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Third-party funding and other key takeaways for arbitration in China

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Third-party funding and other key takeaways for arbitration in China

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Summary

IN SUMMARY

This article discusses the latest developments in relation to third-party funding of arbitration in China. It also looks at the current position of the law and judicial review with respect to arbitration clauses contained in standard form contracts and pre-arbitration procedural requirements in multi-tier dispute resolution clauses.

DISCUSSION POINTS

- Third-party funding in arbitration
- Arbitration clauses contained in standard form contracts
- Pre-arbitration procedural requirements

REFERENCED IN THIS ARTICLE

- Arbitration Law of the People's Republic of China
- Contract Law of the People's Republic of China
- Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China
- Minutes of the National Symposium on Adjudication of Foreign-Related Commercial and Maritime Disputes 2021
- China International Economic and Trade Arbitration Commission's International Investment Arbitration Rules (For Trial Implementation)
- Beijing Arbitration Commission/Beijing International Arbitration Centre's Rules for International Investment Arbitration
- Shanghai Arbitration Commission's Arbitration Rules
- *Company A v Company B*

THIRD-PARTY FUNDING IN ARBITRATION

Third-party funding in arbitration (ie, the provision of funds to a party to the dispute from a third party who has no prior interest in the underlying dispute to pay for the costs incurred by the former in legal proceedings, in exchange for an agreed return from a successful recovery in such proceedings) is still in a relatively early stage of development in mainland China.

In a broad sense, the contingency (or conditional fee) arrangement used by Chinese lawyers, whereby lawyers charge a certain share of the amount awarded by the court or arbitration tribunal, or the usual fee plus an agreed uplift in the event of success,[1] could be seen as a type of third-party funding (by lawyers). Insurance products that cover legal expenses to allow insured parties (typically customers or employees) to pursue claims that might otherwise be too risky or costly may also be seen as a method of third-party funding (by insurers).

However, as the market develops, funding of the costs and expenses of legal proceedings by the funded party's lawyers or in the form of insurance cannot accommodate complex cases that require large amounts of financing or respond to the sophisticated needs of the market. More tailored and structured models of funding have become available from professional third-party funders established in China in recent years. While no specific rules of law regarding such third-party funding are currently in place, Chinese courts have begun to review their legality and regulate their use.

Cases For Legality And Validity

Unlike common law jurisdictions, where funding of legal proceedings (in particular, litigation) by third parties used to be prohibited by the legal doctrines of maintenance and champerty (and continues to be constrained to different extents, despite a loosening of the scope of the doctrines over the past decade), there are no laws or regulations specifically banning third-party funding in mainland China.

Court decisions that validated third-party funding arrangements pertaining to litigation proceedings include the following:

- In ***Li Guoyong v Xiang Shaohe***,[2] the Intermediate People's Court of Qingyuan City, Guangdong Province, acknowledged that the plaintiff, according to his written commitment and the litigation investment agreement that he had entered into, 'may distribute the proceeds of the enforcement to the attorney and the litigation funder'.
- In ***Bangying Network Technology (Beijing) Co, Ltd v Dong Run Jintai (Shenzhen) Investment Management Centre***,[3] the Second Intermediate People's Court of Beijing held that the litigation funding agreement, titled 'Consulting Service Agreement on Litigation Investment', 'is the expression of true intention of the parties and does not violate any mandatory provisions of law or regulations. It is therefore lawful and valid, and the parties should perform the agreement in accordance with its terms'.
- In ***Winfirefly Information Technology (Shanghai) Co, Ltd v Changzhou Aino Textile Co, Ltd***,[4] the Shanghai Songjiang District People's Court ordered the funded party to pay the service fee to the funding party pursuant to the service contract on litigation investment between the parties.

Although the disputed agreements in the above cases took different forms or names, they were essentially third-party funding arrangements whereby a funder provided financial help to cover a party to the litigation's costs and, in return, received a certain amount of the proceeds recovered from the litigation. The courts had no hesitation in upholding the legality and validity of such agreements.

Similar and more direct positions supporting legality and validity of third-party funding have also been taken in relation to arbitration, including the following:

- Article 27 of the China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules (For Trial Implementation)[5]-, article 39 of the Beijing Arbitration Commission/Beijing International Arbitration Centre (BIAC) Rules for International Investment Arbitration[6] and article 34(8) of the Shanghai Arbitration Commission (SHAC) Arbitration Rules[7] expressly provide for third-party funding in arbitration.
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In *Sunan Ruili Airlines Limited et al v Silver Aircraft Leasing (Tianjin) Co, Ltd*,[8] where the arbitration respondent resisted enforcement of the arbitral award on the grounds that, among other things, the third-party funding arrangement impaired arbitration confidentiality, the Intermediate People's Court of Wuxi City, Jiangsu Province endorsed the arbitration tribunal's decision on the legality of the use of third-party funding in the arbitration. In proceedings between the same parties to set aside the award,[9] the Fourth Intermediate People's Court of Beijing similarly confirmed the funded party's right to use third-party funding under the principle of party autonomy and ruled that the third-party funding at dispute did not violate any legal or arbitral rules. Notably, the courts have interpreted arbitration confidentiality as comprising confidentiality from the public, so the involvement of a third-party funder was not deemed a breach of the funded party's confidentiality obligations.

Cases Against Legality And Validity

Despite the general view that third-party funding (for either litigation or arbitration) is legal and valid under Chinese law, ***Company A v Company B***[10] – decided in May 2022 and widely viewed as a landmark case on third-party funding in China – cast a shadow on, and revealed the risks associated with, certain third-party funding arrangements. In this case, the Second Intermediate People's Court of Shanghai found the disputed third-party funding arrangement, titled 'Litigation Investment Cooperation Agreement', to be invalid because the agreement was considered to be against public policy.

As a starting point, the Court opined that the agreement was not in line with the state's policy to guide investments into the economy and should not be encouraged. The Court also observed that, because necessary legal standards for third-party funding (including those in relation to funders' qualifications, sources of funding, prohibition of excessive proceedings control and information disclosure) had not been established in China, the judiciary should be cautious in granting an across-the-board green light for third-party funding on an indiscriminate basis.

The Court went on to assess the third-party funding at dispute and concluded that it went against public policy on the following grounds:

- The third-party funder and the law firm representing the funded party in the litigation were closely connected. The court had reason to suspect that, where there was potential conflict of interest between the funder and the funded party, the law firm might, in violation of the fundamental principle of civil litigation and judicial representation, act against the best interests of the client that it represented. Further, compliance issues would arise as the law firm would be able to circumvent the lawyers' fee cap mandated by law and the funder could in effect engage in the lawyers' business through their close connection.
- According to the Court, a party's freedom to exercise its litigation rights (including in relation to settlement, withdrawal of claims and engagement or change of legal counsel) should not be inhibited. Any form of restriction or exclusion of such freedom, whether by contract or otherwise, vitiates the principles of civil litigation. Nevertheless, the third-party funding arrangement at issue allowed the funder to control the litigation, interfering with the funded party's right to choose legal counsel (by requiring that change of legal counsel be subject to the law firm's assignment or the funder's approval, or both) and to freely exercise litigation rights (by allowing the funder to

participate in discussions of case strategy and restricting the funded party's right to decide settlement or other litigation acts).

- The agreement contained a confidentiality clause limiting the disclosure of third-party funding information. In fact, the funder and the funded party did not disclose relevant information on the funding to the Court or the other party. The Court was of the view that the act of non-disclosure might conceal facts impacting the independence and impartiality of the Court, and expose the proceedings to potential conflicts of interest. In addition, the knowledge that a third-party funder was prepared to commit large sums of money to support a legal claim may have sent a message in relation to the merits of the claim and influenced the other party's decision on whether and how to pursue the case. Non-disclosure of the third-party funding, the Court stated, deprived the other party of the possibility to re-evaluate the case, and broke the balance of rights and power between the litigants. The Court also opined that non-disclosure prevented it from detecting and checking the funder's improper control over the litigation as well as the risk of the funder funding both parties to the litigation at the same time.

Moreover, the Court considered that the third-party funding contravened public interests and morals because:

- the third-party funder invested in judicial activities, wherein the close connection between the funder and the litigation law firm, as well as the funder's control over the litigation, created a tension between the funder's private interest and the public nature of the litigation proceedings; and
- third-party funding might promote a danger of undue incentives to institute claims and judicial proceedings.

The Court's strict scrutiny of third-party funding has been criticised as a paternalistic interference with party autonomy and, as the case concerns third-party funding in litigation, an argument could be made that it is not appropriate to extend the judgment's entire reasoning from public justice to the private consensual system of arbitration. Also, given the particular facts and circumstances of the case, it is likely that the judgment is not an outright negation of third-party funding in mainland China and specific instances of third-party funding will be assessed on a case-by-case basis. Still, the judgment does, to a degree, echo some of the concerns over third-party funding that prevail in other jurisdictions. Absent statutory measures to set clear legal and ethical standards for third-party funding in mainland China, other courts may refer to the judgment in future cases and its influence on third-party funding in arbitration cannot be excluded.

Factors Likely To Affect Legality And Validity

In light of ***Company A v Company B***,[11] concerns over conflict of interests, compliance with regulatory rules, control over proceedings and disclosure of third-party funding might affect the Chinese judiciary's assessment of the legality and validity of third-party funding in arbitration. All such factors should be attended to with care.

Conflicts Of Interest And Regulatory Compliance

Situations may arise where the interests of a third-party funder conflict with the interests of the funded party and other stakeholders. For instance, the interests of the funded party and

the funder might be misaligned on whether or not to accept a settlement, and the dynamics of the settlement discussions could be distorted if the funder, through the legal counsel it appoints, manage to have its interests prioritised over those of the funded party. To avoid any challenge by virtue of such conflicts of interest, it is prudent for the funder and the funded party to agree on legal counsel not associated with the funder. To comply with the regulatory rules concerning the lawyers' fees cap, it is also advisable for the legal counsel engaged in the funded proceedings to be independent from the funder.

Control Over Proceedings

Given that the third-party funder bears the financial risk of the arbitration and is the entity incurring the costs of legal representation, the funder will normally undertake its own independent investigation into the nature and merits of a funded case and may want to exercise control over how the case is run. Chinese courts might prefer to guard against the funder exercising too great a level of control over arbitration proceedings. The third-party funder should be conscious of the need to remain at arm's length; its involvement and role in respect of how arbitration is conducted, including settlement, withdrawal of claims and other matters that impinge on the funded party's arbitration rights, should be limited to avoid the risk of being perceived as exercising abusive control over the proceedings.

Disclosure Of Third-party Funding

According to articles 34 and 58(3) of the Arbitration Law of the People's Republic of China[12], the arbitral tribunal must have no personal interest in the case, and an effective challenge to the independence and impartiality of the tribunal could lead to an annulment of the arbitral award. Disclosure of third-party funding in arbitration is important to ensure that the identity of the funder poses no such challenge and to foster a more transparent funding system. Arbitration institutions in China are now beginning to address the issue of mandatory disclosure of third-party funding in arbitration.

Article 27(2) of the CIETAC's rules, article 39 of the BIAC's rules and article 34(8) of the SHAC's rules set forth explicit provisions that require the disclosure of relevant information on funding arrangements, although the required scopes of disclosure are not uniform. The CIETAC's rules also give the tribunal the power to order disclosure. Where the applicable arbitration rules say nothing about disclosure of third-party funding, it is recommended that, when a funding agreement is entered into, the funded party notify the other party and the arbitration institution of at least the existence of the funding arrangement and the identity of the third-party funder. This could minimise any potential conflicts of interest arising from any relationship between the tribunal and the third-party funder.

Outlook

Third-party funding is generally perceived as a valuable tool for helping aggrieved parties to gain access to justice and availing businesses of a de-risked method of unlocking potential recoveries. Legislative lacunas inevitably bring more uncertainties to the third-party funding industry and cause confusion to those in need of third-party funding. As it develops in mainland China, third-party funding is expected to be subject to more regulation. Questions on its legality, validity and other significant matters – such as funders' liability for adverse costs and recoverability of amounts payable to a third-party funder – remain to be clarified.

ARBITRATION CLAUSES CONTAINED IN STANDARD FORM CONTRACTS

The term 'standard form contract' refers to a contract made by one party for repeated and habitual use in a particular form – whether simple or elaborated – that is not negotiated between the contract parties and allows little, if any, variation from its form. Nowadays, there is a tendency for more standard form contracts to be used in various fields of commerce. The question frequently arises as to whether an arbitration clause contained in a standard form contract is binding and valid.

An agreement to arbitrate requires a party's voluntary and fully informed consent. It is questionable whether such consent exists in relation to an arbitration clause contained in a standard form contract, as there may be a lack of knowledge (ie, it is likely that a party has not read the standard terms and conditions, and is not even aware that there is an arbitration clause in the contract) or choice caused by the imposition of standard contract terms by the more powerful party (especially in the context of a consumer obtaining goods or services).

In accordance with article 39 of the Contract Law of the People's Republic of China[13] and article 496 of the Civil Code of the People's Republic of China, which now replaces the Contract Law, a standard form clause may not form part of the contract if the clause has not been brought to the attention of the party accepting the standard form clause at the time the contract was concluded, and may be invalidated if the clause imposes unreasonable or exclusive terms concerning the parties' liabilities and material rights to the detriment of the party accepting the standard form clause.

In addition, article 31 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China provides that:

> Where a business enters into a jurisdiction agreement with a consumer by using standard form clauses without drawing such clauses to the consumer's attention in an appropriate manner, the consumer's claim for nullification of the jurisdiction agreement shall be supported by the people's court.[14]

While the courts diverge on whether the 'jurisdiction agreement' is confined to litigation jurisdiction agreements or also covers arbitration agreements, the provision is widely seen as a vindication that standard form dispute resolution clauses may be subject to the rules of the Contract Law and the Civil Code relating to standard form clauses.

On this premise, three questions could be identified to determine whether, under Chinese law, a standard form arbitration agreement is binding and valid:

1. Is the arbitration clause individually negotiated and, consequently, does it constitute a standard form clause? If the answer is yes, the rules governing standard form clauses do not apply and a party cannot challenge the binding force or validity of the clause on such grounds. If the answer is no, question (2) must be asked.
2. Has the standard form arbitration clause been brought to the attention of the non-drafting party in an appropriate manner at the time of contract conclusion? If the answer is no, the clause does not form part of the contract binding on the parties. If the answer is yes, question (3) must be asked.
3. Does the clause unreasonably exclude or limit the liability of the drafting party, or unreasonably increase the liability or excludes the material rights of the non-drafting party? If the answer is no, the clause is valid. If the answer is yes, the clause may be invalidated.

Whether The Arbitration Clause Is Individually Negotiated

A key feature of a standard form clause is that it is not negotiated between the contract parties. The mere fact that the contract is pre-formulated does not render it a standard form contract or the clauses therein standard form clauses. The non-drafting party's ability to influence contract terms is significant; the courts may be more willing to find standard form arbitration clauses in contracts with consumers who do not have an opportunity to negotiate the contract terms and have to either accept the contract as it is or avoid the transaction altogether, but are reluctant to intervene in commercial contracts as such contracts are between parties who are both engaged in trade or business with usually comparable bargaining powers.

If, however, inequality of bargaining powers exists due to, for example, one party's superior position in the transaction or monopoly in the industry, nothing prevents Chinese courts from applying the rules of standard form clauses. In ***Foshan General Pharmaceutical Company Limited v China National Pharmaceutical Group (Guangzhou) Medical Equipment Co, Ltd***,[15] for instance, although both parties were well-established companies, the Fourth Intermediate People's Court of Beijing had no difficulty in finding the arbitration clause in their contract to be a standard form clause. Also, in certain fields of commerce (eg, shipping) where charter parties and bills of lading are based on standard forms that have changed little over the centuries, a consistent line of authority regards arbitration clauses therein as standard form clauses.

Whether The Arbitration Clause Is Brought To The Attention Of The Non-drafting Party

In the field of shipping, Chinese courts are well known to have taken the position that a standard form arbitration clause incorporated into a bill of lading by reference at the back of such a bill is not properly brought to the attention of the bill of lading holder and, therefore, does not form part of the contract binding on the holder.

In other fields, there appears to be no unanimous benchmark rule generally relied upon by the courts when deciding if a standard form arbitration clause can be deemed as having been brought to the attention of the non-drafting party in an appropriate way. In ***Xiao Chong v Beijing Baiklock Technology Co, Ltd***,[16] the Fourth Intermediate People's Court of Beijing considered it appropriate for the party furnishing the standard form contract to highlight the arbitration clause by using bold fonts and underlining. In ***Li Yuanyuan v Beijing Single Boat Education Technology Co, Ltd***,[17] however, the same court held that such highlights were not sufficient to bring the arbitration clause to the other party's attention because similar highlights were used in some other clauses and the arbitration clause was not distinguishable from these other clauses. The wide discretion exercised by the courts suggests that, at the time of contract conclusion, more prudent measures should be taken to ensure that the standard form arbitration clause is specifically brought to the attention of the non-drafting party.

Whether The Arbitration Clause Imposes Terms To The Detriment Of The Non-drafting Party

In general, Chinese courts do not regard an arbitration clause as terms that detrimentally affect a party's right or increases a party's liabilities. ***Ya'an Dayuan Real Estate Development Co, Ltd v Ya'an Municipal Bureau of Land and Resources***[18] is a typical example of the Supreme People's Court holding that the standard form arbitration clause at issue, being an agreement on dispute resolution, did not exclude any of the party's material rights.

In *Yang Jun v Shanghai Pudong New Area Market Supervision Administration*,[19] the Second Intermediate People's Court of Shanghai upheld the disputed arbitration clause because:

> high costs of arbitration and increase in transportation costs as alleged by the plaintiff likewise applied to [the defendant] who provided the standard form clause . . . the arbitration clause did not one-sidely increase the consumer's liabilities or exclude his right to seek remedies, and did not lead to any unfair or unreasonable result to him.

Also, in *Li Anxin v Baihe Jiayuan Network Group Co, Ltd*,[20] the Fourth Intermediate People's Court of Beijing opined that:

> as different dispute resolution mechanisms, litigation and arbitration each have their own characteristics, advantages and disadvantages. Compared with litigation, the choice of arbitration to resolve disputes should not be construed as increasing one party's liability or excluding its material rights, given that dispute resolution by arbitration institutions has the merit and the feature of being efficient and non-appealable.

In reaching the conclusion that a standard form arbitration clause has no detrimental impact on the party accepting the clause, the courts did not accord to consumers any special protection. It is arguable that consumers should be distinguished from commercial entities by virtue of their disadvantaged position in relation to businesses. There might still be a chance that the standard form arbitration clause will be struck down on the grounds of an unfair imbalance in the parties' rights and obligations to the detriment of the consumer if:

- the standard form arbitration clause deprives the consumer of the benefits of the law applicable in the consumer's country of residence, which may occur in cross-border transactions;
- the proceedings envisaged by the clause may impose an excessive filing fee and exorbitant costs on the consumer; or
- the clause restricts the consumer's avenue of redress to arbitration while allowing the company the choice to litigate.

PRE-ARBITRATION PROCEDURAL REQUIREMENTS

Arbitration agreements, more often than not, provide for arbitration only after contractually prescribed procedures (eg, negotiations, discussions, mediation or conciliation) have been attempted and are commonly referred to as multi-tier or escalation dispute resolution clauses. Such clauses are designed to encourage the amicable resolution of disputes. Despite the potential benefits of these clauses in minimising disruptions to the parties' ongoing relationship that escalated proceedings would entail, and in avoiding unnecessary (sometimes prolonged) proceedings and substantial expenses, complex issues emanate from the pre-arbitration procedural requirements that must be satisfied prior to serving a notice of arbitration. Failure to satisfy such requirements usually gives rise to challenges to jurisdiction of the arbitral tribunal and arguably exposes an otherwise valid arbitral award to annulment, non-recognition or non-enforcement.

Arguments raised before the Chinese courts concerning pre-arbitration procedural requirements primarily rest on the grounds that the failure to satisfy pre-arbitration procedural requirements precludes the arbitral tribunal's jurisdiction or constitutes

procedural defects and illegality justifying annulment or non-enforcement of the arbitral award. In addressing these arguments, the Chinese courts tend to rule in favour of arbitration, although sometimes for divergent reasons.

Whether Failure To Satisfy Pre-arbitration Procedural Requirements Constitutes Jurisdictional Bar

In 2008, the Supreme People's Court rejected the argument that failure to satisfy pre-arbitration procedural requirements would foreclose a party's access to arbitration because, the Court opined, the arbitration clause did not specify any negotiation period and the fact that the arbitration had been instituted met the condition that the parties could not reach a consensus through negotiation.[21] Although the court did not spell out the legal doctrine underlying its decision and the analytical approach adopted by the court is somewhat obscure, one possible reading of the case is that the court's reasoning on the vagueness of the negotiation period pertains to uncertainty and unenforceability of the agreed pre-arbitration requirements (ie, a mere agreement to negotiate, without more specific or sufficiently detailed procedural requirements, is generally unenforceable for lack of certainty).

Where the arbitration clause explicitly provides for a specific negotiation period before arbitration, the courts may also circumvent the pre-arbitration procedural requirements by taking a rather broad interpretation of what constitutes negotiation. In ***Shanghai Xuandu Entertainment Co, Ltd v Shanghai Nanshi District Sports Development Division***,[22] the Fourth Intermediate People's Court of Beijing found that a party's non-response to the other party's demand letter within the agreed 30-day negotiation period satisfied the requirement that the parties should exert their best efforts to negotiate within 30 days of the receipt by one party of the other party's written demand. Apart from the possible criticism that the meaning of 'negotiation' as understood by the court was false and implausible, whether the courts could still do away with pre-arbitration procedural requirements if the arbitration clause sets clear and discernible steps against which a party's negotiating efforts can be meaningfully measured is in doubt.

This doubt, however, appears to have also been dissipated by ***Huaxia Asset Management Co, Ltd v Shenzhen Hongtao Decoration Co, Ltd***[23] in which, in response to the contention that pre-arbitration negotiation required by the disputed arbitration clause was a condition precedent to the parties' submission to arbitration and the failure to satisfy the requirement that precluded the arbitrability of the disputes, the Fourth Intermediate People's Court of Beijing, without much reasoning, declared that the parties' intent to subject arbitration to a condition precedent of negotiation could not be inferred from the arbitration clause. The clause provided that 'any dispute arising from or in connection with this contract shall be resolved through amicable negotiation between the Parties. If negotiation fails, the Parties agree to submit the dispute to Beijing Arbitration Commission for arbitration'. If the court's position is generalised to all other multi-tier dispute resolution clauses, failure to satisfy pre-arbitration procedural requirements would not result in a jurisdictional bar to arbitration.

Whether Failure To Satisfy Pre-arbitration Procedural Requirements Constitutes Procedural Illegality

Under Chinese law, procedural defects or illegality (ie, not in accordance with the agreement of the parties or the applicable statutory requirements) are grounds to set aside or refuse the recognition or enforcement of a domestic or foreign arbitral award. There have been many attempts to challenge arbitration awards before Chinese courts on the grounds that

the parties did not conduct the required negotiations before the arbitration was commenced and, as a result, the arbitration procedures were severely flawed and illegal due to violation of the procedures prescribed in the arbitration clause. In these cases, the Chinese courts almost invariably discounted the challenge, holding that pre-arbitration procedural requirements were not part of the arbitration procedures subject to judicial inspection and, therefore, a violation of pre-arbitration procedural requirements did not render the arbitration procedures illegal[24] for the purpose of setting aside, or refusing the recognition or enforcement, of the arbitral award.

Notably, in the context of recognition and enforcement of foreign arbitral awards, article 107 of the Minutes of the National Symposium on Adjudication of Foreign-Related Commercial and Maritime Disputes 2021 unambiguously provides:

> When applying the New York Convention in recognition and enforcement of a foreign arbitral award, if the arbitration agreement provides that the parties shall settle their disputes through negotiation first and may submit to arbitration if the negotiation fails, whereas a party applies for arbitration before the parties conduct negotiation, the people's court shall not sustain the other party's claim that recognition and enforcement of the arbitral award should be refused according to Article V(1)(d) of the New York Convention on the ground that the arbitral procedure as not in accordance with the agreement of the parties on pre-arbitration negotiation procedure.[25]

The general downplaying by the Chinese courts of the consequences of a violation of pre-arbitration procedural requirements may reflect the judicial restraint in impeding or obstructing arbitration proceedings on the basis of:

- non-compliance with procedures that, even if followed through with, are very unlikely to resolve the parties' disputes; and
- the concept of substantive justice that parties should not be denied access to adjudicative proceedings and remedies on potentially meritorious claims due to procedural flaws.

Nevertheless, such an approach may unduly deny the contractual force of parties' agreements and deprive pre-arbitration procedural requirements of the function and value that they are intended to serve. Particularly, where dispute resolution clauses unequivocally provide that negotiations or other procedural steps are mandatory obligations that must be complied with to proceed with arbitration, even if the courts are reluctant to find such multi-tier clauses to be jurisdictional conditions precedent to arbitration, it might not be tenable for the courts to entirely disregard the pre-arbitration procedural requirements. Jurisprudence recently established by the English and Hong Kong courts that a party's non-compliance with pre-arbitration requirements affects the admissibility of the claim (which the tribunal has jurisdiction to determine and the court should refrain from interfering with the tribunal's determination) rather than the jurisdiction of the tribunal may shed some light on how to treat pre-arbitration procedural requirements. It remains to be seen whether Chinese courts will be guided by such jurisprudence in future cases.

Endnotes

1 According to the Administration Measures of Lawyers' Fees issued by the National Development and Reform Commission and the Ministry of Justice in 2006, contingency (or conditional) fees are not permitted in collective actions, criminal proceedings, administrative litigation, state compensation, estate, divorce, social insurance and minimum allowance. The total fee allowed to be charged is capped at 30 per cent of the proceeds recovered by the party to the dispute. Back to section

2 (2017) Yue 18 Min Zhong No. 639. Back to section

3 (2020) Jing 02 Min Zhong No. 807. Back to section

4 (2021) Hu 117 Min Chu No. 12,067. Back to section

5 The CIETAC's rules are available on its website. Back to section

6 The BIAC's rules are available on its website. Back to section

7 The SHAC's rules are available on its website. Back to section

8 (2022) Su 02 Zhi Yi No. 13. Back to section

9 See ***Sunan Ruili Airlines Limited et al v Silver Aircraft Leasing*** (Tianjin) Co, Ltd (2022) Jing 04 Min Te No. 368 and No. 369. Back to section

10 (2021) Hu 02 Min Zhong No. 10,224. Back to section

11 id. Back to section

12 The Arbitration Law is available on the website of the National People's Congress. Back to section

13 The Contract Law is available on the website of the National People's Congress. Back to section

14 This interpretation is available on the website of the Supreme People's Court. Back to section

15 (2021) Jing 04 Min Te No. 557. Back to section

16 (2020) Jing 04 Min Te No. 672. Back to section

17 (2022) Jing 04 Min Te No. 290. Back to section

18 (2017) Zui Gao Fa Min Zhong No. 91. Back to section

19 (2020) Hu 02 Xing Zhong No. 147. Back to section

20 (2022) Jing 04 Min Te No. 462. Back to section

21 Official reply of the Supreme People's Court to the review report on ***Runhe Development Co, Ltd's Application for Non-Enforcement of the Arbitral Award*** (2018) Min Si Ta Zi No. 1 Back to section

22 (2018) Jing 04 Min Te No. 408 Back to section

23 (2018) Jing 04 Min Te No. 225 Back to section

24 See, for example, ***Jiang Qingfeng v Li Zhenyu*** (2019) Jing 04 Min Te No. 310; ***Cui Ming v Shanghai Guochun Venture Capital Co, Ltd*** (2019) Hu 01 Min Te No.250; ***IM Global, LLC v Tianjin Northern Film Group Co, Ltd*** (2018) Jin 01 Xie Wai Ren No. 2. Back to section

25 These minutes are available on the website of the China International Commercial Court. Back to section

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