

## **Validity of Arbitration Agreements under Chinese Arbitration Law**

Sik Kwan Tai

Arbitration clauses may be found in bills of lading or charterparties. Is the following arbitration clause a valid arbitration agreement under Chinese law:

“Jurisdiction: All disputes arising from this bill of lading shall be tried by Chinese courts according to the laws of the People’s Republic of China or submitted to arbitration in China.”

The Chinese Arbitration Law was promulgated in 1995. It contains 80 articles which should have provided almost every answer concerning arbitration. After eleven years’ experience, it proved that the Arbitration Law is far from perfect. It cannot provide direct answers to many ambiguities arising from arbitration agreements. Since it was necessary to involve courts to determine such ambiguities, the advantages of arbitration were greatly reduced.

In fact, the Supreme People’s Court has issued a series of judicial interpretations from time to time to fill in the gaps and to clarify the Arbitration Law.. In 2006, it decided to consolidate all previous interpretations into one document for easy reference, that is, the Interpretations on Several Issues concerning the Application of the PRC Arbitration Law (the Interpretations). This paper will discuss some of the rules under the Interpretations which specifically deal with problems that have led to technical challenges to arbitration agreements and arbitral awards. It also discusses whether the Interpretations have now solved the previous problems.

### **Arbitration Agreements**

Arbitration agreement is defined by Dr John Mo as “an agreement made to submit a future or existing dispute to arbitration”.<sup>1</sup> Such agreement forms the basis for an arbitral tribunal to exercise its jurisdiction on contractual disputes.

In China, the most important source of law governing arbitration agreements is Chapter 3 of the Arbitration Law which is entitled “Arbitration Agreements”. It contains a total of five provisions from Articles 16 to 20. They deal with mainly the issue of validity of an arbitration agreement.

### **Flexible Approach among Arbitration Institutions**

Arbitration commissions and arbitrators are more flexible and prepared to allow arbitration agreements to take effect, even if there are some defects in the underlying

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Assistant Professor of the Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University; PhD, University of Wales (U.K.). This research is supported by Departmental General Research Fund A-PA3M.

<sup>1</sup> John Mo, *Arbitration Law in China* (2001), p. 79.

contract which will not affect the validity of the arbitration agreement incorporated in it. Some examples of ambiguous arbitration agreements are set out below.

### **Ascertainment of An Arbitration Commission**

When an arbitration commission has been specified, any branches of the same commission may accept submission for arbitration.<sup>2</sup> In a contract between a US company and a Chinese company, the arbitration clause provided that disputes should be submitted to CIETAC for arbitration. The US company submitted the dispute to the Shenzhen Commission of CIETAC. The Chinese company challenged the jurisdiction of the Shenzhen Commission and argued that the dispute should be submitted to the headquarters of CIETAC in Beijing. The Shenzhen Commission dismissed the challenge.

In a case of a voyage charterparty signed in 1994 by two Chinese parties,<sup>3</sup> Clause 51 provided that “All disputes should be submitted to the China Council for the Promotion of International Trade (CCPIT) for arbitration”. In 1996, the China Maritime Arbitration Commission (CMAC) of CCPIT handled the arbitration. CMAC explained that it was the only arbitration commission to deal with maritime disputes within CCPIT. Thus, the arbitration institute provided in Clause 51 should obviously mean CMAC.

In another case of charterparty signed in 1992 by two Chinese parties,<sup>4</sup> a supplemental agreement was signed between them later in 1993. Except the amended provisions, other provisions were the same as the 1992 agreement. There was an arbitration clause in the 1992 agreement but not in the supplemental agreement. The arbitration clause was to submit all disputes to “the Maritime Arbitration Commission of the CCPIT in Beijing”. Disputes arose from the provisions of the supplemental agreement. The shipowner submitted the disputes based on the arbitration clause in the 1992 agreement to the China Maritime Arbitration Commission. Although there was a discrepancy in the name of the arbitration institute being used in the arbitration clause (that was MAC, not CMAC), CMAC accepted the application for arbitration.

### **Purposes of Judicial Interpretations 2006**

The Chinese government realised that the existing provisions under the Arbitration Law do not provide answers to various problems concerning the validity of arbitration agreements. Moreover, different courts may have different interpretations of the

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<sup>2</sup> Case No 78, Arbitration Research Institute of the CCIC (ed), *Selected Cases of International Trade Arbitration* (1999), pp. 503-6.

<sup>3</sup> Case 1, China Maritime Arbitration Commission (ed), *Selection of Awards of China Maritime Arbitration Commission 1997-2002* (2003), p. 1.

<sup>4</sup> *Ib.*, Case 8, p. 73.

provisions under it. The Chinese government through the Supreme People's Court has issued judicial interpretations from time to time with the view to "standardizing" the decisions made by different Chinese courts. On 23rd August 2006, the Interpretations were promulgated by the Supreme People's Court which was expressed to be effective as of 8th September 2006.<sup>5</sup> The Interpretations consists of 31 rules. Prior to the promulgation of the Interpretations, the people's courts were free to interpret the Arbitration Law in their decisions under the civil legal system in China. However, all people's courts are now bound to follow the Interpretations if a rule can be found to deal with any ambiguities in the Arbitration Law.

### **Rules on Validity of Arbitration Agreements**

Article 16 of the Arbitration Law sets out the statutory formality of an arbitration agreement, that is, such agreement must be made in writing. It may be in the form of an arbitration clause in a written contract or in any other written forms which are agreements on arbitration reached by the parties concerned either before or after any disputes.<sup>6</sup>

### **Formality**

Rule 1 of the Interpretations first clarifies the meaning of "other written forms" under Article 16. It provides that agreements requesting for arbitration may be in the forms of written contracts, letters and electronic messages which includes telegrams, telexes, facsimiles, electronic data exchange and emails.

Article 16 of the Arbitration Law sets out the substantive requirements for a valid arbitration agreement. According to this Article, an arbitration agreement must contain the followings: (1) the parties' intention to submit to arbitration; (2) the matters to be submitted; and (3) the arbitration commission<sup>7</sup> agreed by the parties.

### **Arbitrable Matters**

Rule 2 of the Interpretations focuses on one of the said validity requirements, i.e. "the matters to be submitted" to arbitration provided in Article 16. Pursuant to Rule 2, if the parties have generally agreed that contractual disputes are arbitrable matters, all disputes arising from the formation, validity, amendment, transfer, performance, breach of duty, interpretation, termination of the contract may be referred to arbitration.

Rule 3 of the Interpretations deals with the identity of an arbitration commission.

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<sup>5</sup> According to Rule 31, the document should have been effective as of the date of promulgation, i.e. 23rd August 2006.

<sup>6</sup> Article 16 rule 1 of the Arbitration Law.

<sup>7</sup> Chapter 2 of the Arbitration Law provides the meaning of arbitration commissions.

Where the name of a particular arbitration commission is inaccurately named in an arbitration agreement, provided that the arbitration commission can still be identified, the selection of that commission remains valid.

### **Arbitration Rules**

Rule 4 of the Interpretations provides that if only the arbitration rules have been specified, the arbitration agreement shall be deemed not to have specified the arbitration institution, unless the institution can be identified in accordance with the specified arbitration rules or the parties can reach a supplementary agreement on the institution.

### **Arbitral Institutions**

Rule 5 of the Interpretations provides that if two or more arbitration institutions have been agreed, the parties may select by agreement one of those institutions for arbitration. If the parties cannot reach any agreement, such arbitration agreement shall be void.

### **Venue**

Rule 6 of the Interpretations deals with the circumstance that only the venue has been stated in an arbitration agreement. If only one arbitral institution exists in that place, such institution is deemed to be the agreed institution. If there are two or more institutions in that place, the parties may select by agreement one of them for arbitration. If the parties fail to reach such agreement, the arbitration agreement shall be void.

### **Arbitration v Litigation**

Rule 7 of the Interpretations provides that if the parties agree that their disputes may be either submitted for arbitration to an arbitration institution or resolved by a legal action in a people's court, such arbitration agreement shall be void. However, such arbitration agreement shall be valid if one party has applied to the arbitration institution and the other party has not raised any objection before the first hearing as provided in Article 20 rule 2 of the Arbitration Law.

### **Successors**

Rule 8 of the interpretations deals with the effect of an arbitration agreement if one of the contractual parties has since merged with another organisation or divided into two organisations. Unless other agreements have been made by the parties, where one party is merged or divided after entering into an arbitration agreement, the agreement

shall bind the successor who enjoys the benefits or bears the obligations.<sup>8</sup>

### **Assignees**

Rule 9 of the Interpretations provides that where all or part of the benefits or obligations are assigned, the arbitration agreement shall be binding on the assignee, unless otherwise provided by the parties or the assignee at the time of the assignment has expressly objected to or does not know of the existence of a separate arbitration agreement.<sup>9</sup>

The above rule can be illustrated in a case where a Chinese company had a joint venture contract with a Hong Kong company (HKC) and the contract contained an arbitration clause. Subsequently, the Chinese company assigned all its shareholding in the joint venture to a third party (TP). Thereafter, TP (assignee) and HKC entered into a new agreement to modify the original joint venture contract. When some disputes arose between TP and HKC, HKC applied for arbitration in accordance with the arbitration clause contained in the original contract. However, TP commenced an action in Wuhan Intermediate People's Court requesting for a declaration that the arbitration clause was invalid. The court supported TP's action. On appeal, the Supreme People's Court set aside the decision below and pointed out that "(i) the new agreement had merely modified some clauses in the original contract, leaving the remaining clauses unaltered, and (ii) the new agreement recognized the validity of that part of the original contract that remained unchanged, including the arbitration clause."<sup>10</sup>

### **Severability**

When an arbitration agreement is contained in a contract, it is treated independently from the validity of the contract. According to Article 19 rule 1 of the Arbitration Law, the validity of the arbitration agreement will not be affected even if the contract has been amended, rescinded, terminated or void.

Rule 10 of the Interpretations has covered three (please would Dr. Tai clarify "two" or "three") more scenarios in Article 19 rule 1 of the Arbitration Law. Firstly, paragraph 1 of this Rule provides that validity of an arbitration agreement will not be affected even if the underlying contract, after the formation, has never become effective or has since been rescinded. Secondly, paragraph 2 of this Rule provides that where an

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<sup>8</sup> The concept can also be found in Article 90 of the Contract Law which provides that: "where a party has undergone division after it entered into a contract, the legal person or other organizations resulting from the division shall jointly and severally enjoy the former entity's rights and bear its liabilities."

<sup>9</sup> See also Articles 82 to 88 of the Contract Law governing the specific rights and duties of the original parties to the contract.

<sup>10</sup> Tao Jingzhou, *Arbitration Law and Practice in China* (2004), p. 41.

arbitration agreement has been reached during the negotiation of the contract, its validity will not be affected even if the underlying contract is not formed. As a result, an arbitration agreement is independent of and said to be a contract within the contract.

### **Indirect Incorporation**

Rule 11 of the interpretations deals with the effect of reference or incorporation. If a contract refers to or incorporates a valid arbitration clause in another contract or document, the parties shall apply for arbitration in accordance with the terms of such arbitration clause. Where a foreign-related contract incorporates an international convention and such convention contains arbitration provisions, the parties shall apply for arbitration in accordance with such arbitration provisions in the convention. If any party contests the validity of an arbitration agreement, such objection can be dealt with by the agreed arbitration commission or a people's court. If one party submits the objection to the arbitration commission and the other party to a people's court, the latter has the priority to decide whether the arbitration agreement is valid.<sup>11</sup> According to Article 20 rule 2 of the Arbitration Law, such objection shall be made by the contesting party "before the first hearing of the arbitration tribunal".<sup>12</sup> The said rule is silent on the time to raise the objection if it is handled by a people's court.

### **Jurisdiction**

Rule 12 of the Interpretations is to explain the issue of jurisdiction raised in Article 20 of the Arbitration Law. According to paragraph 1, where the parties apply to a court for determining the validity of an arbitration agreement, the Intermediate People's Court of the place where the specified arbitration institution is located shall have jurisdiction. If the specified arbitration institution is not clear, the Intermediate People's Court of the place where the arbitration agreement was executed or of the place where the respondent is domiciled shall have jurisdiction.

According to paragraph 2, where the application for determining validity is concerning a foreign-related arbitration agreement, the Intermediate People's Court of the place where the specified arbitration institution is located, or where the arbitration agreement was executed, or where the applicant or the respondent is domiciled shall have jurisdiction.

According to paragraph 3, where the validity of an arbitration agreement in respect of

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<sup>11</sup> Article 20 rule 1 of the Arbitration Law.

<sup>12</sup> Article 20 rule 2 of the Arbitration Law.

a maritime dispute is challenged, the maritime court as provided in paragraph 2 shall have jurisdiction. If none of the foregoing places has a maritime court, the most proximate maritime court shall have jurisdiction.

### **Objections**

Rule 13 of the Interpretations is an interpretation concerning Article 20 of the Arbitration Law. If the parties have not raised any objections to the validity of an arbitration agreement before the first hearing of the arbitration tribunal but later applies to a people's court for a declaration that the arbitration agreement was invalid, the people's court shall reject such application.

According to paragraph 2, after an award has been made by an arbitration institution, if a party applies for a declaration of the validity or for a revocation of such award, the people's court shall reject such application.

### **Conclusion**

Before the promulgation of the Interpretations, arbitration agreements were often challenged due to some ambiguity in their contents and no clear answers could be found from the Arbitration Law. The Interpretations have consolidated previous 1 interpretations by the Supreme People's Court. It is hoped that the Interpretations provide clearer guidelines regarding the validity of such ambiguous arbitration agreements that may in turn minimize inconsistent interpretations hence uncertainty on arbitration agreements.