# Kluwer Arbitration Blog

## Dissecting the 2024 Draft Amendment to the PRC Arbitration Law: A Stride Forward or a Step Back?

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On November 8, 2024, the Standing Committee of the 14th National People's Congress released for public comment the draft amendment to the PRC Arbitration Law ("2024 Draft") after its first review during the Twelfth Session meeting. The 2024 Draft version generated immediate and widespread concerns and criticism. In stark contrast to the draft amendment released in 2021 ("2021 Draft"), which had been lauded for its modern approach and reformative features aligning Chinese arbitration with international standards (see previous Blog posts here and here), the 2024 Draft removed many of these features, adopting instead a rather conservative approach. The 2024 Draft is perceived as raising doubts and concerns as to China's persistent efforts and its aspirations towards evolving into a competitive regional arbitration hub.

### The 2021 Draft: A Stride Towards International Alignment vs The 2024 Draft: A Conservative Retreat

The 2021 Draft represented an attempt to reconcile China's arbitration framework established under China's Arbitration Law (1995) with international prevailing practices, and to provide an answer to the long called-for prayers for reform from domestic and foreign arbitration communities. It adopted many pro-arbitration features, such as liberalizing statutory requirements on the validity of an arbitration agreement (Article 21) (see discussions here), empowering tribunals to rule on their own jurisdiction hence embracing the competence-competence doctrine (Article 28), empowering tribunals to rule on parties' applications for interim measures, the power of which is reserved for courts under the existing arbitration law (Article 47), increasing the transparency and independence of arbitration institutions in China (Articles 16-17), allowing *ad hoc* arbitration for commercial disputes with foreign elements (Article 91), etc. These reformative features were expected to increase the flexibility and relax the administrative control (or the so-called "de-administration") of arbitration in China, further open up the Chinese market, and attract foreign users to resolve their disputes in China.

However, many of these features were removed from the 2024 Draft. It cannot be said that the 2024 Draft reflects no improvement at all from the current arbitration regime. Indeed, there are some improvements, such as the formal adoption of the "seat" concept into the law and confirmation that the nationality of an arbitral award shall be determined pursuant to the seat of arbitration. For an extended period of time, the "seat" concept was non-existent in both Chinese

legislation and judicial practice; therefore, the nationality of the arbitral awards had often been decided pursuant to the location of the arbitration institution administering the arbitration. It was only in recent years that Chinese judicial practices started to recognize the "seat" concept and started to treat arbitral awards rendered in China by foreign institutions as Chinese arbitral awards, not foreign awards or non-domestic awards. The fact that the 2024 Draft formally introduces the "seat" concept into the law, as in the 2021 Draft, provides a much higher degree of certainty as to the enforcement of arbitral awards rendered by foreign institutions with a seat in China.

Similarly, the 2024 Draft also continues to permit *ad hoc* arbitration—though with a more limited scope than under the 2021 Draft. In the 2024 Draft, *ad hoc* arbitration is permitted only for disputes with foreign elements arising from maritime affairs, or disputes with foreign elements between enterprises registered in designated free trade zones (Article 79).

These improvements in the 2024 Draft as mentioned above, however, cannot outweigh the negative impacts caused by its removal of many reformative features included in the 2021 Draft and, even more significantly, its inclusion of new provisions which would likely raise concerns as to the independence of arbitration within China.

## A Brief Comparison of the Notable Features in the 2021 Draft and the 2024 Draft

Bearing in mind the reformative measures proposed in the 2021 Draft with the efforts to align the Chinese arbitration regime with international practice, the 2024 Draft presents a significant drawback from the 2021 Draft in at least the following areas:

- **The 2024 Draft maintains the definition of "arbitration commission" and the resulting invisible "Chinese Great Wall"**

The existing PRC Arbitration Law requires a valid arbitration agreement to include a specific designation of an arbitration commission (Article 16). The law further sets out stringent requirements on the establishment of an "arbitration commission" in China at the provincial and municipal levels (Article 10). As a result, foreign arbitration institutions may not qualify as "arbitration commission"; and arbitration agreements designating the application of foreign arbitration rules such as the ICC Rules are of questionable validity under PRC Arbitration Law. Another consequence is that *ad hoc* arbitration is not possible under the existing regime (for obvious reasons because there is no "arbitration commission" specified in an *ad hoc* arbitration agreement).

The 2021 Draft proposed to remove the requirement to include "arbitration commission" in the arbitration agreement (Article 21), significantly liberalizing China's statutory requirements on the validity of arbitration agreements and removing the invisible "Chinese Great Wall" created by the existing regime to foreign arbitration institutions and ad hoc arbitration.[1)]

The 2024 Draft abandoned the reform proposed in the 2021 Draft, maintaining the language of the existing arbitration law (Article 24). As a result, under the 2024 Draft, it remains unclear as a matter of legislation whether an arbitration agreement designating a foreign arbitration institution would be considered as valid under Chinese law. Notwithstanding the Supreme People's Court's 2013 decision in Anhui Longlide vs. BP Agnati S.R.L (see previous Blog post here) that an

arbitration clause providing for ICC arbitration with a seat in Shanghai should be regarded as valid, the 2024 Draft's abandonment of the 2021 Draft's proposed reform prolongs uncertainty regarding the status of this key issue under Chinese law.

Furthermore, it also creates an internal inconsistency within the 2024 Draft: on the one hand, it requires an arbitration agreement to include a designation of an arbitration commission to be valid, on the other hand, it permits ad hoc arbitrations for certain types of disputes.[2)]

Despite the foregoing, the 2024 Draft made some improvements by allowing foreign arbitration institutions to establish offices and administer arbitrations in China's free trade zones (Article 83), representing a measured open-up of China's market to foreign institutions.

- **The 2024 Draft removed the "competence-competence" doctrine and the tribunal's power to grant interim measures proposed in the 2021 Draft**

China does not recognize the competence-competence doctrine in the existing arbitration law and reserves the power to rule on the jurisdiction of the tribunal to the arbitration commission or the court. The 2021 Draft incorporated the competence-competence doctrine (Article 28), granting arbitral tribunals the authority to determine their own jurisdiction.

Under the existing regime, a tribunal also does not have the power to rule on a party's application for interim measures. Such an application must be passed on by the arbitration commission to the competent court for a decision (Article 28). The 2021 Draft empowered the tribunals to grant interim measures (Article 47) and also introduced the mechanism of emergency arbitration (Article 49). These were considered by Chinese practitioners as a great achievement in the 2021 Draft.

The 2024 Draft abandoned both significant reforms proposed in the 2021 Draft, and the status is restored to the existing regime where the tribunal lacks the power to either rule on its own jurisdiction or to grant interim measures.

- **The 2024 Draft's introduction of new Articles 2 and 23**

Apart from the aforementioned drawbacks, the 2024 Draft introduced two new articles (Article 2 and Article 23) that sparked particular concerns to the arbitration community.

Article 2 provides that:

> "[a]rbitration activities shall adhere to the leadership of the Communist Party of China, implement the Party's and the State's policies, guidelines, and strategic decisions, support the national strategy of opening-up and development, and contribute to the resolution of social conflicts and disputes."

Article 23 mandates that the State Council's judicial administrative department oversee and guide arbitration work nationwide, while local judicial administrative departments supervise arbitration within their regions. Violations of the law by arbitration commissions or personnel may, depending on the severity, result in penalties such as warnings, circulation of notices of criticism, fines, confiscation of illegal gains, suspension of arbitration activities, or revocation of registration certificates.

Article 2 may be read to have unintended extraterritorial effects. It could lead to the misconception that foreign parties, regardless of their nationality or jurisdiction, must adhere to China's policies and guidelines when choosing to arbitrate in China. Such a requirement may deter foreign parties from choosing to arbitrate in China, complicate negotiations for Chinese enterprises, and drive foreign-related cases to other jurisdictions.

Article 23 introduces an extra layer of administrative control that foreign parties may see as compromising the independence of arbitration, diminishing decades of efforts by the Chinese arbitration community in promoting the transparency and independence of arbitration institutions in China.

Arbitration supervision is, by international convention, typically judicial rather than administrative, with competent courts as the gatekeeper overseeing issues such as jurisdictional challenges and award enforcement. Administrative intervention lacks clear boundaries and could play out as disruptive rather than helpful. Allowing administrative bodies to oversee arbitration would trigger hesitance among foreign businesses to arbitrate in China. They may further add uncertainty as to the enforcement of arbitral awards rendered in China, as foreign courts may see these awards as tainted by extra-legal forces of interference.

**Conclusion**

The 2024 Draft reflects a conflicted approach with China's aspiration to become a regional international arbitration center, and represents a retreat from the progressive approach of the 2021 Draft. While China evidently recognizes the importance of foreign-related arbitration in economic development, some of the 2024 Draft's provisions could ultimately deter the international community and reduce China's competitiveness in the global arbitration arena. It remains to be seen whether the 2024 Draft could be passed given that it caused such large scale of concerns and criticism among the Chinese arbitration community.

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References

?1 In the 2021 Draft, *ad hoc* arbitrations for commercial disputes with foreign entities were permitted, representing a progressive shift away from China's traditionally institution-centric arbitration system (Article 91).

?2 In the 2024 Draft, *ad hoc* arbitration is permitted only for disputes with foreign entities arising from maritime affairs, or disputes with foreign entities between enterprises registered in designated free trade zones (Article 79).

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