Peeking over the wall: A critical analysis of China's proposed amendments to its arbitration laws

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Executive Summary

1. The People's Republic of China ("China")[1] has proposed a sweeping amendment to its ageing arbitration legislation, originally enacted in 1995 and largely unchanged thereafter. The draft amendments introduce limited reforms such as the introduction of the concept of a seat of arbitration, permitting ad-hoc arbitration in certain circumstances, reducing the limitation period to seek an annulment of an arbitral award and the recognition of online / virtual arbitral proceedings.

2. The amendments however fail to bridge the large gap between Chinese arbitration law and global best practices. Several important powers are denied to arbitral tribunals, including the power to grant interim measures and the power to rule on their own jurisdiction.

3. In a concerning move, the amendment seeks to expand the amount of interference of the state in arbitrations by prescribing state supervision of '*arbitration activities*' and mandating that these activities be in line with a series of vague political goals. The sanctions prescribed for non-compliance include the suspension of arbitration activities, public censure and seizure of property.

4. These amendments, if carried out, risk making China one of the least arbitration friendly jurisdictions globally. Companies with existing arbitration agreements prescribing arbitration in China, particularly against state owned enterprises, will likely watch the developments in the law with increasing concern.

Introduction

5. The Arbitration Law of the People's Republic of China ("**Arbitration Law**") was enacted in 1995 and has not been amended since. The Arbitration Law focuses on institutional arbitration before Chinese arbitral institutions like the China International Economic and Trade Arbitration Commission (CIETAC) or

[1] The use of the term "China" is to denote the People's Republic of China and not the Republic of China, Taiwan, the usage is solely for convenience in the common parlance.

Shanghai International Arbitration Centre (SHIAC) or the Shenzen Court of International Arbitration.

6. Arbitration in China is overwhelmingly institutional arbitration before institutions that are governed by Arbitration Commissions. The most prominent of these Arbitration Commissions is the CIETAC which has affiliated arbitration centres across China.

7. The Arbitration Law is conceptually very different from the arbitration regimes in India, Singapore, the United Kingdom and the United States of America. Several concepts that find their place in the arbitration laws of these jurisdictions, and which have been applied for decades, are not present in the Chinese Arbitration Law.

8. Some of the concepts that are entirely missing in the Chinese Arbitration Law are:

   (a) Ad-Hoc arbitrations: All arbitrations contemplated under the Arbitration Law are institutional arbitrations that are covered by institutional rules of arbitral institutions that operate under 'Arbitration Commissions' set up in large commercial centres in China, for instance, Shanghai and Beijing each have dedicated Arbitration Commissions. Ad hoc arbitrations are slowly being introduced as pilot concepts in certain Free Trade Zones (FTZs) which have a distinct legal system.

   (b) Interim Measures by the Arbitral Tribunal: The Arbitration Law does not permit parties in an arbitration to seek interim or conservatory measures from the arbitral tribunal. All applications seeking interim relief have to be made before the local Courts or Arbitration Commissions when they are empowered to grant such reliefs. Chinese Arbitration Commissions like CIETAC often refer applications for interim measures to Courts (sometimes dedicated Arbitration Courts) where they are adjudicated under the Chinese Civil Procedure Law. This also applies to post-award measures to secure the arbitral award.

(c) Jurisdictional challenges before the Arbitral Tribunal: The principle of Kompetenz-Kompetenz[2], the principle that an arbitral tribunal can rule on its own jurisdiction, does not find a place in the Chinese Arbitration Law, which provides for the adjudication of such challenges by the Arbitration Commission or the People's Court. Some Arbitration Commissions, like CIETAC delegate this power to the Arbitral Tribunal once it has been formed. The arbitration proceeds in parallel to a challenge to the tribunal's jurisdiction or the validity of the arbitration agreement.

(d) Certain types of Arbitration Agreements: Chinese Arbitration Law does not expressly recognise several types of arbitration agreement, particularly agreements contained over an exchange of communications or incorporation by reference.

(e) Arbitrability of administrative disputes: The Arbitration Law prevents the arbitration of "administrative" disputes, a category which is vaguely defined as a dispute arising from an "administrative" action. This could and often does, lead to interpretating actions by an entity of the state or a public sector enterprise as an administrative action, thereby making the dispute non-arbitrable under Chinese law.

9. The Chinese government has attempted to amend its Arbitration Law twice, with the first attempt being in 2021 when a draft amendment bill was prepared by a working group of arbitration experts within the Ministry of Justice was issued for public comment ("**2021 Draft Amendment**"). Despite being viewed favourably by the international arbitration community, the bill was ultimately not translated into a change in the Arbitration Law.

10. The latest proposed amendment, ostensibly a revision of the 2021 Draft Amendment, was approved by the Standing Committee of the State Council of China and released for public comment in late 2024 ("**2024 Draft Amendment**").

2021 Draft Amendment

[2] An arbitral tribunal has the power to decide on the validity of the arbitration agreement and its own jurisdiction. See Section 16 of the Indian Arbitration and Conciliation Act, 1996.

11. The 2021 Draft Amendment, framed by the Working Group of arbitration experts in the Ministry of Justice was widely acclaimed as being a comprehensive and systemic reform to the Arbitration Law[3].

12. The 2021 Draft Amendment seemed to herald crucial reforms to the Arbitration Law's mandate for institutional arbitration by recognising ad-hoc arbitration. Ad-hoc arbitration were permitted for commercial disputes that featured foreign elements.

13. It also introduced the concept of the 'seat' of arbitration as a replacement for the classification of arbitral awards based on the domicile of the Arbitration Commission referenced in the arbitration agreement.

14. Foreign Arbitration Institutions were proposed to be allowed to set up operations in the PRC under the 2021 Draft Amendment, introducing competition in an otherwise protected space dominated by Chinese Arbitration Institutions.

15. The requirements for the validity of an arbitration agreement that the parties had to have a clear intention to arbitrate their dispute, specify the type of dispute they wanted to arbitrate and designate an Arbitration Commission was proposed to be relaxed. The 2021 Draft Amendment proposed to relax this requirement to just the parties' intention to arbitrate being expressed in writing.

16. While the Chinese Arbitration Law requires an Arbitration Institution to rule on the validity of an arbitration agreement, the 2021 Draft Amendment proposed to allow arbitral tribunals to rule on the validity of arbitration agreements in line with the *Kompetenz-Kompetenz* principle adopted internationally.

2024 Draft Amendment

17. The 2024 Draft Amendment is a result of revisions and, as the author will argue, deletions from the 2021 Draft Amendment. While the 2021 Draft Amendment met nearly universal acclaim from the domestic and international arbitration

[3] Anton A. Ware, Tereza Gao, Grace Yang (Arnold & Porter Kaye Scholer LLP), "*Proposed Amendments to the PRC Arbitration Law: A panacea ?*", Kluwer Arbitration Blog, 9 September 2021; See also Marian Zhong (Hui Zhong Law Firm), "*Validity of Arbitration Agreement: A new relaxed approach in the draft amendment to PRC Arbitration law*", Kluwer Arbitration Blog, 19 September 2021.

community, the 2024 Draft Amendment does away with most of these promised reforms.

18. The important reforms retained in the 2024 Draft Amendment are:

    (a) The concept of the 'seat of arbitration' has been retained in the 2024 Draft Amendment, aligning the Arbitration Law with the international practice of identifying courts of the seat of arbitration. The concept replaces the identification of the domicile of an arbitral award based on the Arbitration Institution under whose auspices the arbitration was conducted. This implies that arbitral awards passed by foreign arbitration institutions in China can now be enforced as domestic awards and not as foreign awards.

    (b) Ad-hoc arbitrations are retained but limited to a narrow set of disputes that feature a foreign element. The 2024 Draft Amendment continues a recent development that permitted ad-hoc arbitrations in respect of some disputes that arise in designated Free Trade Zones (FTZs). Ad hoc arbitrations are also permitted in maritime disputes involving a foreign element[4].

    (c) Online arbitrations are now expressly provided for under the Arbitration Law and will have the same effect as a traditional in-person arbitration.

    (d) Shorter timelines have been prescribed for the annulment of an arbitration award. The limitation period to bring an action seeking annulment has reduced from 6 months post the award to 3 months.

19. The 2024 Draft Amendment retains developments in the Chinese arbitration regime through the landmark ruling of the PRC's Supreme People's Court in the case of *Longlide Packaging Co. Ltd. v. BP Agnati S.R.L*. In its 2013 ruling in this case, the Supreme People's Court for the first time permitted an arbitration under foreign institutional rules, when it upheld an arbitration in Shanghai under the ICC rules.

20. Subsequent judgements by the People's Intermediate Courts at Shanghai in *Daesung Industrial Packaging Printing Co. Ltd. v. Praxair (China) Investment Co. Ltd.*, and at Guangzhou in *Brentwood Industries (US) v. Guangzhou Zhengqi Trading Co.*

[4] China's first ad-hoc arbitration award was issued in Shanghai in a dispute involving the performance of international route crew management service contracts. "The first foreign-related maritime temporary arbtitration case in China was heard and a ruling was made in Hongkou", 5 August 2024, Shanghai Government. | https://www.shanghai.gov.cn/nw15343/20240805/24aec086dd4941fe9dc6b601eb18943b.html

Ltd., have upheld the view that arbitrations involving a foreign element could be conducted in China under foreign institutional rules.

21. The 2024 Draft Amendment, however, stops well short of carrying out meaningful reforms to the now dated Chinese Arbitration Law. Several of the reforms promised in the 2021 Draft Amendment have lost their place in the 2024 Draft Amendment.

Increased interreference with the arbitral process

22. At a time when jurisdictions globally have recognized and taken several generations of reform to reduce the scope of interference in arbitrations, the 2024 Draft Amendments have pivoted towards increased interference. A further concern is that this interference extends beyond judicial oversight of legal issues.

23. The 2024 Draft Amendment introduces the following articles:

    (a) Article 2 – "*Arbitration activities must adhere to the leadership of the Communist Party of China and implements the Party's and State's principles, policies, decisions and deployments to serve the national opening-up and development strategy and give full play to the role of resolving social conflicts and disputes*." [Emphasis Supplied]

    (b) Article 23 – "*The Judicial Administration Department of the State Council shall guide and supervise arbitration throughout the country in accordance with the law and shall work to improve the supervision and management system and coordinate the development of arbitration. The Judicial Administrative Departments of the People's Governments of provinces, autonomous regions and municipalities directly under the Central Government shall provide guidance and supervision in accordance with the law. The arbitration work within this administrative area shall be subject to the arbitration commission and its personnel and staff members shall be ordered to make corrections, give warnings, public criticism, or a fine of not less than 1% but not more than 10% of the annual fee collected, confiscate illegal property, and suspend arbitration activities within a specified time and revoke registration certificates.*" [Emphasis Supplied]

24. The above proposed amendments to the Chinese Arbitration Law make it clear that there are requirements that an arbitration institution and given the ambit of "arbitration activities", the entire arbitration community, are required to meet.

These requirements are of a political nature and are vague enough to bring into its ambit any real and perceived infraction.

25. When coupled with the power given to state authorities to clamp down on arbitration institutions including suspending arbitrations and seizing property, it makes for a potent chilling effect on the liberal space in which arbitration flourishes.

26. These reforms raise serious questions about the independence of not only Chinese Arbitration Institutions but also on the independence of ad-hoc arbitrations when carried out in the limited circumstances in which it is allowed.

Foreign Institutions remain walled off

27. The 2021 Draft Amendment proposed the amendment of the definition of an arbitration agreement, to remove the requirement that the arbitration agreement contain a specification as to the applicable arbitration commission.

28. Under the Arbitration Law, an arbitration agreement required a reference to an arbitration commission. The law also prescribes a process of becoming registered as an arbitration commission in China, involving multiple levels of clearances from municipal, provincial and central authorities.

29. It can be argued that the verdict of the Supreme People's Court in *Longlide v. BP Agnati*, mentioned above, permits arbitration seated in China under ICC rules. However, the 2024 Draft Amendment fails to settle the issue through legislation.

30. Further, while ad-hoc arbitrations are permitted in some scenarios, it remains to be seen how these will be reconciled with the definition of an arbitration agreement and the requirement for a Chinese arbitration commission. These inconsistencies are likely to persist if the 2024 Draft Amendment is enacted in its current form.

Limits on the powers of an arbitral tribunal

31. Unlike arbitral tribunals in most other jurisdictions, Chinese arbitral tribunals do not have the power to grant interim relief in arbitrations before them. The Arbitration Law requires the party to approach the relevant Arbitration Commission or the Chinese Courts to avail interim relief.

32. The Arbitration Law doesn't recognise the doctrine of *Kompetenz-Kompetenz*, which permits an arbitral tribunal to rule on its own jurisdiction. This power is also reserved for the Arbitration Commission or local Courts.

33. While the 2021 Draft Amendment proposed granting arbitral tribunals these powers, the revisions in the 2024 Draft Amendment have rolled back these proposals and now seek to retain the Arbitration Law's restrictions on the powers of an arbitral tribunal.

34. It has been argued by Chinese arbitration practitioners that the belief that Chinese arbitral tribunals do not have the power to grant interim relief, is misplaced[5]. They explain that it is only when interim relief requires the compliance of a third party (for instance for the freezing of bank accounts) that the arbitral tribunal is not empowered to grant the same.

35. However, even these practitioners repose their faith in the then current 2021 Draft Amendments proposed to the Chinese Arbitration Law, which has now been replaced with the far more conservative 2024 Draft Amendment.

Conclusion

36. The 2024 Draft Amendment represents a pivot that perhaps reflects a more protectionist view taken by the Chinese legislators in light of the unwinding of the global trade system.

37. While it makes some symbolic gestures of reform, it introduces a much more pervasive control of the state over arbitration activities in China, prescribing serious penalties for non-adherence to vague and ill-defined political requirements.

38. The 2024 Draft Amendment is representative of an amendment that does more harm than good to the existing law. The Arbitration Law is an imperfect law that must be brought up to speed, but the 2024 Draft Amendment threatens to make it even more archaic and regressive.

39. Foreign companies that have arbitration agreements that prescribe arbitration in the People's Republic of China should be wary of the changing arbitration landscape in the country. Of particular concern is the doubts created by the 2024 Draft Amendments on the independence, and therefore on the impartiality of arbitration in China

[5] Xing Xiusong and Wang Heng (Global Law Office) "Interim measures in arbitration proceedings in China", Global Arbitration Review, 27 May 2022.

40. Companies that are likely to arbitrate against Chinese State-Owned Enterprises will likely be at a particular disadvantage given the blurring of lines between the state, its judiciary and the arbitration system in the country.

41. The PRC's global posture with its Belt and Road Initiative and related arbitration focussed efforts by institutions like the CIETAC are also not in line with its isolationist approach to reform in its domestic arbitration landscape.

42. It remains to be seen whether the Arbitration Law will be amended by the 2024 Draft Amendment in its current form, it seems a likely outcome considering that the National People's Congress delivered the 'Work Report of the Standing Committee of the NPC" on 8 March 2025 outlining the legislative agenda for 2025 which included the amendment to the Arbitration Law.