

# Legal Commentary

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## Dispute Resolution Law

### A Review of the Arbitration Law (Revision Draft for Comment)

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Arbitration, a universally adopted dispute resolution mechanism, plays an important role in China's alternative dispute resolution system. The *Arbitration Law of the People's Republic of China* (the "**Arbitration Law**"), which was adopted in 1994, appears incompatible with the latest arbitration practice that has evolved along with China's economic development. Amendments to the Arbitration Law adopted in 2009 and 2017 made only minor changes to several of its provisions, far from satisfying needs in practice. On July 30, 2021, the Ministry of Justice issued for public comments a revision draft to the Arbitration Law<sup>2</sup> (the "**Revision Draft**"), with a view toward making significant changes to the law. This article provides a brief review of some of the proposed revisions and analyzes their potential impacts.

#### Establishment of the seat of arbitration standard

International arbitration commonly adopts the seat of arbitration standard. That is, the seat of arbitration determines matters such as the nationality of the arbitral award and the competent court to set aside the arbitral award. China has adopted the "institutional standard" in its laws for historical reasons. Judicial practice, however, has supported a shift toward the seat of arbitration standard. For example, a Chinese court has held that an ICC award rendered in Singapore was a Singaporean award rather than a French award<sup>3</sup>. In another case, a court in Guangzhou held that an ICC award made in Guangzhou was a

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<sup>2</sup> Circular of the Ministry of Justice on the Opening for Public Comments the Arbitration Law of the People's Republic of China (Revision Draft for Comment) (Min. Justice; issued July 30, 2021 for public comment until August 29, 2021), available at [http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730\\_432967.html](http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html).

<sup>3</sup> Reply of the Supreme People's Court to the Request for Instructions on Application for Recognition and Enforcement of a Foreign Arbitral Award in the Case of DMT Ltd. (France) (Applicant) v. Chaozhou City Huaye Packing Materials Co., Ltd. and Chao'An County Huaye Packing Materials Co., Ltd. (Respondents), [http://www.pkulaw.cn/fulltext\\_form.aspx/pay/fulltext\\_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb](http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb).

Chinese foreign-related award<sup>4</sup>. Under the regime proposed in the Revision Draft, awards rendered in China by foreign arbitral institutions would be considered Chinese awards subject to domestic judicial review. The Revision Draft would establish the “seat of arbitration standard” to directly bridge the gap between the law and judicial practice for international commercial arbitration.

The seat of arbitration, as a legal concept, is distinguished from the venue of an arbitration hearing. According to the Revision Draft, if a party disputes the tribunal’s decision on the validity of an arbitration agreement or the tribunal’s jurisdiction, it must submit the case to the court of the seat of arbitration for review (Article 28). In addition, the court of the seat has jurisdiction to order interim measures (Article 46), to set aside an award (Article 77), and to assist in forming an *ad hoc* arbitral tribunal as well as to decide on challenges to arbitrators (Article 92). Parties should pay attention to the choice of the seat of arbitration when drafting arbitration clauses—choose a jurisdiction with a mature arbitration practice and an experienced arbitration-related judiciary to make full use of the court’s support and supervision.

### **Arbitration jurisdiction concerning principal and accessory contracts**

Article 24 of the Revision Draft provides that a principal contract will prevail if it contains an arbitration clause inconsistent with its accessory contract, and the arbitration clause of the principal contract covers disputes under the accessory contract. If the accessory contract does not contain an arbitration clause, parties to that contract will also be bound by the arbitration clause of the principal contract.

It is worth noting that Article 21 of the *Interpretation of the Supreme People’s Court on Application of the Security System under the Civil Code of the People’s Republic of China* (the “**Interpretation**”) provides that “where an arbitration clause is stipulated in a principal contract or a security contract, the people’s court shall have no jurisdiction over disputes between the parties to the contract that stipulates an arbitration clause”; “where a creditor brings a lawsuit against the security provider separately under the law and the creditor only sues the security provider, the competent court shall be determined by the security contract.” This provision treats as distinct the dispute resolution clauses of a principal contract and its accessory contract.

The Revision Draft would change this approach. Under the Revision Draft, the effect of an arbitration clause in the principal contract would extend to the accessory contract, and courts would have no jurisdiction over either the principal contract or the security contract, regardless of whether the security contract contains an arbitration clause. Thus, contrary to Article 21 of the Interpretation, the creditor would be required to initiate arbitration against the security provider if the principal contract contained an arbitration clause, even in cases where the creditor only filed claims against the security provider. While the Revision Draft aims to provide a pro-arbitration regime to deal with inconsistent dispute resolution clauses in principal and accessory contracts, the complete denial of the independence of the accessory contract’s dispute resolution clause could inconvenience the parties if, as in this instance, the creditor only

<sup>4</sup> Brentwood Industries (US) v. Guangdong Faanlong Machinery Engineering Co., Ltd., Guangzhou Zhengqi Trading Co Ltd. and Guangdong Environmental Engineering Equipment Corporation, (2015) Sui Zhong Fa Min Si Chu Zi No. 62 (Guangzhou Intern. People’s Ct. August 6, 2020), *available at* <https://law.wkinfo.com.cn/judgment-documents/detail/MjAzMTk1NjMzOTE%3D?searchId=b8d0f0a56a624d968cc3b76aeba307ac&index=1&q=%E5%B8%83%E5%85%B0%E7%89%B9%E4%BC%8D%E5%BE%B7&module=>.

sought remedies against the security provider.

### **Derivative arbitration on behalf of a corporation/limited liability partnership**

Chinese law provides for derivative suits on behalf of companies and limited liability partnerships, respectively, at Article 151 of the *Company Law of the PRC* and at Article 68 of the *Partnership Law of the PRC*. Shareholders or limited partners may file lawsuits against third parties on behalf of the company or the limited liability partnership in certain circumstances. However, where an arbitration agreement is concluded between the company or limited partnership and the third party, it is unclear whether shareholders or limited partners are bound by the arbitration agreement and may initiate derivative arbitration. Article 25 of the Revision Draft provides that shareholders of a company and limited partners of a partnership would be bound by the arbitration agreement between the company/partnership and the third party when seeking remedies against the third party on behalf of the company/partnership under the relevant law.

### **Arbitration agreements valid in the absence of a clear choice of arbitration institution**

Article 35 of the Revision Draft provides that a party's application for arbitration must contain an arbitration agreement, specific claims with facts and reasons, and matters in dispute arbitrable under the Arbitration Law. Compared with the Arbitration Law, the Revision Draft would no longer require an arbitration agreement to contain a "chosen arbitration committee." This provision is in concert with the provision concerning the foreign-related *ad hoc* arbitration (Article 91). Meanwhile, it lifts the restriction on the validity of arbitration agreements in the absence of a clear choice of arbitration institution. According to the Revision Draft, even if the parties cannot reach a supplementary agreement as to the choice of arbitration institution, they may apply for arbitration to the institution located at the parties' common domicile. If the parties do not have a common domicile, the institution outside the parties' domiciles that first docketed the case would have the right to arbitrate the case (Article 35). However, this first-to-docket concept lacks sufficient clarity. Different institutions may have different standards in practice for case docketing and practitioners may argue for different interpretations. Thus, this provision could trigger procedural disputes in the absence of a clear definition of the first case docketed and a method to deal with disputes over the timing of case registrations.

### **Tribunal's competence to decide its jurisdiction**

Article 28 of the Revision Draft provides that the arbitral tribunal is empowered to determine its own jurisdiction to hear the case or the validity of the underlying arbitration agreement, if either party raises an objection in this regard. Before the tribunal is constituted, the arbitral institution may decide whether to proceed with the arbitration proceedings based on *prima facie* evidence. Courts may not take challenges made directly by a party without the tribunal or institution's prior determination of these issues. First, the Revision Draft would give discretion to the tribunal to determine jurisdiction, rather than the institution. Next, the Revision Draft fully endorses the "competence-competence" doctrine, a remarkable development in arbitration law. Under the Arbitration Law, if one party requests the institution to determine the tribunal's jurisdiction while the other party requests a court to do so, the power to make the decision rests with the

court. In addition, under the Arbitration Law, upon the court's notice of a party's challenge to the tribunal's jurisdiction, the institution must suspend the arbitration proceedings. However, the Revision Draft sets forth a mechanism whereby the court's review of the jurisdictional challenge would not interrupt the arbitral proceedings.

### **Interim and partial awards**

Article 74 of the Revision Draft provides that, "in arbitrating a dispute, if part of the facts involved has already become clear, the arbitral tribunal may first make a partial award in respect of such part of the facts. In arbitrating a dispute, if a disputed matter affects the progress of the arbitration proceeding or needs to be clarified before the final award, the arbitral tribunal may make an interim award in respect of that matter." Article 55 of the Arbitration Law allows partial awards on some of the facts that have been discovered; however, in practice, tribunals are reluctant to make partial awards. The availability of partial awards enhances the efficiency of arbitration, as it allows the parties to promptly realize the benefits that have been determined by an award. The Revision Draft reaffirms the norm of partial awards and would add interim awards as new tool. The Revision Draft would require parties to perform partial and interim awards and entitle winning parties to apply to courts for enforcement of partial awards. This would empower tribunals to render partial and interim awards in practice, giving full play to the characteristics of arbitration and facilitating the efficient resolution of disputes.

### **Establishment of foreign-related ad hoc arbitration**

Article 91 of the Revision Draft would enable the parties to refer foreign-related commercial disputes to a "specified arbitral tribunal", also known as an "*ad hoc* arbitral tribunal". *Ad hoc* arbitration is the "original" form of arbitration, whereby the parties, according to an arbitration agreement (clause), select arbitrators to form an arbitral tribunal on an *ad hoc* basis after a dispute has arisen. The *ad hoc* tribunal is only responsible for adjudicating the case and will dissolve itself once the adjudication is completed by rendering an award. *Ad hoc* arbitration is commonly used in the international community and is recognized by national laws and international conventions. As a contracting state to the New York Convention, China recognizes and enforces foreign *ad hoc* arbitral awards. The establishment of *ad hoc* arbitration framework in the Arbitration Law would reflect the equal treatment of domestic and foreign arbitrations. Notably, according to the Revision Draft, *ad hoc* arbitration would be available only for "foreign-related commercial disputes", not domestic commercial disputes.

Conducting an *ad hoc* arbitration smoothly relies on the cooperation of the parties. Otherwise, the parties could easily reach an impasse in the proceedings in the absence of institutional management. If the parties choose to arbitrate on an *ad hoc* basis, they should cautiously devise and agree upon the procedural rules or procedural matters in advance. In the event of an impasse regarding the constitution or challenge of the tribunal, the parties may appoint an arbitration institution to decide or request assistance from a court (Article 92).

### **Improvements to the interim measures regime**

The Revision Draft would make the following improvements to the existing provisions on interim measures:

## I Empower arbitral tribunals to order interim measures (Article 43)

Under the Arbitration Law, courts enjoy exclusive jurisdiction over applications for interim measures, increasing the cost of communication among the court, the arbitration institution, and the parties. This approach does not meet the parties' expectation for efficient dispute resolution. Allowing the arbitral tribunal to issue interim measures is consistent with the logic of arbitration. The tribunal is more familiar with the case and is in the best position to decide whether an appropriate interim measure is required. By contrast, a court lacks knowledge of the case and will face a dilemma—conduct a speedy review that may result in improper decisions or conduct a comprehensive review that could undermine efficiency. In addition, considering the urgency of interim measures, it is more efficient for arbitral tribunals to make these decisions, thereby obviating the need to refer the case to a court.

## II Broaden the types of interim measures

The Arbitration Law only stipulates the preservation of property and evidence, but not behaviors. The Revision Draft further enables the court/tribunal to require a party to do or cease certain activities. The tribunal or the court can also order other short-term measures it deems necessary (Article 43), such as maintaining the status quo. The availability of such measures enables the tribunal and the court to better protect the parties' interests.

## III Establish the emergency arbitrator mechanism (Article 49)

Current arbitration rules allow the parties to appoint an emergency arbitrator to decide on urgent issues<sup>5</sup>. In practice, an emergency award rendered by an emergency arbitrator in a BAC-administered arbitration has been enforced by the High Court of Hong Kong<sup>6</sup>. The SAC has also made similar decisions. The provisions of the Revision Draft would not only provide a legal basis for the arbitration rules but also facilitate the use of the emergency arbitrator mechanism in practice, furthering the efficiency of arbitration. Under the Revision Draft, if the parties intend to apply for interim measures before the constitution of the arbitral tribunal, they may appoint an emergency arbitrator under the relevant arbitration rules. This improvement of the interim measures system is expected to allow the emergency arbitrator mechanism to play a greater role in domestic arbitrations.

## More flexible rules of evidence

The following two aspects reflect more flexible rules of evidence:

### I Examination of evidence

Article 45 of the Arbitration Law provides that “the evidence shall be presented during the hearings and may be examined by the parties.” Before the implementation of the Arbitration Law, there was no

<sup>5</sup> See e.g., Annex 3 of the China International Economic and Trade Arbitration Commission Arbitration Rules (2015); Article 63 of the Beijing Arbitration Commission Arbitration (“BAC”) Rules (2019); Article 69 of the Shanghai Arbitration Commission (“SAC”) Arbitration Rules (2018); Article 21 of the Shanghai International Arbitration Center’s China (Shanghai) Pilot Free Trade Zone Arbitration Rules (2015).

<sup>6</sup> First Emergency Arbitrator Proceeding in the jurisdiction of PRC: Reflections on How to conduct an EA Proceeding from Procedural and Substantive Perspectives, Wei Sun, Sept. 1, 2018, *available at* <https://www.bjac.org.cn/news/view?id=3273>.

fixed procedure for examining evidence in Chinese arbitration proceedings; after the implementation of the law, examining the evidence became mandatory. The Revision Draft would allow the parties or the tribunal to devise appropriate procedures for examining evidence (Article 63), which may simplify the examination procedure and enhance the efficiency of the arbitration.

## II Allocation of the evidential burden

Article 43 of the Arbitration Law provides the principle that the parties must provide evidence to support their arguments. In practice, however, the cost and difficulty of obtaining evidence could be unequal. Rigid adherence to this principle could cause injustice in substantive aspects. The Revision Draft would empower the tribunal to judge the validity and reliability of the evidence and reasonably allocate the burden of proof between the parties (Article 63). This provision would encourage the tribunal to exercise its procedural discretion to level the parties' playing field in obtaining and presenting evidence. Under the framework of the Revision Draft, the tribunal is well placed to review a party's application for document production by the other party and to make an adverse inference against the requested party on substance if it refuses to comply with the tribunal's order for document production. Most institutional arbitration rules grant tribunals broad discretion concerning evidence, and relevant judicial interpretations of the Supreme People's Court suggest the courts' positive attitude toward tribunals' ordering parties to provide evidence<sup>7</sup>. That said, in practice, tribunals generally hesitate to render document production orders due to concerns that the parties could challenge such orders in court. The Revision Draft would eliminate such concerns and pave the way for tribunals to allocate the evidential burden.

Notwithstanding the aforesaid improvements, Article 61 of the Revision Draft would reserve the tribunal's right to "collect" evidence on its own. The scope of such right is not entirely clear. The tribunal could be prejudiced by first impression if it exercises such right improperly, which could to some extent undermine the parties' right to be heard.

## Reconsideration of decisions to set aside awards

According to the Revision Draft, if a party is dissatisfied with a court decision on the validity of the arbitration agreement or a jurisdictional challenge, it may apply for reconsideration by a court at a higher level (Article 28). In addition, the Revision Draft would also enable a party to apply for reconsideration by a court at a higher level against a ruling to set aside an arbitral award (Article 81). The inclusion of this provision may come from the lower courts' practice of seeking approval from higher courts to set aside awards<sup>8</sup>.

<sup>7</sup> Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by People's Courts, Article 16: Where the following conditions are met, the people's court shall identify the establishment of the circumstance that "the other party has concealed any evidence to the arbitration agency that is sufficient to affect fair judgment" prescribed in Item 5 of Paragraph 2 of Article 237 of the Civil Procedure Law: (1) The evidence is the main evidence of identifying the basic facts of the case; (2) The evidence is only available to the other party but not submitted to the arbitration tribunal; or (3) It is learned of the existence of the evidence during the arbitration, and the other party is required to produce it or the arbitration tribunal is requested to order the other party to produce it, but the other party fails to produce it without justifications. If one of the parties conceals the evidence it holds during the arbitration, after the arbitration award is made, the people's court shall not support the application for non-enforcement of the arbitration award on the grounds of the evidence concealed by the said party affecting the fairness of the arbitration.

<sup>8</sup> Explanation of the Arbitration Law of the People's Republic of China (Revision Draft for Comment), available at [http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730\\_432965.html](http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432965.html).

Legislation of such practice can enhance the transparency of judicial supervision of arbitration and secure the parties' right to participate in review proceedings. It is worth noting that if a court decides to set aside an arbitral award, it must report the decision to the higher court on its initiative, pursuant to the currently effective *Relevant Provisions of the Supreme People's Court on Issues concerning Applications for Verification of Arbitration Cases under Judicial Review*. It is unclear under the Revision Draft whether the courts would still need to report to a higher court if none of the parties apply for reconsideration. From a pro-arbitration perspective, we believe that the courts must still do so. This new right to reconsideration would merely allow the parties to participate in the review process in order to guarantee their right to be heard and to further increase the transparency of the review process.

### **Improvements to the jurisdiction of enforcing arbitral awards**

Article 86 of the Revision Draft provides that "where a party requests the enforcement of an arbitral award in force, the party shall apply directly to a foreign court with jurisdiction for recognition and enforcement if the party against whom enforcement is sought or the property thereof is not within the territory of the People's Republic of China." Article 87 provides that "for foreign awards requiring recognition and enforcement by PRC courts, the parties shall apply directly to the intermediate court of the place of domicile of the party against whom enforcement is sought or the place where its property is located. If the party against whom enforcement is sought or its property is not in the territory of the PRC, but its case is related to a case before a PRC court, the party may apply to such court. If the party against whom enforcement is sought or his property is not within the territory of PRC, but its case is related to an arbitration case within the territory of PRC, the party may apply to the intermediate court at the place where the related arbitration institution is located or at the seat of arbitration. The PRC court shall proceed under the international treaties concluded or participated by the PRC, or the principle of reciprocity."

The foregoing articles incorporate the provisions of Article 280 of the *Civil Procedure Law of the People's Republic of China* and Article 3 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Review of Arbitration Cases*. There is no need to refer to the Civil Procedure Law. Moreover, the provision adopted by the judicial interpretation is confirmed by the law, which further improves the enforcement legal mechanism.

In addition to the above, other notable changes in the Revised Draft include the unification of the standards for judicial review of domestic and foreign-related arbitral awards as well as the shortening of the time for challenging an arbitral award from six months to three months. In summary, the Revision Draft, while retaining the distinction between domestic and foreign arbitration, responds to difficult issues in practice by, for example, empowering third parties to file objections regarding the subject matters of enforcement, clarifying the ranking of arbitration clauses in principal and accessory contracts. It also incorporates useful experiences from international arbitration by, for example, empowering arbitral tribunals to issue interim measures. Although the Revision Draft is still at the consultation stage and is not yet effective, it already reflects the legislative intent of supporting arbitration, enhancing the flexibility and efficiency of arbitration, and aligning with international standards. These are encouraging signals for the development of the arbitration community and the optimization of the business environment.

## ***Important Announcement***

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