
# Arbitration Agreement under Chinese Law

In commercial transactions with Chinese companies, international arbitration is increasingly preferred as a method of dispute resolution. Compared to the traditional court litigation, arbitration has the advantages of professionalism, confidentiality, flexibility, finality and international enforceability. Parties to a contract wishing to choose arbitration as their method of dispute resolution shall enter into a valid arbitration agreement or agreed on a valid arbitration clause (jointly referred to as "**arbitration agreement**"). In practice, however, the arbitration agreement, jokingly referred to as the "midnight clause", is often placed at the far end of a contract and severely underestimated. When a dispute arises, it may be invalid, unenforceable as well as cause unnecessary and significant costs and delay.

To give just one example, the following is an arbitration agreement in a recent Sino-German case with a disputed value of approx. 2 million USD handled by the author:

"*Dispute Resolution. Any controversy, dispute or claim between the Parties arising from this Agreement shall be finally settled through International Court of Arbitration in London, UK or Singapore applicable to such contracts. The place of dispute settlement shall be London, UK or Singapore. The verdicts would be in English.*"

Before discussing the substantive case merits, the mere procedural matters such as the governing law of the arbitration agreement, its validity, the subject matter(s) of arbitration, the arbitration institution, the arbitration rules, the place of arbitration, the language of arbitration, and how to resolve the conflict of jurisdiction already predetermine the complexity and costs of this case. Regrettably, similar arbitration agreements are not in the minority in practice.

In the following, the author summarizes some basic rules relating to commercial arbitration agreements under current Chinese law for reference when drafting or negotiating commercial arbitration agreements involving China. On July 30, 2021, China's Ministry of Justice issued a Notice of Public Consultation on the Arbitration Law of China (Amendment) (Draft for Comments). As it has not yet been formally adopted into law, this article does not cover the contents of that draft for public comments.

## I. Definition, form and required contents of arbitration agreement under Chinese law

- **Arbitration agreements** include arbitration clauses included in contracts and other written agreements to request arbitration before or after a dispute arises.
- **Written arbitration agreements** include agreements to request arbitration in the form of written contracts, letters and data messages (including telegrams, telex, faxes, electronic data interchange and e-mails).
- An arbitration agreement **MUST have the following contents**:

  (i) An expression of intent to request arbitration;

  (ii) The subject matter(s) of arbitration; and

  (iii) the selected arbitration committee.
- **If an arbitration agreement does not include the arbitration matters or the arbitration committee or if such agreement is unclear, the arbitration agreement is invalid**, unless the parties to the contract can reach a supplementary agreement in this regard.
- The parties to a contract may **agree in general terms that the matter to be arbitrated is a contractual dispute**, e.g. "*all disputes arising out of or in connection with this contract.*" In this way disputes related to contract formation, validity, modification, assignment, performance, liability for breach of contract, interpretation, and termination can be recognized as the subject matter(s) of arbitration.
- Given that the current Chinese Arbitration Law still only recognizes institutional arbitration, arbitration agreements drawn up in accordance with the Chinese Arbitration Law should contain **the accurate name of the agreed arbitration institution** in order to eliminate ambiguity and ensure the validity of the arbitration agreement. Once the specific arbitration institution is selected, the parties should use the **model clause** recommended by such institution and published on its official website as a starting point for drafting their own arbitration agreement.
- If an arbitration agreement does not accurately state the name of the arbitration institution, but a specific arbitration institution can be identified, the arbitration institution shall be deemed to have been selected.
- If an arbitration agreement only includes the arbitration rules applicable to the dispute, it is deemed that no arbitration institution has been agreed upon, unless the parties to the contract reach a supplementary agreement or the arbitration institution can be determined in accordance with the agreed arbitration rules.
- If an arbitration agreement provides for arbitration by an arbitration institution in a particular place and there is only one arbitration institution in that place, that arbitration institution shall be

deemed to be the agreed arbitration institution. If there are more than two arbitration institutions in that place, the parties to the contract may agree to choose one of them; if the parties to the contract cannot agree on the choice of arbitration institution, the arbitration agreement shall be invalid.

- If the parties to a contract agree that a dispute may be submitted to an arbitration institution or to a court, the arbitration agreement shall be invalid, unless one party applies to the arbitration institution for arbitration and the other party fails to object within the statutory period (please refer to below).

## II. Raising objection to validity of arbitration agreement

- If there is **any objection** to the validity of the arbitration agreement, it shall be raised **before the first hearing of the arbitral tribunal**, and may request the arbitration committee to decide or request the People's Court to make a ruling. If one party requests the arbitration committee to decide and the other party requests the People's Court to make a ruling, the People's Court shall make a ruling.

## III. Independence of arbitration agreement

- As an agreed method of dispute resolution, the arbitration agreement **exists independently** from the substantive contract, and the ineffectiveness, invalidity, nullity, revocation, modification, rescission or termination of the contract does not affect the validity of the arbitration agreement.

## IV. Governing law of arbitration agreement

- The parties to the contract may agree to choose the **law applicable to the arbitration agreement**. If the parties to the contract do not choose, the law of the place of the arbitration institution or the law of the place of arbitration shall apply.
- Due to the above-mentioned independence of the arbitration agreement, the substantive governing law of the contract is not ipso facto also the procedural law applicable to its arbitration agreement. It is therefore advisable to either explicitly agree on the law applicable to the arbitration agreement or at least agree on the place of arbitration (please refer to below) in order to avoid future disputes over this issue.

## V. Status of arbitration agreement

- According to the Chinese Civil Code, as an agreed method of dispute resolution the arbitration agreement constitutes **a substantial part of a contract**. Changing the arbitration agreement in an offer will be treated as a substantial change and rejection of such offer by making a counteroffer.
- Moreover, when using a form contract, the party providing the form contract should also take reasonable measures to draw the other party's attention to the arbitration agreement in it that is

unusual and of significant interest to the other party, and make explanations at the other party's request. If the party providing the form contract fails to fulfill its obligation to prompt or explain, so that the other party does not pay attention to or understand the arbitration agreement in which it has a material interest, the other party might be able to claim that the arbitration agreement does not become the content of the contract.

## VI. Other issues that should be addressed in arbitration agreement

- Instead of the place of the hearing, the **place of arbitration** is the juridical home of the arbitration and should be agreed upon in the arbitration agreement. In the absence of an agreement to the contrary, the determination of the place of arbitration will determine the governing law with respect to the arbitration proceedings, such as the judicial supervision of the arbitration proceedings and the jurisdiction to apply for the setting aside of the arbitral award. In addition, whether the place of arbitration is in a member state of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards may also affect the enforceability of the arbitral award in another country.
- The **number of arbitrators** will have a direct impact on the cost, duration and quality of the arbitration proceedings. Depending on the value and complexity of the transaction, one or three arbitrators may be considered and agreed upon in the arbitration agreement.
- The arbitration rules of certain major Chinese arbitration institutions provide that the Chinese language is presumed to be the language of arbitration in the absence of an express agreement on the arbitration language. Therefore, in order to avoid any ambiguity and potential disadvantages, the **language of arbitration** should be expressly agreed upon in the arbitration agreement. While agreeing on one or at most two language(s) of arbitration, it is possible to agree on the use of other language(s) for the submission of documents, etc., without translation.
- While arbitration is private, under the Chinese Arbitration Law parties are under no statutory duty to keep the arbitration proceedings confidential. Therefore, if wished and unless already sufficiently provided for in the applicable arbitration rules, the **confidentiality** should be addressed in the arbitration agreement.
- The Chinese Arbitration Law neither provides for how the costs and fees of arbitration proceedings will be allocated. Therefore, if wished and unless already sufficiently provided for in the applicable arbitration rules, the **allocation of costs and fees** (e.g. also including fees of inhouse counsels, external attorneys and service providers etc.) should be addressed in the arbitration agreement, e.g. "*to be decided by the arbitral tribunal by considering the relative success of the parties on their claims, counterclaims and defenses.*"
- The parties may also agree on amicable **negotiation before arbitration**. However, if a binding condition precedent to arbitration is wished, the relevant clause should specify a reasonable but not too long period (e.g. 30 – 60 days) for such pre-arbitration negotiation and define the specific event triggering such period (e.g. a written request to negotiate). Otherwise, according to the

current practice in China, the relevant disputes could be submitted to arbitration immediately without going through (the insufficiently specified) amicable negotiation as a first step.

## Author

**Dr. Guang Li, LL.M.**
Taylor Wessing Munich office
+49 89 21038-0
g.li@taylorwessing.com