

# China Legal Report\*

January 2022



\* CHINA LEGAL Report is a monthly collection of Chinese law related news gathered from various media and news services, edited by WENFEI ATTORNEYS-AT-LAW LTD. distributed to its clients and CHINA LEGAL Report subscribers.

WENFEI ATTORNEYS-AT-LAW LTD. does not accept responsibility for accuracy of quotes or truthfulness of content. CHINA LEGAL Report is not intended to provide advice.

<b>Subject</b>	<b><u>Arbitration Law of the People's Republic of China (Revised) (Draft for Comments)</u></b>
<b>I</b>	<b>Introduction</b>
<b>II</b>	<b>Determination of the Validity of an Arbitration Agreement</b>
<b>III</b>	<b>Dispute over the Existence or the Validity of an Arbitration Agreement or the Jurisdiction of an Arbitration Case</b>
<b>IV</b>	<b>Decision to Take Preservation Measures</b>
<b>V</b>	<b>Performance of a Partial Award</b>
<b>VI</b>	<b>Arbitration in China administered by Foreign Arbitration Institutions</b>
<b>VII</b>	<b>Conclusion and Suggestions</b>

## **Arbitration Law of the People's Republic of China (Revised)**

### **I. Introduction**

On July 30, 2021, the *Arbitration Law of the People's Republic of China (Revised) (Draft for Comments)* (“**Draft**”) was released. The Draft consists of eight chapters and 99 articles, thoroughly revising the current Arbitration Law. In this publication, we will introduce some of the important changes, which will be brought about by the Draft. Note that as of the date of this publication, it has not yet been announced when the Draft will enter into force, replacing the current Arbitration Law.

### **II. Determination of the Validity of an Arbitration Agreement**

In the current Arbitration Law, it specifically lists that an arbitration agreement should state (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission. Based on this, in the past, an arbitration agreement will be held invalid if it fails to clearly state an arbitration institution or states multiple arbitration institutions. The Draft directly deletes the last two requirements, specifying that as long as an arbitration agreement has an expression of intention to apply for arbitration, it should be deemed valid.

In case that none or multiple arbitration institutions are mentioned in an arbitration agreement, the Draft adds the followings to guarantee an arbitration could still take place:

Situation 1: If an arbitration agreement contains information about an arbitration institution(s) but this information is unclear with regard to the actual choice of the arbitration institution, but

- the mutually pre-agreed arbitration rules can determine the arbitration institution, then the arbitration institution must accept the arbitration request.
- If there is no mutually pre-agreed arbitration rules in an arbitration agreement, the parties may supplementary the agreement to determine an arbitration institution.
- If no such agreement is reached, the arbitration institution, with which the case was first filed, must administer the proceedings.

Situation 2: If the arbitration agreement does not provide any information about an arbitration institution, and

- the parties fail to reach a supplementary agreement, the arbitration may be initiated with arbitration institution at the common domicile of the parties.
- If the parties do not have a common domicile, the arbitration institution in a location other than the domicile and with which the arbitration has first been filed, must accept to administer it.

### **III. Dispute over the Existence or the Validity of an Arbitration Agreement or the Jurisdiction of an Arbitration Institution**

According to the Draft, if a party disputes the existence or the validity of an arbitration agreement or the jurisdiction of an arbitration institution, the party must raise the issue within the time limit set forth in the arbitration rules. As opposed to the current Arbitration Law, challenges have to be raised prior to the arbitration tribunal's first hearing.

Moreover, the current Arbitration Law states that the parties may raise doubts on the jurisdiction to either the arbitration tribunal or the People's Court. However, now, as the Draft indicates, the challenges have to be first raised to the arbitration tribunal. If a party directly raises an objection to the People's Court without raising it to the arbitration tribunal first, the People's Court must not accept the case. Only if the parties still are in dispute over a jurisdiction decision made by the arbitration tribunal, they can ask the People's Court to review the decision. During the review by the People's Court, the arbitration proceedings will not be paused.

### **IV. Decision to Take Preservation Measures**

Under the current Arbitration Law, only the People's Court may make decisions about asset preservations. Such Interim Measures in order to protect a party or its property notably include freezing the disputed property before the arbitration tribunal issues an award. Now, the Draft stipulates that either the People's Court or the arbitration tribunal may decide to take preservation measures. For example, during the arbitration proceedings, a party may apply for preservation measures directly to the arbitration tribunal. Once the decision to take preservation

measures is made by the arbitration tribunal, the People's Court will, upon request, enforce the decision.

#### **V. Performance of a Partial Award**

Article 55 of the current Arbitration Law states that, in arbitration proceedings, if some of the facts of the case have already become clear, the arbitration tribunal may first make an award in respect of of these already established facts. However, the current Arbitration Law fails to further clarify whether the party is obliged to immediately implement such partial award. Thus, in practice, this clause is rarely used. Now, the Draft clearly specifies that the parties must perform the partial award and that if failing to do so, such partial award may be enforced by the court.

#### **VI. Arbitration in China administered by Foreign Arbitration Institutions**

Most arbitration proceedings in China are administered by domestic arbitration institutions. There is no statutory law that addresses cases in which proceedings would be held in China but administered by foreign arbitration institutions, for example the ICC's Arbitration Court. The PRC Supreme Court long held the position that foreign institutions were not allowed to administer proceedings within China's Mainland. After 2012, however, the PRC Supreme Court handed down several decisions which confirmed that foreign institutions were allowed to administer proceedings in China.

Despite these earlier rulings, it remains in the discretion of the courts to decide on a case-to-case basis if specific proceedings are permissible or not. So far, no unified criteria have been established to determine whether or not proceedings in China administered by a foreign institutions are possible.

Due to the uncertainty caused by this lack of legal regulation, it remains unchanged under Draft that if the seat of arbitration is to be in China, a Chinese institution must be chosen. Only in foreign countries can foreign institutions be considered to administer the proceedings. In any case, it is a pity that this question was not addressed and the situation was not clarified in the Draft.

## **VII. Conclusion and Suggestions**

The Draft brings about a lot of changes to the current Arbitration Law, clarifying the unclear parts and aligning China's arbitration practice more with the internationally prevailing arbitration rules. Also, power is being taken away from the People's Courts and shifted to the arbitral tribunals, which is in principle good news for the parties. Nevertheless, arbitration proceedings in China will unfortunately continue to only be reliably possible before Chinese arbitral institutions.

\*\*\*\*\*

© Wenfei, Beijing, January 2022

Check the China Legal Report archives on: <http://www.wenfei.com/publications.html>

Obtain your personal subscription from: [china@wenfei.com](mailto:china@wenfei.com)