

Judicial supervision for the validity of Arbitration clause in China

Generally speaking, arbitration in China is independent. However, laws have empowered necessary supervision right to people's court for arbitration. Practically, the Supreme People's Court (SPC) has promulgated several interpretations to instruct local courts how to intervene and supervise arbitration. The most significant landmark is a judicial 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 key issues in arbitration. The validity of arbitration clause is listed.

A 'written' arbitration agreement

PRC law requires a valid arbitration agreement must 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?

For this point, SPC shows an expansive and tolerant attitude in Article 2 of the Interpretation by providing that where the scope of the arbitration agreement is unclear, 'arbitrable matters' including but not limited to disputes regarding contractual formation, validity, modification, assignment, performance, liability for breach of contract, interpretation and rescission of a contract.

How to deal with arbitration clause without designating an arbitration institution?

Under PRC law, a valid arbitration agreement must expressly designate an 'arbitration commission'. 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.

Jurisdiction to both court jurisdiction and arbitration?

No. PRC laws adopt a principle of selecting one jurisdiction from court and arbitration. Article 7 in the interpretation 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.

Power to decide validity of an arbitration agreement

It is a common international practice that the validity of an arbitration agreement is primarily

determined by the arbitral tribunal. However, under PRC law, this power is reserved by either the arbitration commission or the people's court for determination. Building on a previous judicial interpretation, article 13 provides that once an arbitration commission has decided on the validity of an arbitration agreement, the people's court will not accept any application to challenge such a decision.

Survival of arbitration clause

Article 8 provides that arbitration clause is still valid even parties to such clause take place merger & acquisition or split. This is regarded a breakthrough to privity of contract.