

Draft Law Makes Substantive Amendments to the Rules in Connection with Interim Measures in Arbitration

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Introduction

Interim measures, also known as "interim relief", refer to temporary measures that are granted prior to the final arbitral award. Examples of common interim measures include freezing orders and anti-suit injunction orders. Many major arbitration rules in the common law world and European countries provide that arbitral tribunals have the power to grant interim measures during the arbitration, while emergency arbitrators have the power to grant pre-arbitration interim measures.

China has thus far adopted a different approach. Under the current law, the power to grant interim measures is vested in the courts rather than tribunals or emergency arbitrators. In addition, with some limited exceptions, the Chinese courts will not grant interim measures to assist arbitrations seated in foreign jurisdictions (known as "foreign arbitrations"), but only arbitrations seated in China, comprising pure domestic arbitrations and foreign-related arbitrations. There are only two exceptions – arbitrations seated in Hong Kong SAR and ship arrests in maritime disputes.

Contribution Note: This article was written with contributions from Wu Youdan, Associate (Foreign Lawyer), from Shipping & International Trade.

On 30 July 2021, the Ministry of Justice of the People's Republic of China published the Arbitration Law of the People's Republic of China (Amended Version) (Draft for Comments) (the "**Draft Arbitration Law**") for public consultation (introduced in our February 2022 article "[Draft Law Potentially Lifts Prohibition on Ad Hoc Arbitrations in China](#)"). The Draft Arbitration Law contains proposals for substantive amendments to the current regime in China concerning interim measures in arbitration and introduces, for the first time, the regime of "emergency arbitrators" in China.

Current Rules

The law relating to arbitration is mainly set out in two pieces of legislation: the Arbitration Law of the People's Republic of China ("**Arbitration Law**") and the Civil Procedure Law of the People's Republic of China ("**Civil Procedure Law**"). Both pieces of legislation refer to "interim measures" as "preservation measures".

Preservation measures under Chinese law are similar to interim measures in the UNCITRAL Model Law. There are three types of preservation measures: preservation of assets, preservation of evidence, and preservation of behaviour.

For an ongoing arbitration, the Arbitration Law provides that a party seeking preservation measures must submit an application to the arbitral *institution*, not the tribunal. If the institution is of the view that the application should be allowed, it shall then forward the application to the appropriate court. The Civil Procedure Law emphasises that the power to grant interim measures is vested in the courts.

Where the arbitration has not yet commenced, under the Civil Procedure Law, a party is entitled to file an application for preservation measures with the courts directly.

Proposed Amendments

The Draft Arbitration Law adds a new Section 3 "Interim Measures" under Chapter IV "Arbitration Procedures". It is notable that the Draft Arbitration Law uses the term "interim measures" instead of "preservation measures" as used in the old legislation. This appears to be a deliberate alignment with international arbitration practice.

We set out below the main features of the new Section 3.

Arbitral tribunals have power to grant interim measures

For arbitrations seated in China, arbitral tribunals for both institutional and *ad hoc* arbitrations are, for the first time, given the power to order interim measures upon application by a party to the arbitration. However, this new rule does not affect a party's right to apply to the court for preservation measures. This leads to an interesting question: whether the party is entitled to apply to the court for preservation measures after its application to the arbitral tribunal for interim measures has been rejected. Similarly, can a party apply to the arbitral tribunal for interim measures after its application to the court for preservation measures has failed?

Per the proposed provisions, an application to the tribunal for interim measures and an application to the courts for preservation measures appear to be an "either-or" option. We are of the opinion that a party should

not be entitled to take a second bite of the cherry by filing substantially the same application unless there is a major change in circumstances.

Although tribunals have the power to grant interim measures, the power to *enforce* interim measures still resides with the courts. For instance, only the courts have the power to freeze bank accounts or to attach an immovable property. In this regard, Article 47 provides that the courts have an obligation to enforce the interim measures granted by the arbitral tribunals "in accordance with the relevant provisions". The "relevant provisions" are lacking for the time being. According to judicial practice, such implementing rules will be set out in the judicial interpretations of the relevant legislations to be issued by the Supreme People's Court. It is unclear whether the courts have the power to review the merits of such interim measures and refuse to enforce them if they deem the measures inappropriate, and to what extent the courts can refuse to enforce the measures.

Introduction of other interim measures

The Draft Arbitration Law expressly provides that a tribunal may issue "behaviour preservation measures" as a form of interim measure. A behaviour preservation measure is an order to a party to the arbitration to do (or refrain from doing) something. It is akin to the grant of prohibitory or mandatory injunctions known in the common law world.

This raises another interesting question. At present, the power to grant anti-suit injunctions is reserved exclusively to Chinese courts. If, however, the Draft Arbitration Law is passed, will a Chinese tribunal have the power to issue a behaviour preservation measure prohibiting a party from continuing with court proceedings commenced in breach of an arbitration agreement? In other words, can behaviour preservation measures perform the function of an anti-suit injunction?

In theory, the answer is "yes". However, in practice, the Chinese courts have rarely issued behaviour preservation orders to prohibit parties from continuing with foreign actions, and such orders were issued to protect the Chinese courts' jurisdiction and not the jurisdiction of a tribunal. It remains to be seen whether tribunals will show a more positive attitude towards issuing the equivalent of an anti-suit injunction order to protect their own jurisdiction.

It is worth mentioning that the Draft Arbitration Law also provides for "other short-term measures which the arbitral tribunals deem necessary". This means that tribunals may have the discretion to create new types of interim measures. However, such interim measures fall to be enforced by the courts. As discussed above, it is presently unclear whether the courts can refuse enforcement, and we await the publication of the relevant implementing rules for clarification.

Introduction of "emergency arbitrators"

Article 49 of the Draft Arbitration Law provides that prior to the constitution of the tribunal, the parties may appoint an emergency arbitrator "in accordance with the arbitration rules" to grant interim measures. As such, it is subject to the arbitration institutions to decide whether to include the regime of emergency arbitrators into their arbitration rules.

Although the Draft Arbitration Law stipulates that Chinese courts are required to enforce interim measures granted by tribunals *seated in China*, it is silent on the enforcement of interim awards and interim measures made by arbitral tribunals *seated outside China*. It follows that the Civil Procedural Law will continue to apply to the enforcement of foreign arbitral awards and interim measures in China. Currently, the Civil Procedural Law does not require the Chinese courts to recognise and enforce interim awards and interim measures granted by tribunals in foreign-seated arbitrations.

Concluding Remarks

The Draft Arbitration Law broadens the availability of interim measures in arbitrations in China and, in particular, gives the arbitral tribunals the power to grant interim measures. Compared to the courts, tribunals may hold a more positive and open attitude towards interim measures.

Nonetheless, this is not the final version and is subject to further amendments. We are of the view that the final version may add more details to the amended rules of interim measures, especially the interaction between the arbitral tribunals and the courts with respect to the enforcement of the interim measures.

For further commentary on the Draft Arbitration Law, please see our February 2022 article titled "[Draft Law Potentially Lifts Prohibition on Ad Hoc Arbitrations in China](#)". For further queries, please feel free to contact our team below.

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Contact



Yu Zheng
Partner (Foreign Lawyer),
Singapore

T +65 6232 0613
yu.zheng@rajahtann.com

Please feel free to contact the editorial team of *Arbitration Asia* at arbitrationasia@rajahtannasia.com, and follow us on LinkedIn [here](#).

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