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# China Legal Briefing* 245

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## 1. PRC Supreme People's Court Confirms an Arbitration Agreement choosing Non-PRC Arbitration Institutions is valid under PRC Law

As written in the Reply to the case "Longlide Packing Co Ltd and BP Agnati SRL" ("Longlide Case"), which is published in the "Guidelines for the Foreign Commercial and Marine Affairs" (vol. 26, p. 125-129, 2014.04.01), the Supreme People's Court of China ("SPC") has confirmed that an arbitration agreement choosing non-PRC arbitration institutions under PRC Law is valid even when the seat of the arbitration is in China, which is a rather surprising development.

### A. Background

The question whether a non-PRC arbitration institutions have a qualification to engage in arbitration work in China has long been debated in the arbitration community. Scholars held different opinions: One opinion is that Chinese foreign investment law does not expressly permit foreign arbitration institutions to conduct arbitration activities in China because non-PRC arbitration institutions such as the International Chamber of Commerce ("ICC") are not covered by the term "arbitration commissions" mentioned in Article 10 of the Arbitration Law of the PRC. Another opinion is that the term "arbitration commissions" in the Arbitration Law should be interpreted more broadly to include foreign arbitral institutions, which would be allowed to offer services in China as a result.

The leading "Duferco Case" heard by the Ningbo People's Intermediate Court in 2009, which was controversial in arbitration community, firstly ruled that an arbitration award made by an arbitral tribunal appointed under the ICC Rules in Beijing was a valid non-domestic award which shall be recognized and enforced according to the "New York Convention"[1]. However, as the Court of Second Instance, Ningbo People's Intermediate Court made a final verdict, so that this case was not referred to the SPC for review.

In order to avoid risks, lawyers so far generally advised their clients not to draft arbitration clauses which specify arbitration in China under the guidance of a non-PRC arbitration institution. In fact, foreign arbitration institutions face obstacles for conducting arbitration activities in China.

### B. Confirmation made by the SPC in the Longlide Case

The arbitration agreement in this case read as follows "According to clause 10.1, disputes under the contract shall inter alia be submitted to ICC Court of arbitration, with the place of jurisdiction in Shanghai."

[1] "*The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*", joined by China in 1987.

Hefei Intermediate People's Court, as the court at first instance, held that this arbitration agreement was invalid because an arbitral tribunal appointed under the ICC Rules is not an arbitration institution under the PRC Arbitration Law and thatpursuant to Article 10 of the PRC Arbitration Law, arbitration institutions should be registered by the relevant PRC authorities before conducting arbitration in the PRC. Therefore, an arbitral tribunal appointed under the ICC Rules is not and cannot be registered in PRC.

However, the majority of the Anhui Province Higher People's Court, as the court at second instance, disagreed with this conclusion. They confirmed the arbitration agreement is valid because it satisfies the requirements under Article 16 of the PRC Arbitration Law: "An arbitration agreement shall contain the following particulars: (1) an expression of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission."

As the minority of the Anhui Province Higher People's Court held a different view, the matter was then submitted to the SPC to make a final decision. The SPC confirmed that the arbitration agreement is valid pursuant to Article 16 of the PRC Arbitration Law.

**C. Implications and Remaining issues**

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

However, there are still some problems: firstly, should an award made by a non-PRC arbitration institutions be considered a "domestic award" or a "non-domestic award"? If it is a "non-domestic award", should the PRC Arbitration Law or the New York Convention apply to its enforcement? Secondly, which court has jurisdiction if one party applies for a setting aside of the arbitration award? Note that according to Article 58 of the Arbitration Law, a party may apply for setting aside an arbitration award with the intermediate people's court at the place where the arbitration commission is located, but there is no regulation in the Arbitration Law relating to awards made by a foreign institution.

These remaining issues will need to be clarified through case law and possible revisions of the Arbitration Law in the future. In the meantime, it may still be prudent to avoid drafting arbitration clauses that specify arbitration in China under the auspices of a foreign institution.

## 2. China to set up special IPR courts

As IPR cases require more skilled judges and more professional trials, Chinese top legislature has decided to establish special courts for intellectual property rights ("IPR") cases in Beijing, Shanghai and Guangzhou. IPR courts have the same trial grade as the

local Intermediate People's Court, focusing largely on first instance cases about civil and administrative lawsuits about patents, new plant varieties, integrated circuit layout designs and technological knowledge. They will also hear appellate cases about other IPR-related matters, such as copyright and trademark disputes.

For all the areas listed above, the IPR courts will have trans-regional jurisdiction, i.e. will hear cases from all over the provinces in which there are located. After three years, their jurisdiction may be extended to include neighbouring provinces.

Appeals against the first instance decisions of the IPR courts will be heard at the provincial higher people's courts. Presidents, vice presidents and chief judges of these courts will be appointed by local legislatures. Also, the courts will establish a professional forensic investigation system to determine technical facts.

### 3. SAFE Circular 36 Changes Policy for the Settlement of Foreign Exchange Capital

The *Circular of the State Administration of Foreign Exchange on Issues Concerning the Pilot Reform of the Administrative Approach to the Settlement of Foreign Exchange Capital of Foreign-invested Enterprises in Certain Areas* (Hui Fa [2014] No.36) ("Circular 36") issued by China's State Administration of Foreign Exchange ("SAFE") has been in effect in 16 pilot areas[2] since 4 August 2014. In these pilot areas, Circular 36 has replaced the *Circular of the General Affairs Department of the State Administration of Foreign Exchange on Issues Concerning the Improvement of Business Operations with Respect to the Administration of Payment and Settlement of the Foreign Exchange Capital of Foreign-invested Enterprises* (Hui Zong Fa [2008] No.142) ("Circular 142") and other regulations related to the settlement of foreign exchange capital of foreign-invested enterprises ("FIEs").

Circular 36 allows FIEs within the covered pilot areas to convert foreign exchange capital into RMB at their discretion. Under prior regulations, FIEs could only convert foreign exchange capital where they had an actual business need. In that case, capital could only be deposited in the capital account in a foreign currency. Therefore FIEs were exposed to currency exchange losses if the RMB increases appreciated. But now, according to Circular 36, FIEs can settle foreign exchange under the capital account at their discretion and deposit the RMB obtained from the settlement in a designated account. Then, they can invest these funds according to their actual business needs. For

[2] The 16 pilot areas are: Tianjin Binhai New Area, Shenyang Economic Zone, Suzhou Industrial Park, Donghu National Independent Innovation Demonstration Zone, Guangzhou Nansha New Area, Hengqin New Area, Chengdu High-tech Industrial Development Zone, Zhongguancun Science Park [in Beijing], Chongqing Liangjiang New Area, Heilongjiang Border Foreign Exchange Administration Reform Pilot Area Wenzhou Comprehensive Financial Reform Pilot Area, Pingtan Comprehensive Experimental Area, China-Malaysia Qinzhou Industrial Park, Guiyang Comprehensive Bonded Zone, Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone and Qingdao Comprehensive Wealth Management and Financial Reform Pilot Area.

this last step, the FIEs still need to provide supporting documents and go through a review process with the bank.

Furthermore, Circular 36 provides a way for FIEs in pilot areas to do domestic equity investment using their converted RMB. Under Circular 142, which stipulated that "RMB funds derived from capital settlement shall not be used for any domestic equity investment" as a general rule, most types of FIEs were restricted from making equity investments in China. Under the new Circular 36, FIEs located in pilot areas are now allowed to make domestic equity investments both inside and outside of the pilot areas.

### 4. China imposes harsher punishments to ensure workplace safety

On 31 August 2014, the Standing Committee of the National People's Congress adopted a revision of the Workplace Safety Law. The revised law will come into effect on 1 December 2014.

The current Workplace Safety Law, which took effect in 2002, has helped reduce malpractice, but light punishment and lack of supervision have still contributed to frequent accidents.

The amendment increased fines for enterprises involved in serious workplace accidents to a maximum of RMB 20 million. Depending on the losses incurred in the accident, fines start at RMB 200,000.

Managers in charge of companies who are found to have failed in their duty to ensure safety may be fined between 30 and 80 percent of their annual income depending on the losses caused by the accident. Under the current legislation, managers faced fines between RMB 20,000 and 200,000. In exceptionally serious cases, companies under whose auspices accidents occur will face fines between RMB 10 million and 20 million.

The amendment adds provisions that enhance the supervisory power of work safety organizations and local governments, especially those at the municipal level. Also, if the workplace of factories is considered highly unsafe and likely to cause accidents, the new Workplace Safety Law allows regulators to force them to suspend operation by cutting off their power supply.

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