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CERTAIN REFORMS OF CHINA'S ARBITRATION LAW AND THE IMPACT ON FOREIGN PARTIES

ABSTRACT. *This article examines the limitations of China's Arbitration Law of 1994 and the proposed reforms to the system set out in the Exposure Draft, which aim to modernize the system, particularly for foreign parties. The article addresses the absence of the term 'place of arbitration' and the non-recognition of ad hoc arbitration in China's Arbitration Law, which contrasts with global norms such as the New York Convention and UNCITRAL Model Law. The Exposure Draft introduces pivotal changes, including the specification of the place of arbitration and the formal recognition of ad hoc arbitration. Furthermore, the draft enhances the role of interim measures, extending beyond the preservation of property and evidence to encompass the preservation of conduct. It also permits the implementation of pre- and post-arbitration measures by both courts and arbitral tribunals. In conclusion, the revisions proposed in the Exposure Draft represent a substantial step towards the internationalization of China's arbitration system. They hold the potential to facilitate a more efficient, cost-effective and confidential process for foreign parties. The amendments are designed to enhance the attractiveness of China as a venue for cross-border dispute resolution, while also providing a robust, flexible, and equitable legal mechanism that reflects China's commitment to align with international arbitration practices.*

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1. Introduction

The Arbitration Law of the People's Republic of China, passed in 1994, has faced criticism for its outdated practices. After extensive debate, the revision of the Arbitration Law has been prioritized by the Standing Committee of the National People's Congress and the State Council.[1]

On 30 July 2021, the Ministry of Justice released the Arbitration Law of the People's Republic of China (Revision) (Exposure Draft) for public consultation.[2] This draft introduces major changes, making a significant step towards formal revision. This article focuses on the main dilemmas related to the foreign-related arbitration system under the current Arbitration Law and briefly analyzes the responses of the Exposure Draft to relevant issues and its impact on foreign parties.[3]

2. The main dilemmas faced by foreign parties under the current arbitration system

2.1. Lack of clarity on the concept of the place of arbitration

Currently, the Arbitration Law does not define the concept of the 'place of arbitration'. In Chinese arbitration practice, the location of an arbitration institution is considered the place, which determines the applicable law and the jurisdiction of the court.[4]

However, the place of arbitration is crucial in arbitration cases. The

[1] The Arbitration Law of the People's Republic of China was adopted at the ninth meeting of the Standing Committee of the Eighth National People's Congress on 31 August 1994 and came into force on 1 September 1995. It has been amended twice, in 2009 and 2017. *See* <www.npc.gov.cn/zgrdw/npc/xinwen/2017-09/12/content_2028692.html> accessed 17 December 2024.

[2] *See* <www.moj.gov.cn/pub/sfbgwapp/lfyjzjapp/202205/t20220511_454820.html> accessed 17 December 2024.

[3] China does not have a dual system for domestic and international arbitration. Besides general rules in the Arbitration Law of China, Chapter 7 provides some special provisions for arbitration involving foreign elements.

[4] He Jingjing, 'Some Thoughts on the Introduction of Ad Hoc Arbitration System in China under the Background of the Revision of the Arbitration Law' (2021) 12 Guangxi Social Sciences 114.

determination of the place of arbitration will have an impact on the arbitrability of the arbitration case, the procedural and substantive laws applicable to the arbitration case, the effectiveness of the arbitration agreement, as well as issues such as the revocation, non-recognition, or non-enforcement of the arbitration award.[5] In other words, the selection of the place of arbitration not only affects the arbitration proceedings conducted there, but may also affect the subsequent arbitral awards.

Normally, in commercial arbitration, concepts such as the seat of arbitration, the location of arbitration institution, and the place of arbitral award can be confusing. In Chinese arbitration practice,

the place of arbitration usually refers to the location of the arbitration institution. For example, if the parties agree to settle the dispute by arbitration at the Beijing Arbitration Commission, then the place of arbitration is Beijing, China. In some cases, the agreed seat of arbitration, the location of the arbitration institution, the place of the hearings, the place of arbitral tribunal and the place of the award are different. In such cases, due to the domestic regulations on the place of arbitration, it is likely that the foreign party will face a lot of uncertainties, which will ultimately result in significant losses.

For example, in the case concerning the *Application by Duferco S.A. for the Recognition and Enforcement of ICC Arbitral Award No.14006/MS/JB/JEM*,[6] the dispute between Swiss Duferco and Ningbo Arts & Crafts Import & Export Co., Ltd. had been submitted to the ICC Court of Arbitration. The award was rendered by the arbitral tribunal of ICC International Court of Arbitration in Beijing on 21 September 2007. Later, DUFERCO S.A. filed an application with the Ningbo Intermediate People's Court for the recognition and enforcement of the arbitral award. The Court ruled that the award was a French award (and thus non-domestic) according to Article 1 of the New York Convention, on the basis that the ICC International Court of Arbitration was headquartered in France.[7]

In the case of *TH&T International Corp. and Chengdu Hualong Auto Parts Co.,*

[5] Jiang Daiping, 'Research on the rules of the seat of international commercial arbitration' (2017) Guizhou University.

[6] (2008) Yong Zhong Jian Zi No.4.

[7] Article I.1 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Ltd. Application for Recognition and Enforcement of Arbitration Award of ICC International Court of Arbitration,[8] the dispute resolution clauses in the sales contract signed by the parties stipulated: 'the dispute shall be submitted to arbitration in Los Angeles in accordance with the ICC Arbitration Rules.' Chengdu Intermediate People's Court ruled that the award in question was a French award rather than a US award (despite the fact that the arbitration took place in Los Angeles) for the same reason.

However, in the case *Application for Enforcement of a Hong Kong Arbitration Award by the Applicant Ennead Architects International LLP of the United States*,[9] the result turned to a quite different way. On 29 March and 15 May 2013, Ennead Architects International LLP (hereinafter referred to as 'Ennead') of the United States and R&F Nanjing Real Estate Development Co. Ltd. signed a land lot design contract and agreed on the arbitration clauses stipulating that any disputes shall be submitted to the China International Economic and Trade Arbitration Commission (hereinafter referred to as 'CIETAC') for arbitration in accordance with its prevailing arbitration rules at the time of application for arbitration, and that the place of arbitration shall be the Hong Kong Special Administrative Region. In the wake of a dispute over contract performance, Ennead applied to the CIETAC Hong Kong Arbitration Center for arbitration. The Intermediate People's Court of Nanjing City, Jiangsu Province held that an arbitration award made by a Hong Kong branch of a Mainland arbitration institution was an arbitration seated in Hong Kong SAR. Therefore, the place of arbitration in this case is Hong Kong rather than Beijing, which is the seat of the headquarters of CIETAC.

It can be seen that the lack of clarity on the concept of the place of arbitration in China has led to a certain discrepancy between China's determination of the place of arbitration and international arbitration practice in some cases. As a result, the arbitration process deviates from the parties' expectations and undermines the principle of party autonomy. With the practice and development of arbitration in China, relevant laws and judicial interpretations have introduced the internationally accepted concept of the seat of arbitration, which could be found in various judicial interpretations.

[8] (2002) Cheng Min Chu Zi No. 531.

[9] (2016) Su 01 Ren Gang No. 1.

Article 16 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China states that the validity of foreign-related arbitration agreements should be evaluated using the law agreed upon by the parties. If no law is agreed upon but the seat of arbitration is specified, then the law of the country of the seat applies. If there is no agreement on either the applicable law or the seat of arbitration, or if the seat of arbitration is unclear, then the law of the forum applies. It is also the first time that the concept of the seat of arbitration has been addressed in domestic case law and practice. Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships enacted by the Standing Committee of the National People's Congress stipulates that the parties may choose the law applicable to the arbitration agreement by agreement. If the parties do not choose, the law of the location of the arbitration institution or the law of the seat of arbitration shall apply. This article is a provision on the applicable law for confirming the validity of foreign-related arbitration agreements. In addition, in recent years, courts in mainland China have gradually realized the importance of the concept of the place of arbitration and have tried to apply it in practice. For example, the *Longlide* case,[10] *Beilun Licheng* case,[11] and *Ennead Architects* case[12] involve the recognition of the concept of the seat of arbitration by mainland courts when confirming the validity of the arbitration agreements, determining the nationality of the award or the application of law.

However, there is no doubt that the understanding and application of the concept of the seat of arbitration in the above-mentioned judicial interpretations and cases have not yet been formally recognized by law, and there is still a lack of clear definition and sufficient basis at the legislative level, and the systematic construction of the normative level, so it cannot fully play its due role in arbitration. The uncertainty caused by the foreign party's ambiguity as to the domestic seat of arbitration is still unavoidable.

[10] (2013) Min Si Ta Zi No. 13.

[11] (2013) Min Si Ta Zi No. 74.

[12] (2016) Su 01 Ren Gang No. 1.

2.2. No recognition of the validity of ad hoc arbitration

Arbitration can be divided into institutional arbitration and ad hoc arbitration. Ad hoc arbitration has a long history and is a common arbitration method in the international community, recognized by national laws and international conventions. Germany, the United States, Italy and other countries and regions have adopted the dual regulation model to clarify the validity of ad hoc arbitration under their national and regional arbitration systems.[13]

Ad hoc arbitration has a long history, and it plays an important role in the field of arbitration. Compared with institutional arbitration, ad hoc arbitration is marked by lower costs and procedural flexibility. It gives more respect to the autonomy of the parties, so it has been recognized by many international arbitration rules. For example, Article 1, paragraph 2, of the New York Convention also confirmed that the scope of the convention includes ad hoc arbitration by saying 'the term arbitral award shall include not only award made by the arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted.'[14] UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as 'the Model Law') also stipulates that 'arbitration means any arbitration, whether or not administered by a permanent arbitral institution.'[15] This indicates its recognition of both institutional and ad hoc arbitration.

However, the Arbitration Law of China has never adopted ad hoc arbitration.

Article 16 of the Arbitration Law of China stipulates that an arbitration agreement must contain the element of a designated arbitration commission. However, an ad hoc arbitration is not an arbitration administered by a permanent arbitration institution, so it cannot be recognized under Article 16 of the Arbitration Law, and the Chinese court will not recognize this agreement of ad hoc arbitration.[16]

[13] Yan Xingjian, 'Research on Extrateritorial Experience and Enlightenment of Ad Hoc Arbitration' (2017) Graduate School of Chinese Academy of Social Sciences.

[14] Article I.2 of Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[15] Article 2(a) of UNCITRAL Model Law on International Commercial Arbitration.

[16] Zhang Chunliang and others, 'Legal Practice of Foreign-related Commercial Arbitration in China' [2019] Xiamen University Press 410.

Apart from this, the Arbitration Law also obviously favors the exclusion of ad hoc arbitration in other provisions, such as the selection of arbitrators, the rules of arbitration procedure etc.[17]

Such negative attitudes are also reflected in judicial practice. On 18 November 2014, Ruifu Ship Management Co., LTD. and Shandong Zhenhong Energy Co., Ltd. signed the Fixture Note No. RFF1411. Article 23 of this Fixture Note clearly stated: Arbitration in Xiamen, Fujian, China. As a typical ad hoc arbitration clause, the validity of this clause has been rejected by the court. The court ruled as follows: According to Articles 16 and 18, an arbitration agreement shall contain a designated arbitration commission. If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void. In this case, the parties only agreed that the place of arbitration would be Xiamen, without agreeing on an Arbitration Institution, and there was no evidence that the parties had entered into an additional agreement on the choice of an Arbitration Institution. Therefore, the arbitration clause in this case was invalid.[18]

In the initial stages, ad hoc arbitration was not entirely compatible with the national conditions of China to a certain extent. The establishment of ad hoc arbitration is contingent upon the existence of a well-developed market economy. As a consequence of the advanced development of the market economy, it can only be established in a legal environment where the market credit system and social credit system are relatively perfected, specific rules have been formed in various fields of social and economic life, and some professionals with high credibility have emerged.[19] The legal foundation of the society in China was nascent, and the public continued to exhibit a strong inclination towards dependence on a specific institution or authority. It appears that

[17] Li Jianzhong, 'China's Attempt at Ad Hoc Arbitration: Institutional Dilemma and Realistic Path – From the Perspective of China's Pilot Free Trade Zone' (2020) Rule of Law Research, No. 2, 39.

[18] (2016) Lu 72 Min Te 466.

[19] Liu Maoliang, "'Ad hoc arbitration should be slowed down' (2005) 1 Beijing Arbitration.

domestic parties would encounter significant challenges in adapting to the practice of arbitration in the absence of institutional support. Conversely, ad hoc arbitration, due to its greater degree of arbitrariness and reliance on the self-determination of the arbitration tribunal, places higher demands on the professional level and professional ethics of the arbitrators. Given the immaturity of the arbitration market in China and the absence of a professional team of arbitrators, the hasty introduction of ad hoc arbitration is likely to result in a number of problems.[20]

Nevertheless, ad hoc arbitration is a dispute resolution method that has been long and widely recognized, particularly in the field of international commercial activities. In such circumstances, the flexibility and autonomy of ad hoc arbitration are more prominently advantageous compared to institutional arbitration. The laws of numerous countries and international treaties recognize this form of arbitration. As the only contracting state of the New York Convention that does not recognize ad hoc arbitration, China is obliged to recognize and enforce ad hoc arbitration awards in accordance with the provisions of the international convention. This is also the due meaning of Article 545 of the Supreme People's Court's Interpretation on the Application of the Civil Procedure Law of the People's Republic of China.[21] To deny the effectiveness of ad hoc arbitration, as in the aforementioned case, is manifestly unreasonable, contravenes international common practice, and may give rise to confusion in judicial practice. To illustrate, when the parties in dispute select China as the venue for arbitration (with Chinese law designated as the applicable law of the arbitration agreement) and consent to the use of ad hoc arbitration, the arbitration agreement is likely to be deemed invalid due to non-compliance with Article 16 of the Arbitration Law. However, an ad hoc arbitration award from another state party to the New York Convention may be recognized and enforced by the Chinese courts.

[20] Liu Xiaohong and Zhou Qi, 'Analysis of the advantages and disadvantages of the establishment of ad hoc arbitration in China and the choice of timing' (2012) 9 Nanjing Social Science.

[2121] Article 545 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China stipulates that if a party applies to a People's Court for recognition and enforcement of an arbitral award rendered by a temporary arbitral tribunal outside the territory of the People's Republic of China, the People's Court shall handle the award in accordance with Article 283 of the Civil Procedure Law. *See*, <www.court.gov.cn/fabu/xiangqing/353651.html> accessed 17 December 2024.

2.3. Interim measures suffer from many constraints

(1) The power to decide on interim measures rests exclusively with the courts

At present, there are three main legislative models for the attribution of the power to issue interim measures: (i) exercised only by the court; (ii) exercised only by the arbitral tribunal; and (iii) exercised by both the arbitral tribunal and the court.[22]

According to the provisions of China's current Arbitration Law, China adopts the first model, that is, only the court has the power to issue conservative relief. In addition, the parties shall apply directly to the relevant court for conservatory measure before arbitration, and the conservatory measure during arbitration shall be submitted by the arbitration commission to the relevant court. In other words, the arbitration commission and the arbitration tribunal have no power to award interim relief, but only play the role of transferring the relevant formalities to the court, and the power to award conservatory measures is still exercised by the court. And this kind of distribution of power has brought many challenges to arbitration practice. On the one hand, the legitimacy of arbitration is based on the autonomy of the parties. The choice of arbitration not only means that both parties have reached an agreement on the way of dispute settlement, but also reflects the trust of both parties that the arbitrator or the arbitral tribunal renders the necessary measures in support of arbitration. If the court exercises the power to decide on interim measures on behalf of the arbitral tribunal, it is essentially a violation of the autonomy of the parties. On the other hand, the high efficiency of arbitration is one of the main reasons for its wide popularity. However, this kind of system design for interim measures will precisely detract from the high efficiency of arbitration.

(2) Non-recognition and non-enforcement of interim measures issued by foreign courts

In practice, it is up to the domestic law to determine whether a foreign court will issue an interim measure that needs to be enforced extraterritorially, but if it issues interim measures, can the measures be recognized and enforced by Chinese courts? The answer is uncertain. Although according to Article 289 of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the Civil Procedure Law),

[22] Shi Yuping, 'Research on the Legal Issues of Interim Measures of International Commercial Arbitration' (2005) East China University of Political Science and Law.

China is required to recognize and enforce judgments and rulings of foreign courts in accordance with relevant treaties or the principle of reciprocity, there are no such relevant cases at present. The foreign party is faced with the dilemma that the interim measures applied for abroad may not be recognized and enforced by the Chinese side.

(3) Refuse to accept or permit applications for conservatory measures by the parties of overseas arbitration

As for overseas arbitration parties applying for an interim measure in Chinese courts, Chinese courts have not developed a uniform judicial practice. Some courts hold that overseas arbitration parties' applications for interim relief should not be accepted, the main reason being that there is no legal basis. For example, the claimant DONGWONF&B submitted an application for property preservation to the Shanghai No.1 Intermediate People's Court, stating that it and the respondent, Shanghai Lehan Commercial Co., Ltd., had filed an arbitration application to the Korean Commercial Arbitration Court for a contract dispute over the sale of goods, and the Korean Commercial Arbitration Court had officially accepted the application. In view of the respondent's failure to perform the contract as agreed after the delivery of the goods by the applicant, the claimant had every reason to believe that the respondent's solvency was in serious question. Therefore, the applicant applied for the preservation of the respondent's property. However, the Shanghai No.1 Intermediate People's Court held that, according to Article 272 of the Civil Procedure Law, the claimant did not apply for arbitration in China, so it ruled that the application should not be accepted.[23] It can be seen that, when the foreign party applies for conservatory measures in China, it faces the risk of its application not being accepted or approved.

[23] Civil Ruling No. 2, Shanghai First Intermediate, Initial Ruling, 2014 Civil Ruling No. 21, Shanghai Higher, Final Ruling, 2014.

3. Important Changes in the Foreign-Related Arbitration Regime in the Exposure Draft and the Impact on the Parties

3.1. Specifying the seat of arbitration

Article 27 of the Exposure Draft allows parties to specify the seat of arbitration within the arbitration agreement. If the parties do not designate a seat or if the agreement is unclear, the seat of arbitration defaults to the location of the administering arbitration institution. The arbitral award is then considered to have been made at this seat. The determination of the seat of arbitration shall not affect the agreement or choice of the parties or the arbitral tribunal to conduct arbitration activities such as collegiate deliberations and hearings at a suitable place different from the place of arbitration according to the circumstances of the case. This article establishes the concept of the place of arbitration at the legislative level, enabling parties to a foreign-related arbitration to confirm, on the basis of their autonomy, under which legal system the parties wish to conduct the arbitration, and to decide on the law applicable to the arbitration. As a result, the parties will be able to assess in advance the validity of the arbitration agreement, the nationality of the award, the jurisdiction for judicial review of the award and the validity of the award, thereby reducing the uncertainty of arbitration. Allowing the parties to foreign-related arbitration to agree on a specific place of arbitration, rather than arbitrarily using the seat of the arbitral institution as a criterion, is more in line with international practice and meets the needs of foreign-related parties. Article 27 of the Exposure Draft allows the parties to negotiate the place of arbitration on their own, in accordance with the principle of autonomy, which has made up for the legislative gap in the provisions on the place of arbitration in the Chinese Arbitration Law and has brought the Chinese arbitration law more in line with the international commercial arbitration law.

Incorporating and clarifying the concept of the place of arbitration makes China adopt the international standard of the seat of arbitration when determining the nationality of the award, that is, the nationality of the award is characterized based on the location of arbitration agreed upon by the parties. In practice, the phenomenon of recognition of the nationality of overseas arbitrations on the basis of the location of the arbitration institution and thus determining the determination of foreign nationality

will be eliminated, and foreign parties will not again face the adverse impact of recognition and enforcement of awards due to the difference in the determination of nationality in arbitration.

Secondly, the clarity of the place of arbitration also affects the question of judicial supervision, namely which national court can revoke an award or whether a domestic court has the power to revoke an award. Generally speaking, the court only has the power to revoke the arbitral award in their own country, but not in the case of overseas arbitrations. Article 27 of the Exposure Draft will effectively avoid the ambiguity of the nature of overseas arbitration institutions in China caused by the unclear concept of the seat of arbitration, thereby determining the judicial supervision power of Chinese courts over arbitration awards and providing foreign parties with a clear risk expectation and reducing uncertainties.

3.2. Allowing ad hoc arbitration

Over the past few years, a number of ad hoc arbitrations 'pilot projects' have been initiated in several specific regions of China. For instance, the 'Opinions on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones',[24] issued by the Supreme People's Court in 2016, for the first time allowed companies registered in pilot free trade zones to use ad hoc arbitration to resolve listing disputes, provided they meet the requirements of a specific location, specific arbitration rules and specific personnel. Later in 2017, the Zhuhai Arbitration Commission issued the 'Ad Hoc Arbitration Rules for the Hengqin Pilot Free Trade Zone',[25] which further improved the relevant provisions of the ad hoc arbitration regime and enhanced its applicability. On 27 December 2019, the Supreme People's Court published the 'Opinions of the Supreme People's Court on Provision Regarding the Judicial Services and Guarantees Provided by the People's Courts for the Construction of China (Shanghai) Pilot Free

[24] Article 9, para.3: 'If two enterprises registered in FTZ agree that relevant disputes shall be submitted to arbitration at a particular place in Chinese mainland, according to particular arbitration rules, or by particular personnel, the arbitration agreement may be determined as valid.' FaFa[2016] No. 34, *see* <www.chinacourt.org/law/detail/2016/12/id/149055.html> accessed 17 December 2024.

[25] *See* <www.zcia.pro/info/693.html> accessed 17 December 2024.

Trade Zone Lin-Gang Special Area'.[26] This document emphasized that the principle of the 'Three Specifics' of arbitration can also be adopted in the Shanghai FTZ, thereby demonstrating the court's continued support for ad hoc arbitration.

However, it is undeniable that the application circumstances and regional specificity of the above documents undermined the general applicability of ad hoc arbitration in China, and it is still unclear to what extent ad hoc arbitration cases outside the free trade zone can refer to its provisions. Similarly, the compatibility of the above-mentioned documents with the Arbitration Law is also controversial.[27] Currently, China's Arbitration Law does not recognize the legality of ad hoc arbitration. The aforementioned ad hoc arbitration rules, as formulated by the FTZ, are a legal adjustment of special administrative matters in accordance with the needs of reform, as authorized by Article 13 of the Legislative Law. However, their legal effect remains open to question. Therefore, the issue of the lack of legislative recognition of ad hoc arbitration remains unresolved in China. In contrast, the Exposure Draft aligns with Article 7[28] of the Model Law by discarding the requirement for an arbitration commission's appointment to validate arbitration agreements. Articles 91 and 92 of the Exposure Draft permit parties in foreign-related arbitrations to bring disputes before an ad hoc arbitration tribunal. This change allows parties to bypass traditional arbitration institutions, select their own arbitral tribunal, and set the arbitration rules, thus granting ad hoc arbitral awards the same legal standing as those from institutional arbitrations, reflecting the protection and respect for party autonomy. At the same time, new provisions are proposed on the composition of the arbitral tribunal and the withdrawal of arbitrators and other matters, providing necessary support and guarantee for the ad hoc arbitration system. This can be regarded as one of the most important achievements in the revision of the Arbitration Law. It can be seen that the Exposure

[26] FaFa[2019] No.31, *see* <http://gongbao.court.gov.cn/Details/523fed527b53ea1d4f4fe73b79b720.html> accessed 17 December 2024.

[27] See Zhang Shengcui and Fu Zhijun, 'Research on the Innovation of the Ad Hoc Arbitration System in China's Free Trade Zone' (2019) 2 Journal of Shanghai University of Finance and Economics.

[28] Article 7 (1) of the UNCITRAL Model Law on International Commercial Arbitration provides that arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Draft now not only paves the way for the legality of ad hoc arbitration in foreign-related commercial cases conducted by foreign parties in China, but also officially confirms the legality of ad hoc arbitration.

With the recognition and introduction of the ad hoc arbitration system, China's arbitration system aligned with the international community, eliminated the differences in the arbitration procedure for foreign parties, reduced the arbitration cost and risks, and greatly promoted the development of China's international arbitration center and enhanced China's arbitration international competitiveness. At the same time, both the New York Convention and the Model Law recognize the system of ad hoc arbitration, in which the parties freely choose to refer disputes to an ad hoc arbitral tribunal, regardless of the type of case, and follow the principle of party autonomy to the greatest extent. China's recognition of ad hoc arbitration is also the respect for further autonomy for the foreign parties. Furthermore, the advantages of the ad hoc arbitration system itself will bring many benefits to foreign parties.[29] China's recognition of ad hoc arbitration means that foreign parties will have a more convenient, efficient and feasible choice of arbitration method. Unlike traditional institution arbitration, the more flexible provisions on limitation and procedure in ad hoc arbitration have the potential to reduce the burden on foreign parties and save time and costs. The convenience and efficiency of ad hoc arbitration is particularly evident in instances where a speedy award is required to prevent further losses for the parties involved.

Secondly, the establishment of the ad hoc arbitration system also provides foreign parties with a confidentiality guarantee of trade secrets. In most commercial trade arbitration disputes, the parties are usually reluctant to disclose the relevant information of the case due to various considerations. While in institutional arbitration, the arbitral documents are frequently presented in a written format, which leads to the possibility of information leakage. Compared with this, ad hoc arbitration can be agreed by the parties in a private way, to better protect the arbitration information of the parties. In addition, in terms of costs, the parties can save a lot by choosing ad hoc arbitration. In the practice of international arbitration, there is often such a situation

[29] Gordon Blanke, 'Institutional versus Ad Hoc Arbitration: A European Perspective' (2008) 9 ERA Forum 275 <https://doi.org/10.1007/s12027-008-0055-6> accessed 17 December 2024.

where the subject amount of commercial arbitration disputes is very high, but the legal relationship involved, that is, the focus of the dispute between the two parties, is very clear and not complicated. For such arbitration cases, ad hoc arbitration does not need too much workload input, and the arbitration can even be completed within one day. If, in this case, the parties have to settle the dispute through institutional arbitration, it is obviously unreasonable, according to the relevant provisions, to charge expensive arbitration fees according to the proportion of the subject amount of the arbitration. For the parties, the cost of institutional arbitration is too high, which will discourage the parties from arbitration to a certain extent, thus affecting the legitimacy of the entire arbitration system in resolving transnational commercial disputes.

In conclusion, the ad hoc arbitration system is recognized and established in China, which has great practical significance to the foreign parties. On the one hand, it temporarily offers another choice for foreign parties, providing a more convenient dispute settlement mechanism, and giving foreign parties a more friendly arbitration environment in terms of cost, confidentiality and flexibility. On the other hand, the ad hoc arbitration system means that China's arbitration system is gradually in line with the international arbitration system, preventing foreign parties from facing the contradiction between the Chinese arbitration system and the international arbitration system in the entire international arbitration system, thus suffering additional losses. At the same time, the ad hoc arbitration system in China is faced with increasing commercial disputes year by year, under the circumstances of urgent judicial resources, it would also relieve some of the pressure on the judicial system as a whole.

3.3. Improvement of interim measures

According to the current provisions of the Arbitration Law, interim measures only include property preservation under Article 28 and evidence preservation under Article 46. The two kinds of preservation must be submitted to the People's Court by the arbitration tribunal upon the application of the parties. The Exposure Draft reflects the great importance attached to ad hoc measures and sets up a separate chapter to regulate them. It can be seen from articles 43 to 49 that the Exposure Draft for Comments opens up the types of interim measures, including not only property preservation and evidence preservation, but also conduct preservation (similar to the

concept of injunction in the common law system) and other necessary interim measures. The procedure for filing preservation is more reasonable – according to the time when the preservation is filed, it is divided into pre-arbitration preservation and post-arbitration preservation. An application for interim relief before arbitration shall be filed directly by the parties to the court, and an application for preservation after filing the arbitration, the parties shall have the right to choose to submit it to the people's court or to the arbitral tribunal.

In addition, Article 49 confirms that interim measures may be taken by emergency arbitrators pending the establishment of the arbitration tribunal. The inclusion of these clauses provides further protection for parties participating in arbitration proceedings in China.

The changes to the relevant provisions on interim measures in the Exposure Draft have greatly shaken the phenomenon that China has prioritized litigation over arbitration. The parties can directly apply for necessary interim measures through arbitration, instead of leaving the arbitral proceedings to make a request to the court, which enhances the authority and systematization of arbitration, and at the same time brings great convenience to the foreign parties in the application procedure. It avoids the situation in which one party intends to delay the other party's injunction or seizure request in the arbitration procedure, and the other party can only seek the aid of the national court, which greatly improves the efficiency of the arbitration procedure.

The Model Law already provided for the enforceability of interim measures in 2006, and the Exposure Draft gives the arbitral tribunal the power to review preservation measures (except pre-litigation preservation), and reflects the concept of integrating with the mature international arbitration system and practice in many aspects, allowing parties to take other preservation measures in addition to evidence preservation and property preservation, broadening the scope of preservation measures, which is undoubtedly a major measure to integrate with the international arbitration system, reflecting the practical exploration of China's arbitration, and absorbing useful experience from international rules.

4. Prospects for the revision of the Arbitration Law

Currently, nations worldwide are working to develop advanced, scientifically-based arbitration systems for international commercial disputes to enhance their competitiveness. Arbitration is favored for its respect for party autonomy, finality of decisions, high efficiency, low cost, and convenience in transnational dispute resolution, making it the preferred method for resolving international disputes. Therefore, optimizing the arbitration mechanism and developing a cutting-edge arbitration system are of great significance to China's further opening up in the context of economic globalization.

The Exposure Draft is only the first step in amending the Arbitration Law. It has incorporated the modifications to international arbitration regulations and procedures that have occurred in recent years in a more comprehensive manner, implementing numerous fundamental alterations and endeavors to align with international arbitration standards. It is evident, however, that there is still scope for further debate and analysis regarding future developments in China's arbitration law.