

Kluwer Arbitration Blog

Judicial Review of Arbitration Agreements in PR China

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The [Chinese Arbitration Act \(1995\)](#) recognizes the principle of competence-competence in Article 20, under which a party challenging the validity of the arbitration agreement may request the relevant arbitration commission to make a decision or apply to the court for a ruling. Ultimately, though, it is the reviewing courts in PR China that shall have the final say on the validity of an arbitration agreement including its scope. Under the Chinese legal system, such reviewing courts are spread amongst different geographical locations.

Taking arbitration agreements choosing Shanghai International Economic and Trade Arbitration Commission (also known as Shanghai International Arbitration Center; the “**SHIAC**”) as example, the court responsible for reviewing such arbitration agreements is the Shanghai No.2 Intermediate People’s Court in accordance with Article 12 of the [Judicial Interpretation on Arbitration Act \(2006\)](#) (the “**2006 Judicial Interpretation**”) made by the Supreme People’s Court of the People’s Republic of China (the “**SPC**”).¹⁾

However, where an arbitration agreement does not designate an institution, the question of validity (including the scope) of an arbitration agreement will be determined in accordance with [Chinese Civil Procedural Laws \(2017\)](#), *i.e.*, pursuant to the principle of *actor sequitur forum rei*, whereby a party must seek relief from competent jurisdiction.

Standardized Practices and Increased Transparency

Reviewing court judgments in PR China are without precedential effect. Without standardized practices, this could lead to judgments that lack uniformity and thus yield uncertainty about the law.²⁾ In order to unify the courts’ practices on judicial review of arbitration agreements, the SPC issued several judicial interpretations, one of which was issued in 1987 for [foreign-related arbitration agreements](#) and another in 2017 for [purely domestic arbitration agreements](#). Together, the two judicial interpretations from SPC form the Internal Reporting Mechanism under which lower courts are required to seek approval from higher courts, and up to the SPC if necessary, before striking down an arbitration agreement.

Further, in view of the development of legal technology and increasing awareness of judicial transparency, the SPC ordered in July 2013 publication of court judgments and verdicts on the

internet after they become effective. As of August 2020, the [website](#) has published more than one hundred million judgments and verdicts, a significant number of which relate to arbitration agreements.

SHIAC has observed that an increasing number of judgments and verdicts relating to arbitration agreements that choose SHIAC are being published. These judgments and verdicts reflect the pro-arbitration attitude of the courts in PR China when assessing arbitration agreements choosing SHIAC. In this regard, two selected cases relating to the issue of arbitrability are summarized below.

Case No. 1:³⁾ Are Tort Claims Arbitrable?

Facts

In December 2016, the petitioner and the respondent concluded a leasing agreement, under which the petitioner leased the roof area of certain industrial premises to the respondent for use in a power-generating project. Since 2018, the premises began to experience problems allegedly due to improper use of the roof area by the respondent which caused damage to, *inter alia*, the petitioner's leased premises. The petitioner accordingly sought compensation from the respondent.

In reliance on [Chinese Tort Law](#) (replaced by Chapter 7 of the [PRC Civil Law Code](#)) and Chinese Civil Procedural Laws, the petitioner filed court proceedings in the court of the place where the respondent was domiciled. The respondent objected to the court's jurisdiction and argued that the dispute should be submitted to arbitration in accordance with the arbitration agreement contained in the leasing agreement between the parties, which specified that "*any dispute arising out of the performance of the agreement.....shall be submitted to Shanghai International Arbitration Center for arbitration*".⁴⁾

Court's Ruling

The competent court, located in Hubei Province in the middle part of Mainland China, identified the core issue as whether the court had jurisdiction over the dispute brought by the petitioner against the respondent.

Firstly, the court examined whether such tort claim fell under the scope of arbitrable disputes under Article 2 of the Chinese Arbitration Act (1995), and found after reading the text of Article 2 that such tort claims were arbitrable.

Secondly, the court examined whether the tort claim submitted by the petitioner fell under the scope of the arbitration agreement. The court found that the arbitration agreement gave a broad discretion to the SHIAC arbitral tribunal to determine "*any dispute arising out of the performance of the agreement*". The court was of the view that such tort claims were included under this broad scope.

Thirdly, the court considered whether such tort claims were detachable from the parties'

contractual rights and obligations, and therefore would fall outside the broader scope of performance of the underlying lease agreement. The court took note that Article 6 of the leasing agreement specified that “*Party B [(i.e., the respondent)] shall be responsible for the maintenance of the power-generating project on the roof, and for the water-proof work resulted by the power-generating project...*”.⁵⁾ The court further noted Article 2 of the Judicial Interpretation on Arbitration Act (2006), providing that “[w]here the parties concerned synoptically agree that the matters to be arbitrated are contractual disputes, the disputes arising out of formation, effectiveness, modification, assignment, performance, liabilities for breach, interpretation, rescission, etc. of the contract may all be ascertained as matters to be arbitrated”,⁶⁾ and found with reference to Article 6 of the leasing agreement that the respondent’s alleged tortuous acts were closely connected with and could not be detached from the respondent’s performance of the leasing agreement.

Based on the above analysis, the court determined that there was a valid arbitration agreement between both parties and that their disputes, including claims on torts, should be referred to arbitration. The petition was accordingly dismissed.

Case No. 2:⁷⁾ Are Disputes over Public-Private-Partnership Arbitrable?

Facts

In November 2015, the respondent signed a Building-Ownning-Operation (“**BOO**”) Contract for the development of a cultural tourism resort (the “**Project**”) with a third party. Due to funding issue, the respondent invited the petitioner to join the development and construction of the Project adopting the Public-Private-Partnership (“**PPP**”) model. The petitioner and the respondent subsequently signed the BOO Contract in dispute, which contained clauses on the investment, construction and operation of the Project.

On March 14, 2018, the respondent unilaterally issued a notice for an early termination of the Project to the petitioner, after which the petitioner notified the respondent of its agreement to the early termination, and of its request for compensation to which the respondent objected. The petitioner then filed court proceedings to seek compensation from the respondent. The respondent relied on the arbitration agreement contained in the BOO Contract and objected to the jurisdiction of the court, claiming that the dispute should instead be submitted to arbitration.

Court’s Ruling

The competent court to hear the case, which is located in Jiangsu Province in the eastern part of Mainland China, considered that the disputed BOO Contract was concluded for a Project using the PPP model, which in general contains both commercial and administrative elements. In this regard, under Article 3 of the Chinese Arbitration Act (1995), administrative disputes are not arbitrable and shall be handled by the administrative organs as prescribed by law, instead of via commercial arbitration.

However, the court determined that the disputed BOO contract was of a civil rather than

administrative nature, based on the following considerations:

1. From the perspective of contract formation, a standard BOO contract contains the rights and obligations negotiated by the parties on the basis of the principle of equality thus having the basic characteristics of a civil contract, *e.*, parties negotiate at arms' length;
2. The contents of a standard BOO contract typically involve matters of a civil nature which can be contracted and negotiated, *g.*, project capital, construction scope, construction standards, acquisition of benefits and risk allocation; and
3. The Project involved in the dispute was essentially a framework of cooperation between parties, neither of whom was a public authority nor was subordinate to the other.

The court found that since the disputed BOO Contract was of a civil nature and that it contained a valid arbitration agreement, the petitioner's claims did not fall under the jurisdiction of the court and should be referred to through arbitration. The petition was accordingly dismissed.

Concluding Remarks

As demonstrated in the two cases discussed, the courts in PR China adopt an arbitration-friendly attitude in their acknowledgement of the validity of arbitration agreements and in their recognition a broad scope of discretion of arbitral tribunals to determine their own jurisdiction. In doing so, arbitration as a dispute resolution mechanism may become even more widely available to users, and in turn help alleviate the overwhelming caseload faced by the courts in PR China. Such an achievement should be attributed to the SPC for its efforts in standardizing the practice of the reviewing courts.

In terms of continuing efforts of the judiciary, one example is the revision of the Chinese Arbitration Act (1995) which is currently under progress. Although the current draft revision has yet to undergo public consultation, legal experts involved have indicated that one key development pertains to having the law of the seat as the law applicable to the arbitration agreement, which is a concept so far only introduced in the SPC's judicial interpretations, *e.g.* the 2006 Judicial Interpretation and the [Provisions of the Supreme People's Court on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review \(2018\)](#) (the "**2018 Provisions**").⁸⁾

On this point, it could reasonably be expected that the said concept of law of the seat will exclusively apply to determination of validity of arbitration agreements which, together with the persistent efforts of the courts in PR China towards unifying practices on judicial review of arbitration agreements, may help resolve the fundamental [question of determination of the proper law governing the arbitration agreement](#).


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References

- ?1 The SHIAC is a permanent arbitration institution established in Shanghai since 1988.
Article 20 of the Chinese Arbitration Act (1995) provides that: “[i]f the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people’s court for a ruling. If one of the parties submits to the arbitration commission for a decision, but the other party applies to a people’s court for a ruling, the people’s court shall give the ruling. If the parties contest the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitration tribunal.”
- ?2
- ?3 (2020) E 0802 Min Chu 2196 Hao
- ?4,
- ?5, This is the author’s courtesy translation of the original provision in Chinese.
- ?6
- ?7 (2020) Su 10 Min Chu 144 Hao
Article 13 of the 2018 Provisions explicitly provides that, “if the parties intend to agree on the choice of applicable law for the arbitration agreement, the parties should do so through explicit expression. The parties’ choice of the law applicable for the contract should not be used as the law for determining the validity of the arbitration clause in the same contract”. (This is the author’s courtesy translation of the original provision in Chinese.)
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