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Validity of Arbitration Agreement: A New Relaxed Approach in the Draft Amendment to PRC Arbitration Law

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On 30 July 2021, the PRC Ministry of Justice issued the [Amendment to the Arbitration Law \(Consultation Draft\)](#) (the “**Draft Amendment**”), which is the first substantial amendment of the existing [PRC Arbitration Law](#) (the “**Arbitration Law**”) in more than two decades. (See previous posts on the PRC Arbitration Law [here](#) and [here](#).) Of the changes made, this article discusses the Draft Amendment’s relaxed approach towards the validity of the arbitration agreement and competence-competence.

Stringent Requirements under the Existing Arbitration Law

Under Article 16 of the existing Arbitration Law, an arbitration agreement refers to an arbitration clause contained in a contract or an agreement to arbitrate reached in writing either before or after the occurrence of a dispute. It must contain three elements to be effective: first, the parties’ intention to arbitrate; second, the specific matter for arbitration; and third, a designated arbitration commission.

The third requirement that there must be a designated arbitration commission has been heavily criticized for being inconsistent with the international trend as embodied in the [UNCITRAL Model Law](#) (the “**Model Law**”). (See, e.g., [here](#) and [here](#).) This statutory requirement alone has led numerous arbitration agreements to be rendered invalid. For instance, the Supreme People’s Court of PR China (the “**SPC**”) decided in an appeal that the arbitration agreement, which provided that “any unresolved matter should be submitted to local arbitration agencies for arbitration,” was invalid because the parties did not reach a supplemental agreement or make a choice on the “local arbitration agencies.”¹⁾ In another case where the parties agreed on the application of ICC arbitration rules, the SPC decided that the arbitration agreement was invalid because the parties had failed to designate an arbitration commission.²⁾

Despite the foregoing, in judicial practices, the SPC has for a long time realized the value and importance of respecting the parties’ choice of arbitration as the dispute resolution mechanism. For instance, in a case where a defendant argued that the arbitration agreement providing that “the arbitration shall take place at CIETAC Beijing, P. R. China” was invalid because it provided the place of the arbitration but

did not designate the arbitration commission, the SPC found the agreement to be valid on the ground that “take place at CIETAC” could be interpreted as the parties designating CIETAC as the arbitration commission.³⁾

To further improve the situation caused by the stringent requirements in the Arbitration Law concerning the validity of arbitration agreement, in 2006, the SPC issued its *Interpretation on Several Issues concerning the Application of the Arbitration Law* (the “**SPC’s Interpretation**”). The SPC’s Interpretation clarified that, as long as the arbitration commission can be ascertained or the parties could reach a supplemental agreement or make a choice when filing the arbitration, the arbitration agreement shall still be regarded as valid for having designated an arbitration commission—even if the name of the commission was inaccurate, the parties only agreed on the rules of the arbitration commission, or they have agreed on more than one commission.

Subsequent to the SPC’s Interpretation, in a similar case where the parties agreed on the application of the ICC arbitration rules, the Beijing Dongcheng District Court found the arbitration agreement to be valid because the arbitration commission (viz. ICC) could be ascertained from the parties’ agreement on the arbitration rules.⁴⁾

The SPC’s Interpretation was indeed helpful but did not resolve the matter from its source—it could not amend the Arbitration Law. Hence, the third requirement for the validity of the arbitration agreement remains. After the SPC’s Interpretation, there were still plenty of arbitration agreements found invalid for failing to designate an arbitration commission.

The Relaxed Approach in the Draft Amendment

The Draft Amendment adopted a different approach to this issue.

According to Article 21 of the Draft Amendment, the arbitration agreement “includes the arbitration clause contained in a contract and parties’ agreement to arbitrate reached in other written form before or after the occurrence of the dispute.” Notably, the new definition only contains a substantive requirement (the parties’ intention to arbitrate) and a formality requirement (that the agreement shall be in writing). It has deleted the other two statutory requirements: the specific matter for arbitration and a designated arbitration commission.

Adding to the liberal approach, the Draft Amendment also incorporated a waiver clause similar to Article 7(5) of the Model Law and provides that, if one party in the arbitration asserts that there is an arbitration agreement and the other party does not deny it, then the arbitration agreement shall be regarded as in existence between the parties (see Article 21 of the Draft Amendment).

The Draft Amendment has clearly taken a leap forward from the existing law and is much more in line with the “presumptive validity” approach in the New York Convention and the Model Law. One can reasonably expect that more arbitration

agreements will be given effect by the PRC courts applying the new law (if the Draft Amendment stands as it is).

Comparative Study

The reforms undertaken in the Draft Amendment follow the prevailing international practices. The Model Law and some national legislation akin to the Model Law treat the validity of the arbitration agreement quite liberally, and the tests applied are simply whether the parties had the clear intention to arbitrate and whether the parties' agreement to arbitrate was put "in writing."

For example, the [Hong Kong Arbitration Ordinance](#) incorporates Option I, Article 7 of the Model Law in whole, which defines "arbitration agreement" as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" and requires that the "arbitration agreement shall be in writing" (Section 19). The [Singapore International Arbitration Act](#) contains the same definition of "arbitration agreement" and the requirement that the "arbitration agreement shall be in writing" (Sections 2A.(1) & 2A.(3)).

English law goes further. According to Section 6 of the [English Arbitration Act 1996](#), an "arbitration agreement" means "an agreement to submit to arbitration present or future disputes (whether they are contractual or not)." English law does not require the agreement to be necessarily done in writing, although oral agreement could be problematic. The French Law could perhaps be seen as the ceiling of liberalism. Pursuant to the amended [Code of Civil Procedure](#), for domestic arbitration, an arbitration agreement shall be in writing to be valid, and for international arbitration, "an arbitration agreement shall not be subject to any requirements as to its form" (Article 1507).

The Draft Amendment appears similar to the requirements for the validity of the arbitration agreement under Singapore and Hong Kong law, *i.e.*, the parties' intention to arbitrate and an agreement in writing.

Competence-Competence

The existing Arbitration Law does not recognize the competence-competence doctrine (*see also* past [article](#) on competence-competence in PRC courts). In this respect, both the judicial courts and the arbitration commissions, rather than the arbitral tribunal, have the power to rule on the validity of an arbitration agreement. The arbitration commission's power is [secondary to the court's power](#), *i.e.*, if a request for confirmation on the validity of an arbitration agreement has been submitted to both the arbitration commission and the court, then the court shall decide the matter.

By contrast, the Draft Amendment embraces the competence-competence doctrine. It empowers the arbitral tribunal to rule on its own jurisdiction and to decide on issues

including the existence and validity of the arbitration agreement. In the meantime, it allows the arbitration institutions to decide on the said issue on a prima facie basis before constitution of the tribunal. Further, it delays a court's intervention by providing that—without submitting the issue to be decided by an arbitral tribunal or by an arbitration institution—a court shall not accept a party's request on confirmation of the existence or validity of an arbitration agreement (*see* Article 28 of the Draft Amendment).

These changes are indeed positive and encouraging. For a long time, PRC arbitration reflected a strongly “administrative” color,⁵⁾ and PRC arbitration institutions were criticized for being quasi-governmental organs rather than private dispute resolution service-providers. By handing over the power to rule on the validity of an arbitration agreement to the arbitral tribunal and by delaying the judicial courts' intervention in this respect, the Draft Amendment appears aimed at correcting this erroneous image of the institutions and better represents the feature of arbitration as a private and voluntary dispute resolution process.

Conclusion

An amendment to the Arbitration Law has long been called for. By simplifying the statutory requirements on validity of arbitration agreement and recognizing arbitral tribunal's power to rule on their own jurisdiction, China is aligning itself with international standards and norms, striding ahead towards arbitration-friendly jurisdictions such as Singapore and Hong Kong. The arbitration community has high hopes for the new Arbitration Law in this respect.

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References

- ↑1 SPC (2006) Min Yi Zhong Zi Di No.11.
- ↑2 SPC (2007) Min Si Zhong Zi No.15.
- ↑3 SPC (2012) Zhe Yong Zhong Zi Que Zi No.4.
- ↑4 Beijing Dongcheng District Court (2018) Jing 0101 Min Chu No.6973.
See, e.g., CHEN Fuyong, *Unfinished Transformation: An Empirical Study of the*
- ↑5 *Current Status and Future Trends of China's Arbitration Institutions* (Law Press 2010).

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