Draft Revised Arbitration Law of PRC Published for Comments

On 30 July 2021, the Ministry of Justice of the People's Republic of China published a consultation draft of the revised Arbitration Law of the PRC (the Consultation Draft), the first time since its enactment in 1994, after two incremental amendments in 2009 and 2017, to propose significant changes to the arbitration infrastructure in mainland China. Whilst the Consultation Draft does not directly mirror the UNCITRAL Model Law on International Commercial Arbitration, it has reflected some of the widely accepted practices thereof and has proposed some welcome changes in areas such as scope of arbitration, validity of arbitration agreements, and ad hoc arbitration.

I. Scope of arbitration and seat of arbitration

Article 2 of the current Arbitration Law of the PRC provides that "contractual disputes and disputes over other rights and interests in property between citizens, legal persons and other organizations that are ***equal subjects*** may be arbitrated" (emphasis added). The Consultation Draft removes the "equal subjects" requirement and replaces "citizens" with "natural persons," reflecting the acceptance of investor-State arbitration and sports arbitration that have already been in existence in practice, and at the same time clearing the hurdles for potential legality issues in choosing mainland China as the seat of arbitration.

Further, the Consultation Draft proposes to replace the current standard that deems an arbitral award as made where the arbitration institution is situated with a more commonly adopted standard that an arbitral award is deemed to have been made at the seat of the arbitration. Judicial practice has in recent years indicated such shift through its rulings and the proposed legislative amendment has captured this trend, which is in line with what has been enacted in many jurisdictions worldwide. This is an important change for parties who are contemplating the

choice of place to arbitrate, as the seat of arbitration will determine some key matters, such as the applicable law to set aside the award.

II. Foreign arbitration institutions

Pursuant to the current Arbitration Law in the PRC, arbitration institutions, according to Article 10, shall be established through the administrative department of justice of the people's government. Article 66, on the other hand, provides that the establishment of "foreign-related arbitration institutions" may be set up by the China Chamber of International Commerce. The two provisions are sometimes read together and interpreted by commentators as uncertainty toward, if not prohibition against, administration of arbitrations by foreign arbitration institutions (such as ICC and SIAC) in the Mainland.

The Consultation Draft provides some clarification in the draft Article 12 that foreign arbitration institutions setting up operational branch in mainland China to conduct foreign-related arbitration businesses shall be established in accordance with measures to be formulated by the PRC State Council. This appears to be consistent with recent developments in judicial rulings confirming that foreign arbitration institutions are not prohibited from administering arbitrations in mainland China. Once implemented, potential parties considering arbitration in China as a dispute resolution mechanism with foreign-related elements may have more options in terms of choice of institutions.

III. Validity of arbitration agreement & foreign-related ad hoc arbitration

Under the PRC arbitration regime, where an arbitration agreement made between the parties does not include an unambiguous choice of arbitration institution, the arbitration agreement may be unenforceable. In recent years, courts in mainland China have in their rulings indicated a tendency toward a more liberal approach to recognise parties' clear intention to arbitrate notwithstanding that the arbitration agreements are not without ambiguities. The Consultation Draft, consistent with the trend in judicial practice, no longer requires a valid arbitration agreement to contain a clear choice of arbitration institution. Instead, where the parties cannot reach an agreement

as to the choice of arbitration institution, they may apply to arbitrate at the common domicile of the parties. If the parties have different domiciles, the institution situated outside the parties' domiciles that first dockets the matter would administer the case.

This proposed amendment is also in synergy with another important change in the Consultation Draft in respect of foreign-related ad hoc arbitration, where parties are enabled to refer foreign-related commercial disputes to an ad hoc arbitral tribunal, which is the practice widely adopted in many other jurisdictions and frequently selected as the dispute resolution mechanism. Whilst not applicable to domestic cases and confined to commercial disputes, this proposed change is a step forward to further align with the international arbitration practice.

IV. Interim measures

The Consultation Draft also aims to enhance the mechanism regarding grant of interim measures, of which the power is currently reserved exclusively by the PRC courts. The proposed amendments include: (1) allowing the arbitral tribunal to grant orders for interim measures which are enforceable in courts; (2) the scope of interim measures is widened from the preservation of property and evidence, which is offered under the current regime, to order a party to carry out or refrain from certain acts, a concept similar to interim injunctions under the common law jurisdictions, and to other interim measures as the arbitral tribunal sees necessary and feasible. This is a very pro-arbitration change that gives the arbitral tribunal more power and flexibility in administration of the matter, which adds to the tribunal's efficiency, especially in the event of urgency.

V. Competence-competence principle

According to the current Article 20 of the Arbitration Law of the PRC, if a party submits a challenge against the jurisdiction of the arbitral tribunal to a relevant court directly without first raising it to the tribunal, the court will have jurisdiction to determine the issue with the arbitration proceedings stayed pending the court's decision. The Consultation Draft proposes to remove this provision and instate the competence-competence principle, namely that an arbitral tribunal may rule on its own jurisdiction.

The Consultation Draft expressly provides that a party wishing to challenge the jurisdiction of the tribunal should submit the challenge to the tribunal in accordance with the applicable arbitration rules. Any jurisdictional challenge application made to the court of the PRC without going through the aforesaid procedures shall not be considered by the court. Decisions made by arbitral tribunals with respect to jurisdiction are subject to review and reconsideration by the courts of the PRC, but the arbitration proceedings shall not be stayed. This long-awaited adoption of the competence-competence principle is another pro-arbitration sign of the Chinese judiciary's efforts to be in concert with international practice.

In addition to the above, there are other changes proposed in the Consultation Draft for public comments, including the option to choose arbitrators outside the panel list and new rules on an arbitrator's disclosure obligation.

The takeaway

The amendments proposed in the Consultation Draft, which is currently published for comments from stakeholders, has demonstrated a legislative intent to create a pro-arbitration (international arbitration in particular) environment in mainland China through various efforts, including lifting certain jurisdictional hurdles, enhancing procedural efficiencies, and providing more options to parties from choice of arbitrators to interim measures. If those welcome changes are implemented, the arbitration infrastructure in mainland China will be further aligned with the international practice, and companies when contemplating and negotiating dispute resolution clauses with Chinese entities may be less concerned about potential “cultural shocks” in terms of rules and procedures in case parties are to arbitrate in mainland China.

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