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Background

Nationality of an arbitral award marks the source of the legal validity of the award. Most countries generally divide the awards into domestic awards and foreign awards, and provide different requirements for their recognition and enforcement. It is a common practice to determine the nationality of the arbitral award by the seat of arbitration, which is the so-called "territorial theory". However, Chinese law adopts the "institutional theory", which raises controversy concerning the nationality of the arbitral award made by foreign arbitration institutions located in mainland. After long-term debate in practice, the *Brentwood* Case[1] finally confirmed that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards.

Fact and decision

Guangzhou Intermediate People's Court (hereinafter, "the court") delivered the

judgment on *Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.* on 6 Aug 2020[2]. After *DUFERCOS* Case[3], it is another landmark case that granted the enforcement of arbitral award made by a foreign arbitration institution in mainland China.

Brentwood Industries (hereinafter, "plaintiff") concluded a sales contract with three Chinese companies (hereinafter, "defendants") and agreed that "any dispute arising out of or in relation to the agreement shall be settled by amiable negotiation. If no agreement can be reached, each party shall refer their dispute to the International Commercial Chamber (hereinafter, "ICC") for arbitration at the site of the project in accordance with international practice." Due to the defendants' delay in payment, theplaintiff submitted their disputes to the ICC for arbitration. Since the "project" mentioned in the arbitration clause was the "Guangzhou Liede Sewage Treatment Plant Phase IV Project" listed in Article 3 of the "Supplementary Agreement", located in Guangzhou, China, the seat of arbitration shall be Guangzhou, China. After defendants refused to perform the award, which was in favor of plaintiff, plaintiff resorted to the court for recognition and enforcement.

Under current Chinese law, there are two possible ways to enforce the arbitral award made by a foreign arbitration institution in mainland China: (1) Classify such an award as a foreign award by the location of the arbitration institution under Art. 283 Civil Procedure Law of the People's Republic of China (hereinafter, "Civil Procedure Law"), which provides that an award made by a foreign arbitration institution must be recognised and enforced by a people's court pursuant to international treaties or the principle of reciprocity. (2) Classify such award as non-domestic award provided by the last sentence of Art. 1(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "New York Convention"), which provides that the convention shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Besides the aforementioned choices, the court provided a third way. It ruled that the arbitral award made by a foreign arbitration institution in mainland China shall be regarded as Chinese foreign-related arbitral award. If a party fails to perform the arbitral award, the other party may refer to Art. 273 of the Civil Procedure Law for recognition and enforcement. Under Art. 273 of the Civil Procedure Law, after an award has been made by an arbitration institution of the

People's Republic of China for foreign-related disputes, no party may file a lawsuit in a people's court. If a party fails to perform the arbitral award, the other party may apply for enforcement to the intermediate people's court of the place where the domicile of the person against whom an application is made is located or where the property is located.

Comment

Since *Long Lide* Case[4], Chinese court had affirmed the validity of arbitration agreements providing arbitration proceedings conducted by a foreign arbitration institution in mainland China. But in practice, arbitral awards based on these agreements still face the dilemma in recognition and enforcement. Because in China, different from international practice, the nationality of an arbitral award is determined by the location of the arbitration institution instead of the seat of arbitration, which is referred to as the "institutional theory". Under Art. 283 Civil Procedure Law, to recognise and enforce an award made by a foreign arbitration institution by a people's court, the people's court shall handle the matter pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. It impliedly refers to the New York Convention. However, concerning the determination of the nationality of the arbitral award, the New York Convention adopts the "territorial theory", which provides: "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". The "territorial theory" adopted by the New York Convention collides with the provision of the Civil Procedure Law. The confusion on application of law has not yet been dispelled.

In response to the conflict between domestic legislation and international convention, judicial practice has shown inclination to convert towards the "territorial theory". For example, in *DMT* case[5], the nationality of an arbitral award made by ICC in Singapore was deemed Singapore rather than France. But in line with the "territorial theory", arbitral awards made in mainland China shall therefore be deemed as Chinese awards. Under the "reciprocity reservation" filed by China, the New York convention shall only be applied to the recognition and enforcement of awards made in the territory of another contracting state. Hence,

the New York Convention shall not be applied to China-seated arbitral awards.

As early as *DUFERCOS* Case, the court defined the arbitral award made by the ICC in Beijing as non-domestic and therefore enforced it under the New York Convention. However, it failed to clarify what exactly constitutes a non-domestic award and how to interpret the reciprocity reservation. Originally, both non-domestic awards and reciprocity reservation were methods to encourage the acceptance and enlarge the application of the New York Convention. Conversely, their coexistence has impaired the effect of the New York Convention.

From this perspective, the Guangzhou Intermediate Court did find another way out by completely avoiding such conflict. The current Chinese law divides arbitral awards into: (1)domestic awards; (2)Chinese foreign-related awards; (3)foreign awards. Compared with domestic awards, Chinese foreign-related awards take into account the particularity of foreign-related factors, and the review standards for recognition and enforcement are less strict, subject to procedural review only. Compared with foreign awards, Chinese foreign-related awards can be set aside by Chinese court, which makes them under more restrictive supervision. That is reason why some argued that China-seated arbitral awards will be subject to stricter supervision by Chinese court because there are more diversified judicial review channels.[6] Indeed, arbitral awards made by Chinese foreign-related arbitration institution are under triple supervision carried out by the seat of arbitration, the place of recognition and enforcement, and China. But it should be noted that when it comes to China-seated arbitral awards made by foreign arbitration institution, China, as the seat of arbitration, has the inherent power to review the arbitral award and set it aside. Moreover, according to Art. 70 and Art. 71 of the Chinese Arbitration Law, reasons for setting Chinese foreign-related arbitral awards aside do not exceed the scope of reasons for refusing recognition and enforcement of these awards. Therefore, they are not imposed with any additional burden by being regarded as Chinese foreign-related arbitral awards. Concerning the recognition and enforcement of Chinese foreign-related award, Art. 274 of the Civil Procedure Law provided a more tolerant standard than the New York Convention. Compared with Art. 5 of the New York Convention, the legal capacity of the parties to the agreement and the final effect of the award are no longer obstacles to recognition and enforcement. Since arbitral awards made by foreign arbitration institutions are regarded as Chinese foreign-related award, they are treated more favorably than foreign awards concerning recognition and

enforcement. Left the legal problems behind, it showed China's effort to support the arbitration within the current legislative framework.

However, Chinese foreign-related arbitral award itself is a distorting product of the conflicts between "institutional theory" and "territorial theory". Application of Art. 273 of the Civil Procedure Law can only temporarily ease the tension. "Institutional theory" stipulated by Chinese law is an issue left over from history. "Foreign-related arbitration institutions" historically referred to the China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) and China Maritime Arbitration Commission (hereinafter referred to as CMAC). They were established respectively in 1954[7] and 1958[8]. At that time, only CIETAC and CMAC can accept foreign-related arbitration cases, while domestic arbitration institutions can only accept domestic arbitration cases. Accordingly, arbitral awards made by different arbitration institutions were divided into Chinese foreign-related arbitral awards and domestic arbitral awards. However, nowadays, such restrictions are extinct in practice. In 1996, the State Council of People's Republic of China issued a document stating that: "The main responsibility of the newly established arbitration institution is to accept domestic arbitration cases; if the parties to a foreign-related arbitration case voluntarily choose the newly established arbitration institution for arbitration, the newly established arbitration commission can accept the case."[9] In fact, there is no longer division of foreign-related arbitration institution and domestic arbitration institution. Hence, the "institutional theory" can no longer meet the needs of practice. Under the "territorial theory", the arbitral awards are divided into domestic awards, non-domestic awards and foreign awards. We may wonder whether China would revoke the reciprocity reservation, the obstacle in recognition and enforcement of non-domestic arbitral awards, in the future. Would China-seated arbitral awards made by foreign arbitration institution be defined as non-domestic awards by then? To get out of the dilemma once for all, the responsibility remains on the shoulder of legislative body.

[1]
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[2]

https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[3] https://www.pkulaw.com/specialtopic/61ffaac8076694efc8cef2ae6914b056bdfb.html

[4] https://www.pkulaw.com/chl/233828.html

[5] http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb

[6]Good News or Bad News? Arbitral Awards Rendered in China by Foreign Arbitral Institutions Being Regarded as Chinese Awards available at: https://www.chinajusticeobserver.com/a/good-news-or-bad-news-arbitral-awards-rendered-in-china-by-foreign-arbitral-institutions-being-regarded-as-chinese-awards?from=timeline

[7] http://www.cietac.org/index.php?m=Page&a=index&id=2

[8] http://www.cmac.org.cn/%E6%B5%B7%E4%BB%B2%E7%AE%80%E4%BB%8B

[9] http://cicc.court.gov.cn/html/1/218/62/83/440.html