Foreign Attorneys as Party Representatives in Arbitrations Seated in PR China

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The arbitration laws of many established arbitral jurisdictions, for instance, the English Arbitration Act 1996, German Code of Civil Procedure, the Swedish Arbitration Act 2019 (see post on the revised Act here) and the US Revised Uniform Arbitration Act, place no restrictions as to who may act as a party representative in an arbitration. The same is true under the UNCITRAL Model Law on International Commercial Arbitration.

In terms of institutions, the arbitration rules of major Chinese arbitral institutions generally do not contain limitations on party representative's nationality or qualification either. In fact, Article 22 of the CIETAC Arbitration Rules 2015 explicitly allows this by providing that "[a] *party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration*".

Some Chinese legislation do, however, impose restrictions on the role of foreign attorneys in arbitrations. The Regulations on the Administration of Resident Representative Offices in China of Foreign Law Firms ("**the Regulations on Foreign Law Firms**") are "*applicable to the establishment of representative offices in China by foreign law firms and the legal service activities they conduct*" (Article 2). Article 15 of the Regulations on Foreign Law Firms provides that a representative office and its representatives may only conduct activities "*other than matters relating to the laws of China*".

Article 32 of the Implementation Provisions of the Ministry of Justice on the Regulations on Foreign Law Firms (2004 Amendment), ("**the Implementation Provisions**") provides that:

> "[t]*he following acts shall be recognized as 'matters relating to the laws of China' specified in Article 15 of the Regulations on Foreign Law Firms: … (4) provide opinions on the application of the laws of China as a representative in arbitration activities …*".

The above-mentioned provisions of the Regulations on Foreign Law Firms and the Implementation Provisions convey that foreign law firms' representative offices in PR China and their representatives shall not provide opinions on the application of Chinese laws. However, these provisions do not prohibit such representatives from acting as party representatives in arbitrations in PR China even if the arbitration proceedings are governed by Chinese law. In fact, this is not uncommon in arbitration cases in PR China involving at least one foreign party.

A more difficult issue arises from Article 16 of the Regulations on Foreign Law Firms, which provides that "[a] *Representative Organization shall not hire Chinese practicing lawyers, and the supporting personnel hired by such Representative Organization shall not provide a party concerned with legal services*".

In practice, the representative offices of foreign law firms can and do hire lawyers qualified in PR China. The real effect of this Article 16 is: (a) by joining such an office, a PR China-qualified lawyer will be temporarily suspended from the Bar; and (b) work experience in such an office does not count towards the "internship period", which is required before those who have passed the bar examination can be admitted to the Bar in PR China.

Article 16 also leads to an interesting staff composition in the representative offices of foreign law firms in PR China. Often, only one or two foreign lawyers will be registered as "representatives", with the majority of employees instead seen as "supporting personnel" in the eyes of the Ministry of Justice and its local branches. From the perspective of strict legal compliance, these employees are not allowed to provide any legal services. In reality, such personnel may provide the bulk of such services.

In the case of *Yi Zhong Min Te Zi* [2013] No.6539, the Beijing First Intermediate People's Court addressed the issue of legality of foreign attorneys acting as arbitration representatives in PR China. In the Application for Arbitration submitted by the claimant, the arbitration representatives were two foreign citizens and their law firm's name was stated before their name. After the award was rendered, the award debtor applied to the Court to set aside the award based on, *inter alia*, the ground that the claimant entrusted foreign attorneys to participate in the arbitration proceedings as representatives and thus violated the applicable procedural laws.

In defense, the award creditor argued: firstly, the two representatives bore the identity of foreign citizens rather than attorneys; secondly, the relevant information of the two representative as set out in the arbitration documents was a description of their personal information and their address for contact, which could not be used as evidence as to the identity with which they participated in the arbitration.

The Court found that the inclusion of the name of the law firm before the name of the representatives in the Application for Arbitration did not equate to those representatives having acted as attorneys of the law firm in the arbitration. Therefore, the Court held that the claims of the award debtor lacked factual basis.

In this case, the Court ruled that foreign attorneys can act as party representatives in arbitrations in the capacity of foreign citizens, but the Court did not express whether foreign attorneys can act as party representatives in arbitrations in the capacity of attorneys. In my view, whether foreign attorneys represent a party in arbitration as foreign citizens or as attorneys makes no difference to their role as foreign attorneys in the arbitration proceedings, nor does it violate the Arbitration Law or other laws or regulations of PR China.

In comparison, section 63 of the Hong Kong Arbitration Ordinance (Cap. 609) provides:

> "*Section 44 (Penalty for unlawfully practising as a barrister or notary public), section 45 (Unqualified person not to act as solicitor) and section 47 (Unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance (Cap. 159) do not apply to — (a) arbitral proceedings; (b) the giving of advice and the preparation of documents for the purposes of arbitral proceedings; or (c) any other thing done in relation to arbitral proceedings, except where it is done in connection with court proceedings— (i) arising out of an arbitration agreement; or (ii) arising in the course of, or resulting from, arbitral proceedings.*"

In Hong Kong-seated arbitrations, the parties concerned therefore may choose representatives, consultants and attorneys with a higher degree of freedom, regardless of their qualification or nationality. In this respect, Hong Kong is one of the most arbitration friendly jurisdictions in Asia. Note however that, the exception in section 63 of the Hong Kong Arbitration Ordinance does not extend to court proceedings connected to an arbitration, and such applications will have to be made by lawyers with the appropriate qualifications and rights of audience.[1)]

In my view, the approach in the HK Arbitration Ordinance should be preferred over the Arbitration Law of PR China. First, the cornerstone of arbitration is party autonomy. A party's right to authorize anyone to represent itself in the arbitration proceedings should not be restrained. Second, unlike professional bar qualifications required for litigation in court, there is no basis for prohibiting foreign lawyers to appear before an arbitration tribunal as a party's attorney. Third, it is not uncommon that the applicable substantive law of an arbitration case is the law of a country different than the seat of arbitration (the "**foreign law**"), including in PR China-seated arbitrations. Under these circumstances, it is natural and makes practical sense for a party to authorize lawyers practicing the "foreign law" as its attorney.

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