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RESEARCH ARTICLE

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Latest evolution in the judicial intendance mechanism over arbitration in China
——Comment and analysis on the Interpretation of the Supreme Court concerning Some Issues on the Application of the Arbitration Law of China

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Abstract Based on past court practices, the Supreme Court of China promulgated the Interpretation of the Supreme Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which is in line with the international trend of justice-arbitration relationship and reflects the pro-arbitration idea, as well as making a new step forward in the evolution of China's judicial intendance over arbitration. However, confined by current legislation and due to inadequate judicial experiences, some problems still remain in the judicial intendance mechanism for further solution.

Keywords arbitration, arbitration law，judicial intendance

摘要 在认真总结审判经验的基础上，最高人民法院制定并颁布了《关于适用〈中华人民共和国仲裁法〉若干问题的解释》，它顺应了司法与仲裁关系发展的世界潮流，体现了支持仲裁的精神，这是中国仲裁司法监督制度的新发展。因受现行立法的制约以及司法实践经验不足等限制，中国仲裁司法监督制度还有一些余留问题需要进一步解决。

关键词 仲裁，仲裁法，司法监督

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1 Background and main characteristics

The relationship between justice and arbitration, which involves the intendance and control of the former over the latter as well as the support and assistance of the former to the latter, constitute the core part of all the countries' arbitration laws. The worldwide development trend of this relationship is the weakening of control and intendance along with the strengthening of the assistance and support, and this has been universally accepted by countries as a legislation guideline and judicial policy (Yu, 2006).

China's arbitration mechanism has been greatly advanced along with the rapid increase of foreign related civil and commercial activities since the late 1970s when the country adopted the policy of reform and opening up. In developing arbitration mechanism, the problem of how to handle the relationship between justice and arbitration has become an unavoidable issue for both arbitration legislation and judicial practice. In this respect, various laws, including the Civil Procedure Law, have provisions to regulate this relationship, especially the Arbitration Law of China (1994) which lays out a legal framework for China's judicial intendance system over arbitration. However, due to its historical limitations, the Arbitration Law failed to reflect the idea of supporting arbitration with certain provisions lacking the quality of operation, nor did it include some of the world's universally adopted pro-arbitration institutions, which is not in line with the general development trend of the relationship between justice and arbitration, the limitations of the Arbitration Law gradually manifest themselves with the passage of time and practice. Therefore, the Supreme Court has made amendments to the Arbitration Law by timely summarizing judicial experiences to release judicial interpretations and written replies concerning individual cases, thus promoting the evolution of Judicial Intendance System over Arbitration. After one decade's exploration and practice, courts on various levels have accumulated mature experiences as to the application of Arbitration Law. On this background, the Supreme Court promulgated the Interpretation of the Supreme Court concerning Some Issues on Application of the Arbitration Law of the PRC (hereinafter referred to the Interpretation) as an interpretative guidance for the courts to judge arbitration related cases on December 26, 2005.

The basic characteristics of the Interpretation are as follows:

First, in terms of scope, it gives on-target interpretations to problems arising from judicial work, which is in close contact with judicial practice. Arbitration related cases in the courts' judicial practices involve cases concerning the review of agreement for arbitration's validity、cases concerning the property preservation and evidence preservation、cases concerning the revocation and enforcement of

domestic arbitral awards[1] and the recognition and enforcement of awards by foreign arbitration agencies. The most common are cases concerning the judicial review of agreement for arbitration's validity and those concerning the revocation and enforcement of domestic arbitral awards. The Interpretation mainly provides solutions to cases falling into the two categories in response to the practical needs.

Second, in terms of content, complying with the international development trend of justice-arbitration relationship, it brings into the pro-arbitration idea to the utmost extent within the current legal system, and we will discuss this in details later. It is pointed out that no single provision in the Interpretation is intended to enhance the intendance and control over arbitration, but rather a strong tendency to uphold arbitration.

Third, in terms of legislative mode, the Interpretation makes no difference between domestic arbitration and international commercial arbitration but apply the same set of rules. The Arbitration Law of China adopts the legislative style that treats domestic arbitration and international commercial arbitration differently and has some special stipulations about the latter, while the Interpretation provides a set of uniform regulations based on the commonness of the two, so unless otherwise expressly provided, they apply to both domestic arbitration and international commercial arbitration. Despite this, we still shall take into consideration the difference of the two as to their applicable laws in practice.

Fourth, in terms of methods, the Interpretation uses the method of filling blanks as well as that of detailed interpretation. To be specific, on the one hand, it incorporates some institutions which have been universally adopted by countries but still yet to find their way into the legal system; on the other hand, it goes into particulars on some principal provisions so as to improve their quality of operation.

2 New progress in the judicial intendance mechanism over arbitration

The most distinctive characteristic of the Interpretation is that it further reduces the court's intendance and interference into arbitration within current legal system and embodies the pro-arbitration idea, which is in line with the international development trend of justice-arbitration relationship.

[1] It includes the revocation and enforcement of arbitral awards by Chinese arbitration agencies on domestic disputes and foreign related disputes.

2.1 On cases concerning the validity of arbitration agreement in judicial review

2.1.1 Adopt a wide definition of the written arbitration agreement

According to the Arbitration Law of China, an arbitral agreement shall include the arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs,[2] but the law gives no definition to the term "other written agreements", so if this term are interpreted strictly in judicial practice, there is bound to be an increased possibility of the validity of an arbitral agreement and the arbitration tribunal's jurisdiction is taken exception to. In contrast, a wider definition of the term will cause it possible to decline. The worldwide trend in this respect is toward an increasingly loose definition of written agreement[3]. Learning from the method used in defining "other written contracts" in the Contract Law of China[4], Article 1 of the Interpretation provides that the term "agreements for arbitration in other written forms" as prescribed in Article 16 of the Arbitration Law shall include the agreements on resorting to arbitration which are reached in the forms of contracts, letters or data message (including telegraph, telefax, fax, electronic data interchange and e-mail), thus giving a very wide definition of the term "other written agreements", which encompass virtually all the possible written agreements.

2.1.2 Provide an extensive interpretation on disputed matter for arbitration

Agreement for arbitrations usually make no elaborate list of arbitrable disputes, but generally provide that "disputes under this agreement" or "all disputes related to this agreement" shall be submitted to arbitration. Even standard arbitral agreement clauses of world famous arbitration agencies use only such general expressions as "disputes arising from or related to this contract" to refer to arbitrable disputes. [5] Therefore, when a certain dispute arises, it must be

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[2] Art. 16 of the Arbitration Law of China (1994).

[3] Art. 2.2 of New York Convention (1958); Model Law on International Commercial Arbitration (1985).

[4] Art. 11 of the Contract Law of China (1999).

[5] For instance, the model arbitral agreement of "China international economic and trade arbitration commission " uses such expressions as "all disputes arises from the performance of or related to this contract ". The expression used in the model arbitral agreement of Pairs International Chamber of Commerce are "any disputes arising from or related to this contract". Besides, model agreement for arbitrations from the American Arbitration Association, London court of International Arbitration and ICSID all use similar expressions.

determined first whether this dispute is under the contract or related to the contract so as to decide if the arbitral agreement can be applied. Thus, when a court reviews the scope of an agreement for arbitration, how such general terms as "disputes arising from, related to or under this contract" are interpreted determines, to some extent, the validity of an agreement for arbitration. In view of this, the Interpretation used the method of liberal interpretation, and provided expressly in Article 2 that "when parties to an agreement agreed generally that contractual disputes shall be submitted to arbitration, then the contractual disputes shall be construed as including disputes arising from the establishment, validity, change, assignment, performance, default, interpretation and termination of a contract." A liberal interpretation of arbitrable disputes enables more disputes to fit into the scope of arbitration and then be ruled by an arbitration tribunal, this indeed reflects the pro-arbitration idea.

2.1.3 Make a "soft" treatment to the provision that an arbitral organ shall be specified in the arbitration agreement

The Arbitration Law of China expressly provided that one of the mandatory contents of an arbitral agreement is a specified arbitration commission.[6] This is a unique stipulation in Chinese arbitration legislation, which denies the legal status of ad hoc arbitration and always leads to the objection of the effectiveness of agreement for arbitrations by parties on the ground of indeterminate arbitration agency. As a result, in cases concerning the review of agreement for arbitration's validity, the litigant disputes always focus whether an arbitration commission has been specified. Approaching this issue with a pro-arbitration, the Interpretation softened the rigid regulation that a certain arbitration agency must be specified in the arbitral agreement in the following ways:

First, Article 3 of the Interpretation provides that where the name of an arbitration institution as stipulated in the arbitral agreement is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected. For instance, some agreement for arbitrations may choose China International Economic and Trade Arbitration Commission as the arbitration agency, but write its old name "Chinese foreign economic and trade arbitration commission", other arbitral agreement may misspell "XX Arbitration Committee" as the 'XX Municipal Committee of Inquiry". Under such circumstances, it shall be construed that the parties have selected arbitration commission.

Second, Article 4 of the Interpretation provides that where an arbitral agreement only stipulates the arbitration rules applicable to the dispute, it shall

[6] Art. 16 of the Arbitration Law of China (1994).

be deemed that the arbitration institution is not stipulated, unless the parties concerned reach a supplementary agreement or may determine the arbitration institution according to the arbitration rules agreed upon between them.

Third, according to Article 6 of the Interpretation, where an arbitral agreement stipulates two or more arbitration institutions, the parties concerned may choose either arbitration institution upon agreement when applying for arbitration; If the parties concerned cannot agree upon the choice of the arbitration institution, the arbitral agreement shall be ineffective. According to Article 4, 5 and 6 of the Interpretation, even though the arbitral agreement did not explicitly specify a certain arbitration body, if the parties reached a supplemental agreement after a dispute choosing an arbitration body, it shall be determined that the parties have selected an arbitration body.

2.1.4 Adopt a flexible approach towards the effect of the "arbitration or judge" provision in disputes

Some dispute settlement provisions in contracts provide that disputes can either be submitted to an arbitration body or to the court. This type of clause is commonly known as an "arbitration-or-judge" clause in practice, since such provision doesn't impose on parties the obligation to submit to arbitration and thus doesn't constitute a valid agreement for arbitration. Therefore, Article 7 of the Interpretation provides that where the parties concerned agree that they may either apply to the arbitration institution for arbitration or bring a lawsuit with court for settlement of dispute, the arbitral agreement shall be ineffective, unless after one party applies to the arbitration institution for arbitration, the other party fails to propose any objection within the period prescribed in Article 20.2 of the Arbitration Law. According to Article 20 of the Arbitration Law, where a litigant takes exception to the validity of the agreement for arbitration, he shall raise a challenge before the arbitration tribunal starts the first hearing of the case. With the flexible approach, if a litigant doesn't raise a challenge before the arbitration tribunal starts the first hearing of the case, the "arbitration-or-judge" clause will be construed as a valid arbitration clause.

2.1.5 Made clear the effect of arbitration agreement on new parties

It happens that the parties may be changed after the signing of an arbitral agreement, thus comes the question of whether the arbitral agreement still be effective on the successors of original parties. If it is regarded as effective on the successors, the scope of agreement for arbitrations are sure to be expanded, which is in the interest of arbitration. As for this issue, the Interpretation provides differently according to different circumstances. First, According to Article 8.1

and 8.3 of the Interpretation, where one party concerned is merged or divided after concluding an agreement for arbitration, the arbitral agreement shall be binding upon the successor of its rights and obligations, unless otherwise agreed between parties when concluding the arbitral agreement. Second, according to Article 8.2 and 8.3 of the Interpretation, where one party concerned died after concluding an agreement for arbitration, the arbitral agreement shall be binding upon the inheritor who inherits his rights and obligations in the matter to be arbitrated, unless otherwise agreed between the parties when concluding an agreement for arbitration. Third, according to Article 9 of the Interpretation, where the credits or debts are entirely or partially assigned, the arbitral agreement shall be binding upon the assignee, unless the parties concerned have otherwise agreed, or the assignee explicitly objects to the assignment of the credits or debts or does not know there is a separate agreement for arbitration. The above mentioned provisions enlarge the scope of agreement for arbitration, uphold the pro-arbitration idea and reflect the oriented value that seeks to validate arbitral agreements when possible.

2.1.6 Further expand the application of the principle of arbitral agreement in autonomy

The basic meaning and thrust of the arbitral agreement autonomy principle is that the arbitral agreement shall be treated as a separate and independent contract from the main contract, therefore its effectiveness shall not be affected by that of the main contract and flaws or alternations in the main contract are not to be used to deny the effectiveness of agreement for arbitration. In designing the principle of arbitral agreement autonomy an important issue is how to determine its scope of application, namely what kind of effective law in the main contract may not affect the effectiveness of the agreement for arbitration. China's Arbitration Law provides that an arbitral agreement stands on its own. modification, rescission, termination of the contract or its being declared invalid does not affect the agreement for arbitration's validity.[7]

Accordingly, the principle of arbitral agreement autonomy applies to the modification, rescission, termination of the main contract or its being declared invalid. However, in practice, the main contract may have other effectiveness defects, such as the main contract has yet to be established, is not yet in effectiveness or has been revoked, and so on. Therefore, a further problem is whether the arbitral agreement shall apply in the above mentioned cases. Article 10 of the Interpretation provides clearly: After the establishment of the main

[7] Art. 19.1 of the Arbitration Law Of China (1994).

contract and before it comes into force, or in case of the main contract being revoked, the validity of arbitral agreement shall be determined according to Article 19.1 of the Arbitration Law, which provides that if parties reached an arbitral agreement in forming the main contract, then the fact of the main contract not being established does not affect the effectiveness of the arbitral agreement. Accordingly, the main contract not being established, not coming into force or its revocation does not affect the validity of agreement for arbitration.[8] The expansion of the application scope of arbitral agreement autonomy principle further reduces the possibility of the agreement for arbitration's being affected by the main contract's effectiveness defect, which is obviously a gesture of support to arbitration.

2.1.7 Definitely provide that a valid arbitral agreement be reached by inference

Parties may not provide specifically and elaborately on dispute resolution in the main contract, but rather generally agreed that dispute shall be resolved by applying arbitration clause in other contracts or documents, or in accordance with the relevant provisions in international treaties, and it becomes a common problem in judicial practice whether a valid arbitral agreement can be reached by inference. In line with the pro-arbitration idea, the Interpretation gives a positive answer to this question by providing in Article 11 that where a contract stipulates that an effective arbitration clause in another contract or document shall apply in order to settle the disputes, the parties concerned shall, when a contractual dispute arises, resort to arbitration according to the said arbitration clause. Where a relevant international treaty applicable to contracts involving foreign interests contains an arbitration provision, the parties concerned shall, when a contractual dispute arises, resort to arbitration in accordance with the arbitration provision in the international treaty.[9] In a word, it expressly confirmed that a valid arbitral agreement can be reached by inference, this is of course a support to arbitration.

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[8] The interpretation lays out three types of main contract effectiveness flaws, only two of which are innovatory regulations, namely the main contract not being established and its not coming into effectiveness. The third—the revocation of main contract—has been stipulated in Art. 57 of the Contract Law, which provides that invalidation, cancellation or discharge of a contract does not impair the validity of the contract provision concerning the method of dispute resolution, which exists independently in the contract.

[9] The question of the application of arbitration clauses in applicable international treaties has been dealt with in the Supreme Court's reply on how to determine jurisdiction in cases involving Mongolia related economic contracts where no arbitration clauses are specified (Court Reply [1996] No.177), but the Interpretation provides a more normal explanation.

2.1.8 Expressly establish the system of implied waiver of objection right to the arbitral agreement

It is one of the litigant's essential procedural rights to file a challenge to the effectiveness of an agreement for arbitration, and it's also a prerequisite for the court to initiate the procedure of judicial review of the validity of agreement for arbitration.

To support arbitration, many countries have established the system of implied waiver of objection right to the arbitral agreement, which requires all challenges must be filed before the arbitration's first substantive defense, otherwise the defense will be construed as recognition of the arbitral agreement and the waiver of right of dissent, and the dissenting party has no right to file a challenge in the subsequent procedure.[10] Article 20.2 of the Arbitration Law of China provides that where a litigant takes exception to the validity of the agreement for arbitration, he shall raise a challenge before the first sitting of the arbitration tribunal[11], which approximates the essence of the system of implied waiver of objection right to the arbitral agreement. However, due to lack of explicit provision in the Arbitration Law of China that the dissenting party has no right to file a challenge in the subsequent procedure if he fails to file it before the first sitting of an arbitration tribunal. Therefore, it's not clear yet whether this system has been adopted or not. In practice, litigants always file a challenge after the first sitting of an arbitration tribunal, and to be treated differently by courts. According to Article 20.2 of the Arbitration Law of China, Article 13 of the Interpretation provides that if one party concerned fails to object to the effectiveness of the arbitral agreement prior to the first hearing in the arbitral tribunal, and then applies to the court for confirming the arbitral agreement as ineffective, the application shall not be accepted by the court. Thus confirming the system of implied waiver of objection right to the arbitral agreement and contributing to the maintenance of its effectiveness. Certainly this is a support to

[10] Art. 5 of the European Convention on International Commercial Arbitration (1961); Art. 16.2 of the Model Law on International Commercial Arbitration (1985); Art. 1052.2 of the Civil Procedure Law of the Netherlands (1986); Art. 31.1 of the Arbitration Law of UK (1996).

[11] The deadline for litigants to file challenge to the validity of agreement for arbitrations provided in China's Arbitration Law is not in line with the modus operandi. In most countries, the law stipulates that litigants shall file challenges to the validity of agreement for arbitrations before the first substantive defense, while Chinese law provides that litigants shall file the challenge before first sitting of an arbitral tribunal, which is not very reasonable, because in practice, the respondent may neither attend to the substantive defense nor the first sitting of the arbitral tribunal, in such a case, it will be unfair to deny respondent the right to file challenge after the arbitral tribunal started sitting and default trial hearing.

arbitration.

2.1.9 Make clear the law application of foreign-related arbitral agreements

According to the principle of arbitral agreement in autonomy, the applicable law of foreign arbitral agreement shall be distinguished from that of the main contract since the arbitral agreement are considered as independent from the main contract. But no provision in the Arbitration Law covers the problem of foreign arbitral agreements' applicable law, so in past judicial practice, it's not seldom for courts to apply the applicable law of the main contracts to foreign arbitral agreements, which is in violation of the principle of arbitral agreement in autonomy. The interpretation fills this gap by providing in Article 16 that: The examination of the effectiveness of an arbitral agreement which involves foreign interests shall be governed by the laws agreed upon between the parties concerned; if the parties concerned did not agree upon the applicable laws but have agreed upon the place of arbitration, the laws at the place of arbitration shall apply; if they neither agreed upon the applicable laws nor agreed upon the place of arbitration or the place of arbitration is not clearly agreed upon, the laws at the locality of the court shall apply. This provision for the first time adopted the principle of party autonomy and it used laws in the place of arbitration or that in the court as a connecting point in the application of law, which is in line with the general international trend in this respect.

2.2 Cases concerning judicial reviews over arbitral award

2.2.1 Establish the system of partial revocation of arbitral award

Revocation of arbitral award by the court is an important method of judicial intendance over arbitral award. The arbitration tribunal shall pass an award on arbitrable disputes within the scope of arbitral agreement, ruling beyond the scope of the arbitral agreement is a statutory ground for revoking an arbitral award. But some legislations do not treat arbitral awards involving matters beyond the scope of arbitral agreement is revocable in whole, but adopted the system of partial revocation, whose principle is that the court revokes only the part beyond the scope of the arbitral agreement if it is separable from other parts, and the award can be revoked in whole only when the part beyond the scope of the arbitral agreement is inseparable from other parts[12]. The partial revocation system helps to maintain the effectiveness of the part of the arbitral award which is within the agreement for arbitration, thus reduces the intendance of courts over

[12] Art. 34.2 (A) (c) of the Model Law on International Commercial Arbitration (1985).

arbitration and upholds arbitration. China's arbitration law has yet to adopt the partial revocation system, and this blank has been filled by Article 19 of the Interpretation which provides that where one party concerned applies for revocation of an arbitral award on the ground that the matter under arbitration goes beyond the scope of the agreement for arbitration, and the application is found true from examination, the court shall revoke the excessive part in the arbitral award. If, however, the excessive part is inseparable from other matter under arbitration, the court shall revoke the arbitral award.

2.2.2 Improve the re-arbitration system

The revocation of arbitral award is one of the court's sternest intendance over arbitration, the ultimate result of which is the denial of the whole arbitration process and its award. In order to reduce such cancellations, the Model Law on International Commercial Arbitration created a mechanism which allows for courts to suspend the cancellation procedure of arbitral awards and notify the arbitration tribunal for re-arbitration. The Model Law stipulates that the court, when asked to revoke an award, may, where appropriate and so applied by one party, suspend the revocation proceedings for a period of time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such action as in the arbitral tribunal's opinion will eliminate the grounds for revocation.[13] As for domestic arbitration, the Arbitration Law has a similar stipulation which provides that after accepting the application to revoke an award, if the court maintains that the arbitration tribunal still shall arbitrate the dispute, it shall notify the arbitration tribunal to re-arbitrate the dispute within a specified period and it shall also rule to suspend the revocation procedure. If the arbitration tribunal refuses to re-arbitrate the dispute, the court shall rule that the revocation procedure be reinstated. The positive implication carried in this provision, which reflects pro-arbitration idea, shall not be undervalued. The interpretation elaborates on related procedures, making the re-arbitration system more operable. For instance, Article 21.1 of the Interpretation provides that the court shall suspend the revocation proceedings and notify the arbitration tribunal for a re-arbitration where the evidence on which the arbitration based is forged; or where the adverse litigant has concealed evidence that is enough to affect an impartial ruling, and Article 21.2 provides that the court shall state in the notice the specific ground for requiring re-arbitration. Article 22 and 23 provides that where an arbitral tribunal fails to begin the re-arbitration within the time limit specified by the court, the court shall rule to terminate the revocation procedures; if the re-arbitration is not begun, the court shall rule to resume the revocation

[13] Art. 34.4 of UNCITRAL (1985).

procedures; where one party concerned is dissatisfied with a re-arbitration award, it may, within six months as of service of the re-arbitration award, apply to the court for revocation of the re-arbitration award in accordance with Article 58 of the Arbitration Law.

2.2.3 Straighten out the relationship between the revocation of arbitral award and the ruling of non-enforcement of an arbitral award

There are two modes of judicial intendance over arbitral award stipulated in the Arbitration Law and Civil Procedure Law, namely the revocation of an arbitral award and the ruling of no enforcement of an arbitral award. Moreover, according to the law, litigants may apply the court to revocation or ruling to no enforcement of an arbitral award on the same ground[14]. And such application can be filed either to the court having jurisdiction over the case or the one in charge of enforcement. However, due to the lack of stipulation about the relationship of the two intendance modes, in judicial practice, chances are the same arbitral award may be subject to more than one mode of intendance. For instance, one party concerned may apply the court in charge of enforcement of an arbitral award after their previous application to revocation the same award has been dismissed by the court with jurisdiction, it will be a waste of judicial resources if the court in charge of enforcement review the same application again and it also adds to the possibility of getting contradicting results for the same case.

Aiming at these problems, the Interpretation makes two provisions: Article 25 provides that where, after a court accepts the application filed by one party concerned for revocation of the arbitral award, the other party applies for enforcement of the same arbitral award, the court that accepts the said enforcement application shall rule to suspend the enforcement after the acceptance.[15] Article 26 provides that, after the application filed by one party concerned to the court for revocation of the arbitral award is rejected, the said party proposes its demur to no enforcement in the enforcement procedures on the same ground, such a demur shall not be supported by the court. The above cited provisions put in good order the relationship between the two intendance modes—revocation and ruling of no enforcement of an arbitral award, avoids the double intendance over the same arbitral award, and reduces the possibility of having contradicting results, all these reflects the pro-arbitration

[14] Art. 58, 70, 71 of the Arbitration Law of China (1994); Art. 217, 260 of the Civil Procedure Law of China (1994).

[15] This provision is absolutely in line with the principle of Art. 64 of the Arbitration Law of China.

idea.

2.2.4 Establish the mechanism of implied waiver for the revocation of an arbitral award

The implied waiver of the grounds for revoking an arbitral award means that although there is a legal ground for the arbitral award to be revoked, if the party applying for its revocation has already known the said ground in the arbitration proceedings but failed to raise a challenge in time, then it will be determined that the party has waived his right to invoke such ground to apply for a revocation.

The grounds for revocation that can be impliedly waived include void agreement for arbitration (including lack of jurisdiction of the arbitration tribunal), the discrepancy between arbitration procedure and formation of the arbitral tribunal and parties' agreement, etc.[16] This important mechanism has been accepted by many countries, though the Arbitration Law has no such stipulations, the Interpretation clearly provides in Article 27 that where one party concerned did not object to the effectiveness of an arbitral agreement in the arbitration procedures, and requests revocation of the arbitral award or proposes demur to no enforcement on the ground of ineffectiveness of the arbitral agreement after the arbitral award is rendered, the court shall not support its request or demur. However the Interpretation limited the ground that can be impliedly waived to void arbitral agreement, excluding the discrepancy between arbitration procedure and parties' agreement, which is different from other countries' related stipulations. In spite of this imperfection, the Interpretation established the mechanism of implied waiver of the grounds for repealing an arbitral award, which has great significance to maintaining the effectiveness of arbitral award.

In conclusion, the Interpretation is in line with the international development trend of the justice-arbitration relationship, pushing China's Judicial Intendance System over Arbitration forward in the direction of reducing the intendance and strengthening the support of arbitration.

3 A brief analysis of some leftover problems

Of course, as a judicial interpretation, the Interpretation cannot solve all the

[16] Art. 1065 of the Civil Procedure Law of the Netherlands (1986); Art. 73 of the Arbitration Law of UK (1996); Art. 1704 of the Justice Code of Belgium (1998); Art. 1704 of the Arbitration Law of Sweden (1999); Art. 23 of the Uniform Arbitration Law of U.S. (2000).

problems in China's judicial review and support mechanism. On the one hand, it's impossible for it to have a break through and transcend the principles and regime established by the current Arbitration Law. On the other hand, due to lack of experience as well as limited by objective conditions, it left out some issues which shall be solved un-touched.

3.1 Leftover issues due to the limit of current legislation

3.1.1 The problem of whether an arbitral organ must be specified in the arbitration agreement

The Arbitration Law provides that a certain arbitration agency must be specified in the agreement for arbitration,[17] which denies the legal status of ad hoc arbitration, and always causes the court to review whether the parties concerned have specified a certain arbitration agency. This is a unique provision of China's Arbitration Law, which has been criticized by both domestic and international legal academia and arbitration practice. However, because the Arbitration Law is very definite on this point, so it's impossible for the Interpretation to break through and transcend its provision, all it can do is to reduce the rigidity of the provision.

3.1.2 The problem of "one trial is final" in judicial intendance over arbitration

In China, the regime of "one trial is final" is applied in judicial intendance over arbitration, therefore parties concerned has no right to appeal in such cases. This is contradicting with international general practice, and has been widely criticized. The regime of "one trial is final" has its source in the Civil Procedure Law, which provides that rulings made out in proceedings of the cancellation or refusal of enforcing an arbitration award can not be appealed[18]. Based on the principle of this provision, the Supreme Court released a series of judicial interpretation, through which established the principle that all other cases of judicial review over arbitration shall not be appealed, either. The interpretation can't break through the stipulations in the Civil Procedure Law and establish the appealing system for cases of judicial review over arbitration.

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[17] Art. 16 of the Arbitration Law of China (1994).

[18] Art. 140 of the Civil Procedure Law of China provides the scope of the usage of ruling by listing 11 circumstances, the ninth of which is no enforcement of arbitral award, and only the first 3 items can be appealed.

3.1.3 The problem of the deadline for parties concerned to raise objection to the effectiveness of agreement for arbitration.

The Arbitration Law provides that a doubt to the effectiveness of an arbitration agreement shall be raised before the first hearing at the arbitration tribunal.[19] According to this provision, the deadline for litigants to raise doubt to the effectiveness of an arbitration agreement is before the first hearing at the arbitration tribunal, which is different from the deadline internationally adopted—before the first substantive defense. The problem is, for one thing, some arbitration cases may not go through a hearing but a written trial instead, thus the deadline of "before the first hearing" may have no way to be applied. For another, if the party concerned has submitted his substantive defense before the first hearing, it shall be determined that the party has accepted the jurisdiction of the court. Then it will be self-contradictoryif to permit the party concerned to raise a doubt against the effectiveness of the arbitration agreement after that. But because of the definitude of the related provision in the Arbitration Law, the Interpretation has to make "before the first hearing" as the deadline when it comes to the issues of when to raise a doubt to the effectiveness of an arbitration agreement and the implied waiver of the ground of revoking an arbitral award.

3.1.4 The problem of the implied waiver of the ground of revoking an arbitral award by the parties concerned

It is universally acknowledged in the world that party concerned may waive such grounds of revoking an arbitral award as void arbitral agreement and the discrepancy between arbitration procedure and parties' agreement. In other words, if the party concerned fails to raise the doubt before submitting the substantive defense, or if there is discrepancy between the formation of arbitral tribunal and parties' agreement and the party concerned has taken part in forming the arbitral tribunal, or the party concerned has known the discrepancy between the arbitration procedure and parties' agreement but fails to raise a doubt to the court in time, then it shall not raise a doubt in the proceedings on the ground. Unfortunately, the Interpretation provides according to Article 20.2 of the Arbitration Law that only the ground of void arbitral agreement can be impliedly waived, as for the other two circumstances, due to lack of stipulation, they are not included in the Interpretation.

[19] Art. 20.2 of the Arbitration Law of China (1994).

3.2 Leftover problems due to lack of experiences

Due to lack of judicial practice, some problems which should have been dealt with are left out by the Interpretation, the most typical of which is the comprehension and application of public policy, violation of public policy is universally adopted by many countries, including China, as a ground for the arbitral award to be set aside. In judicial practice, the problem is whether an arbitral award violates public policy. However, in most cases, the grounds invoked by litigants include only the unfairness of the arbitral awards, violation of good-faith principle or the enforcement of the arbitral award will jeopardize social security, which apparently won't hold. In contrast, it's very rare for arbitral awards to be revoked for violating public policy. Therefore, the courts have yet to accumulate enough experience to determine under what circumstances an arbitral award violates the public policy.

3.3 Leftover problems due to the confined objective conditions

The Interpretation doesn't further provide on the "internal reporting regime" of cases involving judicial review over arbitrations, this is one of the leftover problems of the Interpretation due to the limit of objective conditions. As discussed early in this paper, China adopted the regime of "one trial is final" in judicial intendance over arbitration, under which the party concerned has no resort to remedy. Aiming at this problem, the Supreme Court established through judicial interpretation the "internal reporting regime" of cases involving judicial review over international commercial arbitrations, which has been questioned from that day, because for one thing, it only requires the internal reporting of cases involving judicial review over international commercial arbitrations, treating domestic and foreign litigants differently; for another, it requires only the internal reporting of cases involving the objection of the effectiveness of arbitral agreement or arbitral award, treating the parties of the same case unequally. Although a contingency under the regime of "one trial is final", the problem of unequal treatment caused by the "internal reporting regime" still be worth our attention. However, if this regime is extended to all the cases involving judicial review over arbitration, the workload on the Supreme Court will increase rapidly and there will be an amount of objective difficulties.

As for above issues, some can be solved through amending the Arbitration Law, others call for new judicial interpretation based on further practices.

Reference

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