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Post-Brentwood Judicial Practice on China-Seated Arbitrations Administered by Foreign Arbitral Institutions

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It is well-recognized in the world of international arbitration that the curial courts—those at the seat of the arbitration—have supervisory jurisdiction over their local arbitral proceedings (the so-called "seat standard"). Despite this, Chinese courts have historically been reluctant to take on the mantle of this supervisory jurisdiction for arbitrations administered by foreign arbitration institutions within China.

We explained in our previous posts (here and here) the reason behind Chinese courts' historical reluctance. About half a decade ago, there was hope that an attitude shift might be underway based on *Brentwood v. Guangdong Fa'anlong* (2020) ("***Brentwood***"), where the court suggested that an ICC award seated in China should be enforced as a *Chinese* award, implying perhaps that Chinese courts would be more ready to accept supervisory jurisdiction over such awards going forward. However, for various reasons including the lack of precedent-setting effect of the *Brentwood* decision itself, our previous posts in 2020 called the "seat standard" an "unconfirmed trend" awaiting judicial clarifications and/or codifications in the Chinese Arbitration Law.

It now appears that some of those long-awaited judicial clarifications are here and likely to stay, signifying a holistic shift of Chinese practice toward applying the "seat standard" in determining an award's nationality and, by extension, in allowing Chinese courts to take on the supervisory role over China-seated arbitrations administered by foreign arbitral institutions. We discuss notable developments and our takeaways below.

Post-*Brentwood* Judicial Developments

- **2022: Clarifications by the Chinese Supreme People's Court ("SPC")**

Consistent with the proposed incorporation of the "seat standard" in the draft amended Chinese Arbitration Law published by the Chinese Ministry of Justice on 30 July 2021 ("**Draft Amended Law**") (discussed here), the SPC published the Minutes of the National Symposium on Foreign-related Commercial and Maritime Trial Work of Courts ("**Minutes**") on 24 January 2022, stating (*inter alia*) that "an arbitral award made by a foreign arbitral institution with the seat of arbitration in Mainland China shall be deemed as a foreign-related Mainland Chinese award." This is an

important step in promoting the adoption of the "seat standard" among lower courts throughout China. While the Minutes are not a "judicial interpretation" and arguably do not bind the lower courts, they reflect a general consensus among the SPC judges that Chinese courts should now take on the role of the curial court for arbitrations administered by foreign arbitral institutions within China.

- **2023:** *China First Heavy Industries v. Aktiebolaget Sandvik Materials Technology* (released on 8 July 2023) ("***Heavy Industries***") **concerning an ICC arbitration seated in Beijing**

In 2023, the Beijing Fourth Intermediate People's Court ("**Beijing Court**") rendered the *Heavy Industries* decision—a post-*Brentwood* decision where the "seat standard" was adopted to determine the nationality of an arbitral award. Notably, in *Heavy Industries*, the court was asked to set aside an entire merits award on due process grounds.

The underlying arbitration agreement in *Heavy Industries* provides for ICC arbitration in Beijing. Having lost the arbitration, the claimant attempted to set aside the award at the Beijing Court on various due process grounds, including that the sole arbitrator was partial to the respondent, allegedly having an undisclosed "close relationship" with the respondent's counsel.

Faced with the same threshold question in *Brentwood*, the Beijing Court directly applied the "seat standard" and decided that it had supervisory jurisdiction over the ICC award rendered in Beijing. The Beijing Court then proceeded to review the set-aside challenges brought by the claimant. Having considered the claimant's arguments, the evidence, and the relevant authorities, the Beijing Court decided that there were no procedural violations in the way the sole arbitrator conducted the arbitration. Perhaps most importantly, the Court provided a detailed analysis based on the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") and the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"), calling them part of the "soft law" in international arbitration. The decision's alignment with international standards is notable, and appears to be rarely seen, if not a first, in Chinese judicial practice.

- **2024: SPC's promotion of** *Daesung Industrial Gases Co., Ltd. and Daesung (Guangzhou) Gases Co, Ltd Praxair (China) Investment Co., Ltd.* (released on 3 August 2020) ("***Daesung***") **as a "typical case"**

On 16 January 2024, the SPC released a recent batch of "typical cases" relating to arbitration practice, including the *Daesung* case decided by the Shanghai First Intermediate People's Court ("**Shanghai Court**").

Daesung concerns an arbitration clause providing for SIAC arbitration in Shanghai. Having received a positive jurisdictional ruling from the Shanghai-seated SIAC tribunal, the respondent chose to apply to set aside the tribunal's ruling in Singapore. Singapore courts refused to exercise jurisdiction over the tribunal's ruling, noting (*inter alia*) that the arbitration agreement specifies Shanghai, not Singapore, as the seat of the arbitration (see previous posts here, here, and here).

Pending outcome of the arbitration, the claimants applied to the Shanghai Court for a confirmation that the arbitration clause is valid under Chinese law. The respondent vigorously objected to the

claimants' application, contending (*inter alia*) that "there is no legal basis for Chinese courts to exercise supervisory jurisdiction over an arbitration administered by a foreign arbitral institution."

The Shanghai Court rejected the respondent's argument and held that it has supervisory jurisdiction over the Shanghai-seated SIAC arbitration. The Shanghai Court also confirmed the validity of the arbitration agreement, rejecting the respondent's contention that "'arbitral institutions' under Chinese Arbitration Law excludes foreign arbitral institutions." In that connection, the Shanghai Court recognized the tension between the existing legislation and the judicial practice—going so far to state that the existing Chinese Arbitration Law is "incomplete" and "out of sync with international arbitration [practices]," thereby requiring the judiciary to "make up for the deficiencies of the Chinese Arbitration Law" and to "conform to the international commercial arbitration trends."

Despite its criticism of the state of existing Chinese Arbitration Law, *Daesung* has now been blessed with the endorsement by the SPC and become a "typical case." The SPC's approval of the Shanghai Court's criticisms indicates that the "seat standard" will almost certainly be codified in the upcoming amendments to the Chinese Arbitration Law.

Put to the Test: Do Chinese Courts Exercise Their Supervisory Jurisdiction Well?

In both *Heavy Industries* and *Daesung*, Chinese courts demonstrated a newfound willingness to embrace their supervisory role in international arbitration, as well as a surprisingly global perspective. While these two cases do not have binding effect under Chinese law, some of the details of these cases provide helpful indication as to how a Chinese court may act as the curial court in the future. Specifically:

- **Commitment to align Chinese Arbitration Law with international standards**: As discussed above, both courts were willing to discuss what they termed the "deficiencies" and outdated features of the existing Chinese Arbitration Law. For instance, in *Daesung*, the Shanghai Court disagreed with an interpretation of the law that would prevent parties from choosing foreign arbitration institutions to administer arbitrations in China, calling such view "contradictory to global trends" and "lacking global perspective."
- **Appreciation of due process considerations under international arbitration guidelines**: Chinese courts rarely address due process concerns in the international arbitration context, but the Beijing Court in *Heavy Industries* had to review an award challenged on multiple procedural grounds. With little guidance from similar Chinese court precedents and domestic rules concerning due process rights, the Beijing Court did an excellent job in reviewing the award and drawing support from the IBA Rules and Guidelines. Specifically, on the issue of the sole arbitrator's relationship with the respondent's counsel (which appeared to only involve professional overlaps at seminars and conferences), the Beijing Court correctly noted that under the IBA Guidelines and the well-known traffic light system (i.e., the red, orange, and green lists), the specific situation in question squarely fell into the "green list" bucket and did not require arbitrator disclosure. On that basis, the Beijing Court found no procedural irregularity with respect to the sole arbitrator's conduct.
- **Adequate and well-articulated reasoning**: It is not uncommon for Chinese judgments to be criticized for lacking sufficient reasoning and analysis. Not so with the *Heavy Industries* and *Daesung* Both are detailed and well-organized, containing a comprehensive recap of the parties'

arguments and the relevant procedural histories plus an analysis drawing support from appropriate legal authorities. As an aside, the level of sophistication demonstrated in these judgments might also be credited to the counsel involved in these cases (who are all renowned practitioners in the Chinese arbitration community).

- **Self–restraint on the scope of review**: Despite acting as the curial court, the *Daesung* court's review was nevertheless limited to the validity of an arbitration agreement. The dispute in *Heavy Industries*, however, placed multiple challenges before the Beijing Court on the merits of the award, some of which exceeded a supervisory court's jurisdiction under international standards. For example, the claimant argued that the sole arbitrator should have sided with its take on the evidence of the case. The Beijing Court correctly refused to consider such an argument on the ground that it concerned matters within the sole arbitrator's discretion and therefore fell outside the scope of its judicial review.

Implications

Post-*Brentwood* developments concerning the "seat standard" send a strong signal that Chinese arbitration law is moving in a favorable direction towards alignment with international standards. It is evident from these decisions that Chinese courts are now ready to embrace their role as the curial court for arbitrations administered by foreign arbitral institutions in China and that, in addition, these courts have become increasingly competent and capable of living up to the expectations of sophisticated international practitioners and parties.

That said, there have only been a limited few instances thus far where Chinese courts have acted as the curial court supervising arbitrations administered by foreign arbitral institutions. Uncertainties remain including as to whether a consistent standard of review will be maintained across courts in China. Further developments will no doubt be closely observed by the authors and the international arbitration community.

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