

INSIDE ARBITRATION: PROPOSED AMENDMENTS TO CHINA'S ARBITRATION LAW - A SIGN OF INTERNATIONALISATION?

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Legal Briefings

A review of China's 26-year old arbitration law promises sweeping change and a major step towards global dispute resolution norms

The current Arbitration Law of the People's Republic of China (**Arbitration Law**) was promulgated in 1994. Except for cosmetic amendments made in 2009 and 2017, it has been in force for 26 years without substantial changes. With the rapid economic expansion over the past decades in China, the Arbitration Law has, in many respects, become disconnected from both economic reality and international practice.

Mainland Chinese courts, particularly the Supreme People's Court in Beijing and high courts and intermediate courts in the more developed regions, have long demonstrated their support for best practice in international arbitration. Mainland institutions have modernised their rules to reflect international best practice. The Arbitration Law, however, lacks many of the concepts and powers that are fundamental to modern arbitral legislation. These include the kompetenz-kompetenz doctrine, power for tribunals to grant interim relief, and the concept of a legal seat of arbitration. In addition, it is still unclear whether non-Chinese institutions can administer arbitrations in Mainland China. This has hindered the internationalisation process and the overall development of arbitration in China.

In light of these fundamental issues, the Ministry of Justice started a revision process in 2018, which led to the publication of the Revised Arbitration Law (Draft for Comment) (**Revised Draft**) on 30 July 2021 for public consultation. The proposed revisions are designed to improve the Arbitration Law by resolving existing problems and modernising China's arbitration regime.

The Revised Draft signals a range of ground-breaking changes to the existing arbitration regime in Mainland China. If enacted, the proposed revisions would address these lacunae and bring Mainland China more in line with other leading arbitral jurisdictions.

This article provides an overview of the key changes proposed in the Revised Draft.

1. GENERAL PRINCIPLES

Article 10 of the Revised Draft provides that PRC courts will “support and supervise” arbitration. Articles 4, 29 and 30 enshrine the following principles:

- parties to arbitration must be treated equally and provided with opportunities to fully present their cases (Article 29);
- undue delay and expense must be avoided in arbitral proceedings (Article 30); and
- arbitral proceedings must be conducted in good faith (Article 4).

The principle of conducting arbitration in good faith is further enshrined in Articles 21(2) and 33 of the Revised Draft. Akin to the principle of estoppel, Articles 21(2) and 33 prevent parties from raising jurisdictional or procedural objections at a later stage (eg in the enforcement stage or the set-aside proceedings) if they did not raise the objections in the course of the arbitration.

In addition, the Revised Draft seeks to adapt to the post-COVID-19 era, by allowing electronic methods of serving arbitration documents (Article 34) and conducting arbitration proceedings (Article 30).

Furthermore, Article 1 in the Revised Draft replaces “equal parties” with “natural persons, legal persons and other organizations”, which may permit investor-state arbitration in China. However, there is no detailed information on what this means and so whether the courts would recognise and enforce an arbitration award made in investor-state disputes is still a matter of speculation.

2. FOREIGN ARBITRAL INSTITUTIONS PERMITTED TO “CONDUCT FOREIGN-RELATED ARBITRATION BUSINESS”

Article 12 of the Revised Draft provides that "foreign arbitral institutions" may set up offices in Mainland China to "conduct foreign-related arbitration business". Although the Revised Draft does not define "foreign-related arbitration business", it has been widely considered that this article would allow arbitral institutions based outside Mainland China to administer arbitration cases in Mainland China.

A number of foreign institutions such as ICC, HKIAC and SIAC have set up offices in Mainland China. However, those offices have so far only been permitted to conduct business development activities in Mainland China. Provision of case administration services by foreign institutions is currently not allowed except in certain designated areas such as Shanghai's Lin-gang free trade zone. The Revised Draft would allow foreign institutions to administer cases in Mainland China, although the scope of case administration services to be provided by foreign institutions will be limited to foreign-related arbitration cases and not include purely domestic Chinese cases.

In this connection, the Revised Draft also replaces the term "arbitration commission(s)" with the term "arbitral institution(s)". The Arbitration Law uses the term "arbitration commission(s)", a specific name for Mainland Chinese arbitral institutions, as the 1990s legislators originally intended the Law to apply only to domestic institutions, without envisaging that foreign institutions might also operate in Mainland China. In order to introduce the ground-breaking change of allowing foreign institutions to operate in Mainland China, the Revised Draft adopts the term "arbitral institution(s)" throughout, which refers to both domestic arbitration commissions and foreign arbitration institutions.

3. SEAT OF ARBITRATION

While the PRC judiciary has already adopted this approach in practice, the concept of a "seat of arbitration" is not expressly recognised under the current Arbitration Law. The Revised Draft expressly recognises this concept and adopts the term "seat of arbitration".

According to the Revised Draft, if the parties fail to agree on the seat of the arbitration, the seat will be "the location of the arbitral institution" (Article 27). However, in case of a foreign-related arbitration, the seat may be determined by the arbitral tribunal having regard to the circumstances of the case (Article 91).

Based on the proposed text, there appear to be two possible interpretations:

- i) Article 27 applies to domestic arbitration whereas Article 91 applies to foreign-related arbitration; or
- ii) Article 91 applies to ad hoc foreign-related arbitration only, whereas Article 27 applies to both domestic arbitration and institutional foreign-related arbitration.

In our view, the first interpretation is more in line with international practice; hopefully this ambiguity will be clarified in later versions of the Revised Draft.

4. ARBITRATION AGREEMENTS AND KOMPETENZ-KOMPETENZ DOCTRINE

The Revised Draft proposes a number of important changes with respect to the issue of validity of arbitration agreements.

First, under the current Arbitration Law, a valid arbitration agreement must contain three basic elements: (i) an intention to arbitrate; (ii) matters that are subject to arbitration; and (iii) a designated arbitration commission. An ambiguous arbitration agreement, from which it is not clear which arbitration commission the parties have selected, will be deemed invalid. The Revised Draft significantly relaxes this requirement. According to Article 21 of the Revised Draft, the only necessary element for a valid arbitration agreement is an intention to arbitrate. Article 35 further provides that if the parties are unable to ascertain an arbitral institution pursuant to their agreement or the adopted arbitration rules, the first institution that accepts the case shall administer the arbitration.

Second, the Revised Draft recognises the kompetenz-kompetenz doctrine, which allows arbitrators to determine their own jurisdiction. Under the current Arbitration Law, an application to challenge the validity of the arbitration agreement may be made either to the arbitration commission or to a competent PRC court. If applications are made to both the arbitration commission and a PRC court, the court's decision shall prevail, unless the application to the court was made after the arbitration commission had already rendered a decision, in which case the court will defer to the arbitration commission's decision and not accept the application.

The Revised Draft abandons this mechanism and, in line with the international practice and UNCITRAL Model Law, provides that the tribunal has the power to decide on its own jurisdiction (Article 28). The draft further provides that the tribunal's decision may be reviewed by a competent PRC court and, if the court decides that the arbitration agreement is invalid or the tribunal does not have jurisdiction, either party may apply to a higher level court for a second-level review (Article 28).

Third, Article 90 of the Revised Draft clarifies that the law governing the validity of the arbitration agreement will be determined as follows: (i) the law agreed by parties to apply to the arbitration agreement will apply; (ii) in the absence of agreement on (i), it will be the law of the seat; (iii) in the absence of party agreement on the seat, it will be PRC law. This provides welcome clarity to an issue which is often contested in international arbitrations.

5. APPOINTMENT OF ARBITRATORS

The Revised Draft proposes the following changes with respect to the appointment of arbitrators:

- parties to arbitration are permitted to select arbitrators off the panel of arbitrators of the institution (Article 50);
- where parties are unable jointly to appoint a presiding arbitrator, the presiding arbitrator will be jointly appointed by the co-arbitrators. Failing this, the institution will appoint (Article 51);
- arbitrators have a duty to disclose any circumstances that give rise to reasonable doubts as to their independence and impartiality (Article 52). On that note, the current Arbitration Law provides only that an arbitrator must recuse himself or herself under certain circumstances; it does not include disclosure obligations.

6. TRIBUNALS EMPOWERED TO GRANT INTERIM RELIEF

Under the Arbitration Law, the power to grant interim relief in aid of China-seated arbitration is exclusively reserved to the PRC courts. Arbitral tribunals do not have the power to grant interim relief. In practice, parties seeking interim relief may submit their applications to the administering institutions which will then forward the applications to the relevant PRC courts.

The Revised Draft fundamentally changes this mechanism by granting the power to arbitral tribunals and emergency arbitrators as well (Articles 43, 46 and 49). The PRC courts are required to enforce or provide assistance in the enforcement of the interim measures ordered by arbitral tribunals or emergency arbitrators (Articles 47 and 48).

The Revised Draft further provides that: -

- "interim measures" includes asset preservation, action preservation, evidence preservation and any other type of interim measures deemed necessary by the arbitral tribunal (Article 43);
- asset preservation and action preservation may be granted where behaviours of one party or parties, or any other reasons, may render it impossible or difficult to enforce the award or cause losses to the other party (Article 44);
- evidence preservation may be granted where the evidence may be destroyed or lost or become difficult to obtain in the future (Article 45); and
- the arbitral tribunal should require the applicant to provide security if it intends to grant an interim relief order (Article 47).

If an application is wrongfully made and thus causes damage to the other party, the applicant must be liable to compensate the loss suffered by the other party (Article 47). This article mirrors Article 105 of the PRC Civil Procedure Law, which applies to interim relief applications made to the PRC court. It remains to be seen how it would apply in practice to applications to arbitral tribunals or emergency arbitrators.

7. ARBITRAL AWARDS

While Article 55 of the Arbitration Law already provides that arbitral tribunals may issue partial awards before issuing the final award, Article 74 of the Revised Draft further clarifies that:

- i) tribunals may issue partial or interim awards;
- ii) parties must comply with the order(s) granted in any partial or interim awards; and
- iii) if a party fails to comply with the order(s) granted in a partial (but not interim) award, the other party may apply to a PRC court for enforcement.

This article addresses concerns under the current Arbitration Law regarding the finality of partial awards.

Interestingly, Articles 69 and 70 of the Revised Draft provide that, if parties reached a settlement agreement prior to the constitution of the tribunal or before commencing an arbitration, either party may apply to the arbitral institution to form an arbitral tribunal pursuant to the arbitration agreement and ask the tribunal to issue an award based on the contents of the settlement agreement. These articles aim to enhance the enforceability of settlement agreements and the use of other alternative dispute resolution mechanisms such as mediation.

8. GROUNDS FOR SETTING-ASIDE AND NON-ENFORCEMENT OF ARBITRAL AWARDS

The Revised Draft proposes a number of changes to the mechanisms for set-aside and refusing enforcement of arbitral awards. Most significantly, it seeks to unify the grounds for setting aside domestic and foreign-related awards, and to prevent the enforcing court from reviewing issues relating to the merits of the arbitration with respect to both domestic and foreign-related awards.

Under the current Arbitration Law and the Civil Procedure Law, different grounds apply for setting aside domestic awards and foreign-related awards. While the grounds for setting aside foreign-related awards are more aligned with the UNCITRAL Model Law, domestic awards may be subject to a more substantive review and be set aside if (i) the award is rendered based upon any falsified evidence; or (ii) any material evidence which may have an impact on the decisions in the award was concealed by either party. The Revised Draft removes these two grounds and unifies the set-aside grounds for domestic and foreign-related awards (Article 77).

In addition, the Revised Draft introduces a new ground, providing that an award may be set aside if “the award was obtained through fraudulent conduct including malicious collusion and falsifying evidence” (Article 77). This ground also applies to both domestic and foreign-related awards. This addresses so-called “falsified arbitrations” in China, where arbitrations have been based on fraudulent legal relationships and falsified documents in order to damage third parties’ interests and to unlawfully benefit the parties to the arbitration. Although this new ground does not exist under the Model Law, the circumstances it intends to tackle should, in our view, be also caught by the violation of due process ground or the violation of public policy ground under the Model Law and many other arbitration laws worldwide.

Second, the Revised Draft provides that the PRC courts may refuse to enforce a domestic or foreign-related arbitral award, only if the award is “against social public interest” (Article 82). While this appears to be inconsistent with the New York Convention, it arises from the legislators’ concern of duplicative review of arbitral awards by the PRC courts in set-aside proceedings and non-enforcement proceedings and potentially conflicting results. This change will consolidate the power to the court hearing the set-aside applications and restrict the power of the enforcing court.

While currently a party wanting to challenge a China-seated award could do it by either bringing set-aside proceedings or resisting enforcement (or both), if this proposed amendment is adopted, that party would have to do it by bringing set-aside proceedings. The proposed amendment does not apply to foreign arbitral awards and Hong Kong, Macau and Taiwan awards, which would still be enforced under the New York Convention and the relevant arrangements

Other important changes introduced by the Revised Draft regarding set-aside and enforcement procedures include:

- the time limit for applying to set aside an arbitral award has been shortened from six months to three months, from the date the parties receive the award (Article 78);
- the Revised Draft confirms that the PRC courts may partially set aside an arbitral award, which is the approach already followed by the courts in practice (Article 77);
- the Revised Draft stipulates the specific circumstances under which the courts may remit the case for re-consideration by the original arbitral tribunal or newly composed tribunal where the original one was not properly constituted or there is alleged misconduct (Article 80); and
- the Revised Draft confirms a third party's right to object to enforcement proceedings if the proceedings affect the third party’s legitimate rights and interests (Article 84). This was already provided in the PRC Supreme Court’s judicial interpretations and is now confirmed in the Revised Draft.

9. AD HOC ARBITRATION PERMITTED FOR FOREIGN-RELATED COMMERCIAL DISPUTES

Ad hoc arbitration is not permitted under the current Arbitration Law for any arbitrations seated in Mainland China. Chapter 7 of the Revised Draft of the Arbitration Law contains special provisions for foreign-related arbitrations. A key change proposed is permitting *ad hoc* arbitration for “commercial disputes involving foreign-related elements” (Article 91).

The Revised Draft further provides that parties to *ad hoc* arbitrations may jointly appoint an arbitral institution as the appointing authority, failing which a competent PRC intermediate people’s court may designate an arbitral institution as the appointing authority (Article 92). Furthermore, the arbitral tribunals appointed in *ad hoc* arbitrations are required to file the original award and the record of service of the award with the intermediate people’s court of the seat of the arbitration (Article 93).

10. COMMENT

The Revised Draft will significantly enhance If adopted, the internationalisation of the PRC arbitration law. For example, the kompetenz-kompetenz principle, if implemented in practice, would be a significant move towards further empowering the tribunal and reducing the scope of judicial involvement in arbitral proceedings. The change to allowing foreign arbitration institutions to set up branch offices and the adoption of the “seat of arbitration” concept are very positive signals to show that legislators have a genuine intention to change the landscape of arbitration regime in Mainland China, and to develop an environment which is more friendly and open to international arbitrations.

Having said that, the Revised Draft may also create some new uncertainties. For example, it is still not entirely clear whether branches of foreign arbitration institutions will be granted any actual powers to administer cases in Mainland China. Hopefully, these issues will be resolved in the process of finalising the revisions and through implementation and judicial guidance.

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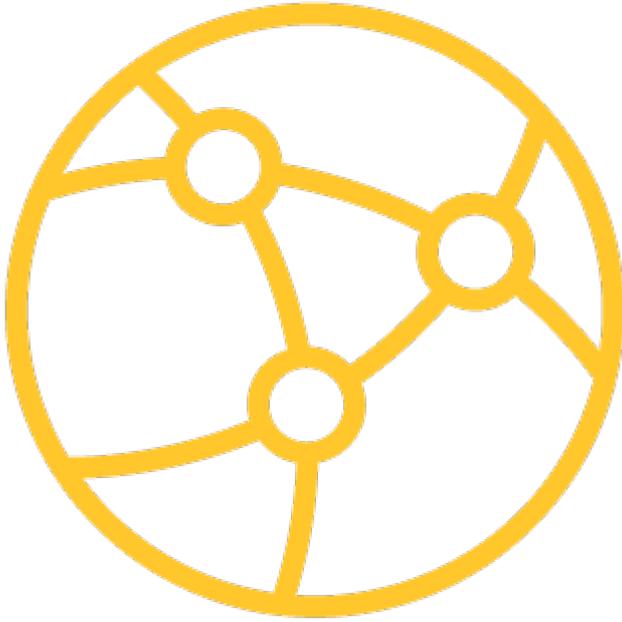
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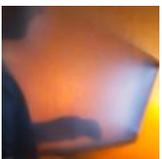
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