

Hong Kong International Arbitration Center's new Shanghai office – an important milestone for arbitration in mainland China

On 20 November 2015, the Hong Kong International Arbitration Center (HKIAC) announced the opening of a representative office in Shanghai. The first foreign arbitration institution to set up an office in mainland China, the HKIAC office is located within the China (Shanghai) Pilot Free Trade Zone, an area designated by China's State Council to "support the introduction of internationally renowned commercial dispute resolution institutions". This new office, established under the leadership of the HKIAC's deputy secretary-general, Liu Jing, is the institution's second overseas presence after it opened an office in Seoul in 2013.

Background

The ties connecting HKIAC with arbitration in mainland China have strengthened in recent years. HKIAC has long marketed itself as an institution able to deal with the particularities and complexities of disputes relating to mainland China and its successful track record is evidence of the success of such efforts. HKIAC awards enjoy a strong record of enforcement on the mainland, with no award refused enforcement since 2010.

Arbitration in mainland China

As set out in our German-language client alert of February 2015 (please [click here](#) to access the alert), foreign parties intending to, or faced with, arbitration in mainland China need to keep a number of particularities in mind.

First and foremost, there is the oft-discussed implications of Article 16 of the PRC Arbitration Law. Article 16 reads as follows:

An arbitration agreement shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration.

The following contents shall be included in an arbitration agreement:

- 1. the expression of the parties' wish to submit to arbitration;*
- 2. the matters to be arbitrated; and*
- 3. the Arbitration Commission selected by the parties.*

Although this Article does not appear to give rise to particular issues on a plain reading of its content, the reference to "Arbitration Commission", read together with the foregoing Articles 10 to 15 of the same Law, may be – and has been – interpreted as referring to Chinese arbitration institutions only. The practical consequence of this has been that foreign arbitration institutions,

including the ICC, SCC, SIAC and HKIAC, cannot administer cases with a Chinese seat because there is a (very considerable) risk that the arbitration agreements underlying such proceedings would be declared invalid or the resulting awards declared unenforceable. However, despite the “arbitration-unfriendly” interpretation of the Law, a select few Chinese cases, including namely *Ningbo* in 2008¹ and more recently *Longlide* in 2013,² have departed from the strict wording of the law and enforced ICC awards rendered in arbitrations with a mainland Chinese seat.

In the *Longlide* case, decided by China’s highest court, the Supreme People’s Court (“SPC”), the arbitration agreement in question provided for ICC arbitration in Shanghai. At first instance, the Intermediate People’s Court of Hefei was minded to hold that the agreement would be in breach of Article 16 as it did not specify a qualifying arbitration commission pursuant to Chinese law. The case was then considered under the reporting mechanism by the Anhui Higher People’s Court, where the court was divided, the majority holding in favor of the validity of the clause. It was thereupon referred to the SPC, which sided with the majority of the previous instance and upheld the validity of the arbitration agreement.

Despite this seemingly welcome development for international users of arbitration in China, certain limitations of the *Longlide* case must be kept in mind. First, it is important to emphasize that the reasoning of the *Longlide* case applies to “foreign-related” arbitration cases only. Thus, for domestic parties, including locally-incorporated subsidiaries of foreign companies – which under Chinese law are not “foreign-related” – nothing has changed and the rule that foreign arbitration institutions cannot administer arbitrations with a Chinese seat still applies. Second, even with respect to foreign-related arbitration cases, the rule has not changed either since the judgment of the SPC cannot be understood as a binding judicial announcement or “interpretation” and therefore does not have binding force on other Chinese courts. Finally, it should be kept in mind that the *Longlide* case was concerned solely with the *jurisdictional* validity of the clause in question. Consequently, a statement from the SPC as to the *enforceability* of arbitrations administered by foreign arbitration institutions with a mainland Chinese seat is still outstanding.

Implications

Against this rather complicated background of arbitration in China, the opening of a Shanghai office of the HKIAC will be welcomed by international users of arbitration with connections to mainland China. It not only strengthens HKIAC’s access to mainland Chinese users, but also paves the way for increasing cooperation and exchange with mainland China-based institutions. Although the administration of HKIAC cases will continue to be carried out exclusively by the Hong Kong office – which reflects the still-prevailing uncertainty about the status of foreign arbitration institutions in mainland China – HKIAC’s presence in Shanghai will serve a multitude of other purposes. It has been announced that HKIAC will provide professional training to local arbitrators and practitioners and that it plans to work closely with courts and judges to enhance a pro-arbitration policy across China. The Shanghai office will also provide logistical support for HKIAC arbitration hearings taking place on the mainland.

¹ *Duferco SA v. Ningbo Art & Craft Import & Export Corp* [2008] Yong Zhong Jian Zi Di 4 Hao.

² *Longlide Packaging Co Ltd v BP Agnati SRL* [2013] Min Si Ta Zu Di 13 Hao.

This development on its own does not, however, lessen the risks of arbitrating and enforcing foreign-related disputes administered by foreign arbitration institutions seated in mainland China. Consequently, we recommend that parties seek legal advice before arbitrating with a Chinese seat and, indeed, before arbitrating disputes with any nexus to mainland China.

Whether, and how quickly, other international arbitration institutions will follow suit and open even representative offices in mainland China is presently unclear. The ICC already has an office in Hong Kong that administers cases independently from the Paris office and SIAC, perhaps HKIAC's closest competitor in terms of geographical coverage, has not announced any plans to open an office in mainland China. Consequently, for the time being at least, HKIAC will retain this unique advantage in geographical proximity to mainland China arbitration users and institutions.

If you have any questions, please do not hesitate to contact Richard Kreindler (rkreindler@cgsh.com), Mariel Dimsey (mdimsey@cgsh.com) or any of your regular contacts at the firm. You may also contact our partners and counsel listed under "[Litigation and Arbitration](#)" located in the "Practices" section of our website <http://www.clearygottlieb.com/>.

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