STEPHENSON HARWOOD

Arbitration in Asia

Quarterly Digest

Inside

Xiangman Shen joins Stephenson Harwood

Stephenson Harwood's international arbitration practice has recently been strengthened in Asia by the addition of Xiangman Shen, a partner in our associated firm (Wei Tu). Xiangman started his professional practice 30 years ago. His practice mainly includes maritime, international trade, general corporate and commercial matters. He has handled hundreds of civil, commercial and even criminal cases during his career.

Tell us a bit about yourself and your practice.

I started work in a state-owned law firm in Wuhan City, China in 1987 soon after my graduation from law school. Two years later I qualified as a PRC lawyer. Arbitration and court litigation have always been favorite subjects of mine. I still can recall the first arbitration case I conducted, in which my client was a state-owned ostrich farm. The ostriches did not mature well, the client believed the Australian counterparty failed to supply the agreed breed of ostrich. I helped the client to deal with CIETAC arbitration. I was also invited to visit the farm and felt sorry for those poor ostriches who would inevitably go on to become someone's shoes or purse. Arguments from both sides focused on whether the Australian company failed to supply the agreed breed of birds, or whether the conditions and climate of or the natural conditions such as weather in Wuhan City were inherently unsuitable. That was more than 20 years ago, and China had just started real arbitration practice. In 1999 I moved to Guangzhou and joined a well-known Chinese shipping law firm, where I had more opportunities to deal with not only domestic arbitrations but also foreign arbitrations including LMAA, GAFTA, LCIA, etc. I was either counsel for my clients, or invited as a Chinese law expert for foreign arbitration tribunals. I have dealt with cases covering shipping, commercial and corporate law. I joined Stephenson Harwood-Wei Tu China around 4 months ago. Arbitration will remain one of my main practice areas. Having worked in Chinese law firms for more than 30 years, I feel lucky and am proud to be of the generation who has witnessed the coming of age of the Chinese legal profession, include arbitration, the judiciary, and more broadly encompassing the development of the Chinese legal system. The pace of development has been amazingly fast and positive.

Can you share some recent highlights of arbitration cases you have been involved in?

One of particular interest is a CIETAC arbitration case I was involved in some time ago. The dispute arose from a sale and purchase contract. The Chinese buyers refused to pay to my client (a Taiwanese company) for chips the client supplied. The goods were actually supplied to two different Chinese companies, one was the parent company and the other was a subsidiary company. At the beginning when the client was negotiating with the two companies for a settlement. Considering the possibility of local protectionism, I advised my client to insert a CIETAC Beijing arbitration clause in the settlement agreement to avoid local court action whereby the Chinese companies could easily have sought some local protection. In addition, from a legal point of view it was unclear which company was obligated to pay, and this would have exposed the client to some risks. I then suggested a solution which would clear all possible legal troubles and obstacles in the future. The client reached a settlement in accordance with my advice. When the parent company failed to pay, I commenced CIETAC arbitration. And during the arbitration proceedings, the parent company of its own initiative requested settlement of the dispute due to the clear drafting of the original settlement agreement. During the further settlement negotiations, I negotiated with both CIETAC and the parent company to re-fix the arbitration timetable along the lines of the terms and

conditions of the settlement agreement to be reached. A substantive settlement was reached whereby the parent company agreed to make 100% payment to the client, plus arbitration costs and legal costs. It was later fully executed and the client was fully paid per the timetable of CIETAC.

Such a good result required not only legal expertise but also a working understanding of the Chinese legal landscape, to enable the best solution to protect the client to be shaped. Smooth communication with CIETAC, a good understanding of CIETAC rules, and skills for commercial negotiation were also required.

Two of the most-talked about topics in Asian arbitration this year have been the enforcement of awards in the PRC and the implementation of China's Belt and Road initiative, against a background of significantly increased Chinese outward investment in infrastructure, energy and finance projects. What are your thoughts on each of these from the perspective of dispute resolution services in China?

China has been a party to the 1958 New York Convention for 30 years. Recently, there has been a significant push within China to fulfil its obligations under the Convention, which I have personally witnessed and experienced as a PRC attorney. Good examples are, firstly, that there is a hierarchy within the PRC courts whereby only the Supreme Court (being the highest judicial authority of the PRC) has final power to reject a foreign arbitral award, such a power is not granted to the lower courts. Secondly, the Supreme Court has always been prudent when rejecting foreign awards, and the number of rejection cases as a consequence is low. Foreign arbitration awards are successfully recognised in China. Thirdly, although ad hoc arbitration is not permitted by PRC domestic arbitration laws, the Supreme Court of the PRC has given judicial interpretations permitting recognition and enforcement of foreign ad hoc arbitration awards. As China continues integration with the rest of the world, I believe that China will continue (perhaps increasingly so) to stick to the international obligations it has agreed to fulfil.

Belt and Road covers 65 independent countries. Chinese investment under the Belt and Road initiative usually involve key sectors for host states, and the amounts involved are substantial. There are potential legal risks for Chinese investors because the legal systems along the Belt and Road states are typically less developed. For commercial disputes, Chinese investors may not be familiar with the local laws and the court systems, and are therefore encouraged to use arbitration as a way to resolve their disputes. Under the 1958 New York Convention, arbitration awards can be enforced in more than 150 countries including most of the Belt and Road countries. In practice, HKIAC, SIAC and CIETAC are commonly being chosen by parties concerned in Belt and Road projects.

Insofar as investment disputes with host states are concerned, Chinese investors tended to resolve them by political or diplomatic means. However, over the past several years I have seen some changes, with Chinese investors beginning to use (for example) the International Centre for Settlement of Investment Disputes ("ICSID") set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) to resolve their disputes. This is being done in accordance with the bilateral or multilateral investment treaties made by China with other countries, including the Belt and Road countries.

Apart from the above, there are some discussions in academic circles in China, that China should build a dispute resolution mechanism and arbitration institutions specially for those disputes arising from the Belt and Road initiative, and that this might become a focus of the Supreme Court of the PRC as well.

I believe all the above will result in an increase of the need for arbitration services, not only in China but also around the world especially in Hong Kong, Singapore, London, Paris, and other major global hubs.

What is next on the agenda for arbitration in the PRC?

A few months ago, a PRC intermediate court ruled that an award made by CIETAC's Hong Kong branch should be deemed as a Hong Kong arbitration award and it should be enforced according to the arrangement in place for enforcement between the Mainland and Hong Kong. This case may be a landmark for the PRC courts to use a "seat of arbitration" standard to determine if an award is a foreign award or a domestic one. Where international arbitration organisations such as ICC, HKIAC, SIAC have representative offices in China, and Chinese arbitration institutes have opened their branches outside of mainland China (such as CIETAC

or CMAC Hong Kong branches), clear guidelines have been given regarding the seat of arbitration.

Secondly, the Hong Kong High Court recently made granted emergency relief to an applicant who was involved in Chinese arbitration proceedings. This Hong Kong court judgment has triggered heated discussions in China as to whether the PRC court should also grant similar remedies such as preservation of property or evidence to an applicant in foreign arbitration proceedings. This would be difficult under the current PRC laws, but the PRC courts may act to grant such similar remedies to an applicant which is a party to Hong Kong arbitration proceedings on the basis of reciprocity, and moving further from there to arbitration proceedings conducted in foreign countries.

Thirdly, as I mentioned above at the moment PRC laws do not permit ad hoc domestic arbitration. The latest development is that starting from beginning of this year, in the Guangdong Hengqin Pilot Free-Trade Zone, rules for ad hoc arbitration have been made under the Supreme Court's guidance, and ad hoc arbitration is now permitted between two companies incorporated within the Free-Trade Zone. Although this is a pilot program, this demonstrates the possibility that China may begin to recognise domestic ad hoc arbitration, thereby allowing more freedom of choice to the parties concerned.

Even if some issues are still under discussion or something is still at its experimental stage, arbitration as a means of dispute resolution is fast developing in China, judging from the yearly increase in the number of arbitration cases and the increased numbers of arbitration institutes newly set up in China. Chinese courts are becoming more open to arbitration, as can be seen from the decreased rate of the court's rejection of arbitration awards. It can also be seen from the revisions made to the Civil Procedural Law of the PRC permitting the court to grant injunctions to preserve property before arbitration proceedings are commenced, which is evidence of a strong message of support from the court to the arbitration business. I anticipate that arbitration in China will be fully developed in the next 10 years.

Xiangman Shan
Senior Partner, Guangzhou
Stephenson Harwood – Wei Tu (China)
T: +86 20 8388 0590
M: +86 138 0252 5603
E: xiangman.shen@shlegalworld.com

Drafting arbitration agreements involving multiple parties and agreements

The ICC Court of Arbitration has published in its latest bulletin further statistics on the new arbitration cases filed with the ICC in 2016. The statistics reveal trend of an increasing number of multi-party arbitrations: slightly less than half of the 1000 new cases filed with the ICC involved three or more parties.

The trend observed by the ICC corresponds to our experience of handling a growing number of arbitral disputes involving multiple related contracts or multiple claimants or respondents. The incorporation by numerous arbitral institutions (such as the ICC and SIAC) of flexible rules is undoubtedly a contributory factor to this growing trend in international arbitration. These rules allow for the commencement of a single arbitration proceeding in respect of multiple related contracts, joinder of additional parties and consolidation of multiple arbitration proceedings.

The release of the ICC statistics underscores the importance of parties making adequate provision in their dispute resolution clauses when drafting and negotiating their contracts. Parties who desire an efficient and stream-lined process should consider arbitration agreements that are able to cater to the potential situations where multiple parties (i.e. more than two) or multiple agreements are involved. In particular, back-to-back transactions which involve investment and shareholding agreements, financing agreements or supply and long-term maintenance agreements would substantially benefit from properly drafted clauses. Such clauses should state in clear terms the parties' intention to allow for a multi-party or consolidated arbitration proceeding. Alternatively, the clause could simply incorporate by reference the latest edition of rules from many of the more popular arbitral institutions which already contain provisions tailored for such type of disputes.

Germaine Chia
Senior Associate, Singapore

T: +65 6661 6522
M: +65 9619 6374
E: germaine.chia@shlegalworld.com

Shanghai Court refuses to enforce SIAC expedited arbitration award

The Shanghai First Intermediate Court has dismissed an application seeking leave to enforce an arbitral award of a sole arbitrator issued by the Singapore International Arbitration Centre (**SIAC**) pursuant to its expedited arbitration procedure because the arbitration was not conducted in accordance with the parties' procedure.

Background

The Seller, Noble Resources International Pte, entered into a contract governed by Singapore law for the sale and purchase of iron ore with the Buyer, Good Credit International Trade Co., Ltd. Disputes were to be submitted to a panel of three arbitrators in Singapore in accordance with SIAC Arbitration Rules (5th Edition, 2013) (**the SIAC Rules**).

A dispute arose between the parties. The Seller applied to the SIAC for it to be determined in accordance with the expedited procedure set out in Rule 5 of the SIAC Rules. The Buyer objected to the use of the expedited procedure due to complexity of the dispute. The SIAC granted the Seller's application. Thereafter a sole arbitrator was appointed. In the ensuing proceedings, the Buyer did not participate. The arbitrator made an award in favour of the Seller, who applied to the Court for leave to enforce it in China.

The court proceedings

The Buyer resisted enforcement of the award on two grounds, namely that the arbitration clause was not properly incorporated into the contract and that the composition of the tribunal did not conform to that agreed to by the parties in the arbitration agreement. The Court rejected the Buyer's first argument, and held that the arbitration agreement had been properly incorporated into the parties' contract.

As to the second ground, the Court found that the arbitral award ought not to be enforced because "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*" pursuant to Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Court considered the parties' express choice of three arbitrators in their arbitration agreement in light of the SIAC Rules that had also been incorporated. Rule 5.2 of the SIAC Rules provides that in expedited proceedings the "*case shall be referred to a sole arbitrator, unless the President determines otherwise*". The Court found that the President's discretion in constituting a tribunal under the expedited process required him to give effect to the parties' express agreement. The Court held that the terms of the arbitration clause were to take precedence over the SIAC Rules that had been incorporated by reference and, therefore, the appointment of a sole arbitrator was in breach of the parties' express agreement. As a consequence, the Court refused to enforce the award under Article 283 of the *Civil Procedure Law of the People's Republic of China* and paragraph 1 of Article 5 of *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

Analysis

It is not clear from the Court's analysis what law it applied to determine whether the appointment of a sole arbitrator was in accordance with the parties' agreement. The analysis (that the parties' choice of three arbitrators in the arbitration agreement must be respected by the President of the SIAC Court when exercising the discretion in Rule 5.2 whether to appoint a sole arbitrator under the expedited procedure) would likely have been different had traditional common law rules of contractual interpretation been adopted. For example, in the Singapore case of *AQZ v ARA* [2015] 2 SLR 972, it was held that where parties had agreed to a tribunal consisting of three arbitrators, and subsequently had a dispute resolved by a sole arbitrator pursuant to an expedited arbitral procedure under agreed institutional rules, the resulting award ought not to be set aside on the basis that the arbitral procedure did not conform to the parties' agreement.

In any event, the case may have limited repercussions. The SIAC has updated its rules to provide in Rule 5.3 (6th Edition, 2016) as follows: "*By agreeing to arbitrate under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in*

cases where the arbitration agreement contains contrary terms." Had this provision formed part of the SIAC Rules considered the Court, it may have interpreted the parties' agreement differently.

To date, the courts have not had to consider the expedited procedure found in Appendix VI of the International Chamber of Commerce's Rules of Arbitration. Under those rules, disputes valued at less than USD 2 million will by default be determined by a sole arbitrator pursuant to the expedited procedure. The apparent tension between parties' choice of three arbitrators in their arbitration agreement on the one hand, and an expedited procedure which provides for a sole arbitrator on the other, does not arise in the rules of the Hong Kong International Arbitration Centre. Article 41.2(a) of those rules provides that a dispute under the expedited procedure 'shall be referred to a sole arbitrator unless the arbitration agreement provides for three arbitrators'. Where the arbitration agreement provides for three arbitrators, the parties will be invited to agree to refer the dispute to a sole arbitrator. If agreement is not reached, 'the case [is to be] referred to three arbitrators' (41.2(b)).

Timothy Cooke
Partner, Singapore

T: +65 6622 6231
M: +65 9022 1817
E: timothy.cooke@shlegal.com

Kingdom of Lesotho ("Lesotho") v Swissbourgh Diamond Mines (Pty) Limited and others [2017] SGHC 195

Following the decision of the PCA Tribunal (the "Award"), seated in Singapore, in favour of the second, third and fourth defendants, Lesotho sought to have the Award set aside under Article 34(2)(a)(iii) of the Model Law.

This Article provides that a competent court can set aside an arbtration award if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

Background

Lesotho is a member of the Southern African Development Community ("the SADC") and a signatory to the SADC Treaty, Protocol on Finance and Investment ("the Investment Protocol") and Annex 1 thereto.

The first defendants diamond mining interests who were granted mining leases by Lesotho in 1988. However, following the agreement for the Lesotho Highlands Water Project the Lesotho Commissioner of Mines purported to cancel all the mining leases.

This formed the basis of the expropriation claim by the defendants against Lesotho. After exhausting local remedies the defendants commenced proceedings against the Kingdom before the SADC Tribunal.

However, the SADC Tribunal in 2010 was dissolved by the SADC Summit before those proceedings reached a conclusion.

The defendants then commenced *ad hoc* arbitration against Lesotho alleging breach of the SADC Treaty in shuttering the SADC Tribunal without providing an alternative means for the expropriation dispute to be determined.

This resulted in the claim before the PCA Tribunal, which Lesotho sought to set aside before the Singapore High Court (the "Court").

Jurisdiction of the Singapore Court

The defendants firstly challenged the jurisdiction of the Court on the grounds that the Singapore International Arbitration Act (the "IAA") does not apply to arbitral awards containing decisions on both jurisdiction and merits; and secondly Art 34(2)(a)(iii) of the Model Law only addresses situations where the tribunal *exceeded* jurisdiction and not those where it lacked jurisdiction to begin with.

Although the Court agreed that the IAA does not apply to an award dealing with the merits of the dispute *however marginally* it found that it had jurisdiction to set aside the award based on Art 34(2)(a)(iii) of the Model Law. It held that a dispute beyond the bounds of the arbitration agreement falls outside "the terms of the submission to arbitration".

Jurisdiction *ratione temporis*

Art 28(4) of Annex 1 excludes the Tribunal's jurisdiction to a *dispute* arising before entry into force of Annex 1, i.e. 16 April 2010. Citing *Chevron v Ecuador*[1], *ATA v Jordan*[2] and *Modev v USA*[3], the majority of the Tribunal found that a "separate and discrete dispute" had arisen in this case by the shuttering of the SADC Tribunal by the SADC Member States without providing an alternative forum. This discrete dispute arose after the entry into force of Annex 1 and therefore falls within the jurisdiction *ratione temporis* of the Tribunal.

Considerations were:

(a) Whether the two disputes involve the same factual or legal disagreement [171]: in this case one conflict was the unlawful expropriation the other was about the shuttering of the SADC Tribunal;
(b) Whether the two dispute have the same "real cause": the real cause of the shuttering dispute was the Lesotho's approach and conduct towards the dispute resolution process not the alleged expropriation; and
(c) Whether the two disputes target or centre on the same conduct: there were clearly different acts of alleged wrongdoing in this case.

Jurisdiction *ratione materiae*

Under Art 28(1) of Annex 1, the dispute must concern an obligation which relates to "an admitted investment". There are three elements to the Tribunal's material jurisdiction: (a) did the defendants have an investment; (b) was the investment admitted; and (c) did the dispute concern an obligation in relation to an admitted investment.

Did the defendants have an investment?

Because the defendants characterised their dispute as the shuttering dispute rather than the expropriation dispute, the corresponding "investment" was not the mining leases but the right to refer the dispute to the SADC Tribunal. Whereas the majority of the Tribunal had concluded that the mining leases created a bundle of rights of (1) performance and (2) remedies, and the right to refer the dispute was part of the latter, the Court rejected this characterisation. They concluded that the definition of "investment" was limited to the economic value of the investment. It also held that the remedies were not sufficiently connected with the defendants' core investment. Therefore the right to bring proceedings before the SADC Tribunal cannot, for the purposes of Annex 1, be considered an investment.

Was the investment "admitted"?

Given that the right that was being pursued was the right to refer disputes to the SADC Tribunal, the Court considered that the concept of admission is a matter of compliance with the host State's domestic laws and regulations. The defendants' right is accordingly not "admitted" as the term is ordinarily understood since it was not susceptible to admission in accordance with laws of Lesotho.

[1] PCA Case No 2007-02, Interim Award, 1 December 2008
[2] ICSID Case No ARB/08/2, Award, 18 May 2010
[3] ICSID Case No ARB(AF)/99/2, Award, 11 October 2002

Did the dispute concern an "obligation in relation to" an admitted investment?

The Court disagreed with Lesotho's proposition that the "obligation" must be one imposed by and arising under Annex 1 as such an interpretation would be inconsistent with the wording of the Investment Protocol. The Court preferred a broad interpretation including all obligations as long as they relate to the protected investment, because the object and purpose of the Investment Protocol and Annex 1 is to create "a favourable investment climate within SADC with the aim of promoting and attracting investment in the Region".

However, the Court found that none of the four obligations accepted by the majority of the Tribunal are obligations which exist "in relation to" the "admitted investment" in question.

The court therefore concluded that there were no obligations on Lesotho relating to the "admitted investment".

Exhaustion of local remedies

Art 28(1) of Annex 1 also states that disputes may only be submitted to international arbitration "after exhausting local remedies". The Tribunal considered that the "primary or direct remedy" for the purported violation was to provide the defendants with an opportunity to have their case heard, and since there was no such power in Lesotho's domestic courts, no local remedy was available.

However, the Court found that an Aquilian action would have been recognised under domestic law would be able to provide effective redress. The defendants had therefore failed to exhaust all local remedies, a prerequisite under Art 28(1).

Conclusion

The Court therefore held that the Award fell foul of Art 34(2)(a)(iii) of the Model Law by dealing with a dispute not contemplated by and not falling within the terms of the submission to arbitration.

While the court has discretion not to set aside the award even where grounds under Art 34(2) of the Model Law are made out, prejudice had clearly been sustained b
y the aggrieved party and therefore the court set aside the Award in its entirety.

Andrew Rigden Green
Partner, Hong Kong

T: +852 2533 2761
M: +852 6013 2520
E: andrew.rigdengreen@shlegal.com

Krystal Lee
Trainee solicitor, London

T: +44 20 7809 2220
E: krystal.lee@shlegal.com

Get in touch

Guangzhou

Xiangman Shen
Senior partner
Stephenson Harwood – Wei Tu (China)
T: +86 20 8388 0590
M: +86 138 0252 5603
E: xiangman.shen@shlegalworld.com

Hong Kong

Andrew Rigden Green
Partner
T: +852 2533 2761
M: +852 6013 2520
E: andrew.rigdengreen@shlegal.com

Jakarta

Bill Sullivan
Senior adviser
T: +65 6226 1600
M: +62 815 8506 0978
E: bill.sullivan@shlegal.com

Shanghai

Evangeline Quek
Partner
T: +86 21 5385 2299
M: +86 136 3217 8216
E: evangeline.quek@shlegal.com

Singapore

Timothy Cooke
Partner
T: + 65 6622 6231
M: + 65 9022 1817
E: timothy.cooke@shlegal.com

Seoul

Michael Kim
Partner
T: + 82 2 6138 4888
M: + 82 10 2005 1690
E: michael.kim@shlegal.com

Yangon

Tom Platts
Partner
T: +65 6622 9641
M: +65 8233 3245 (Singapore)
M: +95 2651 1218 (Yangon)
E: tom.platts@shlegal.com

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