

# Judicial Supervision in International Commercial Arbitration

## -- Lessons from the Zueblin Case in Mainland China

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The Award on Zueblin Case (the “ICC Award”) is an arbitral award which was made in Shanghai by the ICC Arbitrator in accordance with the Rules of Arbitration of the International Chamber of Commerce (the “ICC Rules”) and under the administration of the Court of International Arbitration of the International Chamber of Commerce (the “ICC Court”)<sup>1</sup> on March 30, 2004. The Chinese Courts’ Supervision on Zueblin Case covered not only the arbitration agreement, but also the recognition and enforcement of the ICC Award. As a result, the Zueblin Case is a typical case of international commercial arbitration in which the Chinese courts exercised their power of judicial supervision. The paper intends to offer a comparative study on judicial review on the international commercial arbitration and then discuss judicial supervision exercised by Chinese Courts in the Zueblin Case from academic perspectives. The point in the paper represented nobody’s view but the author’s own.

### I. A Brief Introduction to Zueblin Case

On 22 December 2000, Zueblin International GmbH, Germany (“Zueblin”), entered into an agreement (the “Agreement”) with Wuxi Woco-Tongyong Rubber Engineering Corporation, a wholly-foreign-owned enterprise in Wuxi, Jiangsu Province, China (“Woco”), under which Zueblin agreed to construct a factory for Woco in Wuxi, Jiangsu Province of China. The two-page Agreement incorporated the FIDIC Green Book General Conditions by reference in its appendix. The last line of the second page of the appendix to the Agreement provides: “Arbitration 15.3 ICC Rules Shanghai shall apply” (the “Arbitration Clause”).

The parties disagreed on the payment of construction work. Woco brought the dispute to the People’s Court of High-New Technology Development Zone of Wuxi, Jiangsu Province of China (the “Wuxi District Court”) on 10 October 2002. Zueblin challenged the jurisdiction of the Wuxi District Court based on the Arbitration Clause. Woco later changed its contract claims to the tort claims. The Wuxi District Court decided that it had jurisdiction over the case, which was confirmed by the

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<sup>1</sup> ICC Court was established in 1923 and its main function is to administer the arbitration cases presented to ICC Court in accordance with ICC Rules. The business place of ICC Court is also in Paris, France.

Wuxi Intermediate People's Court in Jiangsu Province (the "Wuxi Intermediate Court") on 20 February 2003.

In the meantime, Zueblin filed its request for arbitration with the ICC Court on 23 April 2003. One week later, on 29 April 2003, Zueblin applied to the Wuxi District Court for the confirmation of the validity of the Arbitration Clause.

The ICC Court decided that the matter would proceed in accordance with the ICC Rules. The ICC Arbitrator rendered a Partial Award on jurisdiction on 10 November 2003, finding that it had jurisdiction over Zueblin's claims. And the Final Award No. 12688/TE/MW was made in Shanghai on 30 March 2004, in favor of Zueblin (the "ICC Award").

On 2 September 2004, Wuxi District Court decided the Arbitration Clause invoked by Zueblin was invalid in accordance with the Reply of the Supreme People's Court (the "Supreme Court") dated 8 July 2004.<sup>2</sup>

On 30 August 2004, Zueblin applied to Wuxi Intermediate Court for enforcement of the ICC Award. The Wuxi Intermediate Court reported the case to the Higher People's Court of Jiangsu Province, which in turn reported to the Supreme Court in conformity with the reporting system in mainland China. After the Supreme Court's approval, Wuxi Intermediate Court rendered its decision on 19 July 2006, refusing the enforcement of the ICC Award because it was made based on the invalid Arbitration Clause under the Chinese law (the "Decision").<sup>3</sup>

The Decision pointed out that, after a judicial review of the Zueblin Case, the Wuxi Intermediate Court confirmed that the Zueblin Case concerned the recognition and enforcement of a foreign award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Simultaneously, the Wuxi Intermediate Court also held that the ICC Award of the Zueblin Case was an award not considered as domestic under the New York Convention.

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<sup>2</sup> "Adjudication Guidance for the Foreign-Related Commercial and Maritime Cases" edited by Xiao Yang, Wan Exiang, compiled by No.4 Adjudication Division of Civil Cases, Supreme Court, No.3, 2004 (Vol. 9), Supreme Court Press, Beijing, 2005, Chinese edition, at 36. In the Reply the Supreme People's Court opined that absence of the choice of applicable law by the parties, the Chinese law shall apply, which is the law of the state where the place of the arbitration takes place in accordance with the general principle for determination of the proper law of the arbitration clause (The parties agreed that the arbitration place is Shanghai). According to Article 16 of the Arbitration Law of the PRC, a valid arbitration clause shall include all of the following three items: (1) the parties' common intention to settle their dispute by arbitration, (2) matters to be arbitrated and (3) definite arbitration institution. The Arbitration Clause in the Zueblin Case provided the parties' intention for arbitration, applicable arbitration rules and the place of arbitration, without naming a definite arbitration institution. As a result, the said Arbitration Clause should be rendered invalid in accordance with the Arbitration Law of the PRC.

<sup>3</sup> Civil Case Decision No.1, 2004, Wuxi Intermediate People's Court, Xi Min Zhong Zi Min 3 NO.1, 2004 (Chinese edition).

## II. Main Issues Discussed by the Paper

The paper firstly studies the basic theories and practices in the international commercial arbitration legislation and practices, as well as the judicial review in the international arbitration proceedings. It specially deals with the basic concepts and the distinctions between *international*, *domestic* and *foreign* awards, as well as the distinction between an *a-national* award and an *award not considered as domestic* under the New York Convention.

Secondly, the paper studies conflicting jurisdictions and decisions on the Zueblin Case made by the ICC Arbitrator and the Chinese Courts. It discusses the applicable law for the international arbitration agreement. The paper further analyzes the theories and legal basis relied on by the ICC Arbitrator and the Chinese Courts in the process of making their own decision as to the validity of the Arbitration Clause in the Zueblin Case.

Thirdly, the paper studies the nationality of ICC awards. In the past more than eighty years since the establishment of the ICC Court in 1923, even though the business place of the ICC Court is located in Paris, France, ICC awards, rendered by the ICC Arbitrators according to the ICC Rules and under the administration of the ICC Court, were not always made in France. As a result, ICC awards were not always French awards unless the place of arbitration of a particular ICC arbitration case was in France.

Finally, the paper discusses the nature of the ICC Award and the Chinese Courts' supervision in the Zueblin Case. Since the ICC Award on Zueblin was made in Shanghai by the ICC Arbitrator according to the ICC Rules and under the administration of the ICC Court, it should have been considered as a Chinese award. Unfortunately, there is no legal basis for the courts to draw such a conclusion in mainland China. The ICC Award is not considered as a foreign, because it was made in China. As a result, we could consider the ICC Award neither as being a Chinese award under the current law in mainland China, nor as being a foreign award under the New York Convention for the Chinese Courts, where the recognition and enforcement of the ICC Award were sought. We have to qualify the ICC Award as an award not considered as domestic under the New York Convention. But while the Decision of the Wuxi Intermediate Court confirmed it as a foreign award, on the one hand, on the other hand, the Decision also viewed the ICC Award on Zueblin as an award not considered as domestic under the New York Convention. The author points out that the Decision confused a foreign award with an award not considered as domestic under the New York Convention.

## III. Conclusions

The author draws the following conclusions after discussion:

1. The concept of international commercial arbitration should be interpreted in a broad way. An arbitration is considered international if the arbitration agreement involves any international element, including – but not limited to – items such as the place of business of each party, location of the permanent arbitration institutions, or the place of arbitration and so on, other than pure domestic arbitration without any foreign elements.
2. The term “International arbitral awards” refers to as awards with international elements. Such awards shall include not only those awards made in the territory of the state other than the state where the recognition and enforcement are sought, but also arbitral awards made in the territory of the state, where recognition and enforcement are sought.
3. An award not considered as domestic under the New York Convention is neither a local nor a foreign award for the court of the state where such award was made and where at the same time its recognition and enforcement are sought.
4. National courts are obligated to supervise international arbitration in accordance with both its domestic law and the New York Convention, to which the relevant State is a Party. Judicial review aims at placing the voluntary settlement of disputes by arbitration under the rule of law. The content of judicial review in international arbitration proceedings covers review of the arbitration agreement, the arbitration procedure and the arbitral award.
5. In the Zueblin case, both the ICC Arbitrator and the Chinese Courts were entitled to decide on the validity of the arbitration agreement and on their jurisdiction: The power of ICC Arbitrator was granted by the Arbitration Clause and the applicable ICC Rules, while the power of the Chinese Courts in Mainland China was based upon local law.
6. The ICC Award in the Zueblin Case should have been considered as a Chinese award according to international arbitration legislation and practice. This is so because it was made in Shanghai, mainland China, in accordance with the applicable ICC Rules and under the administration of the ICC Court, Paris, France.
7. For the Courts in mainland China, where the ICC Award was made and its recognition and enforcement are sought, the ICC Award on the Zueblin Case was neither a Chinese award in mainland China nor a foreign award, but an award not considered as domestic under the New York Convention. The legal reason is not that it was made under the ICC Rules and the administration of the ICC Court, but because of the stipulations of current Chinese Law. The Decision of the Wuxi Intermediate Court on the Enforcement of the ICC Award confused the foreign award with an award not considered as domestic under the New York Convention.