

Kluwer Arbitration Blog

How the Arbitration Law of the People's Republic of China Should Be Modernised

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It is undisputed that the [Arbitration Law of the People's Republic of China](#) (“**the Arbitration Law**”) has greatly contributed to the establishment, development and improvement of China's current arbitration system.

However, due to the fast-moving socio-economic realities and the ever-developing legal system of China, the provisions of the Arbitration Law have gradually begun to lag behind international arbitration practice. For example, the law's requirements for arbitration procedure lack flexibility and are excessively modelled on litigation. Article 45 of the Arbitration Law stipulates that evidence should be presented at the hearing and that the parties can examine the evidence, which suggests that documents-only arbitration is excluded.

To date, the Supreme People's Court of China has promulgated over 30 judicial interpretations and opinions relating to arbitration. All of these documents only serve gap-filling purposes, without providing a cure to the fundamental problems of the Arbitration Law.

In the 13th National People's Congress Standing Committee legislative plan, the Arbitration Law was identified as legislation for which amendment work should be rushed and as legislation that will be submitted for deliberation when the conditions are ripe. In recent years, the government's legislative department, arbitration practitioners, and academics have had extensive discussions on the amendment and improvement of the Arbitration Law. So far, the proposals for amending the Arbitration Law mainly focus on the following aspects: 1) enhancing the non-governmental nature of arbitration commissions; 2) ascertaining the legal status of ad hoc arbitration; 3) loosening the requirements for a valid arbitration agreement; and 4) strengthening judicial supervision and support of arbitration.

Enhancing the non-governmental nature of arbitration commissions

The Arbitration Law does not expressly define the legal nature of arbitration commissions. Academics' views are split on this issue. [One group maintains that arbitration commissions are special public legal persons.](#) [The other holds that arbitration commissions are charitable not-for-profit legal persons.](#) Although differences exist, it is common ground that arbitration institutions should be non-governmental and should not have bureaucratic and official characteristics. This

should be clarified in the Arbitration Law.

Ascertaining the legal status of ad hoc arbitration

The Arbitration Law only provides for institutional arbitration. However, ad-hoc arbitral awards have equal status as institutional arbitral awards under the [New York Convention](#), to which China has acceded, and thus the legal effect of ad hoc arbitration conducted in other jurisdictions should rightly be recognized in China.

There are debates among academics over whether the Arbitration Law should be amended to expressly include ad hoc arbitration. [Proponents argue that arbitration users in China are mature enough to conduct effective ad hoc arbitration proceedings.](#) Most countries have recognized the legality of ad hoc arbitration. Ad hoc arbitration has strong vitality and a positive impact on economic globalization. On the other hand [opponents argue that the timing for China to adopt ad hoc arbitration is not ripe.](#) They say that crucial conditions for establishing ad hoc arbitration have not been met. These conditions include a “[social credit system](#),” effective civil enforcement mechanisms, credibility and the overall quality of the arbitration system in China.

I think China should legitimize ad hoc arbitration. The benefits for doing so are threefold: first, Chinese courts and many major Chinese arbitration institutions in China are overloaded with cases. Introduction of ad hoc arbitration can help alleviate the burden on those institutions and thus improve the overall efficiency of dispute resolution in China; second, compared with institutional arbitration, ad hoc arbitration is more flexible and less costly. Introduction of ad hoc arbitration could not only help reduce the cost for the parties but also motivate the arbitration institutions to improve their services in order to compete with ad hoc arbitration; third, by participating in ad hoc arbitration, parties and arbitrators can develop their capabilities of managing arbitration proceedings.

Loosening the requirements for a valid arbitration agreement

According to [Article 16.2 and Article 18 of the Arbitration Law](#), there are three indispensable components for a valid arbitration agreement: express intention to arbitrate, subject matters to be referred to arbitration, and reference to a selected arbitration commission.

[These requirements have been heavily criticized as being against the principle of party autonomy – the cornerstone of arbitration.](#) Under most national arbitration laws, an arbitration agreement is valid as long as it indicates the parties’ intention to submit their dispute to arbitration.¹⁾ China’s requirements regarding “subject matter of arbitration” and “selected arbitration commission” are unduly strict and are a stumbling block to the development of arbitration.

China’s judiciary has also realized the excessive strictness of the requirements of the Arbitration Law and efforts have been made to mitigate them. For example, in the [Judicial Interpretation on the Arbitration Law by the Supreme People’s Court](#), Article 2 stipulates: “If the parties agree on the subject matter for arbitration in general terms as contract disputes, then disputes arising from the establishment, validity, change, transfer, performance, liability for breach, interpretation, and cancellation of the contract can be deemed as subject matters to be arbitrated.”

Further Article 3 stipulates: “If the name of the arbitration institution agreed in the arbitration agreement is inaccurate but a specific arbitration institution can be identified, it shall be deemed that the arbitration institution has been selected.”

Article 4 also stipulates: “If the arbitration agreement only specifies the arbitration rules, it shall not be deemed as a selection of that arbitration institution, unless parties reach a supplementary agreement or an arbitration institution can be identified from the reference to the specified arbitration rules.”

These provisions substantially relax the requirements for a valid arbitration agreement under the Arbitration Law. Many arbitration practitioners believe that in amending the Arbitration Law, the requirements should be further loosened to prevent the negation of arbitration agreements. I personally agree with this view. The Arbitration Law should take a more pro-arbitration stance by simplifying the requirements for a valid arbitration agreement.

Strengthening judicial supervision and support of arbitration

Under the Arbitration Law, judicial supervision of arbitration only takes place after the award is rendered. Many arbitration practitioners suggest that in amending the Arbitration Law, the legislature should consider adding relevant provisions to achieve effective supervision of the arbitration proceedings.

I have also observed that due to the lack of judicial supervision during the arbitration proceedings, irregularities in the conduct of the proceedings cannot be immediately corrected. This can often occur when an arbitration commission refuses to transfer the property preservation documents or the arbitration tribunal severely delays the arbitration proceedings and keeps putting off the rendering of an award, or the arbitrators act with an obvious lack of due diligence. In this regard, reference can be made to Article 24, Paragraph 1 of the [English Arbitration Act 1996](#), which provides for four scenarios where the court can remove an arbitrator.

The power of national courts to exercise judicial review over arbitral awards is recognized by most national arbitration laws.²⁾ China is no exception. Judicial supervision relating to arbitral awards in the Arbitration Law includes setting aside and refusal of enforcement of arbitral awards.

In China, the relevant procedures for judicial supervision of arbitration are different for domestic arbitration and foreign-related arbitration under a “twofold dual-track system.” Under the Arbitration Law, courts will only review procedural issues for the supervision of foreign-related arbitration, while they would review both procedural issues and certain substantive issues for domestic arbitrations.

Many arbitration practitioners consider that substantive issues in domestic arbitral awards should not be subject to judicial review, based on two major arguments. First, the consensual nature of arbitration requires that the scope of judicial review should fully reflect the principle of party autonomy and the finality of arbitration. Arbitrarily expanding the scope of judicial review to include substantive issues will not only severely undermine the practicality and efficiency of arbitration but also will encroach upon the powers of the arbitral tribunal. Second, [statistics](#) show that in recent years the average percentage of awards that have been set aside or refused

enforcement by courts is less than 1%. This figure demonstrates that tribunals' competency and the case management competency of domestic arbitration institutions stands up to scrutiny at the enforcement stage. Therefore, it is unnecessary to treat domestic and foreign-related arbitration differently.

I agree with the above arguments. Also, judicial review of substantive issues in an arbitral award is not in line with international practice. In my view, another problem with the twofold dual-track system is that sometimes the decision on setting aside and the decision on enforcement of an arbitral award by the courts may contradict each other. At present, after the application of setting-aside is rejected by the competent court, which is the court at the place of the arbitration institution, the enforcement court may still refuse to enforce the award. The amendment of the Arbitration Law should address this issue.

Concluding remarks

The amendment of the Arbitration Law is a huge and systematic project. China should accelerate its efforts to adopt best practices in international arbitration and modernize the Arbitration Law, in order to better serve the needs of arbitration users and to enhance its competitiveness in international dispute resolution.

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References

- ?¹ See e.g. Article 2A of International Arbitration Act of Singapore, Article 2(1) of Japanese Arbitration Act, and Article 6 of English Arbitration Act 1996.
- ?² See, e.g., Part 3 of the International Arbitration Act of Singapore, Chapters 7 and 8 of Japanese Arbitration Act, and Chapter 7 of Indonesian Arbitration Law No. 30 of 1999.

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