



PRC arbitration law

CLARIFICATION FROM THE PRC SUPREME PEOPLE'S COURT

The Supreme People's Court (SPC) recently promulgated its long-awaited interpretation on the application of PRC arbitration law (the SPC Interpretation). The SPC Interpretation consolidates previous judicial interpretations and provides guidance on two key issues in arbitration: the validity of arbitration agreements and challenges to arbitral awards.

The Supreme People's Court (SPC) promulgated its long-awaited interpretation on selected issues relating to the application of PRC arbitration law (the SPC Interpretation) on 8 September 2006. The SPC Interpretation is a significant document that consolidates previous judicial interpretations and provides guidance on two key issues in arbitration: the validity of arbitration agreements and challenges to arbitral awards.

Validity of arbitration agreements

What if parties have failed to designate an arbitration institution?

Under PRC law, a valid arbitration agreement must expressly designate an 'arbitration commission' (仲裁委员会). Such a requirement is unusual in international practice, in which parties frequently agree to arbitration rules without expressly designating an arbitration institution in their arbitration agreement.

Articles 3 and 4 of the SPC Interpretation suggest a possible relaxation of this requirement. In particular, article 4 suggests that even if an 'arbitration institution' is not expressly designated, the arbitration agreement will not be invalid if the arbitration institution can be ascertained under the applicable arbitration rules.

What constitutes a 'written' arbitration agreement?

PRC law requires a valid arbitration agreement to be in 'writing'. Article 1 of the SPC Interpretation clarifies that a 'written' arbitration agreement may be reached by express agreement in writing by exchange of letters and

electronically transmitted documents (including telegrams, telefaxes, facsimiles, electronic data interchange and emails). This is consistent with international practice.

What disputes can be arbitrated?

Article 2 of the SPC Interpretation adopts an expansive interpretation of which matters can be arbitrated by providing that where the scope of the arbitration agreement is unclear, 'arbitrable matters' include (but are not limited to) disputes regarding contractual formation, validity, modification, assignment, performance, liability for breach of contract, interpretation and rescission of a contract.

Can a party agree to both court jurisdiction and arbitration?

Article 7 provides that agreements stating that a dispute may be referred to both an arbitration institution and the people's court are invalid unless one party commences arbitration and the other party does not object promptly.

Validity of an arbitration agreement: who decides?

In international practice, the validity of an arbitration agreement is primarily determined by the arbitral tribunal. However, under PRC law, this question is reserved for determination by either the arbitration commission or the people's court. Most foreign parties prefer the former option.

Building on a previous judicial interpretation, article 13 provides that once an arbitration institution has decided on the validity of an arbitration agreement, the people's

court will not entertain any application to challenge such a decision. This is a welcome development that will bring greater certainty to the legitimacy of proceedings.

What law governs the validity of the arbitration agreement?

Article 16 addresses this question. The provision is not entirely clear, but when read in conjunction with previous judicial pronouncements it suggests that in most cases the validity of an arbitration agreement will be determined based on the law of the *seat* (or place) of arbitration. Therefore, if a contract governed by Hong Kong law is subject to arbitration in China, according to the SPC Interpretation the validity of the arbitration agreement will be a matter of PRC law.

Is ICC arbitration permitted in China?

Unfortunately, as with previous interpretations, the SPC Interpretation fails to directly address the status of International Chamber of Commerce (ICC) arbitration in China. It remains unclear whether a clause providing for ICC (or other foreign institutional) arbitration *in China* is valid.

Challenging awards

Can an award be set aside partially?

Article 19 clarifies that the people's court may set aside only the *part* of an arbitral award lying beyond the scope of the arbitration agreement. This echoes a previous judicial pronouncement and mirrors the position under the New York Convention.

What if a party delays in challenging the award?

Article 27 effectively provides that a party waives its right to set aside or to resist enforcement of an award on the basis that the arbitration agreement is invalid if it raises the argument only after the arbitral award is made and not during the proceedings.

Conclusion

Arbitration in China has made significant and encouraging progress in recent years. The SPC Interpretation represents China's latest effort to bring both the law and the practice of arbitration more closely

in line with commonly accepted international practice. While it is certainly a step in the right direction, it falls short of addressing several questions that concern foreign entities. For example, it does not specifically state whether foreign arbitral institutions (such as the ICC) can conduct arbitrations in China. Moreover, the interpretation does not seem to alter the generally accepted notion that in disputes involving solely Chinese parties, these parties cannot agree to arbitrate outside China.

For a more detailed commentary on the SPC Interpretation, please refer to an article by our China dispute resolution team published in *Mealey's International Arbitration Report*, August 2006, volume 21 #8, pages 52 to 66 (Yuen; Choong). The commentary is on a final draft of the SPC Interpretation that is virtually identical to the actual interpretation as promulgated. A copy of the English translation of the SPC Interpretation is also available upon request.

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