SHANGHAI COURT UPHOLDS VALIDITY OF ARBITRATION AGREEMENT SEATED IN PRC AND ADMINISTERED BY A FOREIGN ARBITRATION INSTITUTION

A recent decision of a Shanghai court that parties to an arbitration seated in the PRC will be permitted to have their dispute administered by a foreign arbitral institution is the latest move towards relaxing restrictions on foreign arbitral institutions administering PRC arbitrations.

What are the restrictions on foreign arbitral institutions in PRC?

Foreign arbitral institutions face two main restrictions on providing their services to PRC parties. Firstly, parties cannot choose a seat of arbitration outside the PRC unless the contract is "foreign related"[1]. Secondly, Article 16 of the PRC Arbitration Law provides that parties must refer their disputes to an "arbitration commission" and Article 10 requires every "arbitration commission" to be registered with the PRC judicial administrative departments. Accordingly, it was thought that only PRC arbitration institutions could be "arbitration commissions" and therefore able to administer PRC arbitrations.

What has changed?

The Shanghai No. 1 Intermediate People's Court in *Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd*[2] examined an arbitration agreement which provided: "...disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules." The respondent argued the agreement was invalid because the SIAC, as a foreign arbitration institution, could not administer a Shanghai arbitration.

The court disagreed and held that the parties were permitted to have their dispute administered by the SIAC. It said that the question remained open as to whether an "arbitration commission" in Article 16 of the PRC Arbitration Law must mean a PRC arbitration institution, and Article 10 was not determinative in this regard. The court issued a rare criticism of the PRC Arbitration Law for its lack of "international perspective" at the time of promulgation. It said that any prohibition on foreign arbitral institutions from administering arbitrations in the PRC (if there had been one) would have gone against the developing trends in international commercial arbitration.

What is the background to the Shanghai court's decision?

The Shanghai court is not the first court to be asked to consider the arbitration agreement in *Daesung*. In December 2019, the Singapore Court of Appeal was asked to decide whether the words "*in Shanghai*" in the arbitration agreement meant that Shanghai was the seat of the arbitration and concluded that they did[3]. The dispute regarding the seat of the arbitration had arisen due to the parties' concern that the arbitration agreement may not be recognised under PRC law if Shanghai was the seat and the SIAC was the administrator. The Shanghai court's decision that the arbitration agreement was valid notwithstanding the choice of Shanghai as the seat challenges that assumption.

Is the debate now resolved?

The Shanghai court's decision has not finally resolved the debate as to whether only PRC arbitration institutions can administer PRC arbitrations for two reasons. Firstly, the Shanghai court's decision is not binding and it is open to another court to reach a different conclusion in the future. Secondly, the court considered the arbitration agreement was "foreign related" and it is not clear whether the same decision would have been reached if the contract was a domestic contract. The Supreme People's Court had already held, back in 2013, that a "foreign related" arbitration can be administered by a foreign arbitration institution[4].

Closing

The Shanghai court's decision is another step towards allowing foreign arbitral institutions access to the PRC arbitration market. In the last 12 months, foreign arbitral institutions have been permitted to operate in Beijing and within the free trade zones in Shanghai in order to administer "foreign related" arbitrations. On 1 October 2019, an arrangement came into force which permits parties to arbitrations in Hong Kong to seek interim measures in aid of arbitration from the PRC courts[5]. There nonetheless remains restrictions on PRC parties from choosing to resolve their disputes by arbitration seated outside PRC and from selecting a law other than PRC law to govern their contracts unless they are "foreign related". Whether these restrictions will be relaxed remains to be seen.

For further information, please contact:

BEN BURY
Partner, Hong Kong
T +852 3983 7688
E ben.bury@hfw.com

Additional research undertaken by Paralegal Connie Kang.

1 Article 128 of the Contract Law of the PRC

2 (2020) Hu 01 Min Te No. 83

3 BNA v BNB [2019] SGHC 142

4 See the Supreme People's Court's letter dated 25 March 2013 regarding *Anhui Province Long Li De Packaging and Printing Co Ltd v BP Agnati S.R.L. No. 13* (2013) Min Si Ta Zi No. 13.

5 The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region