

Choose Foreign Arbitration for Dispute Resolution? Shagang and HNA Drama

Description

The whole thing, the legal battle between Shagang and HaiNan Aviation Group (HNA), has turned into a public event after more than 2000 passengers were affected in respect of their otherwise pleasant voyage.

The eruption of the row between the two companies that are mainly operating within China has raised a good question: why the hell do they choose to resolve their dispute in UK rather than China as both of them are operating in China (though both registered in HK)?

It is unclear which party of the two initiated to choose a foreign forum for dispute resolution outside of China. But the rationale of such choice, as reported in news, is that foreign arbitration and/or litigation is more fair and just than Chinese counterparts. What else could it be?

As a Chinese lawyer practicing law in Shanghai, I will not try to defend China judicial systems in terms of its justice and fairness. There are simply too many disclosed cases online that cast doubts over justice upheld by Chinese courts. The biggest problem in China's judicial systems or court systems is that Chinese courts are not exercising judicial powers independently, rather that they are easily and substantially affected or influenced by non-legal factors, such as political atmosphere, social media and personal connections. Indeed, foreign investors or businessmen have well taken note of this and localized their business behaviors in China, which has led to high-profile corruption cases involving foreign investor. A case in point is GSK scandal.

What Other Pros of Choosing Foreign Arbitration

It is a common practice that foreign investors in China choose a foreign arbitration as the primary way of dispute resolution. The pros are that foreign arbitration is more fair and flexible in resolving disputes, and maybe more efficient compared with litigation. As a result of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a foreign arbitration award can usually be enforced in China as well as in other countries to the Convention. In this sense, a clear advantage of arbitration is that the winning party can launch efforts against the failing party in all countries that are parties to the Convention so long as there are meaningful assets available for attachment. This is particularly useful when the failing party is a multinational company operating globally.

What Cons of Choosing Foreign Arbitration

So far as Chinese laws are concerned, an obvious disadvantage of arbitration by contrast to litigation is that in an arbitration proceeding, there is no concept of third party to the said proceeding. In other words, arbitration can only deal with disputes between the parties who have expressly subjected themselves to arbitration jurisdiction and cannot include any other party however closely related into the proceeding. The same seems to be true of foreign arbitration. In the case between Shagang and HNA, the arbitration court had only adjudicated the dispute between Shagang and HNA while leaving HNA Group, the guarantor in respect of the transaction between Shagang and HNA, out of the

arbitration proceeding. Thus, Shagang shall have to institute another lawsuit against HNA Group based on the performance guarantee/bond. Apparently, there is no arbitration clause in the performance bond so Shagang has to turn to UK court for help.

I am not sure about whether it is possible for a creditor to sue its debtor and guarantor in the same litigation proceeding in a foreign jurisdiction. However, if the dispute is adjudicated in a Chinese court, it is possible for Shagang to sue HNA and its parent at the same time in the same court proceeding, which will save Shagang a lot of time and money in protecting itself.

On the other hand, though a party to the NY Convention has the obligation to recognize and enforce a foreign arbitral award, it is understandable that foreign courts may scrutinize the foreign arbitral awards in a much more stricter sense. Application for recognition and enforcement itself is a time-consuming process.

Another often cited drawback of using arbitration instead of litigation is that it is much slower for one party seeking to attach the properties or assets of the other party in the arbitration proceeding than in litigation. Here in China, asset attachments or other conservatory measures are taken only by courts. A party to an arbitration proceeding can only apply through the arbitration court to proper court to take such conservatory measures. By contrast, in a court litigation proceeding, it is much easier for one party to get the court to attach the assets of the other party who may fail in the end. Time is often of essence in such cases. The defaulting party or likely-to-fail party may take the time to transfer or conceal their properties and assets, which may leave the winning party with nothing to get under the arbitration award.

So it is a question that shall be carefully examined and considered by a foreign investors or businessmen when signing business contracts with Chinese companies or merchants. Professional advice is necessary but shall be tailored to the specific conditions surrounding the parties and the deals in question.



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