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争议解决法律热点问题

《境外 NGO 法》颁布-对国外仲裁机构在中国境内仲裁活动可能产生的影响

自 2015 年 10 月 20 日至 2016 年 2 月 24 日，香港国际仲裁中心（以下简称为“**HKIAC**”）、新加坡国际仲裁中心（以下简称为“**SIAC**”）和国际商会（以下简称为“**ICC**”）先后在上海自贸区登记设立其上海代表处，希望藉此在中国大陆境内拓展仲裁业务并开展更广泛的交流与合作。

2016 年 4 月 28 日，《中华人民共和国境外非政府组织境内活动管理法》（以下简称为“**《境外 NGO 法》**”）由中华人民共和国第十二届全国人民代表大会常务委员会第二十次会议通过，并于同日公布，将于 2017 年 1 月 1 日起施行。

不同于《基金会管理条例》及《外国商会管理暂行规定》，《境外 NGO 法》是我国首次针对所有形式的境外非政府组织（以下简称为“**境外 NGO**”）的境内活动进行立法，填补了我国该领域的立法空白，其出台也必将对国外仲裁机构在中国境内的活动产生深远影响。

一、《境外 NGO 法》的主要内容

1. 适用范围

《境外 NGO 法》的第二条确立了该法的适用范围，即“在境外合法成立的基金会、社会团体、智库机构等非营利、非政府的社会组织”“在中国境内开展活动”应适用该法。

2. 境外 NGO 的活动范围及活动规范

对于境外 NGO 在境内的活动范围以及相应的活动规范，《境外 NGO 法》的规定具体如下表所示：

	境外 NGO 可以在境内从事的活动	境外 NGO 不得在境内从事的活动
总体范围	境外 NGO 可以在经济、教育、科技、文化、卫生、体育、环保等领域和济困、救灾等方面开展有利于公益事业发展的活动。	境外 NGO 在中国境内开展活动不得危害中国的国家统一、安全和民族团结，不得损害中国国家利益、社会公共利益和公民、法人以及其他组织的合法权益。
		不得从事或者资助营利性活动、政治活动，亦不得非法从事或者资助宗教活动。
发展会员		境外 NGO 代表机构、开展临时活动的境外 NGO 不得在中国境内发展会员，国务院另有规定的除外。
登记和备案	境外 NGO 可以登记设立代表机构。境外 NGO 代表机构应当以登记的名称，在登记的业务范围和活动地域内开展活动。 境外 NGO 未登记设立代表机构的，可以与中方合作单位合作，开展经备案的临时活动。	境外 NGO 未登记设立代表机构、开展临时活动未经备案的，不得在中国境内开展或者变相开展活动，不得委托、资助或者变相委托、资助中国境内任何单位和个人在中国境内开展活动。
		境外 NGO 不得设立分支机构，国务院另有规定的除外。
资金监管	境外 NGO 在中国境内活动资金包括：（一）境外合法来源的资金；（二）中国境内的银行存款利息；（三）中国境内合法取得的其他资金。	境外 NGO 在中国境内活动不得取得或者使用规定以外的资金。 境外 NGO 及其代表机构不得在中国境内进行募捐。
	设立代表机构的境外 NGO 应当通过代表机构在登记管理机关备案的银行账户管理用于中国境内的资金。 开展临时活动的境外 NGO 应当通过中方合作单位的银行账户管理用于中国境内的资金，实行单独记账，专款专用。	境外 NGO、中方合作单位和个人不得以其他任何形式在中国境内进行项目活动资金的收付。
其他		境外 NGO 在中国境内开展活动不得对中方合作单位、受益人附加违反中国法律法规的条件。

此外，根据《境外 NGO 法》的规定，对于境外 NGO 的具体活动领域，国务院公安部门和省级人民政府公安机关将会同有关部门制定境外 NGO 活动领域和项目目录，因此境外 NGO 的活动范围也将进一步具体细化。

3. 主管机关

《境外 NGO 法》规定了以政府有关部门作为业务主管单位和公安机关作为登记管理机关进行主要的双重管理，其他部门协同管理的多重管理体制：

（1）国务院有关部门和单位、省级人民政府有关部门和单位，是境外 NGO 在中国境内开展活动的相应业务主管单位。国务院公安部门和省级人民政府公安机关将会同有关部门制定并公布业务主管单位名录。

业务主管单位主要负责批准境外 NGO 代表机构的设立及变更登记申请、对境外 NGO 及其代表机构进行监督指导、协助公安机关等部门查处境外 NGO 及其代表机构的违法行为等工作。

（2）国务院公安部门和省级人民政府公安机关，是境外 NGO 在中国境内开展活动的登记管理机关。

登记管理机关主要负责境外 NGO 代表机构的登记及年检、临时活动备案、违法行为的查处等工作。

（3）除前述的国务院公安部门和省级人民政府公安机关作为登记管理机关之外，各级公安机关也负责对境外 NGO 的监督管理及违法行为的查处。

（4）国家安全、外交外事、财政、金融监督管理、海关、税务、外国专家等部门按照各自职责对境外 NGO 及其代表机构依法实施监督管理。

（5）国务院反洗钱行政主管部门依法对代表机构、中方合作单位以及接受境外 NGO 资金的中国境内单位和个人开立、使用银行账户过程中遵守反洗钱和反恐怖主义融资法律规定的情况进行监督管理。

（6）各级人民政府有关部门为境外 NGO 在中国境内依法开展活动提供必要的便利和服务。

此外，《境外 NGO 法》还规定了国家对境外 NGO 境内活动管理中的指导作用，国家将建立监督管理工作协调机制，研究、协调、解决重大问题，对做出突出贡献的境外 NGO 给予表彰等。

二、《境外 NGO 法》对国外仲裁机构在中国境内仲裁活动的影响

1. 《境外 NGO 法》是否适用于国外仲裁机构

如前所述，《境外 NGO 法》适用于在境外合法成立的非营利、非政府的社会组织。包括 HKIAC、SIAC 以及 ICC 在内的国外仲裁机构无疑属于非政府的社会组织。但它们是否也属于非营利的社会组织？

HKIAC 在其组织简介中明确其为依照香港法设立的非营利性组织，组织形式为担保责任有限公司（Company Limited by Guarantee）。[1]

SIAC 也在其官方网站中写明，其为一家独立的非营利性组织。[2]

[1]参见 HKIAC 官网，http://www.hkiac.org/about-us，最后查看日期 2016 年 5 月 13 日。

[2]参见 SIAC 官网，http://www.siac.org.sg/2014-11-03-13-33-43/about-us，最后查看日期 2016 年 5 月 13 日。

ICC 并未在官方网站声明其非营利性，但 ICC 是联合国经济社会理事会的非政府组织顾问[3]，结合联合国对非政府组织的定义，即“在地方、国家或国际级别上组织起来的非赢利性的、自愿公民组织”[4]，可以看出 ICC 的非营利性质是被联合国所认可的。

然而，这些国外仲裁机构在中国法下是否同样属于《境外 NGO 法》所规定的“非营利”社会组织？《境外 NGO 法》对于“非营利”并未给出具体定义。

《中华人民共和国公益事业捐赠法》的第十条规定“本法所称公益性非营利的事业单位是指依法成立的，从事公益事业的不以营利为目的的教育机构、科学研究机构、医疗卫生机构、社会公共文化机构、社会公共体育机构和社会福利机构等。”可以看出该法对“非营利”仅作字面意义上的解释即“不以营利为目的”。

《民间非营利组织会计制度》[5]的第二条第二款将民间非营利组织的特征归纳为：（1）该组织不以营利为宗旨和目的；（2）资源提供者向该组织投入资源不取得经济回报；（3）资源提供者不享有该组织的所有权。

我们注意到我国的税法对于界定具有免税资格的“非营利”组织有更为严格的规定，具体而言，《中华人民共和国企业所得税法实施条例》和《财政部、国家税务总局关于非营利组织免税资格认定管理有关问题的通知》规定“非营利”应当满足以下条件：（1）该组织从事公益性或者非营利性活动；（2）取得的收入除用于与该组织有关的、合理的支出外，全部用于登记核定或者章程规定的公益性或者非营利性事业；（3）财产及其孳息不用于分配，但不包括合理的工资薪金支出；（4）该组织注销后的剩余财产用于公益性或者非营利性目的，或者转赠给与该组织性质、宗旨相同的组织，并向社会公告；（5）投入人对投入该组织的财产不保留或者享有任何财产权利；（6）工作人员工资福利开支进行严格控制确保不变相分配该组织的财产。

《境外 NGO 法》下的“非营利”组织概念有待相关细则的进一步明确，但我们认为其主要要件将与上述《民间非营利组织会计制度》、《中华人民共和国公益事业捐赠法》和税法对“非营利”组织的界定基本一致，即符合以下要求：（1）依法成立的组织；（2）该组织不以营利为宗旨和目的；（3）该组织的收入不在组织的资金投入者中进行分配或变相分配。从这个意义上讲，国外仲裁机构可以被认定为中国法下的非营利组织，其在境内开展活动也因此将适用《境外 NGO 法》的规定。

2.《境外 NGO 法》生效后，国外仲裁机构主管部门的确定

根据 2014 年 9 月 5 日生效的《国务院关于授权国务院民政部门负责境外非政府组织在中国境内活动登记管理工作的通知》，对于境外 NGO 在中国境内的活动，国务院授权由国务院民政部门负责机构登记、许可、监督、管理以及执法等工作。

但由于该通知本身十分简单，并未对境外

[3]具体名单见联合国网站，http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf，最后查看日期 2016 年 5 月 13 日。

[4]参见联合国网站 http://www.un.org/chinese/aboutun/ngo/qanda.html，最后查看日期 2016 年 5 月 13 日。

[5]中国财政部根据《中华人民共和国会计法》以及国家有关法律、行政法规制定，2005 年 1 月 1 日期执行。

NGO 的登记设立条件等内容作出具体规定，因此就涉外组织而言，民政部目前主要的工作限于依据已有的《基金会管理条例》及《外国商会管理暂行规定》对境外基金会的境内代表机构及外国商会进行登记。[6]

HKIAC、SIAC 及 ICC 的上海代表处都是以外国（地区）企业常驻代表机构的身份在上海市工商局登记设立的。但是，根据《外国企业常驻代表机构登记管理条例》（以下简称为“**《外企代表机构登记条例》**”）的规定，外国企业指的是依照外国法律在中国境外设立的营利性组织，国外仲裁机构并不符合这一条件。我们理解一方面是因为这些境外仲裁机构在境内设立代表机构时《境外 NGO 法》尚未出台，另一方面这可能是上海自贸区根据国务院“支持国际知名商事争议解决机构入驻”的精神所作的一种变通。[7]因此，HKIAC、SIAC 及 ICC 的上海代表处目前的登记及管理机关都是上海市工商局，而根据《境外 NGO 法》的规定，HKIAC、SIAC 及 ICC 将来需要以政府有关部门作为业务主管单位和公安机关作为登记管理机关办理代表机构的登记设立。

根据《中华人民共和国仲裁法》（以下简称为“**《仲裁法》**”）及《仲裁委员会登记暂行办法》的规定，省、自治区、直辖市的司法行政部门是国内仲裁委员会的登记机关。因此，公安机关后续有可能在名录中将司法行政部门划定为国外仲裁机构的业务主管机关。但同时，《境外 NGO 法》作为一项将在全国施行的法律，而“支持国际知名商事争议解决机构入驻”仅是上海自贸区的内部政策，因此也存在另一种可能，即公安机关未在后续制定的境外 NGO 活动领域和项目目录及业务主管单位名录中对国外仲裁机构作出相应规定。届时国外仲裁机构在境内活动的业务主管部门如何确定？实际上，在《境外 NGO 法》的审议阶段，已经出现了关于某些境外 NGO 的业务范围可能涉及多个领域，如何确定业务主管单位，是否需要指定一个兜底的业务主管部门等问题的争议。[8]最终兜底的业务主管部门如何确定，有待进一步的规定予以明确。

3.《境外 NGO 法》对国外仲裁机构代表机构办理登记手续的影响

相较于 HKIAC、SIAC 及 ICC 在上海市工商局登记设立代表处，在《境外 NGO 法》生效后，国外仲裁机构设立代表机构的登记手续主要会有以下变化和新增要求：（1）根据《外企代表机构登记条例》的规定，国外仲裁机构设立代表处仅需向工商行政管理部门办理登记即可。但是根据《境外 NGO 法》，代表机构的设立，需要经过业务主管单位的同意，以及登记主管机关的审核，登记难度提高；（2）境外 NGO 的宗旨及业务范围应有利于公益事业发展；（3）需要提供代表机构首席代表的无犯罪记录证明材料或声明；（4）境外 NGO 需要提供资金来源证明材料。

另外，已经在工商部门登记了代表机构的境外 NGO，是否需要向公安机关进行重新登记？对此，公安部境外 NGO 管理办公室负责人郝云宏在专题新闻发布会上说明，在《境外 NGO 法》生效前，已经登记了代表机构的境外 NGO 的活

[6]此处的外国商会指的是外国商业机构在中国境内成立的非营利性团体，并非成立于境外的商会如 ICC。

[7]详见《国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知》（国发〔2015〕21）。

[8]参见《境外非政府组织管理立法影响的不仅仅是 NGO》，2015 年 5 月 21 日，http://gongyi.sina.com.cn/gyzx/2015-05-21/105652684.html，最后查看日期 2016 年 5 月 5 日。

动开展不会受到影响。在《境外 NGO 法》生效后，只要依照规定补充有关材料，公安机关会继续依法登记。虽未直接说明，但我们理解其倾向性意见是在《境外 NGO 法》生效后，境外 NGO 需要向公安机关重新登记其代表机构。[9]

4.《境外 NGO 法》对国外仲裁机构在中国境内开展仲裁活动的影响

仲裁机构从事的活动通常包括（1）仲裁机构的宣传推广活动；（2）培训仲裁从业人员；（3）受理仲裁案件并对仲裁案件进行程序性管理。

那么《境外 NGO 法》对国外仲裁机构在境内开展活动会有怎样的影响？虽然具体的境外 NGO 活动领域及该法的实施细则都尚未出台，我们现结合前文有关仲裁机构通常从事的活动进行分析如下：

（1）《外企代表机构登记条例》列举的外国企业代表机构可以从事的活动包括：“（一）与外国企业产品或者服务有关的市场调查、展示、宣传活动；（二）与外国企业产品销售、服务提供、境内采购、境内投资有关的联络活动。”上述规定的范围比较窄，但仲裁机构代表处从事的宣传推广活动应当属于与其服务有关的宣传活动，无疑是可以进行的。从前文总结的境外 NGO 活动范围来看，境外 NGO 代表机构在《境外 NGO 法》的管理下，从事宣传推广活动也应当不存在任何的障碍，此类活动可以被认定为是在经济领域有利于公益事业发展的活动。

（2）国外仲裁机构对从业人员进行培训，超出了《外企代表机构登记条例》划定的活动范围。但是，在《境外 NGO 法》下，对从业人员的培训也可以看作是在经济领域有利于公益事业发展的活动。因此，《境外 NGO 法》赋予了国外仲裁机构开展培训从业人员活动的正当权利。

（3）除上述活动之外，另一个富有争议的问题是，国外仲裁机构能否在我国境内受理并管理仲裁案件？

《民事诉讼法》和《仲裁法》对国外仲裁机构在中国境内仲裁的情况未作任何规定。有观点认为，应当以“法不禁止即可为”为指导原则，国外仲裁机构在境内进行仲裁并不存在实际的法律障碍。例如，浙江省宁波中级人民法院也根据《承认及执行外国仲裁裁决公约》的规定承认并执行了 ICC 仲裁院在中国境内作出的 ICC 第 14006/MS/JB/JEM 号仲裁裁决。但也有观点认为，根据《仲裁法》第十条的规定，设立仲裁委员会应当经省、自治区、直辖市的司法行政部门登记，因此，仲裁在我国是需要经过行政机关特许才能提供的专业服务。而我国现行法律并未就国外仲裁机构进入中国仲裁市场作出任何明确的规定，故在现行中国法律框架下，国外仲裁机构仍然不能在我国境内受理并管理仲裁案件。[10]

2013 年，最高人民法院（以下简称“**最高院**”）在《关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L 申请确认仲裁协议效力案的请示的复函》（(2013)民四他字第 13 号，以下简称为“**龙利得案复函**”）及《关于宁波市北仑利成润滑油有限公司与法莫万驰公司买卖合

[9]参见《全国人大回应境外非政府组织境内活动管理法热点问题》，2016 年 4 月 28 日，http://money.163.com/16/0428/19/BLOVJE0S00253B0H.html，最后查看日期 2016 年 5 月 5 日。

[10]参见《国际商会仲裁院在中国仲裁效力几何》，2009 年 7 月 9 日，http://www.legaldaily.com.cn/jdwt/content/2009-07/09/content_1120486.htm?node=6151，最后查看日期 2016 年 5 月 9 日。

同纠纷一案仲裁条款效力问题请示的复函》（（2013）民四他字第 74 号）中正式确认了当事人约定由 ICC 仲裁院在中国大陆仲裁的仲裁协议有效。一些观点认为，这表明最高院支持国外仲裁机构在境内仲裁。但在我们看来，最高院的复函仅仅是确认了当事人选择 ICC 仲裁院在境内仲裁的仲裁协议有效，并未明确确认国外仲裁机构能否在境内开展仲裁业务。特别是在龙利得案复函中，最高院对合肥市中级人民法院及安徽省高级人民法院少数意见所提出的《仲裁法》第十条的相关问题也没有正面回应。因此，国外仲裁机构能否在在中国境内设立分支机构受理并审理仲裁案件依然不明确。

实际上，即使国外仲裁机构在境内开展仲裁活动，其职能的发挥也面临着立法缺失的制约。首先《民事诉讼法》和《仲裁法》对国外仲裁机构是否可以在中国境内仲裁以及如何在中国境内仲裁均未作任何明确的规定。 其次，即便国外仲裁机构可以在中国境内进行仲裁，当事人和法院是否可以进行财产保全和/或证据保全等临时措施，目前中国法律也未作任何规定。实践中，国外仲裁机构的仲裁庭做出的临时措施决定也很难得到中国法院的支持和执行。目前在上海自贸区设立的 HKIAC、SIAC 和 ICC 等国外仲裁机构的代表处也均对外表示，其主要作用在于开发中国大陆市场（Marketing Tool），并不受理仲裁案件，相关的仲裁案件将继续由 HKIAC 香港、SIAC 新加坡和 ICC 香港来受理和管理。

就《境外 NGO 法》而言，国外仲裁机构能否在我国境内审理仲裁案件可能并不是其关注和调整的重点对象，但目前国外仲裁机构一直在积极寻求在华活动，其如何在已有的法律框架内依法开展仲裁活动，值得我们继续关注。

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Dispute Resolution

Promulgation of the Overseas NGOs Law – Its Potential Impacts on the Arbitration Activities of Foreign Arbitration Institutions in Mainland China

From October 20, 2015 to February 24, 2016, the Hong Kong International Arbitration Center (hereinafter the "**HKIAC**"), the Singapore International Arbitration Centre (hereinafter the "**SIAC**") and the International Chamber of Commerce (hereinafter the "**ICC**") successively registered and established their Shanghai representative offices in the China (Shanghai) Pilot Free Trade Zone (hereinafter the "**Shanghai Free Trade Zone**"), to expand arbitration services and to seek a wider range of exchange and cooperation in mainland China.

On April 28, 2016, the *Law of the People's Republic of China on the Administration of Activities of Overseas Non-Governmental Organizations within the Territory of China* (hereinafter the "**Overseas NGOs Law**") was adopted at the 20th Session of the Standing Committee of the 12th National People's Congress of the People's Republic of China, and promulgated on the same day for implementation on January 1, 2017.

Unlike *Regulations on Foundation Administration* and *Interim Provisions on the Administration of Foreign Chambers of Commerce*, the *Overseas NGOs Law* is the first law aimed at the activities of overseas Non-governmental Organizations of all forms (hereinafter the "**Overseas NGOs**") in mainland China. It filled a void and might have far-reaching impacts on the activities of foreign arbitration institutions in mainland China as well.

I. Main Content of the Overseas NGOs Law

1. The Scope of Application

Article 2 of the *Overseas NGOs Law* defines the scope for application of this law as applying to the "*activities of … foundations, social groups, think-tanks and other non-profit, non-governmental social organizations legally formed abroad*" "*within the territory of China*".

2. The Scope of Activities by Overseas NGOs

As for the scope of activities by Overseas NGOs, the relevant provisions in the *Overseas NGOs Law* are listed in the following chart:

	Activities Allowed by Overseas NGOs in Mainland China	Activities Prohibited by Overseas NGOs in Mainland China
Overall Scope of Activities	Overseas NGOs may carry out activities conducive to the development of public-welfare in the areas such as economy, education, science and technology, culture, public health, sports and environmental protection, as well as poverty alleviation and disaster reliefs.	In carrying out activities within China, Overseas NGOs shall neither jeopardize the national unity, security and ethnic harmony of China nor harm the national interests, social public interests and the lawful rights and interests of citizens, legal persons and other organizations of China.
		Overseas NGOs shall neither engage in or sponsor for-profit activities, nor illegally engage in or sponsor religious activities within China.
Developing Members		The representative offices of Overseas NGOs or Overseas NGOs carrying out temporary activities shall not recruit members within China, unless otherwise provided for by the State Council.
Registration & Record-Filing	An Overseas NGO may apply to establish a representative office upon registration within China. The representative offices of Overseas NGOs shall carry out activities in the registered name and within the registered scope of business and areas of activities. An Overseas NGO that has not established a representative office may cooperate with a Chinese partner and carry out the record-filed temporary activities.	Overseas NGOs that have not established representative offices upon registration or completed the record-filing process for their temporary activities shall neither carry out, nor carry out in disguised manner, activities within China nor commission or sponsor, nor commission or sponsor in disguised manner, any entities or individuals in China to carry out activities on their behalf within China.

		Overseas NGOs are not allowed to establish branches within China, unless otherwise provided for by the State Council.
Fund Supervision	The funds for the activities of Overseas NGOs within China shall include: (1) Overseas funds with lawful sources; (2) interests on the bank deposits within China; and (3) other funds lawfully obtained within China.	Overseas NGOs shall not obtain or use funds other than the funds prescribed for in the provisions on activities within China. Neither Overseas NGOs nor the representative offices may engage in fundraising within China.
	An Overseas NGO that has established a representative office shall manage funds used within China through the representative office's bank accounts as declared to the registration authority. An Overseas NGO carrying out temporary activities shall manage funds used within China through the bank accounts of the Chinese partner and keep separate the account books with the designated funds used for designated purposes.	No Overseas NGOs, Chinese partners or individuals may receive or distribute project activity funds within China in any other form.
Other Provisions		In carrying out activities within China, no Overseas NGOs may impose additional conditions violating the Chinese laws or regulations on the Chinese partners or beneficiaries.

Furthermore, according to the *Overseas NGOs Law*, for the detailed areas of activities that the Overseas NGOs may carry out, the public security department of the State Council and the public security organs of the provincial people's governments shall, in conjunction with relevant departments, formulate the directory of areas and projects for the activities of Overseas NGOs so that the scope of activities of Overseas NGOs will be further detailed.

3. Regulatory Authorities

The Overseas NGOs Law set up a multiple administrative system consisting of the primary dual administration by relevant government departments as the competent business authorities and public security organs as the registration authorities, and the collaborative administration by other government departments:

(1) Relevant departments and organizations of the State Council and relevant departments and organizations of provincial people's governments are the competent business authorities supervising the activities carried out by the Overseas NGOs in mainland China. The public security department of the State Council and the public security organs of the provincial people's governments shall, in conjunction with relevant departments, formulate and publish the directory of competent business authorities.

The competent business authorities are mainly responsible for approving applications for Overseas NGOs seeking to establish representative offices in mainland China and for changes in registration, supervising and guiding the Overseas NGOs and their representative offices, and assisting public security departments in investigating any suspected illegal activities of the Overseas NGOs and their representative offices.

(2) The public security department of the State Council and the public security organs of the provincial people's governments are the registration authorities for the activities carried out by overseas NGOs in mainland China.

The registration authorities are mainly responsible for registration and annual review of the representative offices of Overseas NGOs, record-filing of temporary activities, and investigation and punishment of any illegal activities.

(3) Besides the aforementioned public security department of the State Council and the public security organs of the provincial people's governments as registration authorities, public security organs at all levels are also responsible for supervision and administration of Overseas NGOs, and investigation and punishment of any illegal activities.

(4) The departments for national security, foreign affairs, finance, financial supervision

and administration, customs, taxation, foreign experts, etc., shall, based on their respective duties, carry out the supervision and administration of Overseas NGOs and their representative offices in accordance with the law.

(5) The anti-money laundering administrative department of the State Council shall, in accordance with the law, carry out the supervision and administration of compliance with the anti-money laundering and anti-terrorism financing laws by the representative offices of Overseas NGOs, their Chinese partners and the entities and individuals in mainland China that accept the funds from Overseas NGOs in opening and using bank accounts.

(6) Relevant departments of the people's governments at all levels shall provide necessary facilitation and services to Overseas NGOs in carrying out activities in mainland China.

In addition, the *Overseas NGOs Law* also stipulates that the State shall provide guidance on the activities of Overseas NGOs, the State shall establish the coordination system for the supervision and administration, so as to study, coordinate and solve major issues, and commend Overseas NGOs for outstanding contributions.

II. The Impacts of the Overseas NGOs Law on the Arbitration Activities of Foreign Arbitration Institutions in Mainland China

1. Whether the *Overseas NGOs Law* Applies to Foreign Arbitration Institutions

As mentioned above, the *Overseas NGOs Law* shall apply to the non-profit, non-governmental social organizations legally formed abroad. Foreign arbitration institutions including HKIAC, SIAC and ICC are undoubtedly non-governmental social organizations. However, can they be considered non-profit social organizations?

HKIAC affirms, in an introduction to its organization, that it is a company limited by guarantee and a non-profit organization established under Hong Kong law.[1]

SIAC also declares on its official website that it is an independent, not-for-profit organization.[2]

ICC does not claim to be a non-profit on its official website, however, ICC is a non-governmental organization in consultative status with the Economic and Social Council of the United Nations[3], given the definition of non-governmental organization as defined by the United Nations, namely "*non-profit voluntary civil organizations organized at regional, national*

[1]See the official website of HKIAC, http://www.hkiac.org/about-us, last accessed on May 13, 2016.

[2]See the official website of SIAC, http://www.siac.org.sg/2014-11-03-13-33-43/about-us, last accessed on May 13, 2016.

[3]See the website of United Nations for detailed list, http://www.un.org/esa/coordination/ngo/pdf/INF_List.pdf, last accessed on May 13, 2016.

or international levels" [4] and it is clearly considered a non-profit by the United Nations.

But, under Chinese law, should these foreign arbitration institutions also be identified as "non-profit" social organizations and subject to the *Overseas NGOs Law*? The *Overseas NGOs Law* does not provide a specific definition of "non-profit".

Article 10 of the *Donations for Public Welfare Law of the People's Republic of China* stipulates that "*the term 'non-profit public welfare institutions' refers to institutions of education, scientific research, medicine and public health, public culture, public sports and public welfare services, etc., which are formed in accordance with law and engaged in public welfare services with no profit-making purposes.*" It can be seen that in this law the term "non-profit" is interpreted as its literal meaning, namely "*with no profit-making purposes.*"

Paragraph 2 of Article 2 of the *Accounting System for Non-governmental Non-profit Organizations* [5] summarizes the characteristics of a non-governmental non-profit organization as: (1) an organization that is not for marking profit; (2) no sponsor of the organization shall have economic returns for his contribution; (3) no sponsor of the organization shall claim ownership of the organization.

We have noted that the Chinese tax laws have stricter definitions of non-profit organizations especially when it comes to the tax exempt qualifications. Specifically, the *Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China* and the *Notice of the Ministry of Finance and the State Administration of Taxation on Issues concerning the Administration of Tax Exempt Qualification of Non-profit Organizations* provides that the "non-profit" shall meet the following conditions: (1) the organization engages in public welfare or non-profit activities; (2) the incomes obtained are all used for public welfare or non-profit undertakings as approved in registration or stipulated in the bylaws except for the reasonable expenses relating to the organization; (3) the properties and any fruits are not to be distributed, excluding reasonable wages and salaries; (4) the residual properties of the organization after deregistration should be used for public welfare or non-profit purposes or be donated to another organization in the same nature and with the same tenets; (5) the sponsor should not reserve or enjoy any property rights to the properties contributed to the organization; (6) the expenses for the wages and fringe benefits of the employees are

[4] See the website of United Nations, http://www.un.org/chinese/aboutun/ngo/qanda.html, last accessed on May 13, 2016.

[5] Stipulated by the Ministry of Finance in accordance with the Accounting Law of the People's Republic of China and other relevant laws, regulations and rules, which took effect on January 1, 2005.

strictly controlled, none of the organization's properties should be distributed in any disguised form.

Although the concept of "non-profit" organization under the *Overseas NGOs Law* is to be further defined in relevant detailed rules, we understand the primary elements should be essentially consistent with the definitions of "non-profit" organizations under *Accounting System for Non-governmental Non-profit Organizations*, *Donations for Public Welfare Law* and tax laws aforementioned, namely, it shall meet the following requirements: (1) the organization is legally formed; (2) the organization is not for profit making; (3) the incomes of the organization should not be distributed or distributed in any disguised form, to any sponsor. In this sense, foreign arbitration institutions should be recognized as non-profit organizations under Chinese law, and the *Overseas NGOs Law* shall apply to their activities in mainland China.

2. Determination of the Competent Business Authorities for Foreign Arbitration Institutions after the Implementation of the *Overseas NGOs Law*

According to the *Notice of the State Council on Authorizing the Department of Civil Affairs under the State Council to be Responsible for the Registration and Administration of Activities of Overseas Non-Governmental Organizations within China*, which took effect on September 5, 2014, for the activities of Overseas NGOs within China, the department of civil affairs under the State Council is authorized to be responsible for the registration of organizations, approving activities, supervision and administration.

But since this notice is relative simple, and does not provide any detailed conditions of registrations, thus currently, for overseas organizations, the scope of work of the Ministry of Civil Affairs is still limited to the registration of representative offices of overseas foundations and the registration of foreign chambers of commerce in accordance with the *Regulation on Foundation Administration* and *Interim Provisions on the Administration of Foreign Chambers of Commerce.*[6]

Shanghai representative offices of HKIAC, SIAC and ICC were registered with the Shanghai Administration for Industry & Commerce (hereinafter the "**Shanghai AIC**") as resident representative offices of foreign enterprises. However, according to the *Regulation on the Administration of Registration of Resident Representative Offices of Foreign Enterprises* (hereinafter the "**Resident Representative Offices Regulation**"), foreign enterprises shall refer to profit-making organizations established

[6] The term "foreign chambers of commerce" hereof refers to the non-profit organizations which are formed within China by foreign commercial organizations, not foreign chambers of commerce formed abroad like ICC.

abroad in accordance with foreign laws, and foreign arbitration institutions do not qualify. We understand they were registered this way partly because the *Overseas NGOs Law* had not been issued when these foreign arbitration institutions established their representative offices, and partly as a flexible solution provided by Shanghai Free Trade Zone according to the instruction of State Council that "*supporting the entering of international reputed commercial dispute resolution institutions.*"[7] Thus, the Shanghai AIC is the current registration authority and administration authority over these Shanghai representative offices of HKIAC, SIAC and ICC, and pursuant to the *Overseas NGOs Law*, HKIAC，SIAC and ICC shall register their representative offices with the relevant government departments as the competent business authorities and public security organs as the registration authorities.

The *Arbitration Law of the People's Republic of China* (hereinafter the "**Arbitration Law**") and the *Interim Measures for Registration of Arbitration Commissions* provided that, the judicial administrative departments of provinces, autonomous regions or municipalities directly under the Central Government are the departments responsible for the registration of arbitration commissions. It is possible that the judicial administrative departments may become the competent business authorities for foreign arbitration institutions in the subsequent directory published by the public security organs. Meanwhile, the *Overseas NGOs Law* is a law to be implemented nationwide, and "*supporting the entering of international reputed commercial dispute resolution institutions*" is only an internal policy within the Shanghai Free Trade Zone, thus it is also possible that the competent authority in charge of the business of foreign arbitration institutions may not be addressed in the subsequent directory of areas, projects and competent business authorities to be drafted by the public security organs. Then, under such circumstances, how can the competent business authorities for the activities of foreign arbitration institutions in mainland China be determined? In fact, when the *Overseas NGOs Law* was under review, many concerns were raised about how to determine the competent business authorities for those NGOs involving multiple fields, and whether to appoint a single department as the catch-all business authority[8], etc. Eventually, future rules will need to further specify whether or how to appoint a catch-all competent business authority.

3. Impacts of the *Overseas NGOs Law* on the Registration Process of Foreign Arbitration Institutions

[7] See *Notice of the State Council on Printing and Distributing the Plan for Further Deepening the Reform and Liberalization of the China (Shanghai) Pilot Free Trade Zone* (Guo Fa (2015) 21).

[8] See *The Legislation on Overseas NGOs affects more than NGOs*, May 5, 2015, http://gongyi.sina.com.cn/gyzx/2015-05-21/105652684.html, last accessed on May 5, 2016.

Compared to the registration of representative offices of HKIAC, SIAC and ICC with Shanghai AIC, after the *Overseas NGOs Law* goes into effect, the registration process would have following changes and additional requirements: (1) Establishing representative offices of foreign arbitration institutions will only need to register with the relevant AIC according to the *Resident Representative Offices Regulation*. However, pursuant to the *Overseas NGOs Law*, approval from the competent business authorities and examination by the registration authorities are required, thus the registration may be more difficult. (2) The goals and activities of the Overseas NGOs shall benefit the development of public-welfare. (3) Overseas NGOs shall provide the certificate or declaration of non-criminal record of the chief representative of its representative office to be established. (4) Overseas NGOs shall provide proof of funding sources.

Moreover, should Overseas NGOs which have already registered their representative offices with AIC re-register with the public security departments? Hao Yunhong, the official of the Overseas NGOs Administration Office of Ministry of Public Security, explained at a press conference that, the activities of Overseas NGOs with registered representative offices shall not be affected before the *Overseas NGOs Law* goes into effect. After the Overseas NGOs Law goes into effect, the public security organs will continue to provide registration services as long as the Overseas NGOs submit the supplementary materials in accordance with the law. Although the explanation was not quite straightforward, we understand the official was of the opinion that Overseas NGOs shall re-register their representative offices with public security organs.[9]

4. Impacts of the *Overseas NGOs Law* on the Arbitration Activities of Foreign Arbitration Institutions in Mainland China

Generally, the activities of arbitration institutions include: (1) publicity and promotion of arbitration institutions; (2) training programs for arbitration practitioners; and (3) acceptance and procedural management of arbitration cases.

How would the *Overseas NGOs Law* affect the activities of foreign arbitration institutions in mainland China? Although the specific permissible areas for the activities of Overseas NGOs and detailed implementation rules of the *Overseas NGOs Law* are yet to be published, we hereby offer some observations and analysis in relation to the arbitration activities of foreign arbitration institutions in the previous paragraph:

(1) The *Resident Representative Offices Regulation* listed the following activities that

[9] See *The Reply of National People's Congress on Key Issues of the Overseas NGOs Law*, April 28, 2016, http://money.163.com/16/0428/19/BLOVJE0S00253B0H.html, last accessed on May 5, 2016.

the resident representative offices of foreign enterprises may carry out in mainland China, namely, "*1. Market research, presentation and publicity activities related to the products or services of foreign enterprises; 2. Liaison activities related to the product sales, service delivery, domestic purchase and domestic investment of foreign enterprises.*" Although the scope of activities listed above is relatively limited, there is no doubt that the representative offices of foreign arbitration institutions are allowed to carry out publicity and promotion activities, since such activities are regarded as the publicity activities related to their services. Based on the scope of activities of Overseas NGOs summarized above, there shall be no obstacle for the representative offices of foreign arbitration institutions to carry out publicity and promotion activities under the administration of the *Overseas NGOs Law*, because such activities are regarded as activities which benefit the development of public-welfare in economic fields.

(2) Providing training programs for arbitration practitioners goes beyond the scope of activities under the *Resident Representative Offices Regulation*. However, providing training programs for arbitration practitioners may also be regarded as activities which benefit the development of public-welfare in economic fields. Therefore foreign arbitration institutions are entitled to carry out such training activities under the *Overseas NGOs Law*.

(3) In addition to the activities mentioned above, one issue that has caused a lot of debates is whether foreign arbitration institutions can accept and manage arbitration cases in mainland China.

Neither the *Civil Procedure Law* nor the *Arbitration Law* addresses the circumstance of foreign arbitration institutions conducting arbitrations within mainland China. There are thoughts that the principle of "all things are permissible unless prohibited" shall apply, so there would be no practical obstacle for foreign arbitration institutions to conduct arbitrations within mainland China. For example, the Ningbo Intermediate Court of Zhejiang Province recognized and enforced the ICC award 14006/MS/JB/JEM rendered by ICC International Court of Arbitration in mainland China, according to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. However, there is also an alternate view that according to Article 10 of the *Arbitration Law*, the establishment of an arbitration commission should be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government, which means arbitration would be considered a professional service requiring special permission of the administration, and since there is no explicit

law allowing foreign arbitration institutions to enter into the Chinese arbitration market under the current Chinese law framework, foreign arbitration institutions would not be permitted to accept arbitration cases or provide procedural management of the arbitration cases within mainland China. [10]

In 2013, in the *Reply to the Request for Instructions in the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati S.R.L*. ((2013) Min Si Ta Zi No.13, hereinafter the "**Reply of Longlide Case**") and the *Reply to the Request for Instructions in the Sale and Purchase Contract Dispute Between Ningbo Beilun Licheng Lubricating Oil Co., Ltd. and Famowanchi Corporation regarding the Validity of an Arbitration Clause* ((2013) Min Si Ta Zi No. 74), the Supreme People's Court (hereinafter the "**SPC**") officially confirmed the validity of arbitration clauses where parties agreed to have ICC International Court of Arbitration conduct arbitrations in mainland China. Some people consider these Replies to indicate that the SPC is likely to support foreign arbitration institutions in conducting arbitration within mainland China. However, in our view, these SPC Replies only confirm the validity of arbitration clauses and do not explicitly confirm whether foreign arbitration institutions are permitted to conduct arbitration in mainland China. Specifically, in the *Reply of Longlide Case*, the SPC did not provide an answer to the question in relation to Article 10 of the Arbitration Law raised in the minority opinions of Hefei Intermediate Court and the Higher Court of Anhui Province. Thus it is still unclear whether foreign arbitration institutions are permitted to conduct arbitration through their China branches in mainland China.

In fact, even if foreign arbitration institutions are permitted to conduct arbitration within mainland China, the exertion of their functions might still be constrained due to the absence of relevant legislation. First, the *Civil Procedure Law* and the *Arbitration Law* have no provisions with regard to whether or how foreign arbitration institutions can conduct arbitration within mainland China. Second, even if foreign arbitration institutions are permitted to conduct arbitration in mainland China, it is unclear under Chinese law whether the interim measures such as the preservation of property and/or evidence can be taken by the parties or the Chinese courts. In practice, the procedural orders of interim measures rendered by arbitral tribunals of foreign arbitration institutions have had few opportunities to be supported and enforced by Chinese courts. So far, the representative offices of HKIAC, SIAC and ICC established in the Shanghai Free Trade Zone have expressed that they are still a marketing tool

[10] See *The Effect of Arbitration Awards Made by ICC in China*, July 9, 2009,http://www.legaldaily.com.cn/jdwt/content/2009-07/09/content_1120486.htm?node=6151, last accessed on May 9, 2016.

in mainland China at this stage and are not accepting arbitration cases, and arbitration cases shall still be accepted and managed by HKIAC in Hong Kong, SIAC in Singapore and the Hong Kong branch of ICC.

In brief, for the *Overseas NGOs Law*, the question of whether foreign arbitration institutions can conduct arbitration in mainland China might not be a key issue to be addressed under this law. However, foreign arbitration institutions are still seeking to expand their activities in mainland China. It is worth our continued attention whether or how foreign arbitration institutions may conduct arbitration in mainland China under the current Chinese legal framework.

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