



CHINA DISPUTE RESOLUTION

# NEWS LETTER

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# NEWS ALERT

## **1. The Law on Foreign Relations of the PRC Came Into Effect on 1 July 2023.**

[The Law on Foreign Relations of the People's Republic of China](#) (“中华人民共和国对外关系法”) came into effect on 1 July 2023. This law provides, for the first time, a comprehensive legal framework for the application of Chinese Law outside of the jurisdiction. The law promotes independence, peace, fairness, and respect among nations, encourages civilian communication and cooperation among countries, and concurrently aims to “safeguard China’s national sovereignty, national security and development interests”, as well as to “uphold international fairness and justice”. The law specifically makes clear that China has no intention to abuse the mechanism of extraterritorial jurisdiction. To that end, Article 32 provides that China shall “take law enforcement, judicial or other measures in accordance with the law” and shall “strengthen the implementation and application of its laws and regulations in foreign-related fields in conformity with the fundamental principles of international law and fundamental norms governing international relations.” To this end, Article 33 grants China the right to implement countermeasures and other reactive measures against actions that violate international law and undermine the sovereignty, security, and development interests of China.

## **2. The Law of the People's Republic of China on Foreign State Immunity Will Enter Into Effect on 1 January 2024.**

[The Law of the People's Republic of China on Foreign State Immunity](#) (“中华人民共和国外国国家豁免法”) will enter into effect on 1 January 2024. Previously, China adopted what has been jurisprudentially described as an absolute approach to foreign state immunity, granting foreign states full immunity from legal action in courts. This new law marks a transition from China granting states full immunity, towards a more restrictive approach to state immunity. Under the more restrictive approach, foreign states will not enjoy immunity in the Chinese Courts under certain circumstances specified under the law, such as when they are sued for non-sovereign acts or where they expressly accept the jurisdiction of Chinese courts. The Chinese government explained that this shift is necessary to adapt to new developments and changes in its rapidly evolving foreign relations.

## **3. China's Amended Civil Procedure Law Will Enter Into Effect on 1 January 2024.**

Amendments to the Civil Procedure Law of the People's Republic of China will take effect on 1 January, 2024. Most of the revisions focus on the procedural rights of foreign parties involved in civil litigation in China. Key amendments include provisions: (1) allowing parties to elect to have the Chinese Courts determine their disputes by mutual agreement in foreign-related civil disputes; (2) broadening the range of methods by which process in Chinese proceedings can be served outside the jurisdiction; and (3) providing for the recognition and enforcement of judgments and rulings made by foreign courts (see in particular the newly added article 300).



**4. The Chinese Government Released the Third Version of the Draft Revisions to the Company Law of the PRC for Public Consultation on 1 September 2023.**

Following the first version of the draft revisions to the Company Law of the People's Republic of China in December 2021, and the second version of the same in December 2022, the third version of the draft revisions was released for public consultation on 1 September 2023. This draft, amongst other things, envisages that shareholders of a limited liability company (LLC) are required to pay down the entire contribution to the registered capital of the company that they have subscribed for within 5 years of the LLC's incorporation. This particular draft article has been included due to concerns over transaction security that emerged following the removal of capital contribution deadlines, minimum registered capital requirements, and initial contribution ratios in the 2014 Amendment to the Company Law. It is believed that the addition of this article will bolster provisions governing the sufficiency of capital, as well as considerations of transaction security.

**5. The Chinese Government Released the “Comprehensive Anti-Monopoly Compliance Guidelines for Business Operators” on 11 September 2023.**

The State Administration for Market Regulation issued the Comprehensive Anti-Monopoly Compliance Guidelines for Business Operators (“经营者集中反垄断合规指引”) on 11 September 2023. The Guidelines comprise 6 chapters and 35 articles, offering precise instructions that expound on the Anti-Monopoly Compliance Guidance for Business Operators (“经营者反垄断合规指南”) that came into effect on 11 September 2020. While not mandatory, these Guidelines are nonetheless essential for businesses to manage their anti-monopoly compliance risks in relation to concentrations of market power and potential anti-competitive effects.

**6. The Measures for the Management of Independent Directors of Listed Companies Entered Into Effect on 4 September 2023.**

The Measures for the Management of Independent Directors of Listed Companies (“上市公司独立董事管理办法”) have been approved by China's securities regulator, the China Securities Regulatory Commission, and entered into effect on 4 September 2023. The previously implemented Rules for Independent Directors of Listed Companies (“上市公司独立董事规则”) ceased to apply at the same time. Corporate issuers will have a one-year transition period to adjust to the new measures. The stock listing rules of the Shanghai Stock Exchange, Shenzhen Stock Exchange, and Beijing Stock Exchange have all been updated in response to these amendments.

**7. The Regulation on the Supervision and Administration of Private Investment Funds Entered Into Effect on 1 September 2023.**

The Regulation on the Supervision and Administration of Private Investment Funds (“私募投资基金监督管理条例”) entered into effect on 1 September 2023. The Regulation, presented in seven sections, aims to encourage the standardised and healthy development of the private investment fund industry, better protect the legitimate rights and interests of investors, and encourage the industry to further play a role in serving the real economy, thereby promoting scientific and technological innovation. The Regulation outlines the scope of its application and sets out the

obligations and requirements for private fund managers and custodians. It also regulates fundraising and investment operations, introduces specific provisions for venture capital funds, and fortifies supervision and management, notably by making provisions for the imposition of legal liability where appropriate.

**8. New CIETAC Arbitration Rules will Come Into Effect on 1 January 2024.**

The China International Economic and Trade Arbitration Commission (“CIETAC”) released [new arbitration rules](#) which will come into effect on 1 January 2024. Key changes include provisions that: (1) the preliminary arbitration procedure stipulated in an arbitration agreement will not necessarily restrain the Claimant’s capability to initiate an arbitration (see article 12.2); (2) the digital delivery of arbitration documents will be prioritised (see article 8.2); (3) require the parties to provide the tribunal with information on third-party funding in a timely manner (see article 48); and (4) an arbitration fee cap will be applied to cases where the amount in dispute exceeds RMB 3 billion, in accordance with Appendix II to the Rules.

**9. CIETAC published its Annual Report on International Commercial Arbitration in China (2022~2023).**

On 5 September 2023, the China International Economic and Trade Arbitration Commission (“CIETAC”) published its [Annual Report on International Commercial Arbitration in China for 2022 to 2023](#). This marks the ninth annual report of CIETAC since the initiation of the China International Commercial Arbitration Annual Report research project in 2014. In terms of amounts in dispute, CIETAC has seen an increase in the aggregate amounts being disputed in arbitration held under its auspices, reaching RMB 126.9 billion and surpassing the one trillion RMB mark for the fifth consecutive year. The report highlights in particular the arbitration of legal disputes in the automotive industry, stating that China’s position as the top global automobile producer and seller for 14 consecutive years has unsurprisingly resulted in a rise in disputes within that field.

**10. The Beijing Fourth Intermediate People’s Court Released its 2022 Annual Report on the Curial Review of Domestic Arbitration and Announced the Top Ten Precedents in that Sphere.**

In July 2023, the Beijing Fourth Intermediate People’s Court released its 2022 Annual Report on the Curial Review of Domestic Arbitration and announced the Top Ten Precedents in that sphere. Since the establishment of centralised jurisdiction for foreign-related commercial cases in Beijing in 2018, the Beijing Fourth Intermediate People’s Court has heard over 6,000 foreign-related commercial cases. This includes over 3,000 cases concerning the curial review of foreign-related arbitration, placing the court among the top in the nation by that metric. In 2022, the court heard 938 cases concerning the curial review of domestic arbitration. Of that total, 549 cases were filed for the annulment of arbitration awards (accounting for 58.5% of the total), while 389 cases were submitted to establish the validity of arbitration agreements (representing 41.5% of the total). It was specifically observed that the total number of cases remained high, and would likely continue increasing.

## Beijing Court's Stance on Third-Party Funding for Arbitration: A Positive Signal

*Zeng Sheng*

Against the backdrop of a Shanghai court's recent judgement denying the validity of a litigation funding agreement (see our commentary in the prior edition of our China Dispute Resolution Newsletter, pages 5-6), the Beijing Fourth Intermediate People's Court's recent decision eases the worries of Chinese third-party funding industry stakeholders, where the Beijing court stated that a party's right to choose third-party funding for arbitration shall be respected.

### Beijing Court's Decision

The Beijing court's decision arose from an award rendered by a tribunal under the rules of the China International Economic and Trade Arbitration Commission ("CIETAC"). The arbitral award was favourable to a party financially supported by a third-party funder. The losing party filed an application before the Beijing Fourth Intermediate People's Court to set aside the award.


The losing party's case encompasses several points, two of which concern the third-party funder. The losing party first alleged that constitution of the tribunal did not accord with arbitral rules, in that one of the arbitrators failed to disclose conflicts of interest relating to the third-party funder and did not recuse himself. Second, according to the losing party, confidentiality of arbitration was breached, as the third-party funder participated in the proceedings and obtained information regarding the arbitration.

The Beijing court denied all of the losing party's arguments and dismissed the entire set-aside application. In response to the losing party's two points touching upon third-party funding, the court noted that:

- insufficient evidence was provided to prove that the arbitrator had an interest in the third-party funder, nor was there any existing evidence giving rise to justifiable doubts regarding the arbitrator's impartiality and independence; and
- a funding relationship itself did not constitute a breach of confidentiality of arbitration, and the evidence provided was insufficient to prove that information pertaining to the case was disclosed to the public.

Apart from the above, in its reasoning, the Beijing court affirmed the legality of third-party funding for arbitration. The court stated that a party's autonomy to choose third-party funding in arbitration shall be respected, insofar as the funding activity does not breach the law or does not have adverse impact on arbitration justice. The court further ruled that, in order to determine whether a third-party funder's involvement constituted legitimate grounds for annulment, the pivotal issue was whether the funding activities violated the law and arbitration rules, or affected fair adjudication of the case.

### Commentary



Third-party funding is relatively new in mainland China. Almost all major local third-party funders operating in mainland China were established within the last decade. Until now, there has been no PRC legislative guidance regulating third-party funding, other than Hong Kong's legislative reforms which expressly permit third-party funding for arbitration. As noted in our previous Newsletter, the Shanghai court's decision had shocked the third-party funding industry in mainland China. Commentators and experts alike have criticized the Shanghai Court's application of public policy and good custom to a commercial arrangement, and expressed concerns that the decision could hamper the development of the third-party funding industry. This timely Beijing court decision has, to some extent, mitigated the concerns which had been raised by the Shanghai court's decision.

Whereas the Shanghai court's decision, which emphasized that the third-party funder's pursuit of private interest "collides with the public character of judicial adjudication" and the funding's facilitation of a legal fight is "against social harmony and civic friendliness," it would appear that the Beijing court's decision encourages third-party funding in arbitration by affirming that a party's autonomy to choose a third-party funder shall be respected. This difference in emphasis may be attributable to PRC courts' differing attitudes towards litigation and arbitration. The evidence suggests that PRC courts are generally of the view that litigation bears "public character" while arbitration is premised on "party autonomy." Accordingly, PRC courts may adopt a relatively more permissive stance towards third-party funding in the context of arbitration.

Additionally, the Beijing court reviewed third-party funding from a technical perspective. Like their counterparts in many other jurisdictions, PRC courts will defer to tribunals' decisions on the merits, and restrain themselves to review awards from limited statutory grounds. Under PRC law, the existence or involvement of third-party funding does not, standing alone, furnish sufficient grounds to set aside an arbitral award. As a result, in setting-aside proceedings, PRC courts focus on whether there is a statutory basis prescribed by PRC law that mandates setting aside a tribunals decision, which is precisely the approach followed by the Beijing Fourth Intermediate People's Court in the above case. After examining the relevant evidence, the court concluded that the involvement of the third-party funder did not result in any statutory basis to set aside the arbitral award.

An important takeaway from the Beijing court's decision is that the involvement of a third-party funder in arbitration was not deemed to undermine justice or fairness in arbitration. This requires that in order to avoid potential conflicts of interest a party, on its own initiative or under the arbitral rules, must disclose the existence of a third-party funding arrangement and the identity of the funder (or other information necessary) to the arbitral institutions or tribunals as early as practicable. In addition, both a party and its third-party funder should be vigilant regarding the degree of the funder's control, because a finding of excessive control and interference may cast doubts on the fairness of the arbitral proceedings.

PRC courts do not recognize the precedential principle of "stare decisis." Accordingly, the Beijing court's decision is only expected to have a binding effect on the parties to the above decision. But in the context of the PRC court system's effort to ensure adjudicative consistency, the decision may be helpful in persuading other PRC courts to rule similarly with respect to arbitration funding. The Beijing court's decision is particularly persuasive, considering that the Beijing Fourth Intermediate People's Court is a highly influential court in China, and conducts judicial review over arbitration





administered by the leading PRC institutions CIETAC and BAC.

It is worth noting that the PRC recently has taken significant steps to make mainland China more arbitration-friendly and supports key cities like Beijing, Shanghai, and Shenzhen to be centres of international arbitration excellence. Prohibiting funding for arbitration would conflict with the trend of international arbitration, and the Beijing court's decision coincides with the PRC's ambition to attract international arbitration users.

## The Supreme Court confirms the validity of clauses providing for “Arbitration, if any, in Hong Kong”

*Li Lei*

The Supreme People’s Court of the People’s Republic of China (“The Supreme Court”) has recently published a list containing the “Ten Leading Maritime Cases in 2022”. The second of these cases concerns an arbitration clause providing for “Arbitration, if any, in Hong Kong”. In that case, the High People’s Court of Guangdong Province (“Guangdong High Court”) had upheld the validity of the said arbitration clause. By listing this case as one of the leading cases of 2022, The Supreme Court is affirming the judgement of Guangdong High Court, and settling the disparate positions which had previously been taken by different provincial courts on the matter.

### Facts

Dongguan Lanhai Food International Trade Co., Ltd (东莞市蓝海食品国际贸易有限公司) (as Charterer) entered into a voyage charterparty with Hong Kong Everpeace Shipping & Trade Limited (香港长宁航贸有限公司) (as Owner). The loading port stipulated in the charterparty was Singapore, and the discharging port was to be Huangpu, Guangdong Province. Article 17 of the charterparty provided for, “ARBITRATION, IF ANY, IN HONGKONG AND ENGLISH LAW TO BE APPLIED”. Disputes arose from the charterparty, and the Owner pursued claims for damages and interest before the Guangzhou Maritime Court against the Charterer. The Charterer sought to challenge the jurisdiction of the Guangzhou Maritime Court on the basis of article 17 of the charterparty, arguing that the jurisdiction of the Guangzhou Maritime Court had been excluded in favour of arbitration in Hong Kong.

### Issue

The central issue in dispute may be straightforwardly stated: Whether an arbitration clause providing for “ARBITRATION, IF ANY, IN HONGKONG AND ENGLISH LAW TO BE APPLIED” is valid and can exclude the jurisdiction of the domestic Courts (in this case the Guangzhou Maritime Court)?

### Decision

In the first instance, the Guangzhou Maritime Court dismissed the Charterer’s challenge to its jurisdiction [First instance case no. (2019) Yue 72 Minchu No. 1217]. The Charterer appealed to the Guangdong High Court, and the Guangdong High Court reversed the first instance judgement. The reasoning adopted by the Guangdong High Court was to first determine the validity of the arbitration agreement set out at article 17. In determining the law applicable to the arbitration clause, the Guangdong High Court adopted the Hong Kong Arbitration Ordinance as the governing law for article 17 as (1) the charterparty itself was silent on the applicable law of the arbitration clause; and (2) article 17 provided that the seat of arbitration was to be Hong Kong. The Guangdong High Court went on to find that the arbitration clause was valid under the Hong Kong Arbitration Ordinance, and would suffice to exclude the statutory jurisdiction of the Guangzhou Maritime Court. [Appeal



case no. (2019) Yue Min Jurisdiction No. 327]

### **Commentary**

Arbitration clauses providing for “Arbitration, if any, in Hong Kong” (or “Arbitration, if any, in London”) are quite common in the context of voyage charterparties. Even before the Guangdong High Court’s judgement, there were conflicting judgements from Chinese courts on such clauses. At the very least, we note that the Tianjin Maritime Court once held a similar clause to be valid such that it excluded the jurisdiction of domestic courts. However, both the Shanghai Maritime Court and the Xiamen Maritime Court reached a different conclusion, focusing instead on the words “if any” in the relevant arbitration clauses. The Shanghai and Xiamen Maritime Courts held that the natural meaning of the phrase “if any” meant that arbitration clauses containing such language were not exclusive jurisdiction clauses, and thus could not suffice to exclude the statutory jurisdiction of the Chinese courts. However, even after the decisions of the Shanghai and Xiamen Maritime Courts, inclusion of the phrase “if any” in voyage charterparty arbitration clauses were still common in practice.

By affirming the recent decision of the Guangdong High Court as a leading case, The Supreme Court has, in effect, settled the dispute in favour of such clauses’ validity and ability to exclude the jurisdiction of domestic Courts. This is a welcome development for the shipping industry, providing certainty and removing the risk that a widely-used clause is nonetheless found to be ineffective. In a broader sense, The Supreme Court’s affirmation of the Guangdong position is also demonstrative of the increasing openness and support with which Chinese Courts regard arbitration.

# China's Foreign State Immunity Law

*Alan Li, Celine Cen*

## **I. Overview**

On 1 September 2023, the Law of the People's Republic of China on Foreign State Immunity ("FSIL") was passed by the National People's Congress ("NPC") Standing Committee. It will take effect on 1 January 2024. The FSIL marks China's adjustment from its previous stance of absolute state immunity to a more restrictive approach to state immunity, authorising Chinese courts to hear lawsuits against foreign states.<sup>1</sup> According to the NPC, the Hong Kong and Macao SARs are envisaged to follow the Chinese government in adopting the state immunity rules and policies set out in the FSIL.<sup>2</sup>

The FSIL is the first systematic legislation in China on foreign state immunity. The FSIL, inter alia, establishes the general principles of foreign states enjoying state immunity and stipulates the exceptions thereto. These exceptions include, among others, "commercial activity" exceptions to immunity from jurisdiction (or "immunity from suit") and immunity from measures of constraint (or "immunity from execution"). The FSIL also prescribes a principle of reciprocity in state immunity.

The FSIL stipulates provisions related to foreign state immunity in line with international practices and aims to improve China's foreign state immunity system. It is expected that the FSIL will help to protect the lawful rights and interests of the parties concerned, safeguarding the sovereign equality of states and promoting friendly exchanges with other countries. In turn, and as remarked by the Chinese Foreign Ministry Spokesperson, this will boost China's higher-level opening-up.<sup>3</sup>

## **II. China's legal framework on foreign state immunity – from an absolute to a more restrictive theory of foreign state immunity**

Before the FSIL, the provisions governing foreign state immunity as a matter of Chinese Law tended to be piecemeal and in secondary legislation. Since the founding of the People's Republic of China, it had firmly adopted the absolute theory of sovereign immunity — a foreign state could not be sued before a municipal tribunal in any circumstances. Thus, during this period, no Chinese courts exercised jurisdiction over a foreign state, nor did China accept jurisdiction of any other state's courts. By contrast, under the restrictive theory of sovereign immunity, as adopted by many jurisdictions (including the USA, the UK, Singapore, Australia, France and Germany), a foreign state should enjoy immunity against the jurisdiction of other states' courts in proceedings arising out of public activities such as diplomatic and political acts, while enjoy no immunity against the jurisdiction of other states' courts in proceedings arising out of private activities such as those relating to commerce or trade.

Since China's "Reform and Opening Up", the piecemeal and disparate Chinese laws and regulations on state immunity or specific related topics gradually started to reflect China's shift from an absolute to a more restrictive theory of foreign state immunity.

*The Regulations of the People's Republic of China Concerning Diplomatic Privileges and*




*Immunities* issued (and given effect) in 1986 and the *Regulations of the People's Republic of China Concerning Consular Privileges and Immunities* issued (and given effect) in 1990 define the privileges and immunities enjoyed by consular posts and diplomatic missions of foreign states and their members or officers in China, which correlate to Article 20 of the FSIL. Issued and given effect in 2005, the *Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures* grants foreign central banks the immunity from otherwise compulsory judicial orders providing for preservation and execution against their properties, filling the gap in the Hong Kong SAR's legislative protection on the properties of foreign central banks after Hong Kong's return to China. In 2005, signing on the *United Nations Convention on Jurisdictional Immunities of States and Their Property* demonstrated, to some extent, China's gradual embrace of the restrictive theory. The Convention, adopting a restrictive rather than absolute approach, provides that a state and its property enjoy immunity from the jurisdiction of another state, enumerating eight exceptions to e.g., the "commercial transaction" exception, where state immunity cannot be invoked, and also immunity from execution and the exceptions thereto. The framework and essence of the FSIL largely conform to the Convention, both in structure and spirit. It should be noted for completeness, however, that China has not yet ratified the Convention.

### **Digging into the FSIL**

The FSIL consists of 23 articles, and, as mentioned above, it bears out the general principle that foreign states and their properties enjoy immunity from jurisdiction and immunity from execution, subject to express exceptions. Firstly, this article will consider the FSIL as a whole. The legal framework of FSIL, with a short summary of the articles, is set out below.

Summary	Article Nos.
Legislative intent and definition of a "foreign state"	1-2
The general principle of immunity from jurisdiction	3
Circumstances where a foreign state is considered to have submitted to the jurisdiction of the Chinese courts (or otherwise)	4-6
Exceptions to immunity from jurisdiction: commercial activity (Art 7), contracts of employment or procurement of labour or services (Art 8), compensation for personal injury or death or loss of property (Art 9), stipulated property matters (Art 10), stipulated intellectual property matters (Art 11), commercial arbitration and investment arbitration matters subject to court examination (Art 12)	7-12
The general principle of immunity from measures of constraint	13
Exceptions to immunity from measures of constraint	14-15
Procedural matters regarding trial, enforcement (execution) and service	16-19
Foreign official immunity and privileges, and the coordination of related international and Chinese law	20
Principle of reciprocity	21
Miscellaneous	22-23



A number of provisions in the FSIL bear further note:

#### Waiver

Waiver, whether express or implied, is an important basis for denying immunity. According to Article 4 of the FSIL, a foreign state which provides an express waiver of immunity including, typically, a contractual waiver (an international treaty or written agreement), shall not enjoy immunity from jurisdiction. Article 5 provides for circumstances of implied waiver to immunity from jurisdiction by a foreign state, e.g., initiating proceedings before a Chinese court as a plaintiff, participating in proceedings before a Chinese court as a defendant, and filing a substantive defence or counterclaim. However, under Article 6, circumstances where (a) a foreign state files a statement of defence for the sole purpose of asserting immunity; (b) the representative(s) of a foreign state appear before a Chinese court as witnesses; or (c) the foreign state consents to the application of Chinese law to a specific matter or case, do not constitute a foreign state's waiver to immunity from the jurisdiction of a Chinese court.

#### “Commercial activity” exception


“Commercial activity” is one of the principal exceptions to immunity under the FSIL. This is in line with the spirit of international law (such as those as set out in the Convention), and the foreign immunity laws of other jurisdictions, e.g., the *Foreign Sovereign Immunities Act* (FSIA) of the USA (28 U.S.C. §§ 1330, 1441, 1602–1611). The “commercial activity” exception in the FSIL applies to both immunity from jurisdiction and immunity from execution.

The applicability of this exception to immunity from jurisdiction requires that a proceeding arises out of a commercial activity and that the commercial activity has a nexus with China, and that such nexus with China entails either (a) the commercial activity takes place within the territory of China and between the foreign state and an organisation or individual of another state including China, or (b) the commercial activity takes place outside the territory of the China but causes a direct effect within the territory of China (Article 7(1)). The FSIL also defines “commercial activity” as “any transaction in goods or services, investment, loan, or other act of a commercial nature, which is not an exercise of sovereign authority” in Article 7(2), and states that a Chinese court shall take into account the nature and purpose of the act in determining whether an act is a “commercial activity”.

Article 14(3) of the FSIL makes clear that in order to enforce an effective judgment or ruling of a Chinese court, the property of a foreign state used for a commercial activity which relates to the proceeding in question shall not enjoy immunity from measures of constraint imposed by a Chinese court. Article 15 further expressly excludes certain types of properties from “property used for commercial activities”, e.g., property of a diplomatic mission of a foreign state, property of a military character, and central bank property.

#### The arbitration exception

The FSIL establishes an exception to immunity from jurisdiction related to arbitration matters subject to court review. These matters include questions of the validity of the arbitration agreement, recognition and enforcement of an arbitral award, setting aside of an arbitral award and other arbitration matters which are subject to examination by a Chinese court as provided by law (Article



12). In order for this exception to apply, certain pre-requisites need to be met: either (a) the dispute arises from a commercial activity between a foreign state and an organisation or individual of another state including China and it is submitted to arbitration according to a written agreement; or (b) a foreign state agrees by an international investment treaty or otherwise in written form to submit to arbitration an investment dispute with an organisation or individual of another state including China. Unlike the aforementioned “commercial activity” exception under Article 7, a nexus with China is not a requirement here for the underlying arbitration proceeding or dispute.

#### Immunity from execution

The FSIL addresses immunity from execution separately from immunity from jurisdiction. Article 13 provides that a waiver of immunity from jurisdiction shall not be deemed a waiver of immunity from execution. Immunity from execution, with fewer exceptions and more restrictive conditions (Article 14), is thus broader than immunity from jurisdiction. It is therefore possible that a plaintiff, with a judgment in its favour, nonetheless cannot enforce against a foreign state defendant if the foreign state refuses to cooperate. In this regard, the “commercial activity” exception to immunity from execution has been discussed above.

#### Reciprocity

The FSIL adopts the principle of reciprocity widely recognised by various jurisdictions and in international law. Article 21 provides that where a foreign state accords to China and its property immunities less favourable than those provided for in the FSIL, China will apply the principle of reciprocity. Under the principle of reciprocity, China will have the flexibility to adjust the accordance of exceptions to immunities and specific procedures to a foreign state and its property based on how China and its property have been treated under that foreign state’s legal system.

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<sup>1</sup> [http://en.moj.gov.cn/2023-09/06/c\\_918022.htm](http://en.moj.gov.cn/2023-09/06/c_918022.htm)

<sup>2</sup> [http://en.npc.gov.cn.cdurl.cn/2023-09/04/c\\_917419.htm](http://en.npc.gov.cn.cdurl.cn/2023-09/04/c_917419.htm)

<sup>3</sup> [http://en.moj.gov.cn/2023-09/06/c\\_918022.htm](http://en.moj.gov.cn/2023-09/06/c_918022.htm)

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