

Judicial Review of Arbitration Cases in Mainland China

Prof. LU Song
China Foreign Affairs University

What is judicial review of arbitration in China

- Court judicial activities relating to arbitration, including hearing a party's application and making a decision in respect of arbitral jurisdiction, annulment of an award, recognition and enforcement of an award.
- By doing so, court exercises its function of assistance and supervision of arbitration.

Legal basis for judicial review

- Legislation:
 - Arbitration Law (“AL”)
 - Civil Procedure Law (“CPL”)
 - The Law of PRC on the Laws Applicable to Foreign-related Civil Relations (“PIL Rules”)
- Treaty:
 - New York Convention (1958)

Legal basis for judicial review

- Judicial interpretations (relied on most frequently)
 - on Arbitration Law (2006)
 - on report for approval regime (2017)
 - on the Conduct of Judicial Review of Arbitration Cases (2017)
 - on enforcement of arbitral awards (2018)
- Supreme People's Court circulars and documents (since 1995)

Arbitration cases subject to judicial review

- Cases concerning:
 - (1) verification of the validity of an arbitration agreement;
 - (2) enforcement of an arbitral award of a Mainland arbitral institution;
 - (3) setting aside an arbitral award of a Mainland arbitral institution;

Arbitration cases subject to judicial review

- (4) recognition and enforcement of an arbitral award made in Hong Kong Special Administrative Region, Macao Special Administrative Region or Taiwan Region;
- (5) recognition and enforcement of a foreign arbitral award;

Competent Courts

- Intermediate People's Court or Maritime court
 - where the arbitral institution designated in the arbitration agreement locates, or
 - where the arbitration agreement was signed, or
 - where the applicant or the respondent domiciles

Trial division in the Competent Courts

- Inside the intermediate people's courts, the trial division for handling foreign related commercial cases shall be responsible for the judicial review of arbitration cases

Regime of report for approval

- Regime of report for approval started in 1995 comprised of several judicial circulars, e.g.
 - Notice of the Supreme People's Court on Handling by People's Courts of Relevant Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration (28 August 1995)
 - Notice of the Supreme People's Court on Matters Relating to Setting Aside of Foreign-related Arbitral Awards by the People's Courts (23 April 1998)

Regime of report for approval

- These judicial circulars have been merged into *the provisions of SPC on report for approval of the arbitration cases that are subject to judicial review* (judicial interpretation [2017] no. 21)
- Foreign-related (including HK, Macau and Taiwan-related) cases
- Domestic cases

Judicial review: validity of an arbitration agreement

- Art.16-20 of AL
- Art. 20: “If a party challenges the *validity of the arbitration agreement*, he may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling, the people's court shall give a ruling.”

Validity of an arbitration agreement

- Validity of an arbitration agreement including
 - Validity of an arbitration agreement: form as well as substance, and
 - Non existence of an arbitration agreement
- Judicial decisions supplements AL on existence (out of practical requirement and inspired by international practice)

Validity of an arbitration agreement

- Art. 16 of AL [Para.1, Formality of arbitration agreement]
- *An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise.*

Validity of an arbitration agreement

- Common forms **in writing** of arbitration agreement:
 - *Arbitration clauses (dispute resolution clause) stipulated in a contract*
 - *Reference to a document in which an arbitration clause exists*
 - *Independent agreements of submission to arbitration, e.g. in the exchange of letters*

Validity of an arbitration agreement

- Cases concerning **formality** of arbitration Agreement:
- *Beijing No.4 Intermediate People's Court (2018) Jing 04 Min Te No.21 【(2018)京04民特21号】*
- Facts: Bond repo transaction.

Company Y signs on a master agreement on bond pledge and repos, Art. 18 of which is an arbitration clause.

Company T signs on another copy of the same agreement, not on the copy Company Y signs. Four transactions have been effected under the agreement through Shanghai Stock Exchange and Company Y defaulted at maturity.

Validity of an arbitration agreement

- Facts (continued):
- Company Y applied to Beijing No. 4 Intermediate People's Court for verification of the validity of arbitration agreement.
- Company Y submits that the copy of the agreement containing the arbitration clause relied upon by Company T has only the signature and stamp of Company T. Accordingly, there is no mutually agreed arbitration agreement.

Validity of an arbitration agreement

- Court decision:
- The court find the parties do not sign on the same copy of the agreement, but they sign on two separate copies of an identical agreement the standard version of which has been provided by a third party.
- The court find by signing on the separate copies of the master agreement and performance of the agreement, there is clear mutual intention to submit their dispute therefrom to arbitration.

Validity of an arbitration agreement

- Art. 16 of AL [Para.2, substantive requirements]
- *An arbitration agreement shall contain the following particulars:*
- *(1) an expression of intention to apply for arbitration;*
- *(2) matters for arbitration; and*
- *(3) a designated arbitration commission.*

Validity of an arbitration agreement

- A designated arbitration commission (a unique requirement in China):
- SPC Reply (2003) Min Si Ta Zi No.23 【（2003）民四他字第23号】
- *Wuxi Woco-Tongyong Rubber Engineering Co. vs. Zublin International GmbH* (Wuxi court)
- Facts: Construction contract (FIDIC version)
- “Arbitration: 15.3 ICC Rules, Shanghai shall apply.”

Validity of an arbitration agreement

- **Zublin** case (continue)
- *“Arbitration: 15. 3 ICC Rules, Shanghai shall apply.”*
- No agreement on the law applicable to arbitration agreement. Therefore the law of the seat – Chinese law shall apply.
- Since no arbitral institution has been designated, the arbitration agreement shall be deemed invalid under Chinese law.

Validity of an arbitration agreement

- A designated arbitration commission: 10 years later
- SPC Reply (2013) Min Si Ta Zi No.74 【 2013）民四他字第74号】
- *Ningbo Beilun Licheng Lubricant Co. Ltd. vs. Formal Venture Corp.*
- Facts: Sales contract
- *Art. 11: “All dispute arising from ... shall be settled by arbitration in Beijing, ICC Rules and the award made under those Rules shall be binding on the Parties.”*

Validity of an arbitration agreement

- **Formal Venture Corp.** Case (continued)
- SPC Reply: under ICC Rules (1.1.2012), Art. 6(2): “By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.”
- The parties’ agreement on applying ICC Rules shall be deemed as “capable of identifying the arbitral institution according the agreement”.

Validity and non-existence of arbitration agreement

- SPC Ruling (2019) Min Te No.2 (最高法民特2号)
- *Newpower Enterprises Inc. vs. Shenzhen Zhongyuan City Commercial Investment Holding Company*
- Issue: Is a party entitled to court's finding of the non-existence of an arbitration agreement between the parties when AL only provides a party the right to “challenge the *validity of the arbitration agreement*”?

Invalidity and non-existence of arbitration agreement

- *Newpower case (continued)*
- Facts: equity transaction contract, with multiple rounds of negotiation. During the process, a contract version with the changed arbitral institution was drafted and sent by a party to the other who stamped on the draft. Later the parties negotiated other issues, never re-visited the arbitration clause, however, the entire contract was not formally executed at the end.

Invalidity and non-existence of arbitration agreement

- Party A asked SPC to find the non-existence of the arbitration agreement.
- SPC ruling: Non-existence of arbitration agreement, unlike invalidity of arbitration agreement, has nonetheless a direct impact on the method of dispute resolution. Both are preliminary issues to be determined. Thus, a petition to find the non-existence of arbitration agreement between the parties, in a broad sense, belongs to challenge of validity of arbitration agreement.

Invalidity of arbitration agreement

- **Article 17 of AL**

- An arbitration agreement shall be null and void under one of the following circumstances:
 - (1) The agreed matters for arbitration exceed the range of arbitrable matters as specified by law;
 - (2) One party that concluded the arbitration agreement has **no capacity for civil conducts** or has limited capacity for civil conducts; or
 - (3) One party coerced the other party into concluding the arbitration agreement

Invalidity of arbitration agreement

- Capacity for civil conducts (agency)
- Beijing No.4 Intermediate People's Court Ruling (2018) Jing 04 Min Te No. 420
- *SDY vs. Microsoft (China)*
- Purchase/license of *Office 365* through an agency of Microsoft, Nanyang Co. The argument to challenge the validity of arbitration clause, among others, is the person, Mr. Zhang, on behalf of SDY is not specifically authorized to sign the contract.

Invalidity of arbitration agreement

- *SDY vs. Microsoft (China) continued:*
- The court finds: Mr. Zhang from SDY is authorized to buy products from Nanyang Co. Guided by Nanyang Co., Zhang logged in Microsoft service centre and filled in all required info. Zhang should be deemed to have apparent authority. The use of Office 365 by SDY amounts to consent to Zhang's agent behaviour on behalf of SDY. The arbitration clause in the contract is clear and in conformity with AL and should be binding on both parties.

Setting aside an arbitral award of a Mainland arbitral institution

- Under UNCITRAL Model Law, only the court at the seat of arbitration is competent to set aside the award
- (Previously,) SPC thought it competent to vacate awards made under the auspice of mainland arbitral institutions under CPL
- In the past few years, judges at SPC is more and more inclined to believe that seat of arbitration should determine the competence of a court to vacate the award, though AL and CPL have yet been amended to that effect.

Setting aside a foreign-related arbitral award

- Article 70 of AL
- *“If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 274 of the Civil Procedure Law, the people's court shall, after examination and verification by a collegial panel formed by the people's court, rule to set aside the award.”*

Grounds under Civil Procedure Law

- Article 274 *Where the respondent adduces evidence that an arbitration award of a foreign-related arbitral institution of the People's Republic of China falls under any of the following circumstances, a people's court shall, upon examination and verification by a collegial bench, issue a ruling not to enforce the award:*
 - (1) *The contract between the parties does not include an arbitration clause or the parties have not reached any written arbitration agreement after a dispute arose.*

Grounds under Civil Procedure Law

- *(2) The respondent is not notified to appoint an arbitrator or of the conduct of arbitration procedure or fails to present its case, which is not attributable to the fault of the respondent.*
- *(3) The composition of the arbitral tribunal or the arbitration procedure is not in conformity with arbitration rules.*
- *(4) The matters arbitrated are outside the scope of an arbitration agreement or the arbitral institution has no arbitration power. If a people's court holds that the enforcement of an arbitral award is contrary to the public interest, the people's court shall issue a ruling not to enforce the award.*

Setting aside a domestic arbitral award

- Article 58 of AL “ *A party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following circumstances:*
- *(1) There is no arbitration agreement;*
- *(2) The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;*

Setting aside a domestic arbitral award

- 3) *The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;*
- *(4) The evidence on which the award is based was forged;*
- *(5) The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or*
- *(6) The arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case.*

Setting aside of arbitral award

- Beijing No.4 Intermediate People's Court (2018) Jing 04 Min Te No.30
- *Shanghai Lianshang Network Technology Co. Ltd. vs. Shanghai Yiqilian Technology Co. Ltd.*
- Application: vacation of award
- Ground for vacation: no arbitration clause; inconsistency with arbitration rules; inability to present its case; violation of public policy, etc.

Setting aside of arbitral award

- Transaction: under the promotion contract, Shanghai Y provides promotion service to Shanghai L on Google, Facebook and Twitter and is to be paid for such service.
- Court's view:
 - arbitration clause: already decided by another court
 - Foreign-related award or domestic award: foreign element present in the transaction

Setting aside of arbitral award

- Inconsistency with arbitration rules: whether Chapter 8 of BAC/BIAC Rules applicable? The presiding arbitrator asked the parties' opinion on procedure and no objection was made.
- Inability to present its case: the losing party attended the arbitral procedure and filed its defence
- Public policy: no evidence

Setting aside of arbitral award

- Beijing No.4 Intermediate People's Court (2018) Jing 04 Min Te No.409
- *Jiufeng Investment Centre vs. Beijing Guanghan Law Firm*
- Application: vacation of award
- Ground for vacation: failure of disclosure by arbitrator resulting in violation of the procedure

Setting aside of arbitral award

- Facts: dispute over attorney fees between client and law firm arising from retainer agreement. Arbitrator Y and Counsel G graduated from same university and were lawyers in the same law firm about 17 years ago.
- Jiufeng Investment Centre did not raise any objection on the issue of disclosure during the arbitral proceedings

Setting aside of arbitral award

- Court's view: they were graduates of the same university but not the same year (one in 1983 and the other 1984). They worked in the same law firm in different teams, but it was long time ago.
- Based on all the facts and no evidence proving such non-disclosure had resulted in unfair decision of arbitration, the court believes the composition of the tribunal and arbitral procedure conform to AL and arbitration rules.

Recognition and enforcement of a foreign arbitral award

- Recognition as a procedure
- Recognition and enforcement of a foreign arbitral award will be conducted in accordance with NYC and CPL
- Art. 5 of NYC provides ground upon which an application for the recognition and enforcement of a foreign arbitral award may be refused
- Two groups of grounds in art. 5

Recognition and enforcement of a foreign arbitral award

- Shanghai No.1 Intermediate People's Court (2013) Hu Yi Zhong Min Ren (foreign arbitration) Zi No.2 Ruling
- *Siemens International Trade Co. Ltd vs. Shanghai Golden Landmark Co. Ltd*
- Enforcement of SIAC award
- Ground for refusal: no foreign element so the arbitration agreement to submit difference to SIAC is invalid

Recognition and enforcement of a foreign arbitral award

- **Court's view:** NYC applies to this enforcement
- Although both parties are registered in Shanghai Pilot Trade Zone, the equipment purchased was shipped from abroad which is characteristic of an international transaction, so foreign elements were present.
- Shanghai Golden Landmark Co. Ltd participated in the arbitration, however challenge the arbitration agreement, it breached the principle of estoppel and good faith

Recognition and enforcement of an arbitral award made in HK, Macao or Taiwan Region

- Arrangements of the Supreme People's Court on the Reciprocal Enforcement of Arbitration Awards by Mainland China and the Hong Kong Special Administrative Region (2000) and supplementary arrangement
- Arrangement of the Supreme People's Court on Mutual Recognition and Enforcement of Arbitration Awards Between the Mainland and Macau Special Administrative Region (2008)
- Provisions of the Supreme People's Court on Recognition and Enforcement of Arbitration Awards Issued in Taiwan Region (2015)

Recognition and enforcement of an arbitral award made in HK, Macao or Taiwan Region

- Fuzhou Intermediate People's Court (2013) Rong Zhixing Zi No. 511,512
- *Shidai Cayman Investment Co. vs. China MediaExpress Holding Inc., Fujian Express Information Technology Co. Ltd and Fujian FocusMedia Co. Ltd*
- Application to enforce awards of HKIAC/A11030 and HKIAC/A11098
- Grounds of refusal: violation of mandatory provisions of State Council, Ministry of Industry and Information Technology, Ministry of Commerce for using VIE structure, and it was a value adjustment mechanism arrangement.

Recognition and enforcement of an arbitral award made in HK, Macao or Taiwan Region

- Court's decision:
- The two HKIAC awards do not require continuance of the contract, but require the losing parties to pay damages.
- Violation of PRC ministerial rules may not always result in violation of PRC public policy.

Thank you!
questions

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