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

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

In Part I of our post, we discussed the long-standing uncertainties existing in China about what legal regime governs arbitrations administered by foreign arbitral institutions.[1)] We also introduced the recent, groundbreaking ruling by the Guangzhou Court in *Brentwood v. Guangdong Fa'anlong*. Here in Part II, we further discuss whether China might adopt the internationally-accepted "seat standard," as well as the implications and considerations arising from the *Brentwood* case.

The "seat standard" in China — a new reality?

The Guangzhou Court's ruling in *Brentwood v. Guangdong Fa'anlong* has thus far been welcomed by the international arbitration community (*see* recent blog discussing the case). Despite the lack of precedent-setting effect of the decision itself, there are several reasons to favor viewing *Brentwood v. Guangdong Fa'anlong* as an important indication of the Chinese judiciary's attempt to align its position with the internationally-recognized "seat standard."

First, developments in recent years within and around the Chinese legal system have been gathering momentum towards a departure from the "institution standard" and application of the "seat standard" instead. The "institution standard," whenever applied by a Chinese court, has been widely questioned and even criticized by scholars and practitioners (*see* previous blog). Relatedly, one Chinese Supreme People's Court ("SPC") judge openly expressed her "personal preference" for the adoption of the "seat standard." While, prior to *Brentwood v. Guangdong Fa'anlong*, no Chinese court had ever recognized a China-seated arbitration administered by a foreign arbitral institution as Chinese, a number of Chinese courts nevertheless have looked at the flip side of the issue and categorized foreign-seated awards as "foreign" on the basis that they were "seated" outside Mainland China:

- *Reply of the Supreme People's Court to the Request for Instructions Concerning Whether or Not to Recognize and Enforce ICC Award Lausanne 12330/TE/MW/AVH* (2009) (categorizing an ICC award resulting from an arbitration in Switzerland as a Swiss award);
- *Reply of the Supreme People's Court to the Request for Instructions on Affirming the Force of an Arbitral Agreement* (2006) (categorizing an award resulting from an ad hoc arbitration seated in Switzerland as a Swiss award).

Second, the Guangzhou Court's decision came just at a time when there is special urgency to clarify the legal regime governing arbitrations administered by foreign arbitral institutions in China. Recent measures that purport to open the Lingang Free Trade Zone (in Shanghai) and designated areas in Beijing to foreign arbitral institutions have been welcomed as positive developments bringing China's arbitration practice one step closer to international practice. However, the same developments have also given pause for thought, as parties have recognized the potential of ending up in the limbo of a "no man's land." This resulted in increased calls for clarity regarding the standard to determine the nationality of an award rendered under these measures. In these discussions, the "institution standard" has been disfavored as a practice deviating from the international standard. The Guangzhou Court directly answered those calls for clarity by confirming, at least on the facts of this case, that a China-seated arbitration administered by a foreign arbitral institution should be supervised by the *lex arbitri* (law of the seat): Chinese law.

Third, particularly given the unusually long duration of the Guangzhou Court's deliberation (i.e., five years), *Brentwood v. Guangdong Fa'anlong* potentially carries more weight than a single non-binding decision. Because the Court's decision does not amount to a refusal of enforcement of the award, which would fall within the decisions required to be reported to the Chinese SPC for approval (*see* previous blog on the SPC Prior Reporting System), *Brentwood v. Guangdong Fa'anlong* is not blessed with a Chinese SPC reply, which is generally considered to have quasi-binding or more persuasive effect. Nevertheless, Chinese courts have been known to sometimes consult with courts of higher levels before rendering decisions on important and controversial matters, even in the absence of a formal reporting requirement. Thus, while the unusually long period of deliberation may be attributable in part to the Guangzhou Court's attempts to request Brentwood to reconsider and revise the legal basis for its enforcement request (*see* previous blog discussing the judges' right of clarification in China), it may also reflect the involvement of courts at a higher level, possibly even the Chinese SPC.

Despite its positive implications, *Brentwood v. Guangdong Fa'anlong* remains an Intermediate Court decision lacking binding effect on future cases and on other courts (*see* Provisions of the SPC on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments, Article 1). Notably, the Guangzhou Court itself did not confirm or enforce the parties' award. Because the Court's decision only dismissed Brentwood's request to enforce the award under the legal regime governing foreign arbitral awards without prejudice to its right to enforce the award under the Chinese Civil Procedure Law in Chinese court, Brentwood must initiate another enforcement proceeding if it intends to pursue its case. If it does so, there would be an opportunity for the enforcement court to further solidify the Guangzhou Court's holding by applying Chinese law to the enforcement proceeding. (Moreover, if the enforcement court were to refuse enforcement, the Chinese SPC would then have an opportunity to take a position on this case upon receiving the lower court's report.) For now, it remains to be seen how this dispute will unfold in Chinese court. There is another complication on how this case may play out: any attempt to set aside the award may already be time-barred under Article 59 of the Chinese Arbitration Law, which requires parties to make their set-aside applications "within six months from the date of receipt of the award." It is also arguable that the clock should be stayed due to the lack of clarity on which court governs any set-aside proceedings.

Unless and until the Guangzhou Court's decision is blessed with a final result or the direct involvement of the Chinese SPC, the recent trend in Chinese judicial practice and among Chinese arbitration practitioners towards favoring the "seat standard" over the "institution standard" shall remain just that — an unconfirmed trend.

Additional uncertainties: a potential new can of worms?

Regardless of the final outcome in this particular case, decisions by the Chinese judiciary do not carry the full force of law except under limited circumstances involving judicial interpretations by the Chinese SPC (*see* Provisions of the SPC on the Judicial Interpretation Work, Article 6). Thus, the uncertainties regarding the nationality of an award rendered in China under the auspices of a foreign arbitral institution may ultimately only be solved by amending the Chinese Arbitration Law and Civil Procedure Law. Pending such an amendment, there are a further host of difficult issues that, as yet, have no clear answers.

For instance, even if the "seat standard" is eventually confirmed, a procedural question arises as to which specific court should exercise supervisory jurisdiction over a given arbitration. In light of the newly-effective measures allowing foreign arbitral institutions to administer arbitrations seated in China, if a foreign-institution-administered arbitration is seated in the Lingang Free Trade Zone, which court should the parties go to for a potential set-aside proceeding of the resulting award? Will Chinese Civil Procedure Law apply to determine the proper venue of the supervisory court? To avoid sowing confusion, any change codifying the "seat standard" needs to be accompanied by clear rules regarding its procedural implementation.

In the meantime, parties that have chosen to arbitrate within China under the auspices of foreign arbitral institutions may be surprised to find certain peculiar procedures required in their arbitration under Chinese law. In addition, arbitrators who have already accepted appointments in such arbitration proceedings may face similar challenges when dealing with ongoing cases. A few of these challenges are set out below, which require careful consideration and analysis to ensure that legal rights are not unwittingly forfeited and to ensure that an otherwise valid arbitral award will not be set aside or refused enforcement on procedural grounds:

- Chinese law allows losing parties a period of six months to set aside an award. This is considerably longer than the 28-day limitation imposed on any challenges to an English award and the three-month time limit for setting-aside applications stipulated under the UNCITRAL Model Law (adopted in places such as Singapore and Hong Kong).
- Enforcement applications are subject to very particular formality requirements under Chinese law, including the requirement that "documents in a foreign language submitted by the parties concerned shall be accompanied by a Chinese translation" (*see* Provisions of the SPC on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases, Article 6). In *Brentwood v. Guangdong Fa'anlong*, this requirement had arguably been met because the award was in both Chinese and English per the parties' arbitration agreement. By contrast, in Hong Kong, for example, an award to be enforced under the New York Convention written in English need not be translated into Chinese.
- Chinese law imposes a unique authenticity requirement for any documentary evidence submitted in an arbitration, which mandates notarization "by a notary organ of the country where it is formed, or the procedures for certification shall be completed according to the relevant treaty concluded between the People's Republic of China and the country" (*see* Several Provisions of the SPC on Evidence for Civil Actions, Article 16). It is unclear, though, to what extent this requirement may be applied to a China-seated arbitration proceeding and any enforcement / set aside proceeding in Chinese court. CIETAC Guidelines on Evidence (2015) seem to recognize this issue, and they explicitly exclude the application of the notarization and certification

requirement, among other rules of evidence under Chinese law. However, such a specific exclusion does not appear to exist in other arbitral institution rules.

- There is no right to appeal if a Chinese award is set aside or is refused enforcement. By contrast, in Hong Kong, for instance, a party may appeal against a decision to set aside an award, or a decision to grant or refuse leave to enforce an award, subject to the leave of the court.
- Only disputes that are considered to be "foreign-related" can be referred to non-Chinese arbitration institutions for arbitration under the existing Chinese legal framework. There are questions on what constitutes "foreign-related" disputes under Chinese law, particularly given that this area of law continues to evolve and change. Significant uncertainty remains as to whether the "foreign-related" requirement is satisfied if the dispute is between a multinational company's subsidiary incorporated in China and a Chinese party (including another local subsidiary of a multinational company).

It remains to be seen how *Brentwood v. Guangdong Fa'anlong* will play out and whether the long-standing uncertainties surrounding the "institution standard" versus the "seat standard" will be further clarified either by the courts or by codification in law. It suffices to say that change is warranted. Parties, practitioners, and arbitrators all must stay abreast of future developments in this arena in order to make well-informed strategies and decisions regarding their China-seated arbitration proceedings.

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.

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