ARBITRATION IN CHINA

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

Arbitration law in PRC has traditionally maintained a strict distinction between domestic arbitration and foreign arbitration. Entities in China are more or less restricted from submitting purely domestic disputes to arbitrations outside China. The interpretation of foreign elements has been quite narrow when deciding whether an entity is a domestic entity or foreign entity for the sake of arbitration. If an entity, having foreign investments, is registered under Chinese law, then such an entity is regarded as a domestic entity and even the foreign investments in such an entity are not treated as foreign elements. However, there are two exceptions to these under the Opinions for Pilot Trade Free Zone. Disputes can be referred to foreign arbitrations if (i) the dispute is between wholly foreign owned entities registered in the Pilot Trade Free Zone, irrespective of foreign element; and (ii) the dispute is between one foreign invested entity registered in the Pilot Trade Free Zone and the parties agree to submit the dispute to foreign arbitrations or do not raise an objection to the same during the arbitration.

For foreign invested entities and foreign parties, arbitration is a preferred method of dispute resolution in PRC for a number of reasons. One reason is that most litigations before a PRC court are public and can be accessed by anyone, whereas arbitral proceedings are generally private unless otherwise agreed by the concerned parties. Another reason is that judges in PRC's People's Courts can be inclined to follow the directions of local administrative bodies and favour local parties in disputes involving foreign entities. Also, a major concern is the recognition and enforceability of foreign decisions in PRC due to reciprocity issues between PRC and other countries. Thus even when the parties agree to submit to the jurisdiction of a foreign judicial authority, it becomes difficult to enforce the same. Language is also a concern for foreign entities when deciding about dispute resolution mechanisms. All litigation in PRC must be conducted in the local Chinese language and arbitration offers the flexibility to conduct the proceedings in a foreign language. Thus it is often advised and preferred that foreign entities incorporate arbitration clauses in all agreements/ventures entered into in PRC.