“Perversion of Law” in Chinese Criminal Law – An Indiscriminate Legal Weapon Against Arbitrators

Kluwer Arbitration Blog
September 11, 2015

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Please refer to this post as: Arthad Kurlekar, ‘“Perversion of Law” in Chinese Criminal Law – An Indiscriminate Legal Weapon Against Arbitrators’, Kluwer Arbitration Blog, September 11 2015, http://arbitrationblog.kluwerarbitration.com/2015/09/11/perversion-of-law-in-chinese-criminal-law-an-indiscriminate-legal-weapon-against-arbitrators/

Background

Article 399A included in the Criminal Law of People’s Republic of China, provides for criminal liability to arbitrators for “perversion of law” (*Wangfa Zhongcai Zui*). The provision has been a Part of the Criminal Law since 2006. However, on 24 June 2015, the Supreme People’s Court (‘SPC’) and the Supreme People’s Procuratorate (SPP) of China have undertaken the task of interpreting Article 399A (Further information about the process may be found here).

As it stands Article 399A states that

“Where a person, who is charged by law with the duty of arbitration, intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration, if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; and if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.”

Criminal matters fall squarely within the SPC’s jurisdiction, which interpretation would therefore be binding on lower courts. The SPP is entrusted with the general duty of supervising and safeguarding the law and the rights of the people. Therefore judicial interpretations published by the SPC and the SPP such as the one of Article 399A would, at a minimum, hold considerable value in the clarification of the law.

Although Chinese arbitration practitioners and scholars such as Ruiping and Xiaosong have critiqued (mostly in Chinese and scarcely in English) the provision, these criticisms have not received the international attention they deserve. Yet they have possibly provoked the reconsideration, or in the least clarification, of the provision by the SPC and SPP.

Rationale of the Provision

The insertion of the provision was based on the two systemic concerns prevalent in the Chinese judiciary: bias and corruption. It is interesting to note two incidents which may have had a role to play in the genesis of Article 399A. First, in February 2006 a lawyer representing a subsidiary of Fuji Xerox was arrested for a secret meeting conducted with the arbitrators in that case (New Report here).

Second, in March 2006 immediately prior to the insertion of Article 399A, the former Secretary-General of CIETAC was arrested for financial irregularities. Although he was released in 2009 (New Report here), the temporal proximity of the two incidents (of the arrests and change in law) suggests a causal connection. Resultantly, it could be argued that bribery and partiality were concerns which instigated the insertion of Article 399A (according to Duan Xiaosong).

Prof Chen Guangzhong has noted that, historically, perversion of law has been seen as an offence in every dynastic code, referring it as an offence of dereliction of duty with respect to judges.

Proponents for Article 399A argue that if judges in China are liable criminally for 'biased decisions' there is no reason why arbitrators should be exempt of this duty. Further the intention in including the provision was to declare that only, criminal law regulate the arbitrator liability in China.

The application of this crime, and the interpretation which the highest bodies of China would give, poses a grave question: fundamentally the extent of the risk arbitrators would be exposed to while achieving this ideal of impartiality.

Questions of Interpretation

Prima facie the provision is in conflict with international practice and is arguably more detrimental than beneficial to the development of Chinese arbitration. This regime is in addition to that of annulment of the award ubiquitously present in Model law as well as non-Model Law jurisdictions.

Article 399A raises significant issues which need to be addressed. First, would an arbitral award delivered by an arbitrator charged under the provision be scrutinized on its merits? As argued by Song Lianbin, a reputed commentator on Chinese arbitration, (1) defining something as merely contrary to facts and the law and also against the normal activities of arbitration is an ambiguous proposition and (2) it would require a detailed analysis to assess whether the law was properly followed and applied in any given case. Indeed, an ambiguous definition leaves it open for a broad enforcement of the provision. Thus the elements of what would constitute a perversion of law would largely be determined by the authorities enforcing the provisions exposing arbitrator's to uncertain risks which they may not have foreseen. In addition, the determination of whether the law was applied aptly to the facts for the purposes of the New York Convention, would be tantamount to reopening the award on merits, and would be in breach of finality. In this case, for a question of criminal liability the court would have to look at the evidence considered by the arbitrator, the law put forth before the arbitrator, witness statements etc. before making a determination of fault which would undermine the integrity of the award.

A third issue relates to the nature of the peculiar offence in itself. Criminal liability for arbitrators is not unheard of in international arbitration e.g. Under Spanish law the arbitrators may be subject to liability for "*cohecho*" (bribery) (Arts. 385 and 388 of the Criminal Code) and illegal negotiations with the parties (Art. 297-298 Criminal Code). In Argentina, criminal liability may be entailed when there is misconduct (Art. 269 Criminal Procedure Code). However, what is unique in the case of perversion of law is that liability is imposed because of the manner in which the arbitrator has discharged his adjudicative function. It could be argued that the offence would also be dependent on the outcome of the arbitration, a fact which is different from other offences which incur criminal liability towards arbitrators. Simply put an arbitrator may incur criminal liability under this provision only because the arbitrator may differ from the interpretation given by a Court (here).

In addition to the fact that misconduct or bribery is not dependent on the outcome of the arbitration, instances of bribery or misconduct, cheating or criminal fraud, entail a question of evidence where the party alleging must prove that the arbitrator *acted* in a particular way (actus reus) and did so with

intention/knowledge (mens rea). However, the crime of “twisting the law” arguably entails an analysis of interpretation of the law as made by the arbitrator. Under Article 399A, the outcome would amount to the actus reus and the intention of the arbitrator as the mens rea. In this proposition, even an unintentional application of law by the arbitrator would qualify as an offence, opening arbitrators to significant risk of prosecution.

A fourth issue is that it poses questions of applicable law especially with respect to international arbitrations. Article 399A could be interpreted to mean perversion of the lex arbitri or it could be interpreted to mean perversion of the law applicable to the contract. The two circumstances have been illustrated below.

In the first hypothetical situation, an award may come for enforcement before the Chinese courts with the governing law of merits to be English Law and seat of arbitration to be London. Assuming that the award has been upheld by the Courts at the stage of setting aside at the seat of arbitration, a situation may nevertheless arise that it contravenes Chinese public policy. A broad interpretation of “perversion of law” could mean that the arbitrator’s giving such an award may be subject to criminal penalties. In this case, an arbitrator rendering an award under English law may be subjected to an uncertain criminal penalties should the parties choose to enforce the award in China, an event beyond the control of the arbitrator. This would lead to a ‘Catch-22’ situation for arbitrators where even an award that has not been set aside at the seat may result in criminal punishment in China if that is the place of enforcement.

In the second situation, China may be the seat of arbitration. The issue arises as to which law the arbitrator has ‘twisted’. As an illustration, in an arbitration of a contractual dispute with the substantive law applicable is the English law of Contract and seat of arbitration is Beijing, violation of the Arbitration Law of the People’s Republic of China as the law of the seat, could be construed as perversion of the law given that the laws are promulgated under the sovereignty of the People’s Republic of China. However if the arbitrators misapply the English law to come to a determination, it is then up to the Chinese courts to interpret English law. Although situations under private international law may warrant interpretation of a foreign legislation, imposing criminal penalties on the basis of such an interpretation appears draconian.

Conclusions

Although international instruments such as the New York Convention or international practice do not have influence over domestic arbitrations, the issues with respect to exposure of arbitrators to criminal liability persist in international arbitration. This makes the task of interpretation undertaken by the SPP and the SPC, a task which could have wide repercussions for Chinese arbitration in as much as criminal law may have a deterring effect against bias or twisting the law, it may expose arbitrators to criminal liability even in unwarranted situations. Subjecting arbitrators to a crime of ‘perversion of the law’ for the aforementioned reasons is detrimental. Clarifying the scope of the statute to ensure that the it would not amount to re-opening of the award and also an explanation on subjective terms such as “if it is found serious” in addition to defining its scope of applicability particularly in international arbitration thus become tasks of extreme importance which the SPP and the SPC would have to perform.