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Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I

Tereza Gao (Arnold & Porter Kaye Scholer LLP) and Ziyi Yao · Monday, October 12th, 2020

In any arbitration, the parties' choice of seat normally determines the legal regime under which an arbitration is conducted and any award is enforced.[1)] Accustomed to the international "seat standard," one might think that an ICC arbitration award rendered in China, for example, would be subject to confirmation or set aside in Chinese court pursuant to Chinese law because the arbitration was seated in China. Support for this can be found in the New York Convention, Articles V(1)(a), V(1)(d), and V(1)(e), where recognition may be refused upon proof of (i) certain enumerated defects arising under "the law of the country where the award was made" (or "where the arbitration took place") or (ii) vacatur by a competent authority of such country. One holding that expectation, however, may be surprised by the existing Chinese legal regime as interpreted and applied by the Chinese judiciary.

A recent ruling rendered by the Guangzhou Intermediate People's Court ("**Guangzhou Court**") may have significantly altered the legal landscape of Chinese arbitration law. Our analysis consists of two parts. In Part I here, we discuss the longstanding uncertainties regarding the standard adopted by Chinese courts to determine the legal regime governing arbitrations administered by foreign arbitral institutions, as well as the novel development in *Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd. and Others* (2015) ("***Brentwood v. Guangdong Fa'anlong***"). In Part II, we further elaborate on the relevant practical considerations arising from *Brentwood v. Guangdong Fa'anlong*, and how this decision may further shape the trajectory of Chinese legal reform on the treatment of arbitrations in China administered by foreign arbitral institutions.

Longstanding uncertainties under Chinese law in determining the legal regime governing an arbitration administered by foreign arbitral institutions

In Mainland China, the governing law of the arbitration procedure and the nationality of the resulting award are not necessarily determined by the country in which the arbitration takes place. Having refused to follow the "seat standard," Chinese courts

have previously determined the nationality of an award in accordance with the nationality of the arbitration institution that administered the underlying arbitration — often known as the "institution standard" — or categorized the award as "non-domestic" under Article I(1) of the New York Convention.

Chinese courts that have adopted the "institution standard" cite to Article 283 of the Chinese Civil Procedure Law, which provides that a party seeking the recognition and enforcement of an award rendered "by a foreign arbitral institution" should apply to recognize and enforce the award "under international treaties to which China has entered into or joined, or in accordance with the principle of reciprocity." This rule could be read to imply that a foreign arbitral institution-administered arbitration would not be subject to Chinese domestic arbitration law even if the place of arbitration was within Mainland China. The following Chinese court cases have adopted this approach:

- *Wei Mao International (Hong Kong) Co. Ltd. v. Shanxi Tianli Industrial Co. Ltd.* (2004) (categorizing the ICC award No. 10334/AMW/BWD/TE resulting from an arbitration seated in Hong Kong as a French award and concluding the New York Convention applied);
- *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd.* (2008) (categorizing the ICC awards Nos. 14005/MS/JB/JEM and 14006/MS/JB/JEM, dated September 21, 2007, resulting from an arbitration seated in Beijing as non-domestic awards under Article I(1) of the New York Convention);
- *TH&T International v. Chengdu Hualong Automobile Parts* (2002) (categorizing the ICC award 10512/BWD/SP, dated January 8, 2002, resulting from an arbitration seated in Los Angeles as a French award and stating the New York Convention applied);
- *Reply of the Supreme People's Court to the Request for Instructions on Application by FSG Automotive GmbH to Recognize and Enforce Award SCH-5239 Made by International Arbitration Centre of the Austrian Federal Economic Chamber* (2015) (categorizing the arbitral award No. SCH-5239, dated May 31, 2013, resulting from an arbitration administered by the International Arbitration Centre of the Austrian Federal Economic Chamber seated in Austria as an Austrian award because the International Arbitration Centre of the Austrian Federal Economic Chamber resides in Austria and stating the New York Convention applied).

That leaves a question mark with regard to arbitrations seated in China but conducted under the auspices of non-Chinese arbitral institutions. Will Chinese courts exercise supervisory jurisdiction over such arbitrations? Will Chinese arbitration and civil procedure law apply? With recent measures allowing foreign arbitral institutions to administer arbitrations in the Shanghai Free Trade Zone entering into force this year (discussed in a previous blog), parties and practitioners considering this option must now squarely face these questions.

Subject to clarifications and guidance, there appears to be a fundamental risk of a poor outcome. If the nationality of a resulting award is considered to be that of the arbitral institution which administers the arbitration, a Chinese court would refer the parties to the national court of the chosen arbitral institution's headquarters for court supervision and annulment proceedings. The foreign court may in turn adopt the

internationally-accepted "seat standard" and determine that the parties' China-seated arbitration should be supervised by the relevant Chinese court instead. Parties in this scenario could be left in a "no-man's land" with no judicial recourse in relation to their arbitration.

For example, in *BNA v. BNB and Another* (2019), the parties entered into a contract whose arbitration clause provided that "any and all disputes arising out of or relating to this Agreement […] shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai […]." Applying a "three-stage" analysis, the Singapore Court of Appeals found PRC law, as the law of the seat, to be the implied proper law of the arbitration agreement and therefore the validity of arbitration agreement "should rightly be decided by the relevant PRC court as the seat court applying PRC law."

Impact of the Guangzhou Court's recent ruling in *Brentwood v. Guangdong Fa'anlong*

In *Brentwood v. Guangdong Fa'anlong*, Brentwood, a U.S. company, entered into a sales agreement with Guangdong Fa'anlong and Guangzhou Zhengqi, two Chinese companies ("**Sales Agreement**"). The Sales Agreement included an arbitration clause that stated, "Any dispute arising from or in connection with this Contract shall be […] submitted to arbitration by the International Court of Arbitration of the International Chamber of Commerce (ICC), […] and shall take place at the place of project." The "project" in dispute was located in Guangzhou, China. In 2011, Brentwood applied to the Guangzhou Court to invalidate the arbitration clause in the Sales Agreement. Under Article 20 of the Chinese Arbitration Law, a Chinese court may rule, prior to arbitration, on the issue of "validity of an arbitration agreement" (*see* previous blog on how Chinese courts deal with challenges to the validity of arbitration agreements). The Guangzhou Court affirmed the validity of the arbitration clause in the Sales Agreement on February 22, 2012.[2)] The parties then conducted an arbitration in Guangzhou, administered by ICC-Hong Kong, following which Brentwood obtained a favorable award against Guangdong Fa'anlong.

In 2015, Brentwood applied to the Guangzhou Court to enforce the award under the New York Convention. Brentwood also alternatively requested enforcement under the Arrangements of the Supreme People's Court on the Reciprocal Enforcement of Arbitration Awards by Mainland China and the Hong Kong Special Administrative Region, arguing that the award was administered by ICC-Hong Kong and was therefore a Hong Kong-award. On August 6, 2020, the Guangzhou Court issued its decision dismissing Brentwood's request without prejudice, on the basis that the ICC award rendered in Guangzhou "should be considered a foreign-related *Chinese* arbitral award" (emphasis added) and thus subject to the enforcement regime under Chinese Civil Procedure Law, instead of the regime governing enforcement of foreign and Hong Kong awards.

For the first time in history, a Chinese court applied the "seat standard" to treat an arbitral award rendered in Mainland China under the auspices of a foreign arbitral

institution as a Chinese award. While Chinese courts have previously affirmed the validity of those agreements choosing foreign arbitral institutions to administer arbitrations in China, e.g. *Deasung (Guangzhou) Gases Co., Ltd. v. Praxair (China) Investment Co., Ltd.* (2020)[3] or *Longlide Packaging v. BP Agnati Srl* (2013),[4] no Chinese court has ever exercised supervisory jurisdiction over an arbitration conducted pursuant to such agreements. By encouraging Brentwood to "apply for enforcement under Chinese Civil Procedure Law," the Guangzhou Court demonstrated its willingness and readiness to exercise its jurisdiction as the supervisory court at the seat, despite the fact that the ICC is a French-headquartered arbitral institution. This result directly contradicts several prior court decisions categorizing awards as made in the place where the foreign arbitration institution is located (*see* cases cited in prior section above).

To what extent can parties concerned rely on *Brentwood v. Guangdong Fa'anlong* to discern a trend in Chinese judicial practice? What are the implications for parties when negotiating arbitration agreements and choosing the seat of arbitration for their potential China-related disputes? Are there resulting challenges likely to be faced by parties, practitioners, and arbitrators when dealing with cases currently under way? We discuss these in Part II.

References

↑1 At the beginning of her career, Tereza was a tribunal secretary to Dr. Jane Willems in her role as sole arbitrator in the arbitration case at hand: *Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd. and Others*, ICC Case No. 18929/CYK. The views expressed herein are the authors' own.

↑2 The ruling itself does not appear to be available on public record.

↑3 The court validated an arbitration clause that provides, "any and all disputes arising out of or relating to this Agreement […] shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai."

↑4 The court validated an arbitration clause that provides, "any dispute arising from or in connection with the contract shall be submitted to arbitration by the International Chamber of Commerce ('ICC') Court of Arbitration, according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English."

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