Keep It Open – Recent Rulings Reaffirm Validity of Foreign Arbitration Seated in China

Two arbitration-related rulings recently issued by Chinese courts have drawn the attention of the arbitration community – one by the Shanghai No. 1 Intermediate People's Court (Shanghai ruling) confirming the validity of an arbitration agreement providing SIAC arbitration "*in Shanghai*," the other by the Guangzhou Intermediate People's Court ("Guangzhou ruling") confirming the enforceability of an ICC award issued in proceedings seated in Guangzhou. Both rulings indicate the Chinese courts have a continued and committed pro-arbitration attitude following the Supreme People's Court's judicial reply in the *Longlide* case in 2013, which permitted foreign arbitration institutions to administer arbitration proceedings seated in mainland China, conditioned upon the existence of a foreign element in the underlying contract.

The Shanghai ruling relates to a Singapore High Court ruling in the case of *BNA v. BNB* (see our previous briefing for details), which adjudicated that an arbitration clause providing SIAC arbitration "*in Shanghai*" was an agreement to arbitration seated in Singapore with hearings taking place in Shanghai. This ruling was reversed later in October 2019 by the Singapore Court of Appeal on the basis that, *inter alia*, it was clear from the wording of the arbitration clause (i.e., "in Shanghai") that Shanghai (rather than Singapore) was intended as the seat of arbitration. Based on such interpretation, the Singapore Court of Appeal declined to rule on the validity of the arbitration clause, saying that such issue was subject to the jurisdiction of a Chinese court.

As a result, the SIAC tribunal suspended the arbitration proceedings in October 2019, and the claimant filed an application in January 2020 to a Shanghai court requesting confirmation of the arbitration clause's validity. In its June 29, 2020 ruling, the Shanghai court held:

1. the underlying contracts in dispute contained foreign elements, because the claimant (i.e., the applicant before the Shanghai court), as a party to the underlying contracts, was a company registered in Korea;
2. the applicant was empowered under the Chinese Arbitration Law to apply for the Shanghai court's confirmation on the validity of the arbitration clause; and
3. the arbitration clause was valid under the Chinese Arbitration Law given that it satisfied the prescribed requirement of containing the parties' agreement on (a) the intent to arbitration, (b) the subject matter for arbitration, and (c) the appointed arbitration commission.

The Shanghai court rejected the respondent's argument that the Chinese Arbitration Law does not expressly allow foreign arbitration institutions to administer arbitration proceedings seated in mainland China, on the grounds, *inter alia*, that:

1. the Supreme People's Court's judicial reply in the *Longlide* case in 2013 already confirmed the validity of an arbitration clause providing a mainland-seated arbitration to be administered by a foreign arbitration institution; and
2. the respondent's argument lacked proper basis of prohibition under Chinese law and was contrary to the development of international arbitration in China.

Shortly after, on August 6, 2020, the Guangzhou Intermediate People's Court also confirmed that an arbitral award issued by an ICC tribunal in an arbitration seated in Guangzhou should be recognized as a foreign-related award issued in mainland China and is, therefore, enforceable according to the Chinese Civil Procedure Law.

The background to these rulings is the continued efforts of legislators in mainland China to foster a more open and arbitration-friendly legal environment.

In September 2020, the State Council of China published a policy paper announcing that foreign arbitration institutions will be allowed to set up business organizations in Beijing to provide arbitration services relating to civil and commercial disputes, and to support and ensure the application and enforcement of interim measures. This follows the State Council's 2019 announcement to allow foreign arbitration institutions to conduct arbitration business in the Shanghai free trade zone.

In the area of interregional judicial cooperation, one of the highlights is the arrangement between mainland China and Hong Kong regarding mutual assistance in court-ordered interim measures in aid of arbitral proceedings (see our previous briefing). The Hong Kong International Arbitration Center (HKIAC) released statistics in August 2020 showing that HKIAC has processed 25 applications to the mainland courts for interim measures. The mainland courts have made 17 decisions and the application was granted in each case.

As much as these judicial and legislative developments illustrate a commitment to a more arbitration-friendly legal environment in mainland China, there are still issues to be resolved. Without confirmative amendments to the Chinese Arbitration Law, parties engaging in cross-border business should be vigilant as to arbitration agreements providing for arbitration administered by a foreign arbitration institution and seated in mainland China, as lengthy and costly legal battles on jurisdictional issues could arise. Parties should also be aware that the recent rulings discussed above do not change the "foreign elements" requirement under Chinese law. In other words, should a party enter into an arbitration agreement providing for arbitration proceedings administered by a foreign (*i.e.*, non-Chinese) arbitration institution and seated in mainland China, the "foreign elements" requirement (*e.g.*, at least one of the parties to the arbitration agreement should be a non-Chinese entity) must be satisfied.

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