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China





China

Simon Hui¹ and Hailin Cui²

A. Legislation and rules

A.1 Legislation

International arbitration in mainland China is governed by the following legislation and interpretations: (a) the PRC Arbitration Law, which took effect on 1 September 1995; (b) the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which took effect on 8 September 2006 and was amended on 31 December 2008; (c) the PRC Civil Procedure Law, which was amended on 31 August 2012; (d) the Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, which took effect on 4 February 2015; and (e) the corresponding judicial interpretations.

One notable legislative development in recent years is that the Supreme People's Court issued an interpretation clarifying the enforceability in mainland China of arbitral awards made in the Taiwan region. On 29 June 2015, the Supreme People's Court issued the Provisions of the Supreme People's Court on the Recognition and Enforcement of Arbitral Awards Made in Taiwan Region, which came into effect on 1 July 2015. Pursuant to these provisions, Taiwan awards can be recognized and enforced in mainland China. The grounds for non-recognition/enforcement of Taiwan awards are similar to those specified under the New York Convention, such as

¹ Simon Hui is a partner in the Dispute Resolution Group of Baker McKenzie in Shanghai. He specializes in international commercial arbitration and domestic litigation in China and has a range of international experience.

² Hailin Cui is an international associate in the Dispute Resolution Group of Baker McKenzie in Beijing. She represents international and domestic clients in domestic and international disputes in China.

invalidity of the arbitration clause and procedural irregularity, except it is required that enforcement of the Taiwan award must not prejudice the “one China principle.”

A.2 Institutions, rules and infrastructure

The Hong Kong International Arbitration Center, International Chamber of Commerce and Singapore International Arbitration Centre have all opened representative offices in the Shanghai Free Trade Zone in November 2015, February 2016, and March 2016, respectively.

A number of Chinese arbitration commissions, including China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Arbitration Center (SHIAC), China Maritime Arbitration Commission, Guangzhou Arbitration Commission and Wuhan Arbitration Commission have all amended their rules in recent years to accommodate the increasingly complex needs of cross-border disputes. For example, both CIETAC and SHIAC amended their rules in 2014, which came into effect on 1 January 2015, introducing new procedural rules on issues such as joinder of third parties and consolidation of arbitration proceedings.

B. Cases

B.1 Validity of arbitration clauses

The PRC court has adopted a pro-arbitration stance. In 2015, the Supreme People’s Court confirmed the validity of an arbitration clause that refers the dispute to either CIETAC or the Chinese court, whichever accepts the application first.³ According to the Supreme People’s Court, although the parties agreed that either CIETAC or the court has jurisdiction over their dispute, they also made it clear that whichever accepts the case first will have jurisdiction. Therefore, the parties’ choice is definite, is not ambiguous and should be upheld.

³ *Fumao Development Co., Ltd. v. Guangzhou Fanyu District Lingshan Real Estate Development Co., Ltd., et al.* The Supreme Court’s Reply (2013) Min Si Ta No. 34.



The Shijiazhuang Intermediate People's Court also upheld the validity of an arbitration clause that refers disputes to arbitration, but in the meantime allows the parties to file a claim with the court if either party is unsatisfied with the arbitral award.⁴ The court held that the arbitration clause is valid because it is a statutory right for the parties to challenge an arbitral award before the court.

However, in a similar case, the Beijing No. 3 Intermediate People's Court denied the validity of a similar arbitration clause, which provided that either party would have the right to apply to BAC for arbitration, and if unsatisfied with the arbitral award, either party could apply to the competent court.⁵ The Beijing No. 3 Intermediate People's Court was of the view that the clause contradicts the principle of finality of arbitral awards and thus should be deemed void.

B.2 Arbitrator's conflict of interest

B.2.1 Singapore Sky Central Investment (Group) Co., Ltd.'s application to set aside a CIETAC award

The Supreme People's Court denied the application of Singapore Sky Central Investment (Group) Co. Ltd. (the claimant) for setting aside an arbitral award on the ground that the arbitrator's failure to disclose his relationship with the legal counsel did not constitute a valid ground for setting aside the award.

The claimant argued that the respondent's legal counsel had a close relationship with the arbitrator, since the legal counsel graduated from the law school where the arbitrator was the dean. Further, when the legal counsel's law firm was established, the arbitrator was invited to the opening ceremony. Article 25 of CIETAC Arbitration Rules 2005, which were applicable to this case, provided that "an arbitrator nominated by the parties or appointed by the Chairman of CIETAC

⁴ Shijiazhuang Intermediate People's Court (2014) Shi Min Li Cai Zi No. 00001.

⁵ *Hong Kong Sylvania Technology Co. Ltd v. Daesang S. T Co LTD Beijing No. 2 Intermediate People's Court of Beijing (2014) Er Zhong Min Te No. 09403.*

shall sign a Declaration and disclose any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.” The claimant argued that as the arbitrator failed to disclose these facts, the arbitral proceeding was inconsistent with the arbitral rules, and therefore the arbitral award should be set aside.

The Supreme People’s Court was of the view that the arbitrator and the respondent’s legal counsel only shared the same educational background and the experience of attending the same ceremony. There was no direct tutoring relationship or any other conflict of interest between the two. Therefore, the Supreme People’s Court held that the independence and impartiality of the arbitrator was not prejudiced.

B.2.2 Hong Kong Sylvania Technology Co. Ltd v. Daesang S. T Co LTD

In 2014, the Beijing No. 2 Intermediate People’s Court held that the fact that the respondent’s legal counsel was now an arbitrator of CIETAC did not pose a real risk to the impartiality and independence of the arbitrator and thus dismissed the claimant’s application for setting aside the arbitral award.⁶

In this case, the claimant argued that the respondent’s legal counsel used to be a staff member in charge of case administration at the secretariat of CIETAC, and was now an arbitrator of CIETAC. According to the claimant, this would give rise to reasonable doubt as to the tribunal’s impartiality and independence. Moreover, Article 7 of the Measures for the Penalties for Violation of Law by Lawyers and Law Firms prohibits a lawyer from acting as the agent in cases administered by the arbitration institution where they once served or currently serve as an arbitrator. Therefore, the respondent’s legal counsel who was currently a listed arbitrator of CIETAC violated the PRC law and the arbitral rules.

⁶ *Hong Kong Sylvania Technology Co. Ltd v. Daesang S. T Co LTD Beijing No. 2 Intermediate People’s Court of Beijing (2014) Er Zhong Min Te No. 09403.*



The Beijing No. 2 Intermediate People's Court opined that the Measures for the Penalties for Violation of Law by Lawyers and Law Firms aim only to regulate the conduct of lawyers and have no compulsory legal effect. Although the respondent's legal counsel violated these regulations, the consequence is only a matter of administrative sanction and did not have any impact on the enforceability of the arbitral award. The court further found that although the respondent's legal counsel was listed on CIETAC's panel of arbitrators, he did not work there full time. In this case, although the three arbitrators were also listed on CIETAC's panel of arbitrators, they did not share the same full time job with the respondent's legal counsel, nor did they have constant contact with each other. Therefore, there was no evidence establishing that the legal counsel had a close personal relationship with the arbitrators. As a result, the court ruled that the request to set aside the arbitral award should not be upheld.

B.2.3 Setting aside of the Liupanshui Arbitration Commission's arbitral award (2014) Liu Zhong Cai Zi No. 10-46

In 2016, the Liupanshui Intermediate People's Court set aside an arbitral award because the claimant's legal counsel was also a part time arbitrator of Liupanshui Arbitration Commission, which rendered the award.⁷ The Liupanshui Intermediate People's Court held that according to Article 7 of the Measures for the Penalties for Violation of Law by Lawyers and Law Firms, the claimant's legal counsel, as a part-time arbitrator of Liupanshui Arbitration Commission, should not represent any party before Liupanshui Arbitration Commission. In these circumstances, the composition of the arbitral tribunal was inconsistent with the law and therefore, the court upheld the respondent's request to set aside the award.

⁷ The Intermediate People's Court of Liupanshui (2015) Qian Liu Zhong Shen Zhong No. 00025.

B.3 Referring domestic disputes to foreign arbitration institutions

In 2014, the Supreme People's Court denied the enforcement of an award made by the Korea Commercial Arbitration Board due to the invalidity of an arbitration clause that referred domestic disputes to foreign arbitration institutions.⁸

In July 2007, the claimant, a Korean-owned subsidiary, and the respondent, a Chinese company, entered into a share purchase agreement. The arbitration clause in the share purchase agreement provided for arbitration at the Korean Commercial Arbitration Board. When a dispute arose between the two parties, the claimant applied to the Korean Commercial Arbitration Board for arbitration. After an arbitral award was rendered, the respondent applied to Beijing No. 2 Intermediate People's Court for recognition of the award. The claimant, however, challenged the enforceability of the award on the ground that the arbitration agreement was invalid.

The Supreme People's Court held that the arbitration clause was invalid. It concluded that there were no foreign elements in the contract, because the parties to the contract were Chinese entities, the subject matter was located in China, and the contract was performed in China. The court also opined that the applicable law to the substantive contract and the arbitration clause should be PRC law, regardless of whether the parties had explicitly agreed on the governing law. According to Article 128 of the PRC Contract Law and Article 271 of the PRC Civil Procedure Law, parties are not allowed to refer disputes without foreign elements to arbitration institutions or *ad hoc* arbitration outside China. Therefore, the arbitration agreement was invalid.

⁸ *Beijing Chaolaixinsheng Sports and Leisure Co., Ltd v. Beijing Suowangzhixin Investment Consulting Co., Ltd* (2013) Min Si Ta Zi No. 64.



B.4 The scope and application of public policy

B.4.1 *Castel Electronics Pty Ltd v. TCL Air Conditioner*

In 2014, the Supreme People's Court recognized and enforced an *ad hoc* award made in Australia and refused to apply public policy grounds to deny recognition and enforcement, although the Chinese court held that the arbitration agreement was invalid.⁹

The claimant in this case filed a request for arbitration in July 2008 in Australia. In December 2008, the respondent filed a claim with Zhongshan Intermediate People's Court in China requesting the court to rule that the arbitration agreement was invalid. Two arbitral awards were made in December 2010 and January 2011. In December 2011, the Zhongshan Intermediate People's Court ruled that the arbitration agreement was invalid because it failed to specify the arbitration institution. The respondent claimed that the two arbitral awards should not be recognized and enforced in China, as they contradicted the Chinese court's verdict, and hence violated China's judicial sovereignty.

The Supreme People's Court considered the fact that the arbitral awards were made prior to the Zhongshan Intermediate People's Court's verdict. Moreover, the respondent did not raise any objections in the arbitration proceedings with respect to the validity of the arbitral clause. On the contrary, it even raised a counter-claim before the tribunal. Accordingly, the tribunal confirmed the validity of the arbitration clause and its jurisdiction. The tribunal's ruling was in line with the *lex arbitri* and the arbitration rules. Therefore, China's judicial sovereignty was not violated. The Supreme People's Court further emphasized that the public policy ground applies only when there is a violation of China's basic legal principles, national sovereignty, public security and good customs, which was likely to undermine China's fundamental public interest. In the present case,

⁹ The Supreme Court's Reply (2013) Min Si Ta No. 46.

the circumstances were not severe enough to jeopardize China’s public policy.

B.4.2 *Taizhou Haopu Investment Co., Ltd. v Wicor Holding AG, Taizhou Court, P. R. China*

In 2016, the Taizhou Intermediate People’s Court refused to recognize and enforce an ICC award on the basis of violation of social public interest under Article 7 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong.¹⁰

In November 2011, the claimant commenced arbitration proceedings before the ICC. The respondent challenged the validity of the arbitration clause in China and in December 2012, the Jiangsu High People’s Court held that the arbitration clause was invalid for failure to specify an arbitration institution. In November 2014, an award was issued by the ICC tribunal.

The Taizhou Intermediate People’s Court reasoned that the Jiangsu High People’s Court’s verdict, which predated the ICC award, had already considered the arbitration clause invalid. Therefore, the ICC award, which was made on the assumption that the arbitration clause was valid, contradicted the Jiangsu High People’s Court’s decision and violated the “societal public interest” of the PRC.

C. Trends and observations

The recent developments in China, both legislative and judicial, demonstrate China’s efforts to build its reputation as an arbitration-friendly jurisdiction. The Chinese courts are more ready to provide support to arbitration, and less willing to step in to intervene in the arbitration process. In recent years, the Supreme People’s Court has been moving closer to international practices by broadening the

¹⁰ Taizhou Intermediate People’s Court (2015) Tai Zhong Shang Zhong Shen Zi, No. 00004 (2 June 2016).



interpretation of what constitutes a valid arbitration agreement in order to give effect to an arbitration agreement.

Another positive development is that courts in China now tend to adopt a restrictive interpretation of the scope and applicability of the public policy exception. On various occasions, the Supreme People's Court has held that the public policy ground applies only when there is a violation of China's basic legal principles and public interest. China has also opened its market to foreign arbitration institutions. One unsettled issue concerning Chinese arbitration is whether parties to an arbitration agreement can choose a foreign arbitration institution with the seat of arbitration in China. In 2014, the Supreme People's Court published two decisions upholding arbitration agreements submitting relevant disputes to ICC arbitration to be administered in Shanghai and Beijing, respectively.

However, continuing efforts need to be made to ensure progress in this area. One urgent issue for Chinese arbitration is the inconsistent practices adopted by different local courts, especially when it comes to domestic arbitration, whereby the decisions of the local courts are not required to be reported to the higher-level courts before they are issued. In September 2016, the deputy head of the Supreme People's Court Fourth Civil Division, Liu Jingdong, revealed that the Supreme People's Court is considering applying the reporting system for the enforcement of international arbitration awards to domestic arbitration awards. If implemented, this move will unify the standards for judicial review of domestic awards and help to reduce the number of incorrect lower-court decisions on the enforcement of arbitral awards.

Further work is required to clarify or improve the current legal framework in support of arbitration. According to the Civil Procedure Law, the nationality of an arbitral award is determined by the location of the head office of the arbitration institution. An award made by a foreign institution is classified as a foreign award and therefore, should be enforced pursuant to the New York Convention. However, according to the reciprocity reservation made by China when acceding

to the New York Convention, Chinese courts will recognize and enforce only those arbitral awards that are made in the territory of another contracting state. Therefore, there remains uncertainty as to the nationality of an award rendered by a foreign institution in China and how such award will be enforced in China. Furthermore, domestic legislation should be reformed by extending the court's power and jurisdiction in granting interim measures to assist a foreign arbitration proceeding. A Chinese court has the power to grant interim measures to support arbitration conducted in China. However, PRC law does not confer jurisdiction on Chinese courts to grant interim measures in aid of a foreign arbitration, that is, arbitration seated in a foreign jurisdiction. Chinese courts also do not recognize and enforce interim measures issued by a foreign court.