states that "where disputes arising from economic, trade, transport or maritime activities involve foreign parties, if the parties have included an arbitration clause in their contract or subsequently reached a written arbitration agreement that provides that such disputes shall be submitted for arbitration to an arbitration institution of the People's Republic of China for foreign-related disputes or to another arbitration institution, no party may institute an action in a people's court." Civil Procedure Law of the People's Republic of China (Revised in 2017) (promulgated by the Standing Comm. the Nat'l People's Cong., June 27, 2017, effective July 1, 2017) 2017 China Law LEXIS 771 *1, *113.

As for the "foreign-related" factors (*shewai yinsu*), Article 1 of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations (I)" (enacted in 2015 and revised in 2020) provides that the People's Court may determine a civil relationship to be foreign-related in any of the following circumstances: (1) where either party or both parties are foreign citizens, foreign legal persons or other organizations or stateless persons; (2) where the habitual residence of either party or both parties is located outside the territory of the People's Republic of China; (3) where the subject matter is outside the territory of the People's Republic of China; (4) where the legal fact that leads to establishment, change or termination of the civil relationship happens outside the territory of the People's Republic of China; and (5) other circumstances that may be determined as a foreign-related civil relationship.[158]

This law marked a significant advance in the identification of foreign-related factors by introducing a catch-all provision of "other circumstances" in the identification of foreign-related civil and commercial relationships and granting courts more flexibility in handling foreign-related issues.[159] Based on the wording and content of the above stipulations, disputes with a foreign element can be submitted to extraterritorial arbitration.[160] However, Chinese laws do not provide for the validity of extraterritorial arbitration agreements in cases without foreign-related elements. The Supreme People's Court ("SPC") has issued several normative documents, including notices (*tongzhi*) and judicial interpretations (*sifa jieshi*), to address the inadequacies of the Chinese Arbitration Law and emphasize the SPC's dedication to fostering an arbitration-friendly environment.[161] However, China's legal interpretation held that extraterritorial arbitration agreements are invalid in purely domestic cases.[162]

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[158] Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations, Judicial Interpretation No. 1 [2020] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 23, 2020) Sup. People's Ct. Gaz., Oct. 19, 2021, https://english.court.gov.cn/2021-10/19/c_761776.htm [hereinafter Choice of law for Foreign-Related Civil Relationships].

[159] *Id*.

[160] Gu, *Issues of Extraterritorial Arbitration*, *supra* note 6, at 670.

[161] Erie & Prusinowska, *supra* note 148, at 264 (2020). *See also* Fan Kun, *Supreme Courts and Arbitration: China*, 2 BELG. REV. OF ARB. 589, 602 (2019).

[162] Wàijiāo bù/zuìgāo rénmín fǎyuàn/zuìgāo rénmín jiǎncháyuàn/gōng'ān bù/ānquán bù/sīfǎ bù (**外交部/最高人民法院/最高人民检察院/公安部/安全部/司法部**) [Ministry of Foreign Affairs/Supreme People's Court/Supreme People's Procuratorate/Ministry of Public Security/Ministry of Security/Ministry of Justice], *Shèwài shāngshì hǎishì shěnpàn shíwù wèntí jiědá* (**涉外商事海事审判**实务问题解答); Jiāngsū shěng gāojí rénmín fǎyuàn (**江苏省高级人民法院**) [Jiangsu Higher People's Court], Jiāngsū shěng gāojí rénmín fǎyuàn guānyú xiūgǎi "guānyú shěnlǐ

The SPC's 2008 "Answers on Practical Issues in the Adjudication of Foreign-related Commercial and Maritime Cases"[163] held that "Chinese law does not allow domestic parties to refer disputes that do not have a foreign element to foreign arbitration.[164] Therefore, if domestic parties agree to submit their disputes over contracts or property rights and interests that do not have a foreign element to arbitration by a foreign arbitration institution or to ad hoc arbitration in a foreign country, the people's court shall find the relevant arbitration agreement to be invalid."[165] Accordingly, this type of case, because it is not foreign-related under the current Chinese law, cannot be submitted to arbitration outside China.[166]

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mín shāngshì zhòngcái sīfǎ shěnchá ànjiàn ruògān wèntí de yìjiàn" de juédìng (江苏省高级人民法院关于修改《关于审理民商事仲裁司法审查案件若干问题的意见》的决定 [Decision of the Jiangsu Provincial High People's Court on Amending the "Opinions on Several Issues Concerning the Trial of Judicial Review Cases in Civil and Commercial Arbitration," http://www.lsbar.com/law/146127.

[163] Zuìgāo rénmín fǎyuàn mínshì shěnpàn dì sì tíng (最高人民法院民事审判第四庭) [Fourth Civil Tribunal of the Supreme People's Court] Shèwài shāngshì hǎishì shěnpàn shíjiàn wèntí jiědá (yī)(涉外商事海事审判实务问题解答 [Answers to Practical Issues in Foreign Commercial and Maritime Adjudication (I)] (Dec. 2008).

[164] *Id.*

[165] *Id.* Article 83 stipulates that according to Article 257 of the Civil Procedure Law of the People's Republic of China and Article 65 of the Arbitration Law of the People's Republic of China, disputes arising in foreign economic and trade, transportation, and maritime matters can be submitted to domestic arbitration institutions or other arbitration institutions in China through arbitration clauses in contracts or subsequent written arbitration agreements, as provided in Article 257 of the Civil Procedure Law of the People's Republic of China and Article 65 of the Arbitration Law of the People's Republic of China. However, the law does not permit domestic parties to submit disputes without foreign-related elements to foreign arbitration. Therefore, if domestic parties submit disputes concerning contracts or property rights without foreign elements to foreign arbitration institutions for arbitration or engage in interim arbitration abroad, the People's Court should declare such arbitration agreements invalid.

[166] In 2003, the Supreme People's Court drafted "Several Provisions of the Supreme People's Court on the Handling of Foreign-Related Arbitration and Foreign Arbitration Cases." Article 20, paragraph 7 of the draft stipulated, "If domestic parties agree to submit disputes without foreign-related elements to foreign arbitration, upon the application of one party, the people's court should determine the arbitration agreement as invalid." *Id.* However, the draft has since expired, and this provision was not included in the final promulgated Judicial Interpretation of the Arbitration Law. *See* Provisions of the Supreme People's Court on Several Issues

In 2019, the Chinese government issued the "Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone" ("Shanghai FTZ Measures").[167]The Shanghai FTZ Measures opened a door for well-recognized foreign arbitration institutions[168] registered with local Lin-Gang government authorities[169] to administer and provide services for arbitration cases that involve

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concerning Deciding Cases of Arbitration-Related Judicial Review (promulgated by the Sup. People's Ct., Dec. 26, 2017, effective Jan. 1, 2018), China Int'l Com. Ct. (Dec. 26, 2017), https://cicc.court.gov.cn/html/1/219/199/201/782.html. The *Opinions of the Jiangsu Provincial High People's Court on the Judicial Review of Civil and Commercial Arbitration Cases*, issued by the Jiangsu Higher People's Court, also explicitly stipulates that the people's court should treat foreign arbitration of Chinese disputes without foreign-related elements as invalid. Jiāngsū shěng gāojí rénmín fǎyuàn "guānyú shěnlǐ mín shāngshì zhòngcái sīfǎ shěnchá ànjiàn ruògān wèntí de yìjiàn" (江苏省高级人民法院 《关于审理民商事仲裁司法审查案件若干问题的意见》) [Opinions of Jiangsu Provincial High People's Court on Several Issues Regarding Judicial Review of Civil and Commercial Arbitration Cases] (promulgated by Jiangsu Provincial High People's Ct., Aug. 2010), Nov. 15, 2010, https://www.zwjkey.com/fayuanshenpanguifanxingwenjian/jiangsuguiding/2021-02-23/5740.html (China). For a more general example, *see* Wang Shengchang, *Arbitration Agreements and Determination of their Validity*, BEIJING ARB. COMM'N (2002), https://www.bjac.org.cn/news/view?id=631.

[167] Guānyú yìnfā "jìngwài zhòngcái jīgòu zài zhōngguó (shànghǎi) zìyóu màoyì shìyàn qū lín gǎng xīnpiàn qū shèlì yèwù jīgòu guǎnlǐ bànfǎ" de tōngzhī (关于印发《境外仲裁机构在中国（上海）自由贸易试验区临港新片区设立业务机构管理办法》的通知) [Administrative Measures for Business Offices Established by Overseas Arbitration Institutions in Lin Gang Special Area of China (Shanghai) Pilot Free Trade Zone] (promulgated Oct. 21, 2019, effective Jan. 1, 2020) [hereinafter FTZ Measures], https://sfj.sh.gov.cn/2020jcgk_gfxwj/20201102/93cb5f7fd32e48229600d46caef2839f.html (China).

[168] *Id*. art. 6. ("An overseas arbitration institution can apply to establish an operating office in the Lin-Gang FTZ if it meets the following conditions: 1) it is duly established and has existed for more than five years; 2) it has substantial arbitration operations overseas and has received a good reputation internationally; and 3) the principal of the institution has not committed any criminal offense.")

[169] *See An Overview of Lin-gang Special Area of China (Shanghai) Pilot Free Trade Zone*, SHANGHAI MUN. PEOPLE'S GOV'T (Sept. 24, 2019), https://www.shanghai.gov.cn/nw48071/20200824/0001-48071_108690.html. ("With approval by the CPC Central Committee and the State Council, Lin-gang Special Area of China (Shanghai) Pilot Free Trade Zone . . . will establish a relatively institutional system featuring the liberalization and facilitation of investment and trade, set up functional platforms with higher openness, and enable the area to become a business cluster of world-class enterprises.")

foreign-related disputes.[170] Consequently, foreign arbitration institutions in China should not conduct arbitration for any non-foreign-related case, as doing so causes courts to invalidate agreements, set aside arbitral awards, or refuse to enforce them.[171]

In 2016, the SPC achieved notable progress in recognizing foreign elements in extraterritorial arbitration within China's Free Trade Zones ("FTZs"). Article 9(1) of the "Supreme People's Court Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones" ("FTZ Opinions") specifies that agreements between wholly foreign-owned enterprises ("WFOEs") registered within the pilot free trade zone, which stipulate the submission of commercial disputes to extraterritorial arbitration, are valid even if the disputes lack foreign-related factors.[172] This implies that if both parties in a dispute are WFOEs registered within an FTZ, it meets the "foreign element" requirement for the purpose of extraterritorial arbitration. Article 9(2) of the FTZ Opinions provides that if one or both parties are foreign-invested enterprises registered within the FTZ and agree to submit their commercial disputes to extraterritorial arbitration, but later refuse to acknowledge or execute the arbitral award on the grounds of the invalidity of the arbitration agreement, the court will reject such claims.[173] Furthermore, if one party does not raise objections to the validity of the arbitration agreement during the arbitration process but later claims that the dispute lacks foreign-related elements and refuses to recognize or execute the arbitration agreement based on these grounds, the court will reject such claims.[174]

Foreign-invested Enterprises ("FIEs") and Wholly Foreign Owned Enterprises ("WFOEs") incorporated in China have long been classified as "Chinese legal entities."[175] Therefore, unless the case involves other foreign-related factors, a party being an FIE in China does not constitute a foreign-related factor. In this regard, the FTZ Opinions make significant strides by loosening the restrictions on extraterritorial arbitration for FIEs and WFOEs within FTZs.[176] This highlights the PRC's strategic use of the "exceptional" and "experimental"

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[170] FTZ Measures, *supra* note 167 art. 14.

[171] Erie & Prusinowska, *supra* note 148, at 264–65.

[172] Supreme People's Court Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones (promulgated by the Sup. People's Ct., Jan. 9, 2017) China Int'l Com. Ct. (Jan. 9, 2017) [hereinafter FTZ Opinions], https://cicc.court.gov.cn/html/1/219/199/411/807.html.

[173] *Id*.

[174] *Id.*

[175] Bill H. Zhang, *Legal Representatives, Company Supervisors and Their Roles and Responsibilities in Foreign Invested Enterprises in China*, 16-17 KOR. U. L. REV. 13, 19 (2015).

[176] *China Extends Access to Offshore Arbitration*, HSF NOTES BLOGS (Jan. 13, 2017), https://hsfnotes.com/arbitration/2017/01/13/china-extends-access-to-offshore-arbitration/.

nature of the pilot FTZ to liberalize the recognition of foreign-related factors and extraterritorial arbitration in these regions.[177]

In 2018, the SPC issued the "Opinions on Providing Judicial Services and Guarantees for the Comprehensive Deepening of Reform and Opening-Up in Hainan" ("Hainan Opinions"), broadening the scope of entities eligible for extraterritorial arbitration.[178] Article 15 stipulates that agreements to settle civil and commercial cases through extraterritorial arbitration within the Hainan FTZ or Free Trade Port are valid even if they lack foreign-related factors.[179] This indicates that disputes between enterprises registered within the FTZ or Free Trade Port can be resolved through extraterritorial arbitration, regardless of whether any foreign elements are involved in the disputes. This development indicates a move toward aligning Chinese arbitration practices with international standards, as practitioners foresee the potential expansion of liberalization measures beyond pilot FTZs in the near future.[180]

B. *Judicial Treatment of Extraterritorial Arbitration*

1. Data Collection and Case Analysis

The above section reviews the legal framework governing extraterritorial arbitration in China. The current section presents an empirical analysis of mainland judgments pertaining to this matter. Necessary data were collected from reputable case law research databases[181] and authoritative publications by the SPC.[182] The seats of arbitration involved in these cases were Hong Kong, Korea, Singapore, and the UK.[183] The arbitral institutions involved were the Hong Kong

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[177] *Id.*

[178] Zuìgāo rénmín fǎyuàn guānyú wèi hǎinán quánmiàn shēnhuà gǎigé kāifàng tígōng sīfǎ fúwù hé bǎozhàng de yìjiàn (fǎ fā (2018) 16 hào) (最高人民法院关于为海南全面深化改革开放提供司法服务和保障的意见 (法发 (2018) 16号)) [Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Comprehensive Deepening of Reform and Opening-up in Hainan, Fa Fa No. 16 (2018)] (promulgated by the Sup. People's Ct., Aug. 1, 2018, effective Aug. 1, 2018), CLI.3.319287, https://www.pkulaw.com/chl/ded6e0872de24ab7bdfb.html (China).

[179] *Id.*

[180] *Id.*

[181] PKU LAW, http://www.pkulaw.com (last visited Dec. 29, 2024); CHINA JUDGEMENTS ONLINE, http://wenshu.court.gov.cn (last visited Dec. 29, 2024).

[182] Gu, *Issues of Extraterritorial Arbitration, supra* note 6, at 657.

[183] These cases are (2010) Min Er Zhong Zi No. 86; (2012) Min Si Ta Zi No. 2; (2013) Er Zhong Min Te Zi No. 10670; (2015) Ji Li Min Zhong Zi No. 12; (2015) Min Si Ta Zi No. 5; (2017) Hu 02 Min Zhong No. 9941; (2020) Su 05 Zhi Yi No.

International Arbitration Centre, the International Chamber of Commerce ("ICC"), the Korean Commercial Arbitration Board, the SIAC, and the International Cotton Association Ltd.[184]

First, per data published as of January 1, 2024, mainland courts addressed the legal issue of selecting foreign arbitration venues and institutions for disputes without foreign-related elements in nine cases.[185] The courts deemed the arbitration agreements invalid in six of these cases, leading to the unenforceability

131; (2021) Zui Gao Fa Zhi Min Xia Zhong No. 90; (2020) Wan 01 Min Te No. 275.

[184] *Id.*

[185] *Id.*

of the associated arbitral awards.[186] Notably, five of these cases took place before 2018, the time of the issuance of the SPC FTZ Opinions.[187]

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[186] These cases are Zuìgāo rénmín fǎyuàn guānyú jiāngsū hángtiān wàn yuán fēngdiàn shèbèi zhìzào yǒuxiàn gōngsī yǔ ài ěr mǔ fēngnéng yèpiàn zhìpǐn (tiānjīn) yǒuxiàn gōngsī shēnqǐng quèrèn zhòngcái xiéyì xiàolì jiūfēn yī àn de qǐngshì de fù hán (**最高人民法院关于江**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 of the Supreme People's Court on the request for instructions on the case of Jiangsu Aerospace Wanyuan Wind Power Equipment Manufacturing Co., Ltd. and LM Wind Energy Blade Products (Tianjin) Co., Ltd. applying for confirmation of the validity of the arbitration agreement] (promulgated by the Jiangsu Provincial High People's Ct., Aug. 31, 2012) Peking Univ. L. CLI.C.326211424, https://www.pkulaw.com/payz/5b198daf3e97a2771a0202b657ae0ca503afc00ec364fbc2bdfb.html (China) [hereinafter Jiangsu Case]; Běijīng cháolái xīnshēng tǐyù xiūxián yǒuxiàn gōngsī yǔ běijīng suǒwàng zhī xìn tóuzī zīxún yǒuxiàn gōngsī shēnqǐng chéngrèn hé zhíxíng wàiguó zhòngcái cáijué àn (**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 Chaolai Xinsheng Sports Leisure Co., Ltd. and Beijing Suowangzhixin Investment Consulting Co., Ltd. on the application for recognition and enforcement of a foreign arbitral award], Peking Univ. L. CLI.C.36082223 (Beijing Second Intermediate People's Ct., Jan. 20, 2014) (China) [hereinafter Sports Leisure]; Měi lǚ bóhǎi lǚ yè yǒuxiàn gōngsī yǔ nèiménggǔ huò méi hóng jùn lǚ biǎn dìng gǔfèn yǒuxiàn gōngsī shàngsù àn (**美**铝渤海铝业有限公司与内蒙古霍煤鸿骏铝扁锭股份有限公司上诉案) [Appeal case between Alcoa Bohai Aluminum Co., Ltd. and Inner Mongolia Huomei Hongjun Aluminum Flat Ingot Co., Ltd.] Peking Univ. L. CLI.C.16341109 (Hebei Provincial High People's Ct., March 9, 2015) (China) [hereinafter Alcoa Bohai]; Ài ěr shídài yīliáo kējì (běijīng) gǔfèn yǒuxiàn gōngsī yú lǐngxiān fǎngshēng yīliáo qìxiè (shànghǎi) yǒuxiàn gōngsī mǎimài hétóng jiūfēn èr (爱耳时代医疗科技(**北京**)**股份有限公司与**领先仿生医疗器械(**上海**)**有限公司**买卖合同纠纷二审民事裁定书) [Dispute over the sales contract between Aear Times Medical Technology (Beijing) Co., Ltd. and Leading Bionic Medical Devices (Shanghai) Co., Ltd. II] Peking Univ. L. CLI.C.61684777 (Shanghai Second Intermediate People's Ct., Nov. 23, 2017) (China) [hereinafter Aear Times]; Zhǎnxùn tōngxìn (shànghǎi) yǒuxiàn gōngsī yǔ hóng ruǎn kējì gǔfèn yǒuxiàn gōngsī jìsuànjī ruǎnjiàn zhùzuòquán xǔkě shǐyòng hétóng jiūfēn guǎnxiá quán (**展**讯通信(**上海**)**有限公司与虹**软科技股份有限公司计算机软件著作权许可使用合同纠纷管辖权异议上诉案) [Jurisdiction over the computer software copyright licensing contract dispute between Spreadtrum Communications (Shanghai) Co., Ltd. and ArcSoft Technology Co., Ltd.] Peking Univ. L.

Second, the courts in all of these cases clarified that according to the SPC Opinions and the provisions of the Civil Procedure Law, parties may refer only civil and commercial cases with foreign elements to extraterritorial arbitration.[188] If the parties agree to refer disputes without foreign elements to a foreign arbitration institution and choose a foreign place for arbitration, the courts will invalidate the arbitration agreement.[189]

Nevertheless, the *Siemens International Trading (Shanghai) Co Ltd v. Shanghai Golden Landmark Co Ltd)* ("the Siemens case") decision in 2015, issued by the Shanghai First Intermediate People's Court, represents a significant milestone in China's liberal acceptance of extraterritorial arbitration.[190] The court made a ground-breaking interpretation of "any other circumstances" that constitute a "foreign-related" legal relationship in extraterritorial arbitration and consequently recognized the legal validity of the foreign arbitral award in the dispute between the parties.[191] This landmark ruling exceeded the constraints associated with identifying and acknowledging foreign elements and stands as a highly influential arbitration case in China.[192]

The dispute in this case arose from a sale and purchase contract between two WFOEs in the Shanghai FTZ.[193] The arbitration agreement provided that any

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CLI.C.325009399 (Sup. People's Ct., April 23, 2021) (China) [hereinafter Spreadtrum].

[187] These cases are Jiangsu Case, *supra* note 186; Sports Lesiure, *supra* note 186; Alcoa Bohai, *supra* note 186; Aear Times, *supra* note 186.

[188] See Jiangsu Case, *supra* note 186; Sports Leisure, *supra* note 186; Alcoa Bohai, *supra* note 186; Spreadtrum, *supra* note 186.

[189] Spreadtrum, *supra* note 186.

[190] *First Application for Recognition and Enforcement of Foreign Arbitration Case Concluded in Free Trade Zone*, SOHU NEWS (Jan. 1, 2016), https://www.sohu.com/a/51743389_117927.

[191] *Id.*; Siemens International Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd., (2013) Hu Yi Zhong Min Ren (Wai Zhong) Zi Di 2 Hao (promulgated by the First Intermediate People's Ct. of Shanghai, Nov. 27, 2015), https://cicc.court.gov.cn/html/1/219/199/204/766.html.

[192] SOHU NEWS, *supra* note 190.

[193] *See* (2015 Nián) zuìgāo rénmín fǎyuàn guānyú xīménzǐ guójì màoyì (shànghǎi) yǒuxiàn gōngsī shēnqǐng chéngrèn yǔ zhíxíng wàiguó zhòngcái cáijué yī àn de qǐngshì de fù hán ((2015年) 最高人民法院关于西门子国际贸易(上海)有限公司申请承认与执行外国仲裁裁决一案的请示的复函) [Supreme People's Court's Reply to the Request for Recognition and Enforcement of Foreign Arbitration Award by Siemens International Trading (Shanghai) Co., Ltd. (2015) Min Si Ta Zi No. 5] (promulgated by the Sup. People's Ct., Oct. 10, 2015, effective Oct. 10, 2015), https://m.055110.com/law/1/13578.html [hereinafter Reply Foreign Arbitration Award]; *Siemens International Trading (Shanghai) Co.,*

disputes would be arbitrated in Singapore under the administration by the SIAC.[194] The purchaser initiated arbitration proceedings against the seller in Singapore in 2017 and obtained the arbitral award.[195] The seller contested the enforcement of the arbitral award before the Shanghai First Intermediate People's Court, arguing that Chinese law did not permit extraterritorial arbitration in cases without a "foreign element."[196]

The court emphasized that although both parties were Chinese legal entities, they were WFOEs situated within the Shanghai FTZ.[197] The court highlighted the significant presence of foreign elements in these entities, including their close association with foreign investors in terms of capital sources, ownership interests, and business decision-making.[198] The court underlined the importance of recognizing and considering these foreign elements, especially in light of ongoing reforms to promote investment and trade within the FTZ.[199]

The court also sought guidance from the SPC on the matter. In a reply letter entitled "Reply to the Consultation on the Application for Recognition and Enforcement of Foreign Arbitration Awards by Siemens International Trading (Shanghai) Co., Ltd.,"[200] the SPC found that this case involved "other situations that can be deemed as involving foreign-related civil relations" and aligned with the goal of promoting the role of international commercial and maritime arbitration in the Belt and Road Initiative ("BRI").[201] The Vice-President of the Shanghai First Intermediate People's Court highlighted that this ruling exemplified the court's open stance toward the internationalization of commercial arbitration.[202]

Some scholars hold the view that the SPC FTZ opinions elevated the individual case ruling regarding extraterritorial arbitration and foreign elements present in the Siemens case[203] to a judicial interpretation of broad applicability.[204]

Ltd. (First Intermediate People's Ct. of Shanghai, Nov. 27, 2015), https://cicc.court.gov.cn/html/1/219/199/204/766.html.

[194] *Siemens International Trading (Shanghai) Co., Ltd*. (First Intermediate People's Ct. of Shanghai, Nov. 27, 2015), https://cicc.court.gov.cn/html/1/219/199/204/766.html.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.;* Zhu Quanchun, *Shanghai FTZ: 'First in the Nation and Benchmark for the Whole Nation'*, EXPLORE SHANGHAI (Sept. 29, 2023), https://service.shanghai.gov.cn/sheninfo/specialdetail.aspx?Id=900a5866-2f29-42cc-ac0a-690d0ba4a3be.

[200] Reply Foreign Arbitration Award, *supra* note 193.

[201] *Id*.

[202] SOHU NEWS, *supra* note 190.

[203] This case is further analyzed in the following section 4.2.

[204] Gu, *Issues of Extraterritorial Arbitration*, *supra* note 6, at 652-53.

However, there are certain inconsistencies in the practical application of the SPC FTZ Opinions. For example, in *Kunshan Liyi Textile Co., Ltd. v. Glencore China Ltd*.,[205] only one party was a registered WFOE in the Shanghai FTZ.[206] The parties agreed to entrust International Cotton Association Ltd. with the arbitration proceedings and designated the UK as the seat of arbitration.[207] The Suzhou Intermediate People's Court upheld the arbitration agreement's validity.[208] In *Spreadtrum Communications (Shanghai) Co., Ltd. v. Horizon Software Co., Ltd*.,[209] the SPC held that the parties could not choose Singapore for arbitration because the dispute lacked foreign-related elements.[210] The SPC emphasized that the FTZ opinions on recognizing disputes involving WFOEs as foreign-related disputes are subject to stringent application conditions: both parties must be registered within the FTZs and must be WFOEs.[211]

Since the issuance of the Siemens case[212] decision and the 2016 FTZ Opinions, Chinese courts have shown a growing inclination towards a more flexible approach in determining "other circumstances involving foreign-related cases" to validate extraterritorial arbitration.[213] In *Westmark Engineering (China) Co.,*

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[205] Kūnshān lì yì fǎngzhī yǒuxiàn gōngsī yǔ jiā néng kě yǒuxiàn gōngsī guónèi fēi shèwài zhòngcái cáijué zhíxíng cáidìng shū (**昆山立益**纺织有限公司与嘉能可有限公司国内非涉外仲裁裁决执行裁定书) [Ruling on the Enforcement of Domestic Non-Foreign Arbitration Awards between Kunshan Liyi Textile Co., Ltd. and Glencore Co., Ltd.] Peking Univ. L. CLI.C.314361471 (Suzhou Intermediate People's Ct. of Jiangsu Province, Dec. 16, 2020) (China).

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] Zhǎnxùn tōngxìn (shànghǎi) yǒuxiàn gōngsī yǔ hóng ruǎn kējì gǔfèn yǒuxiàn gōngsī jìsuànjī ruǎnjiàn zhùzuòquán xǔkě shǐyòng hétóng jiūfēn guǎnxiá quán (**展**讯通信(**上海**)**有限公司与虹**软科技股份有限公司计算机软件著作权许可使用合同纠纷管辖权异议上诉案) [Jurisdiction over the computer software copyright licensing contract dispute between Spreadtrum Communications (Shanghai) Co., Ltd. and ArcSoft Technology Co., Ltd.] Peking Univ. L. CLI.C.325009399 (Sup. People's Ct., April 23, 2021) (China).

[210] *Id*.

[211] *Id*.

[212] Reply Foreign Arbitration Award, *supra* note 193.

[213] Xī mǎkè gōngchéng (zhōngguó) yǒuxiàn gōngsī, ānhuī tiān dà tóng yè yǒuxiàn gōngsī shēnqǐng quèrèn zhòngcái xiéyì xiàolì qítā mínshì cáidìng shū (**西**马克工程(**中国**)**有限公司、安徽天大**铜业有限公司申请确认仲裁协议效力其他民事裁定书) [Application by SMS Engineering (China) Co., Ltd. and Anhui Tianda Copper Co., Ltd. to confirm the validity of the arbitration agreement and

Ltd. v. Anhui Tianda Copper Co., Ltd., two Chinese companies contracted for domestic supply and services, agreed to abide by the dispute resolution clause of the main corresponding contract.[214] The main contract, signed by Anhui Tianda Copper Co., Ltd., and Westmark GmbH (a German company and also the parent company of Westmark Engineering (China) Co., Ltd.), stipulated arbitration in Hong Kong.[215] The Intermediate People's Court of Hefei City determined that the main contract and the subsidiary contract were closely linked in content, performance, and dispute resolution clauses.[216] Thus, the court rejected the applicant's argument that the parties could not arbitrate in Hong Kong due to the absence of foreign elements and confirmed the validity of the extraterritorial arbitration clause.[217]

Interestingly, in *Shandong Hongda Chemical Co., Ltd. v. Veolia Energy Management (Heze) Co.*,[218] the Beijing Fourth Intermediate People's Court emphasized that arbitral jurisdiction is a power conferred by law and that there is no provision in Chinese law that allows parties to submit disputes without a foreign element to arbitration by an arbitral institution outside China.[219] This is inconsistent with international practice, which indicates that the primary principle for determining the seat of arbitration is party autonomy and that the parties' consent underpins the formation of arbitral jurisdiction.[220] A noticeable trend is that most national legal orders are abandoning the idea that the source of arbitral awards' validity necessarily lies in the legal order of the seat, moving towards recognizing the existence of an arbitral legal order.[221]

C. *Policy Implications of China's Approach to Extraterritorial Arbitration*

Extraterritorial arbitration in cases without foreign elements arises from China's increasing openness and internationalization. The Chinese government aims to oversee arbitration outcomes through regulated institutions and administrative influence, indirectly regulating the economy, domestic market, and foreign trade and investment.[222] Nonetheless, it is unrealistic for the Chinese government to effectively supervise the process and outcomes of extraterritorial

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other civil rulings] Peking Univ. L. CLI.C.407382185 (Hefei Intermediate People's Ct. of Anhui Province, Dec. 28, 2020) (China).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] Shandong Hongda Chemical Co., Ltd. v. Veolia Energy Management (Heze) Co., Beijing 04 Minte 636 Hao (2021).

[219] *Id.*

[220] Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent,'* 24 ARB. INT'L 199 (2008).

[221] Gaillard, *supra* note 59, at 29–30.

[222] Gu, *Issues of Extraterritorial Arbitration*, *supra* note 6, at 670.

arbitration.[223] The Chinese government fears that arbitrating domestic disputes in foreign venues may lead to unpredictable outcomes, potentially undermining social and economic stability and harming China's evolving market economy.[224] Judge Zhang Jian of the Shanghai Maritime Court contends that the prevailing view in current judicial practice is to prohibit overseas arbitration for domestic cases, safeguarding judicial sovereignty.[225]

However, such considerations seem archaic in the current landscape of an increasing globalization of the arbitration services market and are inconsistent with widely embraced international arbitration practices. Arbitration serves as a private means of dispute resolution; therefore, party autonomy (including autonomy in the selection of an arbitration seat), rather than judicial sovereignty, is paramount.[226] Moreover, restricting extraterritorial arbitration is neither necessary or appropriate, as more effective legal mechanisms exist to safeguard fundamental values and public policy and to prevent parties from evading mandatory local laws through arbitration.[227] For example, arbitral award recognition and enforcement procedures in the state where the parties' joint seat is situated serve as a vital safeguard to invalidate arbitral awards that contravene public policy and public interest.[228] Ultimately, a foreign arbitral award holds no legal validity within the jurisdiction of the parties' joint seat until recognized.[229]

On the other hand, limitations on domestic cases' qualification for extraterritorial arbitration constrain Chinese enterprises' outward expansion under the BRI and Going Global initiatives.[230] Initially, concerns focused on the potential asset losses for state-owned enterprises during the early stages of China's

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[223] *Id*.

[224] *Id*.

[225] Zhòngcái xiéyì zhōng "fēidiǎn xíng shèwài yīnsù" de rèndìng (仲裁协议中"非典型涉外因素"的认定), [Recognition of "Non-Typical Foreign-Related Factors" in Arbitration Agreements] (promulgated by Zhang Jian of the Shanghai Maritime Court (PRC) Apr. 11, 2019), https://shhsfy.gov.cn/hsfyytwx/hsfyytwx/spdy1358/jpal1435/2019/04/11/2c93809965f0bed60165f17c0a260209.html?tm=1573197733294.

[226] Moses Oruaze Dickson, *Party Autonomy and Justice in International Commercial Arbitration*, 60 INT 'L J. L. & MGMT. 114, 120-21 (2018); *see also* Bělohlávek, *supra* note 2, at 263-64.

[227] Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO STATE J. ON DISP. RESOL. 365, 368 (1985).

[228] *Id.*

[229] Bělohlávek, *supra* note 2, at 267.

[230] Gu, *Issues of Extraterritorial Arbitration*, *supra* note 6, at 668.

economic reforms.[231] For example, apprehension arose over the recognition and enforcement of extraterritorial arbitral awards that could lead to the auctioning of or execution of judgments concerning state-owned assets abroad.[232]

However, such limitations are not conducive to the global reach of Chinese companies in the modern era. India's approach, as demonstrated by the PASL case in 2021, represents a significant advancement in facilitating domestic parties' engagement in extraterritorial arbitration. This development is advantageous for Indian businesses, expanding the range of available venues in which to resolve disputes and thereby empowering their international branches to conclude contracts that include offshore arbitration options in jurisdictions such as Singapore, London, and Hong Kong.[233] China should consider instituting similar reforms to protect and support its enterprises in their global expansion efforts under the Going Global strategy.

The SPC Opinions and recent cases demonstrate an increasing tendency toward a more flexible approach in defining "other circumstances involving foreign-related factors" and relaxing restrictions on extraterritorial arbitration.[234] However, the continued disallowance of extraterritorial arbitration for domestic cases in China must be acknowledged.[235] By comparison, prevalent international arbitration practice, based on the party autonomy principle, allows extraterritorial arbitration in domestic disputes, which serves as the cornerstone of arbitration.[236] China's approach not only creates a disparity between itself and many renowned arbitration hubs such as the UK but also lags behind emerging Asian arbitration hubs such as Singapore and India.[237] This approach may reduce China's competitiveness in both the Asian global market.

As the SPC and various arbitration commissions work to "internationalize" China's arbitration mechanism,[238] such as by updating procedural rules and

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[231] Shigeo Kobayashi et al., *The "Three Reforms" in China: Progress and Outlook*, 45 SAKURA INST. OF RSCH., INC. (Sept. 1999).

[232] *Id.*

[233] Steven P. Finizio & Shanelle Irani, *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd: The Indian Supreme Court Clarifies that Two Indian Parties Can Choose a Foreign Arbitral Seat*, WILMERHALE: INTERNATIONAL ARBITRATION LEGAL DEVELOPMENTS (May 25, 2021), https://www.wilmerhale.com/en/insights/blogs/international-arbitration legal-developments/20210525-pasl-wind-solutions-pvt-ltd-v-ge-power-conversion-india-pvt-ltd.

[234] *Id.*

[235] Detailed examples have been analyzed in section 4.

[236] Detailed examples have been analyzed in section 3.

[237] Detailed examples have been analyzed in section 3.

[238] Internationalization of China's arbitration mechanism is a significant aspect of China's "Foreign-Related 'Rule of Law'" reform, which was launched by the Chinese Communist Party (CCP) in 2020 to modernize the intersection between

establishing bespoke mechanisms,[239] the possible liberalization of extraterritorial arbitration cannot be overlooked. Arbitration assumes a strategic role in the development of China's BRI and "foreign-related rule of law" campaign.[240] China should consistently align its practices with international arbitration norms to bolster the competitiveness and influence of China's arbitration mechanism on the global stage. Significantly, loosening constraints on extraterritorial arbitration signifies a transformative leap for China toward aligning with internationally recognized arbitration standards and prioritizing party autonomy. This alignment enhances China's prestige in international dispute resolution.

In summary, China must advance its intuitions to regulate extraterritorial arbitration in the modern era. Currently, the SPC and the Department of Justice in Hong Kong are exploring ways to partially relax restrictions on extraterritorial arbitration in the GBA.[241] This would allow mainland Chinese parties to choose Hong Kong as their arbitration venue and apply Hong Kong law in domestic cases.[242] Cooperation between Hong Kong and mainland China on extraterritorial arbitration of disputes without foreign-related factors in the GBA can serve as a pilot initiative for China's lifting its limitations on extraterritorial arbitration in domestic cases.

V. PROSPECTIVE BREAKTHROUGHS IN EXTRATERRITORIAL ARBITRATION IN

Chinese domestic law and foreign and international law. For more detail, *see* Matthew S. Erie, *Foreign Policy Implications for China's 'Foreign-Related "Rule of Law,"'* 67 ORBIS 565, 570 (2023).

[239] *Id.*

[240] Pamela K. Bookman & Matthew S. Erie, *Experimenting with International Commercial Dispute Resolution*, 115 AM. J. OF INT'L L. 5, 8 (2021); Jiākuài tuījìn shèwài fǎzhì jiànshè fúwù gāo zhìliàng fāzhǎn hé gāo shuǐpíng kāifàng (加快推进涉外法治建设 服务高质量发展和高水平开放) [Accelerate the Construction of Foreign-related Rule of Law to Serve High-quality Development and High-level Opening Up] (promulgated by Party Committee of the Ministry of Justice of the Communist Party of China, April 2, 2024), https://www.moj.gov.cn/pub/sfbgw/qmyfzg/202406/t20240604_499868.html; Lǐkějìng (李可婧) [Li Kejing*], Sīfǎ bù: Dǎzào miànxiàng quánqiú de guójì shāngshì zhòngcái xīn mùdì de* (司法部：打造面向全球的国际商事仲裁新目的地) [*Ministry of Justice: Creating a New Destination for International Commercial Arbitration Facing the World*], YĀNGSHÌ XĪNWÉN (央视新闻) [CCTV NEWS] (April 9, 2024) https://content-static.cctvnews.cctv.com/snow-book/index.html?item_id=14566903646784169841.

[241] Dep't. of Just., Gov. of the H.K. Special Admin. Region, Hong Kong: Deal-making and Dispute Resolution Hub 1, 13 (April 2019), https://www.doj.gov.hk/en/publications/pdf/hk_deal_making_n_dispute_resolu_hub_en.pdf.

[242] *Id.*

CHINA

A. *Arbitration: Strategic Significance and Comparative Advantages in Hong Kong–Mainland Legal Convergence*

Thanks to its advanced common law system and robust financial flows in international commercial transactions, Hong Kong became a prominent international arbitration hub in the Asia–Pacific region well before China's resumed sovereignty in 1997.[243] To maintain Hong Kong's competitive advantage in international dispute resolution, its government implemented various measures, such as incorporating the UNCITRAL Model Law in its 1996 Arbitration Law amendment to perfect its arbitration system[244] and allocating office space at the Legal Hub to local and international dispute resolution institutions.[245] Moreover, the Hong Kong judiciary is renowned for its unwavering support of international arbitration.[246] The Chinese government has actively bolstered Hong Kong's position as a prominent international legal and dispute resolution service center in the Asia–Pacific region.[247] The BRI[248] and the GBA Development Plan[249]

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[243] Lin Feng, *Hong Kong's Role in the BRI Dispute Resolution: Limits of Law and Power of Politics*, 8 CHINESE J. OF COMPAR. L. 224, 225 (2020).

[244] Hong Kong Arbitration Ordinance (1996) Cap. 341, 22 § 34C (amended in 1996 and effective from June 27, 1997, Section 34C stipulates the "Application of UNCITRAL Model Law."); *See also* Gu Weixia, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT'L L. 481, 500 (2005).

[245] Dep't. of Just., Gov. of the H.K. Special Admin. Region, *supra* note 241, at 16.

[246] *See also* SAMUEL WONG & C.K. KWONG, HONG KONG ARBITRATION JUDGMENTS AND COMMENTARIES, 20-35, (Samuel Wong, CK Kwong JP, Bokhary Kemal, Wilson Lui, eds., 2023).

[247] Zhao & Chen, *supra* note 21, at 577-78.

[248] Hong Kong's Secretary for Justice Rimsky Yuen envisioned that the launch of the "One Belt, One Road" initiative would provide opportunities for outward expansion of the local legal and arbitration sectors. *See* Press Release, H.K. Dep't of Just., Secretary for Justice Promotes Hong Kong's Legal and Dispute Resolution Service in Beijing (Aug. 18, 2015), http://www.doj.gov.hk/mobile/eng/public/pr/20150818_pr.html.

[249] H.K. GREATER BAY AREA DEV. OFF., CONST. AND MAINLAND AFF. BUREAU, OUTLINE DEVELOPMENT PLAN FOR THE GUANGDONG-HONG KONG-MACAO GREATER BAY AREA (2019), https://www.bayarea.gov.hk/filemanager/en/share/pdf/Outline_Development_Plan.pdf (describing the plan to increase cooperation among GBA cities and SARs to maximize the region's strengths and enhance its international competitiveness, Hong Kong was given a specific role: enhancing its status as an international financial center and establishing itself as a center for international legal and dispute resolution services).

created golden opportunities for the outward expansion of local legal and arbitration sectors and strengthened Hong Kong's role in international arbitration.[250]

Given its significance in economic development and global governance, international arbitration has become a strategic high ground that China seeks to seize.[251] Since the dawn of the Xi era, Chinese leadership has emphasized enhancing China's influence on global governance.[252] For example, the Chinese Communist Party published the "Plan for the Construction of China under Rule of Law (2020–2025)" in 2020, which emphasized "foreign-related rule of law and legal service."[253] Accordingly, China proactively engages in the arbitration arena and develops homegrown Chinese dispute resolution mechanisms to facilitate global governance and onshore commercial and investment disputes.[254] China's "Five-Year Rule of Law Plan (2020–2025)" stresses "promoting cooperation in international economic law and cross-border legal service, and the establishment of joint arbitration mechanisms."[255] Likewise, the SPC has categorically endorsed international arbitration for settling BRI-related disputes.[256] The establishment of an international commercial arbitration center in the GBA can serve the BRI project by resolving such cross-border disputes and providing a diversified dispute resolution platform.[257] One major objective of the GBA is to serve the development of BRI countries by cultivating new strengths in international cooperation, which creates opportunities for overseas investment and cooperation between China and other BRI countries in infrastructure

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[250] *Id.*

[251] Bookman & Erie, *supra* note 240, at 8.

[252] Yan Xuetong, *From Keeping a Low Profile to Striving for Achievement*, 7 CHINESE J. INT'L POL. 153, 166 (2014); Camilla T.N. Sørensen, *The Significance of Xi Jinping's 'Chinese Dream' for Chinese Foreign Policy: From 'Tao Guang Yang Hui' to 'Fen Fa You Wei*, 3 J. CHINA INT'L REL. 53, 73 (2015).

[253] *Zhōnggòng zhōngyāng yìnfā "fǎzhì zhōngguó jiànshè guīhuà (2020-2025 nián)" (中共中央印发《法治中国建设规划(2020－2025年)》) [The Central Committee of the Communist Party of China issued the "Plan for the Construction of China Under the Rule of Law (2020-2025)"],* Xīnhuá shè (新华社) [Xinhua News Agency] (Jan. 10, 2021), https://www.gov.cn/zhengce/2021-01/10/content_5578659.htm.

[254] Matthew S. Erie, *Mapping the Cosmopolitan Legal Imaginary: Recent Chinese Scholarship on Dispute Resolution*, 70 AM. J. COMP. L. 210, 210-11 (2022).

[255] *The Central Committee of the Communist Party of China Issued the "Plan for the Construction of China Under the Rule of Law (2020-2025)," supra* note 253.

[256] Supreme People's Court Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts (promulgated by the Sup. People's Ct., June 16, 2015), https://english.court.gov.cn/2021-10/23/c_761781.htm.

[257] Zhao & Chen, supra note 21, at 556.

construction.[258] Against this backdrop, China shows a growing inclination to modernize its domestic arbitration regime and departure from its previous conservative stance on international arbitration.[259]

Legal convergence in the GBA will manifest through the harmonization of arbitration frameworks and strengthened cooperation in cross-border arbitration.[260] The cooperation between mainland China and Hong Kong in arbitration has surpassed judicial collaboration in courts.[261] The 1999 "Agreement Concerning the Mutual Enforcement of Arbitral Awards Between Hong Kong and Mainland China"[262] is one of the earliest judicial assistance documents signed by the SPC and the Department of Justice of Hong Kong.[263] It preserves the pre-unification practice under the New York Convention and enhances Hong Kong's standing in the arbitration world.[264] Furthermore, based on the New York Convention and the "Closer Economic Partnership Arrangement," Hong Kong generally recognizes and enforces mainland arbitral awards, rarely denying recognition or enforcement.[265] The Hong Kong judiciary adopts a highly cautious and rigorous approach in reviewing mainland awards under the "public policy" mechanism and has established comprehensive relevant precedents and rules.[266] In addition, the 2019 Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region allows mainland courts to provide interim measures for arbitrations seated in Hong Kong as per mainland laws and regulations[267] and is a remarkable accomplishment in

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[258] *Id*. at 562.

[259] Monika Prusinowska, *China as a Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes*, 10 TSINGHUA CHINA L. REV. 33, 35-38 (2017).

[260] Zhao & Chen, supra note 21, at 562-63.

[261] Fu Hualing (傅华伶), Xianggang he Neidi de Sifa Xiezhu (香港和内地的司法协助) [Judicial Assistance between Hong Kong and Mainland China], GANGDA ZHONGGUO FA ZHONGXIN (港大中国法中心) [HKU CHINA LAW CTR.] (Apr. 24, 2018), https://mp.weixin.qq.com/s/GZ9d4ZAeuJRVQ1tB2FRPdg.

[262] Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards Between Mainland China and the Hong Kong Special Administrative Region, June 21, 1999, http://www.legislation.gov.hk/intracountry/eng/pdf/mainland-mutual2e.pdf [hereinafter Mutual Arrangement].

[263] *Id.*

[264] Xian Chu Zhang, *The Agreement Between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 H.K. L. J. 463, 473-74 (1999).

[265] Fu Hualing, *supra* note 261.

[266] *Id*.

[267] Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the

inter-regional judicial cooperation.[268] It establishes Hong Kong as the only non-mainland jurisdiction where parties to an arbitration administered by designated arbitration institutions can request the implementation of interim measures by mainland courts,[269] which significantly enhances the effectiveness of Hong Kong arbitration processes.[270] In comparison, mutual judicial assistance between mainland China and Hong Kong is currently limited to the recognition and enforcement of judgments, with no arrangements in place for pre-trial or trial preservation measures.[271]

Admittedly, the divergence between the mainland and Hong Kong judicial systems and underlying distrust have partly impeded the progress of mutual judicial cooperation, in particular in criminal judicial cooperation.[272] However, civil and commercial fields display low levels of political sensitivity and align with the common interests of both mainland China and Hong Kong.[273] For Hong Kong, cooperation in arbitration with the mainland not only facilitates exchanges between their respective arbitration and legal communities but also enhances Hong Kong's competitiveness in legal and dispute resolution services in the Asia–Pacific region.[274] This cooperation retains arbitration business in Hong

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Hong Kong Special Administrative Region, (April 2, 2019), https://www.doj.gov.hk/en/mainland_and_macao/pdf/arbitration_interim_e.pdf.

[268] For more details on the impact of the Mutual Arrangement, *see* Matthew S. Erie, *Viewing the "Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" as a Window onto the New Legal Hubs*, CONFLICT OF LAWS.NET (April 8, 2019), https://conflictoflaws.net/2019/viewing-the-arrangement-concerning-mutual-assistance-in-court-ordered-interim-measures-in-aid-of-arbitral-proceedings-by-the-courts-of-the-mainland-and-of-the-hong-kong-special-administrative/.

[269] Raymond Gao*, Bridging an Access-to-Justice Gap for International Commercial Dispute Resolution: Recent Developments of Interim Measures in Cross-Border Chinese Arbitration*, 59 COLUM. J. TRANSNAT'L L. 608, 675 (2020).

[270] *Id.*

[271] Hao Zhan et. al., *Pre-Arbitration Asset Preservation in Mainland China for Hong Kong Seated Arbitration: HKIAC Practices* Explored, ANJIE BROAD**:** CHINA L. VISION **(**July 23, 2024), https://www.chinalawvision.com/2024/07/arbitration-and-litigation/pre-arbitration-asset-preservation-in-mainland-china-for-hong-kong-seated-arbitration-hkiac-practices-explored/.

[272] Since the handover of Hong Kong, discussions have arisen in Hong Kong society regarding its relationship with the central government, the extent of its autonomy, and the progress of democratization. These discussions have led to politicization of certain issues surrounding judicial cooperation between the two regions. *See* Fu Hualing, *supra* note 261.

[273] *Id*.

[274] *See* Annie X. Li, *Challenges and Opportunities of Chinese International Arbitral Institutions and Courts in a New Era of Cross-Border Dispute Resolution*, 38 B.U. INT'L L. J. 352, 365-66 (2020); *see also* Beiping Chu & Wei Wang,

Kong, instead of diverting it to competing international centers, and solidifies Hong Kong's position as a leading international dispute resolution center.[275] For the central government, bolstering Hong Kong's role as an international gateway offers strategic benefits in expanding and exerting China's influence in international dispute resolution and global governance.

The convergence of arbitration-related legal frameworks is reflected in the cooperation among GBA arbitration institutions.[276] However, in cross-border arbitration, the free circulation and recognition of arbitral awards in the relevant jurisdictions directly impact parties' choice of arbitration.[277] Despite this solid foundation of cross-border arbitration cooperation, there remain significant challenges. One pressing issue pertains to whether Hong Kong–funded enterprises can initiate arbitration in Hong Kong for disputes that solely involve mainland-related subject matter and the validity of such arbitration agreements.[278] This is also a significant issue in regional judicial cooperation.[279]

B. *Current Statutes of Extraterritorial Arbitration Between the Mainland and Hong Kong Under GBA Legal Convergence*

Under the GBA national strategy,[280] legal integration between mainland China and Hong Kong has increased, with gradual convergence in many aspects of judicial cooperation and dispute resolution.[281] Harmonization of arbitration frameworks and strengthened cooperation among arbitration institutions are linchpins of legal convergence in the GBA.[282] The GBA Outline emphasizes strengthening collaboration and cooperation among arbitration institutions in Guangdong province, Hong Kong, and Macao, to promote Hong Kong as the center for international legal and dispute resolution services and foster partnerships enhancing the influence and competitiveness of China's dispute resolution

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Building an International Arbitration Hub: China's Competitiveness and Direction, 9 FRONTIERS IN MARINE SCI. 5, 14 (2022); *see also* Xiaobing Xu & George D. Wilson, *One Country, Two–International Commercial Arbitration–Systems*, 17 J. INT'L ARB. 47, 63 (2000).

[275] *See* Xu & Wilson, *supra* note 274, at 9.

[276] Zhao & Chen, *supra* note 21, at 562-63, 576.

[277] *Id*.

[278] *See* Si, *supra* note 6.

[279] *Id*.

[280] *See generally,* H.K. GREATER BAY AREA DEV. OFF., CONST. AND MAINLAND AFF. BUREAU, *supra* note 249 (GBA comprises nine mainland Chinese cities of Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen and Zhaoqing and Special Administrative Regions (SARs) of Hong Kong and Macao and ranks as world's 12th largest economy; "Outline Development Plan" for GBA seeks to increase cooperation among cities and SARs to maximize region's strengths and enhance international competitiveness).

[281] Zhao & Chen, *supra* note 21, at 572.

[282] *Id*. at 567-68.

market.[283] The launch of the BRI also generated political momentum toward legal convergence and the harmonization of international commercial arbitration rules in China, motivated by the goal of lowering commercial transactional costs and ensuring stability, consistency, and predictability in dispute resolution.[284]

The liberalization of extraterritorial arbitration within GBA is a pivotal step toward promoting legal convergence and economic prosperity in the GBA. First, expanding the range of available arbitration services to meet the practical needs of foreign parties will help to attract more foreign enterprises to invest in mainland China. The National Bureau of Statistics conducted a questionnaire survey on the adoption of Hong Kong arbitration by enterprises in Qianhai and 81.69% of enterprises reported that adopting Hong Kong's laws and its dispute resolution mechanism grants vital confidence to Hong Kong residents, capital, and enterprises when investing in the Qianhai FTZ.[285] Arguably, the availability of Hong Kong's top-notch arbitration services also provides a sense of reassurance for many Hong Kong–funded enterprises operating in mainland China.[286] This

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[283] H.K. GREATER BAY AREA DEV. OFF., CONST. AND MAINLAND AFF. BUREAU, *supra* note 249, at ch. 3 sec. 2, ch. 10.

[284] *See* Gu, *China's Belt and Road Development*, *supra* note 151, at 1318-20, 1323-24.

[285] *See* Zhou Bin et. al., *A Small Step in the Rule of Law in Qianhai Boosts Business Confidence with a Big Step*, CHINA DAILY (Dec. 16, 2016), https://china.chinadaily.com.cn/2016-12/16/content_27690667.htm.; *see also* Yu Lu, *Creating the "Take-a-Bag and Head North" Dream Factory, Launching the "One-Stop Service" Express Train: Hong Kong Youth Rushing to Qianhai for Entrepreneurship*, PEOPLE'S DAILY (China) (Aug. 2, 2017), http://paper.people.com.cn/rmrbhwb/page/2017-08/02/04/rmrbhwb2017080204.pdf.

[286] "In the 2023 Policy Address, the Department of Justice introduced another key measure to support the development of the legal industry in the Greater Bay Area, namely the 'Hong Kong Capital, Hong Kong Law' and 'Hong Kong Capital, Hong Kong Arbitration.' We are actively striving to expand the application of 'Hong Kong Law' and 'Hong Kong Arbitration' from the Qianhai area in Shenzhen and the mainland's free trade pilot zones to cover the entire Greater Bay Area by 2024. This expansion aims to enable more enterprises in the Greater Bay Area to choose Hong Kong law as the governing law for civil and commercial contracts and select Hong Kong as the arbitration venue. Furthermore, the Department of Justice encourages and advocates for state-owned enterprises to give priority consideration to adopting Hong Kong law as the governing law for contracts and to choose Hong Kong as the dispute resolution service for handling cross-border contract disputes. These initiatives will create more opportunities for the local business community and provide comprehensive legal services and protections for both domestic and foreign investors seeking to utilize Hong Kong as a gateway for both inbound and outbound investments." *See* Guojun Zhang, Opening Remarks by the Deputy Secretary for Justice at the Legislative Council Panel on Administration of Justice and Legal Services on the Development and Support of Hong Kong's Legal Profession in Hong Kong and the Greater Bay Area (Nov. 27, 2023),

breakthrough will also promote cooperation between legal service sectors and advance the connectivity of legal professionals in the region.[287] This will surely contribute to the realization of the "development of a multi-faceted dispute resolution mechanism that is based on wide consultation, joint contribution, and shared benefits," as specified in the GBA Outline.[288] Even more importantly, enhancing the interaction between Hong Kong and mainland extraterritorial arbitration can widen Hong Kong's scope of engagement in the international dispute resolution market at a more advanced level, thereby elevating Hong Kong's regional advantage in the arbitration arena and expanding China's influence in the international dispute resolution market.

In this context, the SPC and the Department of Justice of Hong Kong are devising an innovative institutional arrangement that will empower Hong Kong–funded enterprises registered in the GBA to choose Hong Kong law as the governing law and select Hong Kong as the seat of arbitration for their disputes in 2024, even when Hong Kong–related elements are absent.[289] The Shenzhen Court of International Arbitration, with a branch in the Qianhai Special Economic Zone, designates Hong Kong as the seat of arbitration in its SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules.[290]

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https://sc.isd.gov.hk/TuniS//www.info.gov.hk/gia/general/202311/27/P2023112700536.htm?fontSize=1.

[287] Lìfǎ huì sīfǎ jí fǎlǜ shìwù wěiyuánhuì (立法會司法及法律事務委員會) [Legis. Council Panel on Admin. of Just. & Legal Servs.], Dà wān qū wèi xiānggǎng fǎlǜ jí zhēngyì jiějué fúwù dài lái de jīyù (大灣區為香港法律及爭議解決服務帶來的機遇) [Opportunities Brought by the Greater Bay Area for Hong Kong Legal and Dispute Resolution Services], CB(4)665/18-19(04) (Mar. 25, 2019), https://www.doj.gov.hk/sc/publications/pdf/ajls20190325c2.pdf (China).

[288] H.K. GREATER BAY AREA DEV. OFF., CONST. AND MAINLAND AFF. BUREAU, *supra* note 249, at ch. 9, § 1.

[289] THE GOV'T OF THE H.K. SPECIAL ADMIN. REGION, *supra* note 20. "The Task Force discussed and agreed to take forward a number of specific recommendations. The key ones include: (2) actively seeking the expansion to Mainland cities in the GBA the measures for Hong Kong–invested enterprises to choose Hong Kong law as applicable law and to choose Hong Kong as the seat of arbitration, and enhancing the promotion of the measures' advantages and benefits for the development and construction of the GBA." *See also* Si, *supra* note 6.

[290] *Qián hǎi quánlì zhīchí xiānggǎng jiànshè yàtài guójì fǎlǜ jí zhēngyì jiějué fúwù zhōngxīn* (前海全力支持香港建设亚太国际法律及争议解决服务中心) [Qianhai fully supports the establishment of the Asia-Pacific International Legal and Dispute Resolution Service Center in Hong Kong], Nánfāng rìbào (南方日报) [Nanfang Daily] (July 20, 2022), https://qh.sz.gov.cn/tzqh/tzhj/sggjfwq/content/post_10217272.html; Shenzhen Ct. of Int'l Arb., SCIA Guidelines for the Administration of Arbitration Under the UNCITRAL Arbitration Rules, art. 3 (effective

However, under China's current legal framework, if wholly owned Hong Kong enterprises ("WOKEs") and joint ventures established by Hong Kong investors in the GBA choose Hong Kong as the place of arbitration and apply Hong Kong law in disputes that lack Hong Kong–related factors, courts may deem the dispute resolution clause invalid.[291] There are two exceptions: (1) when both parties are WOKEs registered in the Qianhai–Shenzhen FTZ, they can elect for arbitration to be seated in Hong Kong in the absence of foreign-related elements; and (2) when one party involved in a civil or commercial contract is a Hong Kong–funded or other type of foreign-funded enterprise registered in the Qianhai Shenzhen–Hong Kong Modern Service Industry Cooperation Zone, the parties can mutually agree upon the application of Hong Kong law.[292] Thus, the liberalization of extraterritorial arbitration between the mainland and Hong Kong is now an irreversible trend; the question becomes how to create an appropriate legal framework to regulate and facilitate this process.

C. *Extraterritorial Arbitration Under GBA Legal Convergence: Possible Roadmaps*

With extraterritorial arbitration well established in the GBA, this section examines critical issues regarding an appropriate legal form or approach to facilitate Hong Kong–mainland extraterritorial arbitration in the GBA. Theoretically, there are three approaches to legal convergence in the GBA: (1) legal unification at the highest level of national legislation; (2) separate introduction of the same legislation locally in Guangdong, Hong Kong, and Macao; and (3) collaborative legislation and uniform rules in the form of regional agreements among the three jurisdictions.[293] In line with these three approaches, there are three possible

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Feb. 21, 2019; revised Feb. 21, 2022) The Shenzhen Court of International Arbitration stated, "Where the parties have agreed on the place of arbitration, the parties' agreement shall prevail. Where the parties have not agreed on the place of arbitration, unless otherwise determined by the arbitral tribunal, the place of arbitration shall be Hong Kong."

[291] *See* discussion *infra* Section 4.1 & 4.2.

[292] Shēnzhèn jīngjì tèqū qián hǎi shēn gǎng xiàndài fúwù yè hézuò qū tiáolì (深圳经济特区前海深港现代服务业合作区条例) [Regulations on the Qianhai Shenzhen–Hong Kong Modern Service Industry Cooperation Zone in the Shenzhen Special Economic Zone], (promulgated by Shenzhen Mun. People's Cong. Standing Comm., Oct. 1, 2020, effective Oct. 1, 2020) Aug. 31, 2020, at art. 57, Ann. No. 209. Article 57 provides that if one party to a civil or commercial contract is a Hong Kong, Macau, Taiwan, or foreign-invested enterprise registered in the Qianhai Cooperation Zone, the parties may agree to select the applicable law for the contract.

[293] Zhao & Chen, *supra* note 21, at 565-67; *See also* Shutian Zhang (张淑钿), Yuè gǎng'ào fǎlǜ hézuò èrshí nián: Chéngjiù yǔ zhǎnwàng (粤港澳法律合作二十年: 成就与展望) [Twenty Years of Legal Cooperation between Guangdong, Hong

roadmaps to liberalize Hong Kong–mainland extraterritorial arbitration: enacting a national law, amending judicial interpretations, and signing new interregional arrangements.[294] The "One Country, Two Systems and Three Jurisdictions" principle renders the third roadmap the most appropriate for reforming extraterritorial arbitration in the GBA.[295]

The first proposal is to amend relevant national laws to loosen restrictions on selecting Hong Kong as the seat of arbitration for cases from mainland China.[296] The relevant national laws are the Arbitration Law,[297] Contract Law,[298] and Civil Procedure Law.[299] However, incorporating specific provisions for Hong Kong–Macau arbitration in a national law is both impractical and without legislative precedent.[300] Although the draft of the amended Arbitration Law introduces the "seat of arbitration standard" to directly bridge the gap between the law and judicial practice for international commercial arbitration, China's Arbitration Law

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Kong and Macao: Achievements and Prospects], Fǎzhì shèhuì (法 治 社 会) [L. BASED SOC'Y], no. 4, 2018, 72, 72.

[294] Zhao & Chen, *supra* note 21, at 565-67.

[295] Jiali Huang, *One Country, Two Systems: Hong Kong's Unique Status and the Development and Growth of Arbitration in China*, 18 CARDOZO J. OF CONFLICT RESOL. 423, 429 (2017).

[296] *See, e.g.*, Anton Ware, et al., *Proposed Amendments to the PRC Arbitration Law: A Panacea?*, KLUWER ARB. BLOG (Sept. 9, 2021), https://arbitrationblog.kluwerarbitration.com/2021/09/09/proposed-amendments-to-the-prc-arbitration-law-a-panacea/.

[297] Zhōnghuá rénmín gònghéguó zhòngcái fǎ (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by Standing Comm. Of the Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018 (China) (adopted at the 9th Meeting of the Standing Comm. of the 8th National People's Congress, Aug. 31 1994; amended at the 10th Meeting of the Standing Comm. of the 11th National People's Congress, Aug. 27, 2009; and the 29th Meeting of the Standing Comm. of the 12th National People's Congress, Sept. 1, 2017) [hereinafter Arbitration Law of the People's Republic of China].

[298] Zhōnghuá rénmín gònghéguó mínfǎ diǎn (中华人民共和国民法典) [Civil Code of the People's Republic of China, bk. III, Contract] (promulgated by Nat'l People's Cong. May 28, 2202, effective Jan. 1, 2021) (China).

[299] Zhōnghuá rénmín gònghéguó mínshì sùsòng fǎ (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991) [hereinafter Civil Procedure Law of the People's Republic of China].

[300] For a broad discussion on why a national substantive law is unsuitable to resolve Chinese interregional conflicts, *see* Jie Huang, *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from U.S. and E.U. Laws,* 6 J. PRIV. INT'L L. 109 (2010).

and its draft amendments do not explicitly address arbitration in relation to Hong Kong and Macau.[301] Instead, they rely on the framework of foreign-related arbitration to encompass arbitration involving Hong Kong and Macau.[302] The Contract Law and Civil Procedure Law only provide that "foreign-related" contracts may be arbitrated extraterritorially.[303] China has not yet enacted specialized national legislation on interregional conflicts of law.[304] In judicial practice, courts resolve interregional conflicts of law by referring to the norms applicable to resolving international conflicts of law.[305] Another proposal is to enact national legislation to allow extraterritorial arbitration for cases without foreign elements.[306] However, this proposal is not feasible at this stage. Judicial treatment indicates that China maintains reservations about extraterritorial arbitration.[307] At present, China only intends to pilot the use of Hong Kong as an arbitration venue for purely mainland-related cases involving Hong Kong–funded ventures in cities within the GBA, to promote economic development and legal integration in this region.[308]

The second roadmap involves amending Article 1(5) of the SPC's "Interpretation on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations" by designating disputes concerning Hong Kong–invested enterprises in GBA as qualifying as "foreign-related civil relation," thereby legitimizing Hong Kong as the seat of arbitration.[309] The drawback of this approach is that the amendment process is complex

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[301] For further detail, *see* Arbitration Law of the People's Republic of China, *supra* note 297.

[302] *Id.*

[303] *See* Civil Code of the People's Republic of China, bk. III, Contract; Civil Procedure Law of the People's Republic of China, *supra* note 299.

[304] Guangjian Tu*, One Small Step Forward: The Mainland China Is Trying to Differentiate Interregional Private Cases From Those Foreign-related Ones*, CONFLICT OF LAWS.NET (Apr. 22, 2023), https://conflictoflaws.net/2023/one-small-step-forward-the-mainland-china-is-trying-to-differentiate-inter-regional-private-cases-from-those-foreign-related-ones/.

[305] Gu, *Arbitration in China*, *supra* note 153, at 604.

[306] *See,* e.g,, Wēnxiāntāo (温先涛) [Xiantao Wen], Jìnzhǐ jiāng wú shèwài yīnsù shāngshì jiūfēn tíjiāo yùwài zhòngcái xū lìfǎ zhīchí (禁止将无涉外因素商事纠纷提交域外仲裁需立法支持) [*The Need of Legislative Support for the Prohibition of Extraterritorial Arbitration of Commercial Disputes without Foreign-related Elements*], Zhōng xīn wǎng (中新网: 法制日报) [CHINA NEWS: LEGAL DAILY] (May 21 2019), https://www.chinanews.com.cn/m/gn/2019/05-21/8842655.shtml?f=qbapp.

[307] *Id.*

[308] THE GOV'T OF THE H.K. SPECIAL ADMIN. REGION, *supra* note 20.

[309] Choice of Law for Foreign-Related Civil Relationships, *supra* note 158.

and time-consuming.[310] Moreover, laws apply to Hong Kong and Macao by analogy (*canzhao*) with the "Judicial Interpretation on Foreign-Related Civil Relations" rather than being "directly applicable."[311] Thus, this roadmap may lack in terms of its legislative technique.

The third roadmap proposes that mainland China and Hong Kong negotiate and agree upon an interregional arrangement on interregional extraterritorial arbitration to be implemented through separate regional legislation.[312] China's interregional legal system comprises bilateral agreements in the form of interregional arrangements as well as unilateral regulations in the form of regional laws.[313] "Arrangement" here refers to an interregional instrument that is signed by member regions in China to address interregional issues.[314] A bilateral agreement between the SPC and the Department of Justice of Hong Kong could directly promote extraterritorial arbitration between Hong Kong and mainland China through mutual arrangements of judicial assistance.[315]

The constitutional base of the Hong Kong Basic Law underpins the legitimacy of this approach. Article 95 of the Hong Kong Basic Law provides, "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other."[316] This provision justifies the expectation of mainland China and Hong Kong's establishment of a system of judicial assistance through consultation and negotiation.[317]

Furthermore, this approach is more efficient and straightforward than the others, drawing from the rich precedents and experiences shared by the mainland

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[310] Zhōnghuá rénmín gònghéguó lìfǎ fǎ (中华人民共和国立法法) [Legislation Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000; amended and effective Mar. 15, 2015; amended Mar. 13, 2023, effective Mar. 15, 2023).

[311] Choice of Law for Foreign-Related Civil Relationships, *supra* note 158, at art. 17.

[312] *See e.g.*, *Perfecting the Legal Interfaces Between the Greater Bay Area and Hong Kong – Generating New Development Opportunities*, H.K. LAW (July 2023), https://www.hk-lawyer.org/content/perfecting-legal-interfaces-between-greater-bay-area-and-hong-kong-%E2%80%93-generating-new.

[313] Huang, *supra* note 300 at 113.

[314] *Id.* at 113.

[315] *See e.g.*, DEP'T OF JUST. OF THE GOV'T OF THE H.K. SPECIAL ADMIN. REGION, *Mainland and Macao SAR Related Topics*, https://www.doj.gov.hk/en/mainland_and_macao/arrangements_with_the_mainland.html (last visited Nov. 22, 2024).

[316] XIANGGANG JIBEN FA art. 95, § 1 (H.K.).

[317] Guobin Zhu, *Inter-Regional Conflict of Laws under One Country, Two Systems: Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance,* 32 H.K. L. J. 615, 662 (2002).

and Hong Kong.[318] The SPC and the Department of Justice of Hong Kong have jointly signed 10 judicial assistance agreements on civil and commercial matters, covering mutual service of judicial documents,[319] enforcement of arbitral awards,[320] mutual assistance in obtaining evidence in civil and commercial cases,[321] recognition and enforcement of judgments in marriage and family civil cases,[322] recognition and enforcement of judgments in civil and commercial cases,[323] mutual assistance in interim measures in arbitration proceedings,[324] and recognition and assistance in bankruptcy proceedings.[325] These agreements

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[318] For numerous precedents and detailed analysis regarding the Mainland-Hong Kong judicial assistance through mutual arrangements, *see* Weixia Gu, *A Conflict of Laws Study in Hong Kong-China Judgment Regionalism: Legal challenges and Renewed Momentum*, 52 CORNELL INT'L L. J. 591 (2019).

[319] The Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, China-H.K., 1998, H.K. Dep't of Just. (entered into force Mar. 30, 1999).

[320] The Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, China-H.K., 1999, H.K. Dep't of Just. (entered into force Feb. 1, 2000).

[321] The Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between Courts of the Mainland and the Hong Kong Special Administrative Region, China-H.K., 2017, H.K. Dep't of Just. (entered into force Mar. 1, 2017).

[322] The Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region, China-H.K., 2017, H.K Dep't of Just. (entered into force Feb 15, 2022).

[323] Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Made Between the Parties Concerned, China-H.K., 2006, H.K. Dep't of Just. (entered into force Aug. 1, 2008); The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region, China-H.K., 2019, H.K. Dep't of Just. (entered into force Jan. 29, 2024).

[324] Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, China-H.K., Apr. 2, 2019, H.K. Dep't of Just. (entered into force Apr. 2, 2023); The Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, China-H.K., Nov. 27, 2020, H.K. Dep't of Just (entered into force November 27, 2020).

[325] The Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region, China-H.K., May 14, 2021, H.K. Dep't of Just. (entered into force May 14, 2021).

essentially achieve full coverage of judicial assistance in the civil and commercial fields between the mainland and Hong Kong.[326]

Consequently, legal convergence serves as the cornerstone for resolving interregional conflicts of law, grounded in the principle of "One Country" and leveraging the benefits of "Two Systems" to foster closer and more convenient cooperation between mainland China and Hong Kong.[327] Promoting judicial assistance through bilateral agreements represents an effective approach to achieving legal convergence and upholding the advantages and uniqueness of the "One Country, Two Systems, and Three Legal Jurisdictions" framework in a more efficient and flexible manner.[328]

Moreover, the experiment of allowing extraterritorial arbitration in cases without foreign elements between the mainland and Hong Kong can provide valuable insights for the future expansion of extraterritorial arbitration to other parts of China. The prevailing practice in international arbitration avoids restricting parties' choice of extraterritorial arbitration, highlighting the jurisdiction's commitment to party autonomy and a pro-arbitration stance.[329] In internationalizing China's arbitration system, it may be prudent to gradually eliminate its restrictions on extraterritorial arbitration in cases without foreign elements. The pilot GBA initiative provides a valuable testbed for accumulating knowledge and experience, providing a foundation for China's future exploration of extraterritorial arbitration.

VI. CONCLUSION

The choice of an arbitration's legal domicile significantly impacts the laws applicable to both substantive and procedural matters in the arbitration. Parties should have the freedom to select a seat of arbitration based on the principle of party autonomy. However, contention arises regarding whether parties can choose a foreign seat of arbitration even in cases of purely domestic arbitration. This article examines China's restrictions on extraterritorial arbitration in domestic disputes from a comparative legal standpoint.

The traditional arbitration hub (UK) and emerging Asian arbitration markets (India and Singapore) examined in this article all allow for extraterritorial arbitration in domestic disputes to respect party autonomy, protect cross-border transactions, and enhance the advantages of their respective countries as arbitration venues. Based on an in-depth analysis of the theoretical basis and institutional practices of extraterritorial arbitration in various countries, this article argues that China's approach to extraterritorial arbitration deviates from the international norm. Moreover, the policy considerations behind China's restrictions on this practice are not aligned with China's own efforts to internationalize the arbitration system under the promotion of the "Foreign-Related

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[326] See Gu, *Arbitration in China, supra* note 153, at 641.

[327] Zhao & Chen, *supra* note 21, at 580-81.

[328] *Id*.

[329] *See* discussion *infra* section 3.

Rule of Law and Legal Service" objective and the BRI. Thus, there is a need for China to make advancements in liberalizing its views on extraterritorial arbitration.

China has gradually reformed its extraterritorial arbitration practices, beginning with partial breakthroughs with respect to foreign-invested enterprises in the FTZs and the GBA. Given the inconsistencies between prevailing international arbitration norms and Chinese practices, it is imperative for China to undertake further measures to liberalize its approach to extraterritorial arbitration. This step is essential for advancing the refinement and competitiveness of China's arbitration system. Judicial opinions and relevant cases demonstrate that China is unlikely to fully overturn its prohibition on extraterritorial arbitration for domestic disputes through primary legislation in the short term. However, the pilot initiative to liberalize extraterritorial arbitration within the GBA, whether examined legislatively or practically, provides a valuable experimental basis for China's liberalization and holds significant and promising implications for China's future advancements in the realm of extraterritorial arbitration.

China has initiated a policy to pilot the use of Hong Kong as an arbitration seat for purely mainland-related cases involving Hong Kong–funded ventures in GBA cities. The SPC and the Department of Justice of Hong Kong are developing new institutional arrangements that allow for Hong Kong–funded enterprises registered in the GBA to choose Hong Kong law as the governing law and choose Hong Kong as the seat of arbitration in 2024, irrespective of any Hong Kong–related elements in the disputes. These arrangements aim to promote economic development and integration of laws in the region. However, there remain unresolved technical and legal challenges pertaining to the coordination and cooperation between these two jurisdictions under the extraterritorial arbitration arrangement. Based on an analysis of the conflict of laws, this article argues that regional agreements in the form of collaborative legislation and uniform rules are more suitable than uniform legislation at the national level for enabling extraterritorial arbitration between the mainland and Hong Kong.

Strengthening the interaction between mainland China and Hong Kong in extraterritorial arbitration through the legal convergence of the GBA carries strategic significance. Specifically, it will boost the confidence of Hong Kong–based enterprises investing in the GBA, strengthen the flow of legal services between mainland China and Hong Kong, and promote the exchange of financial resources and legal professionals. Furthermore, it will reinforce Hong Kong's position in the regional arbitration landscape and enhance China's standing in the global dispute resolution market. More importantly, the experimental implementation of extraterritorial arbitration in cases between mainland China and Hong Kong that lack foreign elements imparts profound insights relevant to the future liberalization of extraterritorial arbitration in other regions of China. The pilot GBA initiative provides a valuable testbed for accumulating knowledge and experience regarding China's extraterritorial arbitration practice and embodies the institutional advantages of the "One Country, Two Systems" principle.