
Chinese Court (PRC) upholds the validity of “Arbitration or Litigation” Clauses

S Ravi Shankar¹

In most of the countries, if an intention of the party to go for arbitration can be traced from the dispute resolution clause between the parties, that clause is treated as a valid Arbitration clause. If there are dispute resolution clauses providing both the mechanisms of courts as well as arbitration, a narrow interpretation is given by the courts to give effect to arbitration by holding that the courts specified in the clause are specified for the limited purpose of specifying supervising courts. The Courts in Taiwan while determining the existence of an arbitration clause, applies the principle of “the – first – choice governs”. But in China for a long time the courts have taken a consistent view that if there is a dispute resolution clause that provides for both arbitration and Courts as available dispute resolution mechanisms, that is not a valid arbitration clause. This is because of the judicial interpretation of People’s Supreme Court of China (Highest court of China) that since such clauses put arbitration and litigation, two exclusive dispute resolution mechanisms on an equal footing for selection and fail to make a clear choice of one dispute resolution mechanism, available for parties and hence it is not an effective arbitration clause.

Facts and contentions: Jian Chengtai Construction Company entered into a project construction contract with Jinan Licheng District Wangsheren Neighborhood Zhanmatun villagers’ committee. The contract between the parties had an arbitration clause *“in case of a dispute arising in the course of performing the contract, the parties shall submit the dispute to the Jinan Arbitration Commission or to a people’s court for litigation”*. When the construction Company wanted to initiate arbitration proceedings later it was objected by the villagers committee on the ground that there is no valid arbitration clause in the contract. Hence the Construction company had to seek an intervention of the Jinan’s People’s court.

Decision of the Court: The Jinan People’s Court while dealing with the application of the construction company determined that it is agreed in the subject contract that any dispute arising therefrom shall be submitted to the Jinan Arbitration commission for arbitration or to a people’s court for litigation. In this clause, the agreed arbitration Institution is Jinan Arbitration Commission and such an agreement is clear, specific and exclusive. The 2nd part of the sentence dealing with people’s court is invalid since it is ambiguous. In the process the Court divided both the aspects separately and tested the validity of both the parts separately instead of considering their validity, as a whole. Since the arbitration part of it specifically mentions the arbitral institution, it was held to be clear and specific, and hence it is found to be a valid arbitration agreement.

¹ The author is an Expert International arbitration lawyer and a Senior Partner of Law Senate Law Firm having offices in New Delhi and Mumbai

Comments of the author: People’s Republic of China continuously endeavors to prove itself to be a pro-arbitration country. PRC courts try to uphold and enforce all the international arbitration awards. If a court decides to not to enforce a foreign award it requires the approval of the higher court to do so. One of the problems faced by parties arbitrating in China was the determination of existence of an arbitration clause by the courts since many of the arbitration agreements were not well drafted, leaving scope for interpretation. The above said judgment has helped the parties to go for arbitration even though the clauses can be termed as an “Arbitration or Litigation” clause.

