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THE MEANING AND VALIDITY OF AN "ARBITRATION, IF ANY" CLAUSE

Applicable law; Arbitration clauses; China; Seat of arbitration; Validity

In some maritime contracts, for example, charter party, the parties may agree to the following clauses: "Arbitration if any to be Settled in Hong Kong with English Law to Apply", "Arbitration, if any, in Hong Kong and English law to apply". How's the validity of such arbitration clauses? Are such arbitration clauses mandatory to the parties? In the event of a dispute, do the parties still have the options to refer the dispute to litigation or arbitration? Various opinions exist.

In the case of *Mangistaumunaigaz Oil Production Association v United World Trading Inc*,[1] the parties agreed to a clause providing "Arbitration, if any, by ICC rules in London". The English court held that such clause was a mandatory arbitration agreement because the words "if any" were either surplusage or an abbreviated reference to "if any dispute arises". Therefore, the parties can only refer the disputes to arbitration, rather than litigation.

In contrast, in the case of *Eurosteel Corp v M/V Millenium Falson*,[2] the United States District Court for the Northern District of Illinois adopted a different view. In this case, the parties agreed to a clause, which provided that "Arbitration, if any, to be settled in Paris". The court held that

> "the prepositional phrase 'if any' indicates that arbitration will take place in Paris if arbitration takes place. In other words, the parties could arbitrate a dispute; and, if they chose to do so, such arbitration would take place in Paris. The mandate is that if arbitration does take place, it must be conducted in Paris by Chambre Arbitrale."

However, such clause does not exclude the jurisdiction of the court to hear disputes arising from the contract. The parties may choose to refer the dispute to either arbitration or litigation.

In the mainland China, there have been several cases involving similar clauses. From the PRC courts' opinions in such cases, we can observe that the PRC courts adopt the latter view. For example, in a *Reply Letter of the Supreme People's Court on Request for Instructions Regarding Objection over Jurisdiction in Contract Dispute for Carriage of Goods by Sea in the Case of International Economic & Trading Corp WISCO (Appellant) v Fuzhou Tianheng Shipping Co Ltd and Caifu International Shipping Co Ltd (Appellees)* (*Reply Letter*),[3] where the arbitration clause involved was "Arbitration if any to be Settled in Hong Kong with English Law to Apply", the Supreme People's Court considered the meaning of such clause as "if an arbitration proceeding is to be launched, it shall be conducted in Hong Kong and under English Law". The Supreme People's Court further elaborated that:

> "This clause is a special agreement between the parties regarding the place of arbitration and the applicable law when they refer the disputes arising from this contract to arbitration. However, it does not provide as the only and exclusive method of dispute resolution between the parties for disputes arising from the contract and does not exclude the jurisdiction of the court."

Hence,when Fuzhou Tianheng Shipping Co Ltd and Caifu International Shipping Co Ltd (the plaintiffs) initiated a lawsuit before the Wuhan Maritime Court, the International Economic & Trading Corp WISCO raised objection to jurisdiction over contract disputes according to the arbitration clause excerpted above. The Wuhan Maritime Court rejected its objection to the court's jurisdiction, stating that the court would have jurisdiction over this matter. The International Economic & Trading Corp WISCO appealed to the Higher People's Court of Hebei Province, who, after reporting this matter to

[1] *Mangistaumunaigaz Oil Production Association v United World Trading Inc* [1995] 1 Lloyd's Rep. 617.
[2] *Eurosteel Corp v M/V Millenium Falson* No.01 C 8817 (N.D. Ill. August 22, 2002).
[3] *Reply Letter of the Supreme People's Court on Request for Instructions Regarding Objection over Jurisdiction in Contract Dispute for Carriage of Goods by Sea in the Case of International Economic & Trading Corp WISCO (Appellant) v Fuzhou Tianheng Shipping Co Ltd and Caifu International Shipping Co Ltd (Appellees)* [2009] Min Si Ta Zi No. 36 (November 4, 2009).

the Supreme People's Court and receiving the Supreme People's Court's *Reply Letter* (as mentioned above), decided to maintain its lower court's decision.

The view of the Supreme People's Court in the *Reply Letter* has been followed by several lower courts. For example, in a case concerning voyage charter party disputes between *Shanghai C-sky International Logistics Co and Huiyang International (HK) Shipping Ltd* appealed to the Higher People's Court of Shanghai Municipality,[4] the arbitration clause agreed to by the parties was "Arbitration, if any, in Hong Kong and English law to apply". The Higher people's Court of Shanghai Municipality also held that this clause was

> "a special agreement between the parties regarding the place of arbitration and the applicable law when they refer disputes arising from this contract to arbitration. However, it does not provide as the only and exclusive method of dispute resolution between the parties and does not exclude the jurisdiction of the court."

Moreover, in the following two cases appealed to the Higher People's Court of Fujian Province, the Court rendered its rulings in line with the opinion in the *Reply Letter*: a case involving disputes over the court's jurisdiction between *Yang Chun Ocean Shipping Co Ltd and Jiuzhou Shipping Ltd*[5] and another case also involving disputes over the court's jurisdiction between *Xiamen Yaozhong Asia-Pacific Trading Co Ltd and Shanghai Union Ocean Shipping Co Ltd*.[6]

Given the Supreme People's Court's *Reply Letter* and the lower courts' rulings following the opinion in the *Reply Letter*, we can conclude that the PRC courts do not regard an "arbitration, if any" arbitration clause as a mandatory arbitration agreement and the parties may still refer the disputes to litigation. Such opinion is different from what had been held by the English court in *Mangistaumunaigaz Oil Production Association v United World Trading Inc* and thus worth noting.

Generally speaking, in comparison to UNCITRAL Model Law, the PRC Arbitration Act sets forth more stringent requirements for a valid arbitration agreement. For example, a valid arbitration agreement shall specify an arbitration commission, see art.16 of the PRC Arbitration Act. The requirements for a valid arbitration agreement in domestic arbitration are different from those in foreign-related arbitration. Hence, it is always advisable to seek professional consultations before entering into an arbitration agreement under PRC law or to be enforced in the mainland China so as to make sure that the arbitration agreement will be regarded as valid and enforceable by the PRC courts.

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[4] *Shanghai C-sky International Logistics Co v Huiyang International (HK) Shipping Ltd* (2009) Hu Gao Min Si (Hai) Zhong Zi No.275 (March 30, 2011).
[5] *Yang Chun Ocean Shipping Co Ltd v Jiuzhou Shipping Ltd The Higher People's Court of Fujian Province* (2010) Min Min Zhong Zi No.683, a Civil Ruling (October 19, 2010). The arbitration clause involved in this case was "Arbitration if any in Hong Kong and English Law to be Applied".
[6] *Xiamen Yaozhong Asia-Pacific Trading Co Ltd v Shanghai Union Ocean Shipping Co Ltd* The Higher People's Court of Fujian Province, (2011) Min Min Zhong Zi No.818, a Civil Ruling (November 4, 2011). The arbitration clause involved in this case was "Arbitration if any to be Settled in Hong Kong with English Law to Apply".
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