Chinese Court Holds Arbitral Award by Foreign Arbitration Institutions in China Enforceable

(This is another version of views for the recent Chinese case on international commercial arbitration provided by Chen Zhi, a PhD candidate in the University of Macau, Macau, PRC)

On 6 August 2020, Guangzhou People's Intermediate Court ("Guangzhou court") handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration ("ICC") in China,[1] which have given rise to heated debate by the legal community in China. This case was thought to be of great significance by many commentators because it could open the door for enforcement of arbitral awards issued by foreign institution with seat of proceeding in China, and demonstrates the opening-up trend for foreign legal service.
[1]Brentwood Industries Inc. v. Guangdong Faanlong Co, Ltd and Others 2015 Sui Zhong Min Si Fa Chu No.62?

Backgrounds of the facts
The plaintiff, Brentwood Industries, Inc. a USA based company, entered into a Sale and Purchase Agreement ("SPA") along with a Supplementary Agreement with three Chinese companies (collectively, "Respondents") in April 2010. Article 16 of Sale and Purchase Agreement provided as follow:
Any dispute arising out of or in connection with this contract shall be settled by amicable negotiation between the parties. If such negotiations fail to resolve the dispute, the matter shall be referred to the Arbitration Commission?sic?of International Chamber of Commerce for arbitration at the project site in accordance with international practice. The award thereof shall be final and binding on the Parties. The costs of the arbitration shall be borne by the losing party, unless the Arbitration Commission?sic?decides otherwise. The language of the arbitration shall be bilingual, English and Chinese.

According to Article 3 of Supplementary Agreement, the project site was in Guangzhou.

On 29 May 2011, Brentwood submitted an application to Guangzhou Court, seeking for nullification of the arbitration clause in SPA. The Guangzhou Court handed down a judgement in early 2012 rejecting Brentwood's application and confirming the validity of the arbitration clause.
Because the ICC does not have an office in Guangzhou, Brentwood subsequently commenced an arbitration proceeding before Arbitration Court of International Chamber of Commerce Hong Kong Office on 31 August of 2012. In the course of proceeding, all three respondents participate in the arbitration presenting their written defenses, and among them, one respondent also raised objection of jurisdiction of the ICC Court to handle the case. The ICC Court decided that the jurisdiction issue shall be addressed by a sole arbitrator after giving all parties equal opportunities to present their arguments. Hence, with the consensus of all parties, the ICC Court appointed a sole arbitrator on 10 January of 2013.

On 3rd April 2013, the case management conference was held in Guangzhou and each party appeared and agreed upon the Term of Reference. After exchange of written submissions and hearing (all attended by all parties), the arbitrator rendered Final Award with the reference No. 18929/CYK (the Final Award) on 17 March 2014.

Enforcement proceeding and judgment
Brentwood sought to enforce the Final Award before the Guangzhou Court, mainly on the basis of non-domestic award as prescribed in Article 1(1) of the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which China is a signatory party ("New York Convention"). To increase its options in obtaining enforcement, Brentwood also invoked the Arrangement on Reciprocal Enforcement of Arbitral Awards Between SPC and Hong Kong Special Administrative Region Government, in the event the court regards the award as Hong Kong award because conducted by the ICC Hong Kong Office.
The Respondents raised their own objections respectively, which can be summarized to four main points:
(1) non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter;
(2) the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017);

(3) there are substantive errors in the Final Award;
(4) the arbitrator exceeded its power in the Final Award.

The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law (revised in 2012), and stipulated that the awards by foreign-related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

China's Stance to domestic award by foreign institutions

There is no law directly applicable to awards issued by foreign institution with seat in China. The current legislation divided awards into three categories:
(1) domestic award rendered by Chinese arbitration institutions, which is governed by the Arbitration Law and Civil Procedure Law.
(2) foreign-related award made by Chinese institutions, which is enforceable under Article 273 of Civil Procedure Law.
(3) awards made offshore, which are governed by international conventions (i.e. New York Convention), judicial arrangements and Supreme People Court's judicial interpretation depending on the place of arbitration.

The problem arises mainly because of the conflict between Chinese law and international conventions. Unlike the common practice in international arbitration across the world, which decides the nationality of award and competent court for remedies thereof based on the seat of arbitration proceeding, Chinese law traditionally relied upon the nationality of arbitration institutions instead. The term "arbitration seat" was not embedded in the legislation framework until the SPC's Interpretation on Application of Arbitration Law in 2006, and Supreme People's Court only begins to decide the nationality of award based on the seat since 2009.[2]
Due to the lacuna in law, there is no remedy for such China seated foreign award, and therefore parties may face enormous legal risks: on one hand, such award cannot be enforced by any Chinese court if the losing party refuse to perform it

voluntarily, on the other hand, the party who is dissatisfactory with the award or arbitration proceeding has no way to seek for annulment of the award.
In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing,[3] granting enforcement by regarding the disputed award as "non-domestic" award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms,[4] because China had filed the reservation set out in Article 1(3) of New York Convection confirming that it will apply the Convention to the "recognition and enforcement of awards made only in the territory of another Contracting State". In other words, said non-domestic award approach shouldn't be use by Chinese courts.
With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention.

[2]See Article 16 of SPC's Interpretation on Several Questions in Application of Arbitration Law Fa Shi 2006 No.7, see also SPC's Notice on Matters of Enforcing Hong Kong Award in Continental China Fa 2009 No. 415. As cited in Gao Xiaoli, The Courts Should Decide the Nationality of Arbitral Award by Seat Instead of Location of Arbitration Institution, People's Judicature (Volume of Cases), Vol.2017 No. 20, p. 71.
[3] Duferco S.A. v. Ningbo Art & Craft Import & Export Corp. 2008 Yong Zhong Jian No.8.
[4] Author Dong et al, Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?, available at http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/

Comments
Brentwood decision does not appear out of thin air, but contrarily, it is in line with the opening-up trend in the judicial practice of commercial arbitration in China

started in 2013. At that time, the Supreme People's Court ruled on the landmark Longlide case by confirming the validity of arbitration agreement which require arbitration proceeding conducted by foreign arbitration in China.[5]This stance has been followed and further developed by the First Intermediate Court of Shanghai in the recent Daesung Industrial Gases case,[6]. In this case, a clause providing "arbitration in Shanghai by Singapore International Arbitration Center" was under dispute by two respondents who alleged that foreign based institutions were prohibited from managing arbitration proceeding in China. However the court viewed this assertion as lacking of legal basis in Chinese law, and was contradictory to the developing trend of international commercial arbitration in the PRC.

In addition, local administrative authorities have shown firm stance and laudable attempt to promote the opening-up policy by attracting foreign institutions to carry out business in China. In late 2019, the justice department of Shanghai adopted new policies permitting foreign arbitration bodies to setup branch and carry out business in Lingang Free Trade Pilot Zone, and to set up detailed rules for registration and supervision in this regard.[7] On 28 August of 2020, the State Council agreed to a new proposal jointly by the Beijing government and the Ministry of Commerce on further opening up service industry, allowing world-renowned offshore arbitration institutions to run business in certain area of Beijing after registration at the Beijing justice department and the PRC Justice Ministry. This goes even further than Shanghai's policy by stipulating that competent authorities shall support preservations for arbitration proceeding, increasing the reach of foreign institution on local justice system.[8]

Nevertheless, there are still lots of works to be done for the landing of foreign institutions:

First, as the lacuna in the law still exists, the judicial policy will continue to be "uncertain, fraught with difficulty and rapidly evolving" in this regard, as described by the High Court of Singapore. [9] Because Article 273 of Civil Procedural Law does not contain award by foreign institution stricto senso, and Guangzhou Court applied it only on analogous basis, this approach is more likely to be an expedient measure by taking into account surrounding circumstances (i.e. the validity of arbitration clause in dispute had been confirmed by the court itself, and all respondents had actively participated in the arbitration proceeding), instead of corollary of legal terms. Further, albeit the decision in Brentwood case is consistent with SPC's opening-up and arbitration friendly policy, no evidence shows its legal validity was endorsed by SPC like that in Longlide case. Therefore,

it is doubtful whether this approach will be employed by other courts in future.
Second, even though the validity and enforceability issues have been settled, the loophole in law concerning auxiliary measures (i.e. interim relief, decision of jurisdiction, etc.) and annulment proceeding remains unsolved, which will probably be another obstruction for foreign institution to proceed with arbitration proceeding in Continental China. The above mentioned proposal by Beijing government provides a good example in this respect, while this problem can only be fully settled through revision of law.

Third, the strict limitations on the content of arbitration agreement remain unchanged. Arbitration agreements providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also unacceptable under current judicial policy, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years, however whilst the above issues have been formally lifted, the arbitration agreement shall be well drafted in terms of both arbitration institution and the seat of arbitration.

[5] Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (SPC Docket Number: 2013-MinTa Zi No.13).
[6] Daesung Industrial Gases Co., Ltd.&Another v. Praxair (China) Investment Co., Ltd 2020 Hu 01 Min Te No.83.
[7] See: Measures for the Establishment of Business Bodies by Offshore Arbitration Institutions in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai) available at http://sfj.sh.gov.cn/xxgk_gfxwj/20191020/3fbcd61ef43147379c5841e28bdf6007.html
[8] See Article 8 of State Council's Instruction on the Work Plan for the Construction of a National Demonstration Zone for Expanding and Opening Up Beijing's Services Industry in a New Round of Comprehensive Pilot Project?available at http://www.gov.cn/zhengce/content/2020-09/07/content_5541291.htm?trs=1
[9] BNA v BNB [2019] SGHC 142 para.116.