Kluwer Arbitration Blog

Reforming the PRC Arbitration Law: Implications to Foreign Parties

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Arbitration in Mainland China offers many of the same advantages as arbitration in other jurisdictions, with lower costs and faster resolution. Still, foreign parties rarely choose arbitration in Mainland China, and typically do so only in cases of necessity.

In recent years, China has endeavored to improve parties' perceptions by promoting reforms aimed at opening up its arbitration market and better aligning its practice with international standards. In 2021, China unveiled its long-awaited plans to modernize the PRC Arbitration Law through proposed amendments ("**2021 Proposed Amendments**"). Many welcomed the 2021 Proposed Amendments, taking them as a sign that China was making a serious move toward becoming, at last, a truly *international* arbitration hub.

More recently, however, on 8 November 2024 China released a draft amended PRC Arbitration Law ("**2024 Draft**") that does not include many of the amendments proposed in 2021. Perhaps most worryingly, the 2024 Draft seeks to add certain provisions that have been criticized as raising concerns about the enforceability of Chinese arbitration awards. While much has already been said about the 2024 Draft, this post focuses on its implications to foreign parties that are considering arbitration in China.

Jeopardizing the Integrity and Independence of Arbitration Proceedings?

Central to the criticisms of the 2024 Draft are new provisions (Articles 2 and 23) that affirm the leadership of the Chinese Communist Party and the government's "supervision" of "arbitration activities in China" ("**Additions**"). Many, including Chinese practitioners, see the Additions as a step backward, contradicting (i) China's announced goal of "making [the PRC Arbitration Law] more compatible with international rules and enhancing the credibility and international competitiveness of [Chinese] arbitration," and (ii) certain other 2024 Draft provisions that affirm the independence of arbitration from government interference (e.g., Articles 8 and 21).

On their face, the Additions are framed in general terms, providing no specifics as to when, where, or how the proposed Party leadership and governmental supervision are intended to be implemented. For example, the only specific means of governmental supervision under Article 23 seems to be the imposition of penalties on "Chinese arbitration institutions and their personnel and

staff" for violating the PRC Arbitration Law. Issues left unclarified include (i) whether other persons (such as arbitrators and parties) are subject to the same supervision, and (ii) the procedure by which any violations of the PRC Arbitration Law and any decisions to impose penalties are to be established. Article 2 is even more abstract, without offering any explanation as to the Party's specific role in relation to Chinese arbitrations.

Articles 2 and 23 are likely to be problematic in the eyes of foreign parties and to negatively impact foreign parties' choice of Chinese cities as arbitral seats. Since the Additions stand alone in the 2024 Draft and remain under debate, they may ultimately be dropped. But even if the Additions are withdrawn, that may not be enough to ameliorate foreign parties' concerns about the integrity and independence of Chinese arbitration proceedings, for at least two reasons.

First, Chinese law lacks certain guarantees of procedural fairness in arbitration that are an essential element in achieving "safe seat" status. For example, unlike the Model Law, the existing PRC Arbitration Law does not expressly guarantee equality of arms and opportunity to be heard (cf. Model Law, Article 18) or prohibit *ex parte* communications (cf. Model Law, Article 24(3)), and the 2024 Draft does not fill this gap. *Second*, foreign parties will only choose a seat in Mainland China if they are persuaded that the PRC courts are professional, fair, independent of local protectionism, and supportive of international arbitration. The PRC courts already have made strides in this regard, having accumulated a positive track record of pro-arbitration rulings and guidance. More can be done, however, including by expanding the availability of relevant published court judgments.

Refusing to Allow Tribunals to Rule on Their Own Jurisdiction?

"*Kompetenz-kompetenz*" is among the most important features of modern arbitration laws, allowing arbitrators to rule—at least in the first instance—on their own jurisdiction (e.g., Model Law, Article 16). The PRC Arbitration Law has long been criticized for not featuring such a concept and instead referring the authority to decide on arbitral jurisdiction to local courts and arbitration institutions. For example, under Article 20 of the existing PRC Arbitration Law, parties may request a decision on a tribunal's jurisdiction from either the administering arbitration institution or the court (in case of parallel requests, the court decides). The deficiency compared to Model Law jurisdictions is obvious: a China-seated tribunal is not presumed to have the competence to decide on its own jurisdiction, and therefore may not proceed in the face of a challenge until a PRC court or an arbitral institution confirms the tribunal's jurisdiction.

The 2021 Proposed Amendments had proposed to incorporate *kompetenz-kompetenz* into the PRC Arbitration Law, but the 2024 Draft took a step back. Specifically, Article 28 stipulates that *tribunals*, arbitration institutions, and Chinese courts all have the power to decide on the tribunal's jurisdiction. While the addition of "tribunals" would (for the first time) confirm the arbitral tribunal's power to rule on its own jurisdiction, Article 28 maintains the rule under the current law that if there are competing jurisdictional challenges brought in parallel before a tribunal/institution and a court, the court shall decide the issue. Because it leaves in place incentives for a "race to the courthouse," this half-step reform is unlikely to promote the predictability or efficiency of Chinese arbitration proceedings.

Refusing to Grant Tribunals Power to Issue Interim Measures?

For over two decades, Chinese arbitration law has conferred on local courts the exclusive power to grant interim measures in aid of arbitration. Such approach has advantages, particularly in asset preservation, where courts provide predictable and efficient relief. What is missing from such a system, however, is the flexible, individualized, and substantive approach that a tribunal is best placed to offer in relation to interim measures requests that relate to the merits of the dispute in the arbitration. In recognition of the desirability of tribunal involvement in deciding such requests, a few Chinese arbitration institutions introduced rules allowing arbitrators to issue interim measures in certain circumstances—even in the absence of any express affirmation in the PRC Arbitration Law. Those institutions were no doubt heartened by the 2021 Proposed Amendments, which proposed to expressly empower tribunals to grant interim measures. Such a change would have aligned the Chinese approach with the Model Law and international practice.

The 2024 Draft, however, rejected the proposed expansion of tribunals' power, maintaining courts' exclusive authority to grant interim measures (Article 36). At the same time, the 2024 Draft retains one change proposed in 2021—namely, to expressly empower PRC courts to issue in aid of arbitration not only asset preservation orders but also so-called "conduct preservation" measures, which order a party to take or refrain from taking certain actions in relation to the substance of the dispute. Modern arbitration laws typically do not reserve such power exclusively to local courts, including because oftentimes the arbitral tribunal may be better situated to grant, modify, and/or terminate such relief (e.g., Hong Kong Arbitration Ordinance, Section 45(4)). Requiring parties to obtain "conduct preservation" orders from the court rather than the arbitral tribunal means that the parties may need to litigate *merits* issues before the court, which is not an efficient use of judicial resources and runs counter to the purposes of arbitration. Therefore, with respect to interim measures, the 2024 Draft is not an improvement over existing law.

Limited Party Autonomy?

Other 2024 Draft provisions that have drawn criticism relate to the reduction of choices available to parties, in contrast to the 2021 Proposed Amendments' more liberal approach. Specifically, while the 2024 Draft would recognize party autonomy to choose ad hoc arbitration and arbitration administered by foreign arbitral institutions, such recognition is limited in scope.

Arbitrations administered by foreign arbitration institutions seem to have been divided into two categories: (i) those administered by institutions that have "case management offices within China's free trade zones" (Article 83) and (ii) those administered by all other institutions. While the first category is unambiguously permitted under the 2024 Draft, the second category is less clear. Some argue that the fact that Article 83 "permits" foreign arbitration institutions to set up case management offices in China's free trade zones means that foreign institutions that do not have such offices cannot administer arbitrations in China. The more prevalent and likely correct view, however, is that neither Article 83 nor any other provision of the 2024 Draft expressly *prohibits* foreign institutions from administering China-seated arbitrations or *conditions* such administration on their setting up of case management offices in China. After all, even absent express permission under the PRC Arbitration Law, foreign arbitration institutions have administered China-seated arbitrations in the past and the resulting arbitration awards have been recognized and enforced by Chinese courts (see previous posts here and here). It would seem

inconsistent with such existing practice to interpret Article 83 in a way that would invalidate parties' choice of a foreign institution that has no case management offices in China. However, the lack of clear language complicates choosing a Chinese arbitral seat, potentially requiring an understanding of China's various free trade zones.

Conclusion

The 2024 Draft includes an aspirational call on "parties to foreign-related arbitrations" to opt for Chinese arbitral institutions and Chinese seats (Article 84). The Chinese government also has actively promoted various Mainland Chinese areas as future international arbitration hubs. Yet, the 2024 Draft reflects a missed opportunity to change, in a favorable way, the calculus of foreign parties in considering Mainland China-seated arbitration.

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