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Opening of Mainland China Arbitration Market to Foreign Institutions: Is It Happening, Really?

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Since the enactment of the People's Republic of China ("**PRC**") Arbitration Law (1994), Chinese arbitration commissions have had exclusive access to the mainland China arbitration market. This is primarily because the establishment and operation of arbitration institutions are subject to the prior approval of the "*administrative department of justice of the relevant province, autonomous region or municipality directly under the central government*", creating a legal obstacle for foreign arbitration institutions administering cases within mainland China.

On 7 September 2020, the PRC State Council issued a reply approving a joint application by the Beijing Municipal Government and the PRC Ministry of Commerce ("**MOFCOM**") concerning several reforms to promote the Beijing business environment and the further opening-up of the PRC market. The following section of the State Council's reply is particularly interesting to the arbitration community: "*Allowing well-known foreign arbitration and dispute resolution institutions to set up, after registering with the administrative department of justice of the Beijing Municipality and filing with MOFCOM, operational entities in designated areas of Beijing, to provide arbitration services for civil and commercial disputes in international business and investment sectors*" ("**Beijing Policy**").

This wording seems to affirm a trend beginning in Shanghai in 2019 ("**Shanghai Policy**", discussed in a previous blog) and revive the question of whether the mainland China arbitration market is opening up to foreign arbitration institutions. In addition, the 6 August 2020 decision from the Guangzhou Intermediate People's Court ("**Guangzhou IPC**") for the first time expressly deals with how to enforce awards issued based on an arbitration clause providing for a place of arbitration in mainland China by a foreign institution ("**Mixed Clause**") and seems to further point towards an opening up of the Chinese arbitration market.

Place of Arbitration in Mainland China and a Foreign Arbitration Institution Used to Be "No-Go"

As a starting point, Article 10(3) of the PRC Arbitration Law (1994) provides that an arbitration institution only qualifies as such if it is duly registered with the relevant administrative department of justice. However, no law or regulation explicitly deals with the registration process for foreign arbitration institutions. It seemed that only Chinese arbitration commissions are entitled to

administer arbitrations with a place of arbitration in mainland China. Therefore, for many years, Chinese courts have considered that Mixed Clauses are invalid since a foreign institution could not abide by Article 16 of the PRC Arbitration Law (1994). Article 16 provides that a valid arbitration agreement must designate an "arbitration commission".

That said, as early as 2013, the PRC Supreme People's Court ("**SPC**") issued ground breaking "Replies" through the Prior Reporting System (see this post on the Prior Reporting) in *Ningbo Oil v. Formal Venture (2013)* and *Longlide Printing v. BP Agnati (2013)*, confirming the validity of arbitration clauses opting for ICC Rules with a place of arbitration in mainland China. However, whilst the SPC found the choice of the ICC Rules was an indirect selection of the ICC as arbitration institution and thus fulfilled the third requirement of Article 16(2) (the choosing of an "arbitration commission"), the SPC carefully refrained from discussing whether the ICC as a foreign institution was eligible to be considered an "arbitration commission" within the meaning of Article 10(3).

Although the SPC seems to be upholding the validity of Mixed Clauses, it has not provided any guidance on how to implement the resulting awards. In particular, it has not specified whether such an arbitral award would be considered a "Chinese award" (based on a place of arbitration in the PRC), a "foreign award" (relying on the choice of a foreign arbitration institution), or a "non-domestic award" (based on a PRC place of arbitration and a foreign arbitration institution). This distinction is important because it determines the framework for challenging and/or enforcing the award, namely, a Chinese award is subject to the PRC Arbitration Law (1994) and the PRC Civil Procedure Law (2017), and a foreign or non-domestic award is subject to the New York Convention and/or other treaties.

In view of the uncertainty arising from Article 10(3) of the PRC Arbitration Law (1994), it has been extremely difficult to persuade Chinese courts to treat any award issued under such a Mixed Clause as a "Chinese award". The authors are not aware of any case in which a PRC court has adopted such an approach. In contrast, there are cases where the parties have successfully persuaded the lower courts to enforce the award by treating it as "non-domestic" (see *Züblin International v. Woke Rubber (2006)* and *Duferco S.A. v. Ningbo Imp. & Exp. (2009)*).

Yet, these decisions were based on a misunderstanding of the "non-domestic award" concept, which is not found in Chinese law and instead derived from Article I(1) of the New York Convention (1958). Under the New York Convention, "non-domestic awards" are awards issued within a State which involve foreign elements. To apply the New York Convention to these awards, contracting States must not have invoked the reciprocity reservation. However, China has made a reciprocity reservation under Article I(3) of the New York Convention (1958) and declared that "*it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State*". The concept of a "non-domestic award" arguably has no place under Chinese law.

New Developments

In this context, the 6 August 2020 ruling by the Guangzhou IPC in *Brentwood Industries v. Faanlong Complete Engineering (2020)* appears groundbreaking. In 2011, the Guangzhou IPC confirmed the validity of the arbitration clause in this case, which was a Mixed Clause providing

for "*arbitration by the International Chambers of Commerce's Arbitration Commission in accordance with international customs at the place where the project is located*" (which is Guangzhou, China). In 2020, the Guangzhou IPC now had to decide on the enforcement of the arbitral award arising from an arbitration pursuant to that clause. The Guangzhou IPC ruled that the ICC award could be enforced as a "foreign-related Chinese award". At this stage, it is unknown whether the case was subject to the Prior Reporting System and thus approved by the SPC. However, it would appear that the Guangzhou IPC would likely have issued this ruling after having, at least informally, consulted the higher courts and in particular the SPC.

The next step to open up mainland China arbitration market fully would logically be to allow foreign arbitration institutions to also physically administer cases in mainland China.

In this regard, the above-mentioned Shanghai Policy was the pioneering attempt to move in such direction by allowing foreign arbitration institutions to "carry out arbitration activities" in a specific Pilot Free Trade Zone ("**FTZ**"). In contrast, though most of the wording is identical, the Beijing Policy does not require the "operational entity" (of the foreign arbitration institution) to be inside an FTZ.

The Beijing Policy could be interpreted as allowing foreign arbitration institutions to register an entity with no such geographical restriction. In other words, the Beijing Policy could be understood as providing the Beijing municipal government with the authority to allow a foreign arbitration institution to set up an "arbitration commission" (under Article 10(3) of the PRC Arbitration Law (1994)) in Beijing. After all, according to Article 10(2) of the PRC Arbitration Law (1994), it is precisely the municipal government's role to coordinate with local chambers of commerce to set up arbitration commissions. Parties would no longer have to worry about the lack of compliance with Article 10(3) of the PRC Arbitration Law (1994), as local branches of foreign arbitration institutions would qualify as arbitration commissions in the meaning of Article 16 of the PRC Arbitration Law (1994).

Concluding Remarks

These new developments clearly demonstrate political will to bring the dispute resolution environment in the PRC to the next level by gradually opening the market to foreign arbitration institutions. A key question is whether this opening up will come through piecemeal approaches such as local policies and court decisions, or whether the Chinese central government will revise the PRC Arbitration Law (1994) at some point soon.

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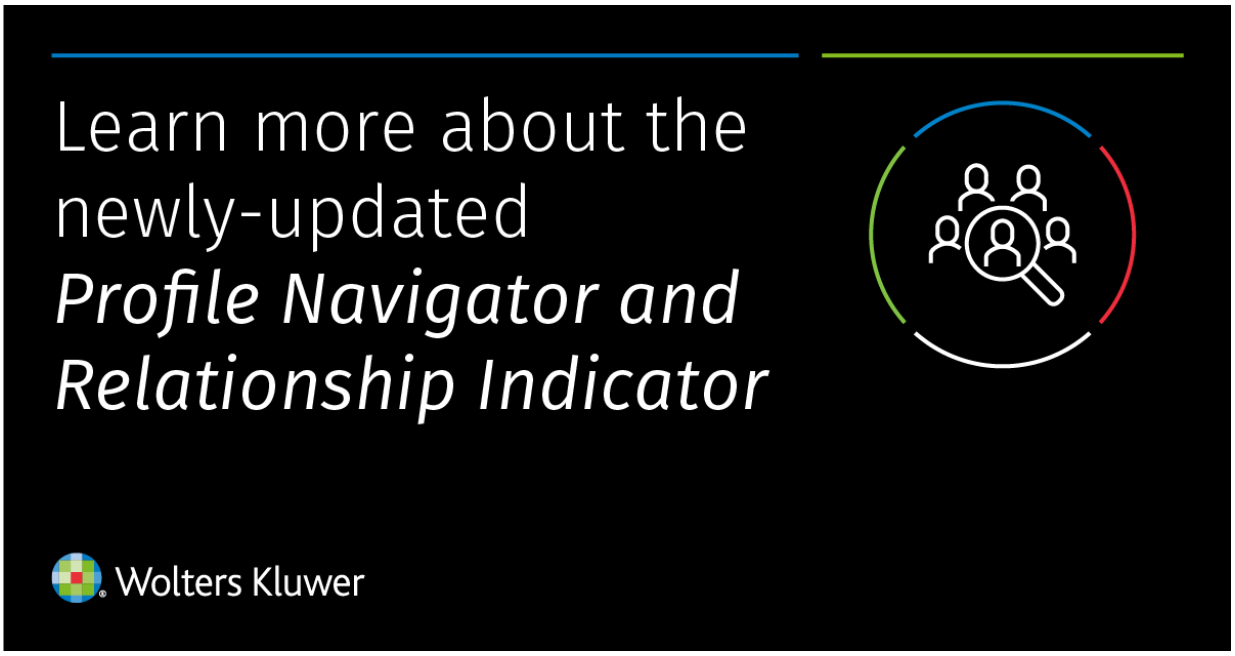

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