

PRC Supreme People's Court endorses Arbitration Agreement choosing Non-PRC Arbitration Institutions under PRC Law

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In a decision which surprised many within the arbitration community, the Supreme People's Court ("**SPC**") - the highest court in the PRC – has confirmed that an arbitration agreement choosing non-PRC arbitration institutions (such as the ICC in Paris) is valid even though the arbitration agreement is governed by PRC law.

Despite the confirmation, there are a number of issues to be clarified.

The Facts

In October 2010, Longlide Packing Co Ltd ("**Longlide**") and BP Agnati SRL ("**Agnati**") entered into a Sale and Purchase Contract. According to Clause 10.1, disputes under the contract shall inter alia be submitted to "*ICC Court of Arbitration*", with "*the place of jurisdiction*" (管辖地) in Shanghai.

Longlide submitted amongst other matters that (1) the arbitration agreement is governed by PRC law, (2) the arbitration agreement is invalid because ICC is not an arbitration institution under the PRC Arbitration Law, and (3) any arbitral award rendered under the arbitration agreement is a "domestic award" which cannot be enforced under the New York Convention.

The Hefei City Intermediate People's Court ("**the Intermediate Court**") held that pursuant to Article 10 of the PRC Arbitration Law, arbitration institutions should be registered by the relevant PRC authorities before conducting arbitration in the PRC. Given that ICC is not registered, the Intermediate Court held that the arbitration clause was invalid.

The matter was then referred to the Anhui Province Higher People's Court ("**the Higher Court**"). The minority of the Higher Court agreed with the Intermediate Court, relying on inter alia Article 10 of the PRC Arbitration Law.

However, the majority of the Higher Court took a different view. In particular, the majority held that there is no legal basis for the findings by the court below (namely that non-PRC arbitration institutions such as the ICC cannot conduct arbitration activities in the PRC). The majority confirmed that the arbitration agreement in question satisfies the requirements under Article 16 of the PRC Arbitration Law, ie an arbitration agreement should comprise of 3 elements, namely (1) an intention to arbitrate, (2) matters to be arbitrated, and (3) choice of arbitration institution.

The matter was then referred to the SPC. In the Reply given by the SPC dated 25 March 2013 (but not publicised until July 2014), the SPC confirmed its agreement with the view expressed by the majority of the Higher Court. In particular, the SPC confirmed that under the arbitration agreement, the parties had chosen an arbitration institution pursuant to Article 16 of the PRC Arbitration Law.

The Implications

For many years, the arbitration community believed that an arbitration agreement governed by PRC law which specified non-PRC arbitration institutions (such as the ICC), would be invalid as it would not satisfy Article 16 (requiring an arbitration institution to be chosen) read in the light of Article 10 (requiring an arbitration institution to be registered in the PRC). Accordingly, lawyers have generally advised clients not to draft arbitration clauses which specify arbitration in China under a non-PRC arbitration institution.

In the light of the Longlide decision, the possibility of arbitration in China under a non-PRC arbitration institution has been opened up.

However, the SPC (and indeed majority of the Higher Court) did not expressly deal with Article 10 of the PRC Arbitration Law (requiring an arbitration institution to be registered in the PRC), which is at the heart of the views expressly by the Intermediate Court as well as the minority of the Higher Court.

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Taking the argument to the extreme, arbitration institutions may be set up without registration and still validity accept arbitration cases under the law. This would defeat the requirement for registration under Article 10.

Given that the above issues remain to be clarified, it may be prudent to avoid drafting arbitration clauses that specify arbitration in China under a non-PRC arbitration institution, at least for the time being.

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