The Asia-Pacific Arbitration Review 2018

Published by Global Arbitration Review in association with

Clayton Utz
Cuatrecasas
Dechert LLP
Desierto & Desierto
Dzungsrt & Associates LLC
Economic Laws Practice
FTI Consulting
Hong Kong International Arbitration Centre
JLA Advogados e Consultores
Nagashima Ohno & Tsunematsu
Rajah & Tann Singapore LLP
Shanghai International Arbitration Center
Wilmer Cutler Pickering Hale and Dorr LLP
WongPartnership LLP
Yoon & Yang LLC
Zhong Lun Law Firm

www.globalarbitrationreview.com

gar

China

Jingzhou Tao and Mariana Zhong
Dechert LLP

Asia has become an attractive emerging centre for international arbitration and this shift in trend in recent years has prompted the development of the arbitration regime in China. Having implemented the PRC Arbitration Law for over 20 years, China has demonstrated its willingness to improve its somewhat outdated arbitration regime, largely for the purpose of nurturing an arbitration-friendly environment, so as to progressively make China a regional, if not international, arbitration centre. This was particularly the case in 2016 in terms of legal and practical developments in China.

Legal developments

The Supreme People's Court (SPC) has the power to promulgate judicial interpretations under the Legislative Law,[1] for the effect of guiding and regulating lower courts' judicial activities. In 2016, the SPC promulgated several such judicial interpretations concerning arbitration that, in general, signalled the SPC's pro-arbitration stance.

The SPC's June 2016 Interpretation: Well-demonstrated Judicial Attitude of Pro-Diversified Dispute Resolution Mechanisms in China

On 28 June 2016, the SPC promulgated the SPC's Opinions on Further Deepening the Reform of Diversified Dispute Resolution Mechanisms in People's Courts,[2] which, inter alia:

- reaffirmed the Chinese supreme judiciaries' resolution to develop diversified alternative dispute resolution (ADR) mechanisms, including mediation and arbitration in China;[3]
- emphasised the needs for the Chinese national courts to increase their communication and connections with arbitration institutions, to respect commercial arbitration rules, to handle preservation requests from arbitration institutions in a timely manner, to review in accordance with the law applications for set-aside and non-enforcement of arbitral awards, and to regulate the judicial review process of foreign-related and foreign commercial arbitral awards;[4] and
- encouraged the internalisation process of diversified ADR mechanisms in China, which requires, for instance, respecting parties' choice for non-litigation ADR mechanisms, more frequent exchanges and cooperation between Chinese and foreign arbitration institutions, and promoting the international competitiveness and credibility of Chinese ADR mechanisms.[5]

The SPC's attitude is pro-arbitration, a trend that started at least three years ago when the government announced the 'One Belt, One Road' initiative (the OBOR Initiative), which was designed to foster closer regional economic ties and collaborations between China and countries in parts of Asia, Europe and Africa.[6] The cause behind the strongly signalled pro-arbitration judicial attitude in China is not difficult to understand: the government needs to assure foreign investors and partners under the OBOR Initiative that arbitration is a highly recognised mechanism of ADR in China,[7] and that resolving disputes in China through ADR is guaranteed and has judicial support.

The SPC's December 2016 Free Trade Zone Opinions

In the same vein, on 30 December 2016, the SPC issued the Opinions on Providing Judicial Safeguards for the Construction of Pilot Free Trade Zones (the 2016 FTZ Opinions),[8] taking an even more liberal and innovative approach towards the conduct of arbitration by parties located in the pilot free trade zones. Such approach, as foreign practitioners observed, indicates that China is moving towards a less interventionist approach of upholding the validity of arbitration clauses.[9]

The 2016 FTZ Opinions touched upon two major historic issues: (i) the validity of arbitration clauses providing for arbitration outside China of solely Chinese domestic disputes and disputes with foreign elements (issue one); and (ii) the legality of ad hoc arbitration in China (issue two).

Issue one: arbitrating disputes outside China with foreign-related elements

Paragraph 1, article 9 of the 2016 FTZ Opinions provides the following,

> *…If two wholly foreign owned enterprises registered within the pilot free trade zones entered into an agreement to submit commercial disputes to arbitration seated outside mainland China, such an arbitration agreement shall not be held as invalid merely on the ground that the dispute concerned does not involve foreign-related elements.*

The above-cited provision opens a window for parties registered in the pilot free trade zones, including foreign-owned enterprises that are considered to be Chinese companies, to submit their disputes to arbitration overseas. However, this is subject to the limitation that such agreement to arbitrate may still be held invalid if other invalidating grounds are present.

By contrast, in the past, as established in *Chaolaixinsheng*,[10] the SPC once held that an arbitration agreement providing for arbitration outside China of purely domestic disputes (ie, disputes without foreign-related elements) was invalid, and the arbitral award rendered under such agreement was not enforced. The issue then turned on to the determination of any existence of a 'foreign-related element' in a given dispute.

According to article 522 of the SPC's most recent Judicial Interpretation of the Civil Procedure Law,[11] a dispute may be considered 'foreign-related' if (i) one or both parties to the dispute is a foreign citizen, foreign legal entity or other organisation or individual without nationality; (ii) the habitual residence of one or both parties is outside the PRC; (iii) the subject matter of the dispute is located outside the PRC; (iv) the legal facts establishing, changing or terminating the parties' civil relationship occurred

outside the PRC; or (v) there are other circumstances that may be considered foreign-related civil relations.

Although the law confers large discretion to the people's courts in finding 'foreign elements', the traditional judicial position was rather conservative and, as such, wholly foreign-owned enterprises (WFOEs) were always treated as Chinese legal entities without foreign elements.

A small development occurred in 2015 in *Siemens v Golden Landmark*,[12] where the Shanghai No. 1 Intermediate People's Court upheld and enforced a Singapore International Arbitration Centre (SIAC) award, on the ground, inter alia, that the dispute was 'foreign-related' because (i) the two contracting parties are WFOEs registered in the Shanghai Pilot Free Trade Zone (the Shanghai FTZ), which means the two parties' source of capital, ultimate ownership interest and business decisions were closely connected with foreign investors; and (ii) the performance of the contract bore foreign-related features as the goods in dispute was procured from abroad, stored in the Shanghai FTZ, and finally transferred out of the tariff-free zone and delivered to the buyer.

As precedent judgments bear no binding effect upon subsequent cases in China, it was the 2016 FTZ Opinions (as cited above) which made real meaningful development. The FTZ Opinions appear to encourage the Chinese national courts to allow WFOEs in pilot free trade zones to arbitrate their disputes abroad, which is a welcoming development for foreign investors in China. It remains to be seen whether such an innovative judicial approach will extend to WFOEs registered in other parts of China.

Issue two: legality of ad hoc arbitration in China

As a highly contentious matter, ad hoc arbitration is not allowed in China because, according to the PRC Arbitration Law, a valid arbitration agreement must contain designation of an arbitration commission.[13] The rationale behind such prohibition of ad hoc arbitration is multifold. Many believe that the central government simply does not trust – and is not willing to confer such power to – adjudication of commercial disputes by one or three individuals without supervision or management by an organisation. It should be noted, however, that China indeed recognises ad hoc arbitral awards rendered in other contracting members of the New York Convention, as well as in Hong Kong and Taiwan as per the bilateral enforcement arrangements.

China's historic position towards ad hoc arbitration was, to a certain extent, affected by the 2016 FTZ Opinions, where it provides the following in article 9:

> *…where one or both parties registered in the pilot free trade zone have agreed to arbitrate relevant disputes at a specific place in the mainland, according to specific arbitration rules, and by specific arbitrator(s), the arbitration agreement may be held valid. Where the People's Court considers the arbitration agreement to be invalid, it shall report its opinion for review by the court of a higher level. Where the court of a higher level concurs with the lower court, the opinion shall be reported to the Supreme People's Court for review, and decided after the Supreme People's Court renders a reply.*

The above-cited provision makes it possible for Chinese parties registered in the pilot free trade zones to agree on ad hoc arbitration seated in mainland China, provided that the agreement must specify the chosen arbitration rules and the chosen arbitrators. In the meantime, the long-established prior-reporting system, which applies in Chinese judicial review of enforcement of foreign and foreign-related arbitral awards, has been extended to judicial review of ad hoc arbitration agreements.

Strengthened administration and management of Chinese arbitration institutions

Since 2012, many new arbitration institutions have been established to serve special industries or the national strategic OBOR Initiative, such as the Shanghai FTZ Court of Arbitration, the Wuhan Arbitration Commission OBOR Court of Arbitration and the Arbitration Center Across the Straits. Some small and medium-sized arbitration institutions have begun to integrate into regional bodies, and big arbitration institutions have established new local branches.

These rapid changes caused somewhat chaotic management and jurisdictional disputes between arbitration institutions. To cope with such a situation, on 14 June 2016 the Ministry of Justice issued the Opinions on Regulating and Strengthening the Registration and Management of Arbitration Institutions, which basically require the tightening of the registration of new arbitration institutions and the strengthening of the management and supervision of the existing institutions.

Currently, China has over 250 arbitration institutions established across the country. Practitioners believe that there is an abundance in the number of these institutions but low efficiency in their operations.

Jurisdictional developments

The representative offices of the Hong Kong International Arbitration Centre, SIAC and the International Chamber of Commerce opened in the Shanghai FTZ continue to play communicational roles

Following the establishment of local offices in the Shanghai FTZ by the Hong Kong International Arbitration Centre (HKIAC), SIAC and the International Chamber of Commerce (ICC) consecutively in late 2015 and early 2016, these local offices of the three major players in the Asian arbitration market continue, as permitted by their registration, to enhance communication between foreign and Chinese arbitration communities, promoting good international arbitration practices in China, and expanding the influence of their respective rules and services.

Since their inception, these local offices of foreign arbitration institutions have been actively involved in organising conferences and seminars by themselves or jointly with local arbitration institutions, targeting Chinese users, in order to, among other things, familiarise Chinese users with their rules and services so that once the legal barrier is lifted, they can immediately start to accept and administer cases in the mainland and compete with local institutions.

Chinese judicial review of foreign arbitral awards reflects a pro-arbitration trend in general

According to certain data analysis, the average rate of recognising and enforcing foreign arbitral awards by Chinese courts in the past five years increased dramatically; from 2005 to 2015, the average rate of enforcement was 68 per cent, with the highest number of applications occurring in 2011–2015, equating to an enforcement rate of 86.4 per cent.[14]

A notable denial of enforcement is the *Haopu* case decided on 2 June 2016,[15] where the Taizhou Intermediate People's Court of Jiangsu Province refused to recognise and enforce an ICC arbitral award rendered by a tribunal seated in Hong Kong. The denial of enforcement was made on the public policy ground that an

early decision by another Chinese court had found the arbitration clause to be invalid approximately 19 months prior to the issuance of the ICC award. This is the second case[16] in which a Chinese court has denied the recognition and enforcement of a foreign arbitral award on the public policy exception provided under article 7 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the Arrangement).[17]

The public policy ground under article 7 of the Arrangement resembles article V2(b) of the New York Convention, with the distinction being that article 7 provides for the public policy of the 'mainland', while article V2(b) provides for that of the enforcing 'country'. The common ground is that a large scope of discretion has been given to the enforcing court in determining violation of public policy.

The *Haopu* case is distinguished from the earlier *Castel* case,[18] where the SPC did not refuse to enforce a foreign arbitral award on the public policy exception under the New York Convention, as the arbitration agreement was found to be invalid by a Chinese court one year after the issuance of the arbitral award.

This means that the timing of a Chinese court's review and decision on the validity of a given arbitral clause (before or after issuance of the award) could be a decisive factor in deciding whether Chinese public policy is violated.[19]

Shenzhen Court of International Arbitration updates its rules to hear investment arbitrations

Investment arbitration has become a heated topic in China in recent years, especially after the implementation of the OBOR Initiative. As predicted, it is reasonable to expect more disputes between Chinese investors and foreign host countries in the coming years.[20]

In order to facilitate and protect Chinese outbound investments, the Chinese government is interested in developing investment arbitration mechanisms in China.

The Shenzhen Court of International Arbitration (SCIA) is a pioneer in responding to such trend. On 1 December 2016, the SCIA issued updated arbitration rules to include administration of investor-state disputes. Specifically, according to paragraph 2, article 2 and paragraph 5, article 3 of the SCIA Arbitration Rules, the SCIA accepts arbitration cases related to investment disputes between states and nationals of other states, and will administer such cases in accordance with the UNCITRAL Arbitration Rules and the 'SCIA Guidelines for the Administration of Arbitration under the "UNCITRAL Arbitration Rules"'.[21]

The SCIA is the first arbitration institution in mainland China to announce that it will accept investment arbitration cases. It is reasonable to expect that its Chinese competitors, such as the Chinese International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC) and Shanghai International Economic and Trade Arbitration Commission (SHIAC), will shortly follow suit.

It is interesting to note that by taking a similar approach to expand an arbitration institution's jurisdiction through issuing or amending its institutional arbitration rules, SIAC launched its Investment Arbitration Rules, effective as of 1 January 2017.

Practice developments

In general, there is a noticeable shift from the West to the East in terms of international commercial arbitration. China, as the second-largest economy in the world and the largest economy in Asia, has been catching up very fast in responding to the most modern trends of good practices in the international arbitration community. The academic and practical communities (ie, arbitration law professors, legal practitioners and legal institutions) are unprecedentedly active on resolving outdated issues under the PRC Arbitration Law in innovative ways, reforming the Chinese arbitration regime and integrating advanced experience into the Chinese arbitration system.

In particular, the leading Chinese arbitration institutions (eg, CIETAC, BAC, SHIAC and SCIA) have been putting great efforts into promoting their regional, if not international, influence, by, inter alia, diligently amending their arbitration rules to cater for the needs of international arbitration users.

Among the topics being discussed, third-party funding and tribunal secretaries are arguably attracting the most attention.

Third-party funding

Following Singapore and Hong Kong's legalisation of third-party funding earlier this year,[22] third-party funders began to actively explore their markets in Asia. Several conferences introducing third-party funding have been held in Hong Kong, Beijing and Shanghai.

Chinese law does not expressly prohibit third-party funding, and there are no such common law doctrines of maintenance and champerty. Contingency fee arrangements are commonly seen in small and medium-sized litigation cases in China, subject to a ceiling of 30 per cent of the value in dispute.[23]

As Chinese companies are extremely reluctant to pay for international law firms' fees, such third-party funding arrangements could be a welcoming development for Chinese companies at large.

The Chinese courts' attitude towards third-party funding arrangements in international arbitrations involving Chinese parties is as yet unknown.

Tribunal secretaries

Tribunal secretaries has also became a hot topic in China after the famous *Yukos* case.[24] The HKIAC is now providing training and accreditation to tribunal secretaries. Many Chinese practitioners are interested in being accredited as it would, among other things, provide them with valuable insight into the black box of tribunal deliberation.

Chinese law does not regulate the role of tribunal secretaries and, in practice, it is common for a tribunal of Chinese arbitrators to use the Chinese institutions' secretariat staff as a tribunal secretary. The official admission of tribunal secretaries, if it happens, would legitimise the past ambiguous arrangements and practices.

Notes

1 See, eg, article 104 of the Legislative Law of the PRC, latest amendment on 15 March 2015.
2 Effective as of the promulgation date.
3 Article 2.
4 Article 10.
5 Article 16.
6 See, eg, the Supreme People's Court's Opinions on Providing Judicial Services and Safeguards for the Building of One Belt, One Road by People's Courts, promulgated on 16 June 2015.
7 Keith M Brandt & Michael K H Kan, China chapter, *The International Arbitration Review*, 136 (7th ed, 2016).
8 Effective as of the promulgation date.
9 'Recent Arbitration Developments in Mainland China towards A More Inclusive Approach to Foreign-seated Arbitrations', available

at https://singaporeinternationalarbitration.com/2017/02/07/recent-arbitration-developments-in-mainland-china-towards-a-more-inclusive-approach-to-foreign-seated-arbitrations (last visited 20 March 2017).

10 *Beijing Chaolaixinsheng Sports and Leisure Co, Ltd v Beijing Suowangzhixin Investment Consulting Co, Ltd*, 2nd Intermediate Civil Chamber No. 10670 (2013).

11 Promulgated on 30 January 2015 and effective as of 4 February 2015.

12 *Siemens Int'l Trading (Shanghai) Co, Ltd v Shanghai Golden Landmark Co, Ltd*, 1st Intermediate Civil Chamber No. 2 (2013).

13 PRC Arbitration Law articles 16 and 18.

14 Meg Utterback et al, Survey - 'Enforcing foreign arbitral award in china – a review of the past twenty years', *Crossing Borders International Arbitration Insights*, 10 (6th ed, October 2016).

15 *Taizhou Haopu Investment Co, Ltd v Wicor Holding AG*, Taizhou Intermediate Commercial Arbitration Chamber No. 4 (2015).

16 The first case is *Hemofarm DD et al v Yongning Pharmaceutical*, SPC 4th Civil Chamber No. 11 (2008).

17 Promulgated by the Supreme People's Court on 24 January 2000, and effective as of 1 February 2000.

18 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co, Ltd*, SPC 4th Civil Chamber No. 46 (2013).

19 Gao Xiaoli, The Latest Development of the Judicial Review for China International Commercial Arbitration, available at www.sccietac.org/web/doc/view_legaForum/797.html (last visited 20 March 2017).

20 Keith M Brandt & Michael K H Kan, China chapter, *The International Arbitration Review*, 136 (7th ed. 2016).

21 SCIA Arbitration Rules, articles 2 and 3.

22 On 10 January 2017, the Singapore parliament passed the Civil Law (Amendment) Bill permitting the use of third-party funding in support of international arbitrations and related proceedings. 'Singapore to permit third-party funding of international arbitrations', available at https://info.dechert.com/10/8030/january-2017/singapore-to-permit-third-party-funding-of-international-arbitrations.asp (last visited 20 March 2017).

One day later in Hong Kong, the Secretary for Justice, Mr Rimsky Yuen SC moved the second reading of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 in order to clarifying that third-party funding or arbitration, mediation and related proceedings are permitted under Hong Kong law. 'Speech by SJ in moving second reading of Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill', available at www.info.gov.hk/gia/general/201701/11/P2017011100487.htm (last visited 20 March 2017).

23 Measures for the Administration on Lawyers' Charging Activities, article 13, promulgated jointly by the Ministry of Justice and National Development and Reform Commission on 13 April 2006, and effective as of 1 December 2006.

24 *Veteran Petroleum Limited (Cyprus) v the Russian Federation*, PCA case No. AA 228, final award, 18 July 2014.

Jingzhou Tao
Dechert LLP

Mariana Zhong
Dechert LLP

Jingzhou Tao is the managing partner at Dechert LLP China responsible for developing the firm's Asian practice. He has more than 30 years of experience advising Fortune 500 companies on China-related matters. He has acted as counsel, chief arbitrator or party-nominated arbitrator in over 100 international arbitration proceedings. International arbitration-related positions currently held by Jingzhou include member of the ICC International Court of Arbitration, member of the International Advisory Committee of China International Economic and Trade Arbitration Commission, member of the board of trustees of the Foundation for International Arbitration Advocacy, member of the board of *Global Arbitration Review* and fellow of the Chartered Institute of Arbitrators.

Mr Tao is a frequent speaker in the legal world and has also published many articles in Chinese, international legal and business publications. He is also an adjunct professor at Peking University Law School, East China University of Political Science and Law, China University of Political Science and Law for the MBA programme, and a specially invited professor of law for the International Arbitration Programme at Tsinghua University School of Law.

Ms Zhong is a senior associate of Dechert LLP (Beijing) in the international arbitration practice. She is qualified in New York and China (not currently practising). Ms Zhong has assisted foreign and Chinese clients in many international commercial arbitrations before SIAC, HKIAC, ICC, CIETAC and BAC, and advised and represented clients in pre-arbitration negotiations with Chinese joint venture partners, Chinese SOEs, government organs and entities. She also has a wealth of experience enforcing foreign awards in China, and advising foreign clients on Chinese law-related issues. Ms Zhong has also assisted clients in some ICSID arbitration cases. She has spoken on several occasions, including in New Delhi and China, on topics including international investment arbitration and commercial arbitration in China.

Ms Zhong is recognised as a 'Next Generation Lawyer' in *The Legal 500 Asia Pacific* 2017 for her work in dispute resolution in China.

Dechert LLP

28/F South Tower Beijing Kerry Centre
1 Guanghua Road Chaoyang District
Beijing 100020
China
Tel: +86 10 5829 1300
Fax: +86 10 5829 1313

Jingzhou Tao
jingzhou.tao@dechert.com

Mariana Zhong
mariana.zhong@dechert.com

www.dechert.com

Dechert is recognised as having one of the world's premier international arbitration practices, with partners who are acknowledged leaders in the field. We have handled a wide range of disputes, including in the energy, mining, power, financial services, life sciences, construction, real estate, technology, telecommunications and sports sectors. We advise clients on dispute resolution clauses, investment treaty protection, negotiation and mediation, arbitration and, if necessary, the enforcement of awards and judgments. At all times we remain conscious of the need to minimise risks and costs involved in protracted disputes. We thus seek creative business solutions to help resolve intractable legal disputes as early as possible.

We have intimate knowledge of the rules and practices of the major arbitral institutions, acquired through years of working within the institutions, chairing and participating in their committees, representing clients in thousands of cases administered by them and through the writing of treatises and articles on their rules. Clients benefit from the unique insights thus gained. In particular, we have a long history of involvement with the ICC. Lawyers in our practice include: the current chair of the ICC Task Force on ICC Arbitration Involving States and State Entities; the current vice-chair of the ICC Commission of Arbitration; a current member of the ICC Court of Arbitration (member for China); three current members of the ICC Commission on Arbitration; and the former secretary-general of the Secretariat of the ICC Court of Arbitration.

Our arbitration lawyers have acted as counsel and arbitrators under the rules of most international arbitral institutions (as well as ad hoc arbitration).

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

THE ASIA-PACIFIC ARBITRATION REVIEW 2018 ISSN 1753-917X