The Continuing Debate As to Whether Non-Chinese Institutions May Administer Arbitrations In China

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One aspect of Chinese arbitration law that is of enduring interest to the international arbitration community is the question of whether Chinese law permits non-Chinese arbitration institutions, such as the ICC, to administer arbitrations in China. In practice, a number of arbitrations have taken place and are currently taking place in China under the rules of the ICC and other non-Chinese institutions. Often the question of whether this is in compliance with Chinese law does not arise, for example where no damages are awarded or where the award is enforced against assets outside of China. But will the Chinese courts enforce awards resulting from Chinese arbitrations administered by foreign institutions? A recent Chinese decision has caused some speculation that this may in fact be possible, despite the traditionally-prevailing view to the contrary, but unfortunately the position remains somewhat opaque.

The starting point is Article 16 of the PRC Arbitration Law, which provides that one of the requirements for a valid arbitration clause is a designated arbitration commission. It is accepted that this provision prohibits ad hoc arbitration in China. But the Arbitration Law does not expressly state whether the designated commission must be Chinese. One pointer towards such a restrictive interpretation is the fact that another part of the Arbitration Law deals with the requirements for establishing an arbitration commission, which must be set up by the relevant department of the People's Government at municipal level and registered at the applicable administrative department for justice. As a result, it is often accepted that the arbitration commission required under Article 16 must be Chinese.

It should be noted that Article 16 only applies to arbitrations taking place in China, and so Chinese courts will of course enforce ad hoc awards and awards rendered under the auspices of non-Chinese institutions where the place of arbitration is elsewhere.

However, in a court order dated 22 April 2009, the Ningbo Intermediate People's Court of Zhejiang Province ordered recognition and enforcement of an ICC award issued following an arbitration sited in Beijing. The award was in favour of Duferco S.A., a Swiss company, and against a Chinese company domiciled in Ningbo.

Unfortunately, the Court's reasoning did not involve an analysis of Article 16. The question of the validity of the arbitration agreement was raised in the enforcement proceedings, but this argument was dismissed on the procedural ground that no objection to the arbitration agreement had been

raised prior to the first hearing before the arbitral tribunal (as is required by Chinese law).

The Court found that the award was a "non-domestic award" under Article I.1 of the New York Convention, and that the New York Convention was therefore applicable to the recognition and enforcement of the award, notwithstanding that it was rendered in China. Since the Court found no grounds for refusal under the Convention, it held that the award should be recognized and enforced.

The Supreme Court of China considered similar issues in its review of the earlier decision of the Wuxi Intermediate Court of Jiangsu Province dated 19 July 2006 (*Züblin International GmbH vs. Wuxi Woke General Engineering Rubber Co., Ltd*). The *Züblin* case concerned the enforcement of an ICC award under an arbitration clause which provided for arbitration under "ICC Rules, Shanghai,. The Supreme Court in *Züblin* similarly held that the ICC Shanghai award was a "non-domestic" award under the New York Convention, but in that case it went on to hold that recognition and enforcement should be refused on the basis that the ICC Shanghai clause was an invalid arbitration agreement under the law of the seat, i.e. the Arbitration Law of China, which requires a designated arbitration institution as a mandatory element of an arbitration agreement.

The characterisation of the *Züblin* and *Duferco* awards as "non-domestic" has been the source of some debate in China and elsewhere. The Court's reasoning was that the award was "non-domestic" because it was made under the auspices of the ICC, a foreign arbitral institution. A problem with this finding is that "non-domestic" arbitrations are not regulated by the Arbitration Law, and so the Chinese courts would not have authority to decide on important matters such as the validity of the arbitration clause or applications for setting aside, despite China being the seat, while other national courts would consider such arbitrations to be Chinese for enforcement purposes under the New York Convention, and no other court will have the right to consider applications to set aside the award.

It should be noted that the recent *Duferco* case is a lower court decision and the Supreme Court was not consulted on the matter since the Supreme Court's approval is only required for non-enforcement of foreign awards, and not where awards are to be enforced. In *Duferco* the non-validity point was essentially dismissed on procedural grounds, and so the previous decision in Züblin to the effect that a clause providing for ICC Shanghai was invalid is probably the more reliable statement of Chinese law. In practice, however, the situation will remain somewhat uncertain unless or until the legislature amends the Arbitration Law of China or the Supreme Court clarifies the position. In the meantime, the sensible approach remains for parties to provide either for arbitration in China under the auspices of a Chinese institution or arbitration outside China administered by a foreign institution.