

Kluwer Arbitration Blog

Right of Clarification by the Arbitral Tribunal: the Approach in PR China

Wei Sun (Zhong Lun Law Firm) · Monday, September 21st, 2020

The “right of clarification” (in German: *Aufklarungsrecht*) is a product of the inquisitorial method of hearing. It refers to a judge’s right to ask, suggest to or require the parties to [clarify or supplement their ambiguous, insufficient or improper claims, submissions or evidence](#). In international arbitration, which is strongly influenced by the adversarial system, arbitral tribunals are usually cautious and reluctant to exercise the right of clarification. In comparison, for arbitrations seated in PR China, due to the influence of the inquisitorial system on Chinese courts, it appears common for arbitral tribunals to provide clarification to the parties at hearings.

The right of clarification under Chinese law

Chinese law does not address the right of clarification in litigation or arbitration seated in PR China. Guidance may be taken from judicial interpretations of the Supreme People’s Court. In PR China, although judicial interpretations of the Supreme People’s Court are not formal sources of law, they carry the same legal weight as laws and regulations in the adjudication of cases by courts. These judicial interpretations set out several scenarios where a judge is obligated, entitled or encouraged to exercise the right of clarification, and these have also been widely applied and referred to in arbitration in China. Some of the main judicial interpretations include:

- [Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China, Articles 198 and 268.](#)
- [Provisions of the Supreme People’s Court on Several Issues Concerning Evidence in Civil Procedures \(2019 Amendment\), Articles 2 and 30.](#)
- [Interpretation of the Supreme People’s Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts, Article 27.](#)

To be clear, in applying the right of clarification, an arbitral tribunal should not ignore the fundamental question of whether the tribunal even has jurisdiction. For example, if two related contracts contain different arbitration clauses and refer to different arbitration institutions, the tribunal does not need to exercise the right of clarification because the tribunal does not have jurisdiction over the other contract. In such case, the arbitral tribunal should simply refuse jurisdiction.

Principles for clarification by the arbitral tribunal

Except for situations within the scope of the judicial interpretations, the decision of whether to exercise the right of clarification is largely at the discretion of the judge or arbitrator. Clarification by an arbitral tribunal might concern both procedural and substantive issues including legal and factual components. In exercising the right of clarification, the arbitral tribunal should observe two main principles.

First, the purpose for the arbitral tribunal in exercising the right of clarification is to balance the rights of the parties to present evidence and engage in argument with each other. In exercising this authority, the arbitral tribunal should keep in mind principles of impartiality and due process and avoid showing favoritism toward a party or making a decision in place of a party.

For example, in a dispute over a sales contract, where the claimant Seller terminates the contract and requests that the respondent Buyer return the goods but the goods have been destroyed and cannot be returned, even if the tribunal were to uphold the claimant's request for the return of goods, it would not be enforceable. In such case, the claimant would have to file a separate claim for damages, which would not be efficient. In such a situation, the arbitral tribunal could suggest to the claimant that it modify the original return claim to a damage claim. However, if the claimant insists on its original claim, the arbitral tribunal should respect the claimant's choice and should not render an award beyond the scope of the claimant's request. In addition, this clarification by the tribunal should be limited to the nature of the claim and should not be extended to the amount of damages sought by the claimant.

Second, when deciding whether to exercise the right of clarification, if there are no directly applicable laws or regulations, the arbitral tribunal can refer to basic legal principles. For example, in a dispute over a subcontract, the general contractor and the subcontractor have agreed that the project payment shall be made only when the general contractor has passed the final completion acceptance test and the subcontractor has already passed the completion acceptance test for the subcontracted project but is unable to prove whether the conditions for payment of the overall project have been satisfied, nor can it calculate the interest on late payment due to lack of information. As the subcontractor is not a party to the general contract, it cannot be reasonably expected to provide evidence about the completion date of the general project. Based on the principle of privity of contracts, the tribunal should allocate the burden of proof to the general contractor to prove that the general project has not passed the overall completion acceptance test.

Remedies for improper clarification by the arbitral tribunal

If the arbitral tribunal violates the law or regulations or unreasonably exercises its authority of clarification and causes imbalance of interests of the parties, would this be a ground to set aside the arbitral award in courts in PR China? There is no clear answer from the courts in PR China and the question continues to be debated.

On the one hand, Articles 58 and 70 of the [PR China's Arbitration Law](#) set out an exhaustive list of grounds for setting aside a domestic arbitral award and a foreign-related arbitral award, respectively. That is to say, the people's court can only set aside an arbitral award if one of these

grounds is met. The arbitral tribunal's improper exercise of a right of clarification is not expressly covered in those grounds. Court judgments issued by Chinese courts also show that improper clarification by the arbitral tribunal does not constitute a ground for setting aside the award *per se*.

For example, in the case of *Chongqing Jiangdu Co., Ltd v. Cheng Jinhong*, the arbitral tribunal held that the relevant facts of the partnership contract needed further clarification and that the issues concerning the nature and validity of the contract should be clarified. Therefore, the arbitral tribunal indicated to the parties that the partnership contract in dispute was "in name a partnership contract, but in reality a lending contract." The arbitral tribunal granted the claimant a period of time to modify its request and supplement evidence. After the award was rendered, the respondent applied to the Chongqing First Intermediate People's Court to set aside the award on the basis that, *inter alia*, clarification by the arbitral tribunal violated the law and common practice.

Chongqing First Intermediate People's Court held that both the Arbitration Law of PRC and the arbitration rules were silent on the requirements and procedures for clarification. According to the court, whether and when to use clarification falls entirely within the scope of discretion of the arbitral tribunal and is not subject to judicial review by the court.

On the other hand, the award may be set aside if the court finds that the tribunal used clarification improperly and that this has amounted to a ground in Article 58 or 70 of the PR China's Arbitration Law, such as violation of due process; the award rendered is outside the scope of the parties' submission to arbitration; the arbitrator committed embezzlement, accepted bribes or conducted malpractice for personal benefits; or the arbitrator perverted the law.

For example, in the hypothetical sales contract case mentioned above, if the claimant insisted on its original claim but the tribunal nevertheless awarded damages, the award is very likely to be set aside for being outside the scope of the parties' submission to arbitration.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

This entry was posted on Monday, September 21st, 2020 at 7:00 am and is filed under [China](#), [Civil Procedure](#), [Court Proceedings](#), [Discretion](#), [Fair and Equitable Treatment](#), [Procedural Fairness](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.