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PRC Foreign State Immunity Law: A Gateway to Judicial Review of Investor-State Arbitration by the PRC Courts?

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Introduction

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the People's Republic of China ("**PRC**") Foreign State Immunity Law ("**CFSIL**", bilingual version here). It will enter into force on January 1, 2024, together with the amended Chinese Civil Procedure Law 2023 ("**CPL 2023**", English translation here). The new legislation not only marks a significant change of the PRC's position on state immunity from the absolute theory to the restrictive one, but also provides a gateway for the PRC courts to step into the field of investor-state arbitration and to play a role in judicial review at the international level. This post aims to explore the CFSIL's potential implications for investor-state arbitration.

PRC's Previous Absolute Theory of Foreign State Immunity

For a rather long period of time, the PRC courts had no authority to get involved in judicial review of investor-state arbitrations. The PRC previously adopted the traditional "absolute sovereign immunity" position whereby *all* activities of states and their properties are immune from the jurisdiction of the PRC courts. The "absolute" theory thus stood in notable contrast to the "restrictive" theory, which enshrines certain exceptions to states' broad immunity.

The PRC's robust stance in favor of its now-abandoned absolute theory was made crystal clear by the interpretation issued by the Standing Committee of the National People's Congress ("**NPC**"), *i.e.*, the PRC's central legislature, in the *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC* [2011] HKCFA 41. In the *Congo* case, the Hong Kong Court of Final Appeal referred certain questions relating to Hong Kong SAR's Basic Law to the NPC, which stated that the Hong Kong SAR shall abide by the same rules and policies of state immunity as the central government. Based on this interpretation, the commissioner of the PRC Ministry of Foreign Affairs in the Hong Kong SAR submitted three letters to the Hong Kong court, where it stated, *inter alia*, that the PRC had been consistently upholding the position of absolute immunity, and that such mechanism applies to the entire nation including the Hong Kong SAR. The Hong Kong court accordingly decided that it had no jurisdiction to hear claims initiated by a US company against the state of the Democratic Republic of the Congo.

The PRC's now-abandoned absolute immunity approach diverges from that of certain pro-arbitration jurisdictions, *e.g.*, Switzerland, Singapore, the UK, and the US, which empower their domestic courts to exercise supervisory jurisdiction over investor-state arbitrations. The absolute immunity approach also causes unease among certain commentators who worry that the jurisprudence built by arbitrators "*resembles a house of cards*" by reference to prior awards' reasoning and academic commentaries at large, but with little attention to states' and their courts' opinions and practices.

The CFSIL Opens the Gateway for PRC Courts to Review Matters relating to Investor-State Arbitration

Everything will change after the entry into force of the CFSIL. Article 12 provides that, where the PRC courts are the competent forum, a foreign state cannot invoke immunity from the jurisdiction of the PRC courts over the following matters: (1) the validity of an investment arbitration agreement contained in an investor-state contract or a bilateral investment treaty; (2) the recognition and enforcement of the arbitral award rendered based on such arbitration agreement; (3) setting aside the arbitral award; and (4) other arbitration-related matters prescribed by law that are subject to the PRC courts' review.

To support the implementation of the CFSIL, Article 305 of the CPL 2023 incorporates the application of the CFSIL and empowers the PRC courts to conduct judicial review of investor-state arbitrations in civil litigation proceedings. It opens the gate for PRC courts to exercise jurisdiction over another state upon an investor's application.

Chinese courts' review to recognize and enforce a non-ICSID arbitral award rendered in another contracting state of the New York Convention is theoretically possible under the CFSIL, but it will encounter obstacles before the PRC removes its commercial reservation under the New York Convention. This specific reservation limits the Convention's applicability in the PRC to disputes arising out of legal relationships, whether contractual or not, that are considered "commercial" under Chinese law. It is widely accepted by Chinese practitioners and confirmed by the PRC Supreme People's Court that the commercial reservation excludes the recognition and enforcement of the non-ICSID investor-state arbitral awards seated outside of the PRC.

Further Analysis

Some jurisdictions taking a proactive approach tend to apply their judicial review regime for international commercial arbitrations to non-ICSID investment arbitrations. For example, the Swiss courts, including the Swiss Federal Tribunal in charge of annulment proceedings, perform supervisory functions according to Chapter 12 of the Swiss Federal Private International Act. The Singapore High Court reviewed the *Sanum* tribunal's decision on arbitral jurisdiction under Section 10 of the International Arbitration Act (see prior post). With its anticipated significant revisions to the obsolete Chinese Arbitration Law 1994 ("**CAL**"), which currently does not apply to investor-state arbitrations, the PRC appears to be walking towards the same approach.

Judicial Review of the Validity of the Arbitration Agreement

In terms of the validity of the arbitration agreement, the notable difference between commercial arbitration and investment treaty arbitration is that, for the latter, the parties' agreement to arbitrate is not perfected until the investor accepts the arbitration agreement contained in an investment treaty through the initiation of an investment arbitration. Having said that, the same rules for judicial review of commercial arbitration agreements apply *mutatis mutandis* to investor-state arbitration agreements.

The internationally accepted doctrine of competence-competence does not exist under the current CAL. However, it is expected that the revised CAL will embrace the competence-competence doctrine, under which the Chinese courts will refrain from intervening until and unless the tribunals have made a decision themselves.

Judicial Review to Recognize and Enforce an Arbitral Award

The empirical study in prior posts (see Part I and Part II) shows that the PRC courts have fully recognized and enforced almost 90% of foreign commercial arbitral awards. PRC demonstrates an arbitration-friendly judicial environment by effectively implementing the New York Convention.

Nonetheless, enforcement of non-ICSID investor-state arbitral awards will remain problematic due to the PRC's commercial reservation under the New York Convention. Though the CFSIL coming into force in the year 2024 will empower the Chinese courts to review the recognition and enforcement of non-ICSID investor-state arbitral awards, such review will bear no fruits unless PRC withdraws its commercial reservation.

The situation for ICSID arbitral awards is no better. The PRC still has not enacted any law or rules to implement its treaty obligation under Article 54, paragraph 1 of the ICSID Convention to execute the ICSID award "*as if it were a final judgment of a [PRC] court.*" In other words, if an investor brings an ICSID arbitral award to the PRC for enforcement, the PRC courts will find a vacuum in law to guide their review or enforcement of the same.

On top of the above, the PRC's position as set out in Article 13 of the CFSIL that a state's waiver of jurisdiction immunity does not entail its waiver of enforcement immunity will compound the uncertainties in the enforcement of investor-state arbitral awards in the PRC.

Annulment of the Arbitral Award

Article 2 of the Draft Amendment to the CAL deleted the expression "*parties of equal legal status*" as a requirement for its scope of application, thus making the CAL applicable to investment arbitration and sports arbitration seated in the PRC. The PRC Ministry of Justice explained in the explanatory note that this deletion was intended to remove barriers that prevented Chinese arbitration institutions from accepting investor-state arbitration cases. As noted, several leading arbitration institutions in the PRC launched investment arbitration rules, *i.e.*, SCIA Rules Article 2(2), CIETAC Rules, and BAC Rules, respectively in 2016, 2017, and 2019, to hear investor-state disputes. These Chinese arbitration institutions are ready to administer such cases. For any future cases seated in China, Chinese courts will be able to exercise jurisdiction on the annulment review of the arbitral award as the forum of the seat of arbitration.

Conclusion

Although the PRC has now embraced restrictive state immunity from the state's level, it is still unclear whether and how the PRC courts will apply the same rules of judicial review of commercial arbitration to investor-state arbitration. So far there has not been any investor-state arbitration seated in the PRC, and there also is no sign that the PRC will withdraw its commercial reservation under the New York Convention any time soon. Nevertheless, the CFSIL is no doubt a great effort in continuously weaving the PRC's legal framework to support the country's development towards a regional dispute resolution center for disputes, commercial and investment, arising from "One Belt One Road."

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