CITATION: Tianjin v. Xu, 2019 ONSC 628
COURT FILE NO.: CV-18-00602425-00CL
DATE: 20190308

2019 ONSC 628 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

APPLICATION UNDER the *International Commercial Arbitration Act, 2017*, S.O., 2017, c. 2, Sched. 5 Rule 14.05(3)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

BETWEEN:	)	
TIANJIN HUARONG EQUITY INVESTMENT FUND PARTNERSHIP (LIMITED PARTNERSHIP) and SHANGHAI LIYI EQUITY INVESTMENT CENTER (LIMITED PARTNERSHIP)	)	*Chloe A. Snider* and *Kristy Warren*, for the Applicants
Applicants	)	
– and –	)	
SHUQIN XU	)	*Gardner Hodder* and *Yan Wang*, for the Respondent
Respondent	)	
	)	**HEARD:** January 16, 2019

L. A. PATTILLO J.:

Introduction

[1] This is an Application by Tianjin Huarong Equity Investment Fund Partnership (Limited Partnership) ("Tianjin Huarong") and Shanghai Liyi Equity Investment Center (Limited Partnership) ("Shanghai Liyi"), (the "Applicants"), pursuant to the *International Commercial Arbitration Act*, *2017*, S.O. 2017, c. 2, Sch. 5 (the "*Act*") for an order recognizing and making enforceable in Ontario an arbitral Award issued by the Chinese International Economic and Trade Arbitration Commission ("CIETAC") on September 11, 2017 (the "Award") against the Respondent Shuqin Xu ("Xu") finding her, along with the other respondents to the arbitration, jointly and severally liable to pay to the Applicants RMB 51,398,996.30 (approximately $10 million CDN). The Applicants seek an order requiring Xu to pay to the Applicants an amount in Canadian currency sufficient to satisfy the Award.

Background

[2] The Applicants are limited partnerships located in China.

[3] Xu is a Chinese national who immigrated to Canada in 2009. Until October 2018 she owned and resided at 165 Norton Avenue in Toronto. Prior to coming to Canada she resided in China with her husband, Jinlong Huang ("Huang") from whom she separated in 2013 and subsequently divorced in 2017. She continued to travel to China until 2013 and since then has only returned to China on one or two occasions in 2016 for a family emergency. She continues to communicate with her former husband through their sons.

[4] Xu and her former husband are shareholders of Putian Zhonghong Investment Industrial Co., Ltd. ("Putian Zhonghong") and Putian Southeast Xiangmi Industry Development Co., Ltd. ("Southeast Xiangmi").

[5] On October 29, 2011, the Applicants entered into an investment agreement in China with Huang, Xu, Putian Zhonghong, Southeast Xiangmi and others which provided that Tianjin Huarong would acquire 1.98% of the shares of Southeast Xiangmi for a subscription price of RMB 20,000,000, and Shanghai Liyi would acquire 2.96% of the shares of Southeast Xiangmi for a subscription price of RMB 30,000,000 (the "Investment Agreement").

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[6] Article 6.7 of the Investment Agreement provided, among other things, that in the event one of certain enumerated circumstances occurred, the Applicants had the right to choose a "transaction reversal" and require Huang, Xu, and Putian Zhonghong to repurchase all the shares they had acquired at the subscription price plus simple interest at 10%. On May 8, 2013, the Applicants issued a notice to Huang and Xu pursuant to the Investment Agreement seeking, among other things, the transaction reversal. They gave notice to Xu and her husband that they were seeking repayment of their capital in full within one year, as provided for under Article 6.7 of the Investment Agreement. Xu and her husband did not comply with this demand and the parties were unable to resolve their dispute.

[7] Article 10.2 of the Investment Agreement provides, in part, that in the event a dispute arising from the Investment Agreement cannot be resolved by negotiation, "either party shall have the right to submit such dispute to China International Economic and Trade Arbitration Commission (Beijing) for arbitration in accordance with the valid arbitration procedures and rules of the Commission at the time." Article 10.2 further provides that the arbitration tribunal shall be composed of three arbitrators designated in accordance with the arbitration rules and the award "shall be final and binding for all parties."

[8] On April 6, 2016, the Applicants submitted the dispute to CIETAC for arbitration naming Huang, Xu, Putian Zhonghong, and Southeast Xiangmi as the respondents on the arbitration (the "Arbitration"). CIETAC subsequently sent Notice of the Arbitration, together with CIETAC's Arbitration Rules, effective as of January 1, 2015 (the "CIETAC Rules"), and a list of arbitrators to both the Applicants and the respondents on the Arbitration. Each of Huang, Putian Zhonghong, and Southeast Xiangmi subsequently appeared and took part in the Arbitration. Xu did not appear.

[9] Following a ruling on March 27, 2017 dealing with jurisdiction, CIETAC designated three arbitrators to hear the dispute as provided by Article 27 of the CIETAC Rules. The Arbitration hearing began on April 28, 2017. The Arbitration tribunal issued the Award on September 11, 2017.

[10] Paragraph 9 of Article 49 of the CIETAC Rules provides that the arbitration award is "final and binding" upon the parties and neither party may bring a lawsuit or make a request to any other organization for revision of the award.

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[11] On July 30, 2018, the Applicants commenced this Application pursuant to the *Act*, seeking an Order recognizing and making enforceable the Award in Ontario, and an Order requiring Xu to pay to the Applicants an amount in Canadian currency sufficient to purchase the amount of RMB 51,398,996. As of close of business on December 14, 2018, UTC, the RMB-CAD exchange rate was 0.19373. Based on this exchange rate, CAD $9,957,527 is the amount in Canadian currency sufficient to purchase the sum of RMB 51,398,996.

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The *Act*

[12] The *Act* sets out the procedure for the enforcement of international arbitration awards in Ontario by providing that both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (the "Convention") and the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended by the United Nations Commission on International Trade Law on July 7, 2006 (the "Model Law") (both of which are set out as Schedules to the *Act*), have the force of law in Ontario.

a) The Convention

[13] In *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649, Rothstein J. described the purpose of the Convention as follows at paragraph 9:

> **9** The New York Convention was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. The purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply worldwide. It requires each Contracting State to recognize and enforce arbitral awards made in the territory of another State, and that recognition and enforcement can only be refused on the limited grounds set out in art. V (see Appendix B). Pursuant to art. I, the obligation to recognize foreign awards applies not only to awards granted in other Contracting States, but also to those granted in all States other than the one in which enforcement is being sought, regardless of whether or not they are party to the Convention.

[14] Article 1 of the Convention provides that it applies "to the recognition and enforcement of arbitral awards made in the territory of a State other than the State

where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

[15] Article IV of the Convention provides that to obtain recognition and enforcement of an award, the party applying shall, at the time of the application supply a duly authenticated original award or a duly certified copy thereof; the original arbitration agreement or a duly certified copy thereof; and if the award or the agreement is not made in the official language of the enforcing country, a certified translation into such language.

[16] Article V of the Convention sets out the grounds upon which recognition and enforcement of the award may be refused. The onus to establish one of the grounds is on the party against whom enforcement is sought.

b) The Model Law

[17] The Model Law was described by Rothstein J. at paragraph 11 in *Yugraneft Corp.* as follows:

> **11** The Model Law was developed in 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). Unlike the New York Convention, which is a treaty, the Model Law is not an international agreement intended for ratification. Rather, it is a codification of international "best practices" intended to serve as an example for domestic legislation. The explanatory note of the UNCITRAL secretariat states that the Model Law
>
> > reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
> >
> > (Model Law, Part Two, at para. 2)
>
> The Model Law has been adopted, subject to some modifications, by every jurisdiction in Canada. Like the Convention, the Model Law limits the ability of national courts to interfere with international arbitration proceedings. Article 36 of the Model Law also limits the grounds on which enforcement of an international arbitral award may be refused (Appendix A). These grounds are essentially identical to those set out in art. V of the New York Convention.

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[18] Article 1(1) of the Model Law provides that it applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States. Article 1(3) provides when an arbitration is international.

[19] Articles 35 and 36 of the Model Law deal with recognition and enforcement of awards.

[20] Article 35(2) provides that the party relying on an award or applying for its enforcement shall supply the original award or a copy thereof and if the award is not made in an official language of the enforcing State, the court may request a translation.

[21] Article 36 sets out the grounds upon which recognition and enforcement may only be refused. The grounds are similar to those in Article V of the Convention.

Position of the Parties

1. The Applicants

[22] In their factum and before me, the Applicants cited and relied on the Model Law. They submit that they have met the requirements for recognition and enforcement of the Award provided for in Article 35 of the Model Law and there are no grounds for refusing recognition and enforcement pursuant to Article 36.

[23] In support of the Application, the Applicants have filed with the court copies of the Investment Agreement and the Award together with certified translations of Article 10.6 of the Investment Agreement (the Arbitration Agreement) and the Award.

2. Xu

[24] In her factum Xu submitted that the court should not enforce the Award because she did not receive notice of the arbitral proceedings and was therefore unable to present her case. She submits that service should be in accord with the Hague Convention.

[25] In argument before me, Xu raised a second defence to the Application. She submitted that because the arbitration was not an "international commercial

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arbitration" as defined in the Model Law, the court has no jurisdiction to enforce the Award under the *Act*.

[26] The Applicants objected to Xu's jurisdiction argument on the ground that they had only received notice of it on the eve of the hearing and had not been able to respond. Given the importance of the matter in dispute, I ordered at the end of the hearing that Xu should file further written argument on the issue of jurisdiction and the Applicants should respond. Both parties have submitted additional written argument on the issue.

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Analysis

1) Service

[27] Article 36(1)(a)(ii) of the Model Law provides:

> 36(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

[28] Xu submits that she did not receive notice of the arbitral proceedings or the appointment of arbitrators and therefore was unable to present her case. In her affidavit, Xu says that the first time she learned of the arbitration in Canada was on or about August 1, 2018 when she received a letter from the Applicants' lawyer. Before that she says she did not receive any arbitration documents or the Award.

[29] In *Rusk Renovations Inc. v. Dunsworth*, 2013 NSSC 179, 331 N.S.R. (2d) 187, at paras. 19 to 22, the Nova Scotia Supreme Court considered the meaning of "proper notice" in Article 5.1(b) of the Convention (identical to Article 36(1)(a)(ii) of the Model Law) to be informed by the *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234 and the arbitration agreement between the parties in circumstances where the parties against whom the award was sought to be enforced were neither parties to the arbitration agreement or served with a demand for arbitration as required by the arbitration agreement.

[30] In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambaltovy S.A.*, 2017 ONCA 939, 70 C.L.R. (4th) 51, the Court of Appeal considered the fairness or natural justice portion of Article 36(1)(a)(ii) of the Model Law (previously Article 34(2)(a)(ii)) in respect of being otherwise unable to present one's case.

[31] More on point with respect to service, American authorities have held that the proper notice requirement will be satisfied where the form of notice given was reasonably calculated to inform the party of the arbitral proceedings and give them an opportunity to respond. See: *Tianjin Port Free Trade Zone International Trade Service Co., Ltd. v. Tiancheng International Inc.*, 2018 WL 4502497 (C.D. Cal. 2018) at paras. 4 and 5; *Guang Dong Light Headgear Factory Co. Ltd. v. ACI intern Inc.*, 2005 WL 1118130 (D. Kan. 2005); *Nanoelectro Research and Production Co. v. Alphysica Inc.*, 2018 WL 3795889 (D. Mass. 2018). In my view, that is a reasonable standard to apply to determine what constitutes "proper notice."

[32] As noted, the Arbitration Agreement between the parties provides that the Arbitration is to be in accordance with the CIETAC Rules.

[33] The CIETAC Rules provide that the party submitting the dispute must provide, among other information, the names and addresses of the Claimant and Respondent. If CIETAC accepts the case and finds that the arbitration application to be complete, the Arbitration Court shall send a Notice of Arbitration to both parties together with copies of the CIETAC Rules and CIETAC's Panel of Arbitrators (Article 13).

[34] With respect to service/notice, Article 8 of the CIETAC Rules provides:

> 1. All documents, notices and written materials in relation to the arbitration may be delivered in person or sent by registered mail or express mail, fax, or by any other means considered proper by the Arbitration Court or the arbitral tribunal.
>
> 2. The arbitration documents referred to in the preceding Paragraph 1 shall be sent to the address provided by the party itself or by its representative(s), or to an address agreed by the parties. Where a party or its representative(s) has not provided an address or the parties have not agreed on an address, the arbitration documents shall be sent to such party's address as provided by the other party or its representative(s).

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> 3. Any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, place of registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, place of registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention.

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[35] In the absence of the CIETAC Rules providing for service in accordance with the Hague Convention, there is no requirement that service of notice of the arbitral proceedings or the arbitrators must be done in accordance with it.

[36] The Award sets out in some detail the steps taken by CIETAC concerning service of the Notice of Arbitration and other Arbitration materials following the Applicants submission of the dispute to arbitration on April 6, 2016. In addition, the affidavit of Jie Fang filed by the Applicants in support of the Application also deals with the steps taken to serve Xu with the arbitration materials. Together they set out the following steps which were taken to serve Xu with notice of the Arbitration:

> i. On May 9, 2016, the Court of Arbitration sent the Arbitration Notice, the CIETAC Rules, and the List of Arbitrators (the "Case Materials") to the Respondents and the Petitioners. Xu's Case Materials were sent to 269 Guohuan East Road, Hanjiang District, Putian, Fujian Province, which was the address for notice to Xu set out in the Investment Agreement and also the address to which the Case Materials for Huang, Putian Zhonghong, and Southeast Xiangmi were sent. Xu's Case Materials were returned to CIETAC for the following reason "the Company refuses to receive [the mailed case materials]; this person has been abroad for years and cannot be located; [the mailed case materials] are to be returned to the original address."
>
> ii. On May 20, 2016, the Court of Arbitration sent a letter to the Applicants asking them to confirm "the legal, valid correspondence address" of Xu. The Applicants made inquiries of the local Household Registration Bureau and Bureau of Public Security to obtain information about Xu's address. On June 6, 2016, the Applicants sent a letter to the Court of Arbitration confirming that the 269 Guohuan East Road address was the last known

address of Xu. Accordingly, in accordance with the CIETAC Rules, the Court of Arbitration mailed the Case Materials to Xu via notarized delivery. The Beijing Zhongxin Notary Office issued a "Notary Certificate" in respect of the delivery.

iii. In June, 2016, Southeast Xiangmi provided two additional addresses for Xu: 165 Norton Ave., North York, Ontario, Canada M2N 4A8 and 159 Guohuan East Road, Huangxia Village, Guohuan Town, Hanjiang District, Putian, Fujian Province.

iv. On June 21, 2016, the Court of Arbitration sent the Applicants response to Southeast Xiangmi's Statement of Objection and Statement of Objection to Jurisdiction to the Respondents, including Xu. Xu's documents were again sent to the 269 Guohuan East Road address via notarized delivery. Once again, the Beijing Zhongxin Notary Office issued a "Notary Certificate" in respect of the delivery.

v. On October 13, 2016, the Applicants submitted a request to CIETAC that the Case Material be mailed to Xu at both the 159 Guohuan East Road address in China and the 165 Norton Ave., North York address in Canada.

vi. On October 25, 2016, the Court of Arbitration sent a letter to Southeast Xiangmi requesting confirmation of Xu's address in Canada. At the same time, CIETAC mailed all of the Case Materials to XU at the 159 Guohuan East Road address. The Case Materials were returned for the reason that "the company refuses to receive [the mailed case materials]; this person has been abroad for many years."

vii. On October 31, 2016, Southeast Xiangmi sent documents to CIETAC that confirmed that the 165 Norton Ave., North York address was Xu's Canadian address.

viii. On November 17, 2016, the Court of Arbitration mailed the Case Materials and all other relevant documents to Xu at her 165 Norton Ave., North York address. They were subsequently returned for the reason "[the mailed materials] were returned upon signing for receipt; receipt of materials refused."

ix. On January 11, 2017, the Court of Arbitration mailed Southeast Xiangmi's submitted evidence to the Applicants and other respondents. The documents were sent to Xu via notarized delivery at her 269 Guohuan East Road address. At the same time, all Case Materials were mailed to Xu via notarized delivery to both her 159 Guohuan East Road address and her Canadian address at 165 Norton Ave., North York.

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> x. Subsequently, on March 27, 2017, the Court of Arbitration sent all relevant documents in respect of the arbitration including the Decision of Jurisdiction, Notice of the Tribunal Formation, and the Notice of Hearing, to all three of Xu's addresses by notarized delivery.
>
> xi. Thereafter, CIETAC sent relevant documents concerning the hearing to Xu by mail including the closing submissions and the Award. CIETAC also notified Xu of the status of the hearing of the arbitration and that if she had any opinions or objections regarding materials, opinions or objections regarding the procedure and substance of the arbitration, or request for another hearing, that she submit same within a stipulated period. Xu never responded.

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[37] In my view, the evidence establishes that Xu was given "proper notice" of both the appointment of the arbitrators (Notice of Tribunal Formation) and of the arbitral proceedings, including the Arbitration Notice and the subsequent Notice of Hearing.

[38] Article 8(1) of the CIETAC Rules set out above permits service "by registered mail or express mail, fax, or by any other means considered proper by the Arbitration Court or the arbitral tribunal." Article 8(2) provides that the arbitration documents shall be sent "to an address agreed by the parties." In circumstances where a party has not submitted an address for service, "the arbitration documents shall be sent to such party's address as provided by the other party or its representative(s)".

[39] In response to the Respondent's argument at the Arbitration that the arbitration panel should suspend the hearing because Xu was not present to give evidence, the Tribunal stated (at p. 50 of the Award translation):

> The Arbitration Tribunal believes that first, the Court of Arbitration of the Arbitration Commission has delivered all arbitration documents related to the case to the Second Respondent, Xu Shuquin, in accordance with the stipulations of Article 8 of the "Arbitration Rules." Upon notice, its failure to attend the hearing and submit relevant evidence and written opinions shall not impact the proceeding of the procedures of this case. Thus, it shall bear the adverse consequences incurred thereby on its own. It is not inappropriate for the Arbitration Tribunal to make the award in accordance with the stipulations of the "Arbitration Rules" and current materials.

[40] The Award together with the evidence of Jie Fang establish that for a period of more than 10 months (May 9, 2016 to March 27, 2017) prior to the hearing of

the Arbitration, the Court of Arbitration of CIETAC sent the Case Materials to Xu a total of seven (7) times to her two addresses in China (four of which were by notarized delivery) and three (3) times to her Canadian address in North York (two by notarized delivery). The three addresses were provided by both the Applicants and Southeast Xiangmi, a company in which Xu was a shareholder. The addresses in China were the address for notice agreed to in the Investment Agreement which Xu signed and the address of Southeast Xiangmi, of which Xu was a shareholder.

[41] There is no issue that at all material times, Xu resided at her Canadian address – 165 Norton Avenue, North York, Ontario, Canada M2N 4A8. Her response to service on her by mail at that address is to say that during the relative period her ex-husband had commenced divorce proceedings against her in China and she therefore refused delivery of any mail from China. That evidence is not sufficient to overcome the substantial burden that she did not receive proper notice of the Arbitration or the arbitrators.

[42] Xu submits that it is incumbent on the Applicants to establish that proper notice of both the appointment of arbitrators and the arbitral proceedings have come to Xu's attention by providing proof of service by CIETAC in the form of an affidavit or documents from CIETAC establishing notarized delivery. I disagree. Under the Model Law, Article 35(2), to obtain enforcement, the Applicants are required to supply the original award or a copy and if the award is not in the language of the court, the court may request a translation of the award. The onus then shifts to the responding party to establish proof in respect of one of the grounds of defence set out in Article 36. See: *Depo Traffic Facilities (Kunshan) Co. v. Vikeda International Logistics and Automotive Supply Ltd.*, 2015 ONSC 999 at paras. 31 and 32.

[43] *Tianjin Port Free Trade Zone International Trade Service Co., Ltd. v. Tiancheng International Inc.* is a case similar in its facts to this case with respect to service. In that case, the District Court for the Central District of California considered a petition to confirm a foreign arbitration award issued by CIETAC pursuant to the Convention. The respondent sought to avoid confirmation on the basis, among other things, that it did not receive notice of the arbitration proceeding. In emphasizing the "proper notice" did not mean "actual notice", the Court stated at in para. 10 of its Conclusions of Law:

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> … Here, the Arbitral Award details CIETAC's efforts to provide proper notice to Tiancheng. The Arbitral Award includes Tiancheng's correct address, and describes dates, manner, and verification of CIETAC's sending, by express mail service, at least four notices of arbitration proceeding to Tiancheng. Like the Ninth Circuit in Linley [*Linley Investments v. Jamgotchian*, 670 F. App'x 627, 628 (9th Cir. 2016)], this Court has "no doubt that the notices … the arbitrator sent by mail … on numerous occasions over a six-month period were reasonably calculated to apprise [respondent] of the overseas arbitration instituted against [it]. [Respondent's] claim that [it] never received those notices is both incredible and unpersuasive." [Emphasis in original.]

[44] Based on the above discussion, therefore, I am satisfied that the numerous attempts of service on Xu of notice of the Arbitration proceedings by the Court of Arbitration of CIETAC including the Notice of Tribunal Formation at her addresses in both China and Canada were in accordance with the CIETAC Rules and more than sufficient to inform her of the arbitral proceedings and give her an opportunity to respond to the Arbitration. Xu has failed to establish proof of the contrary.

2) Jurisdiction

[45] Xu submits this court has no jurisdiction to enforce the Award because the subject arbitration does not meet the definition of international arbitration under the Model Law.

[46] Article 1(3) of the Model Law defines international arbitration. Article 1(4) gives interpretive guidance. They provide as follows:

> (3) An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

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(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

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[47] There is no issue that the arbitration was commercial. The Applicants submit that the arbitration was international as defined by the above definition. Specifically, they submit that as Xu is an individual, reference must be had habitual residence – the place where a person resides for an applicable period of time with intent to stay. In 2011, when the Investment Agreement (which contains the Arbitration Agreement) was entered into, Xu was living in Toronto with the intention of residing indefinitely. At the time of the Arbitration Agreement, therefore, while the Applicants place of business was China, Xu was habitually residing in a different State (Ontario, Canada).

[48] Xu submits that based on the Applicants' evidence that Xu "owned and controlled" Putian Zhonghong and Southeast Xiangmi which are Chinese companies, that her place of business was China. They also rely on the address CIETAC initially used to serve Xu which was the address for Southeast Xiangmi.

[49] The problem with Xu's submission is that both in her affidavit and during her cross-examination, her evidence is that her former husband was the directing mind of the Chinese companies and that she was just a shareholder who acted in accordance with his directions. Further, the fact that Xu's last known address in China was the address for Southeast Xiangmi is not by itself an indication that she was carrying on business in China or that China was her place of business. Her evidence makes it clear that at the time of the Arbitration Agreement she did not have a place of business in China. Accordingly her habitual residence is the governing factor.

[50] Xu also relies on findings by the arbitration tribunal in the Award that the arbitration was not international, that it was domestic to China, there were no "foreign elements", and that the CIETAC Rules applied. I agree with the Applicants submission that having regard to the dispute before the arbitration tribunal, it is obvious that they were not addressing the issue of whether the arbitration was an international arbitration under the Model Law. The arbitration tribunal's statements are not determinative of the issue.

[51] For the above reasons, therefore, there is no issue of jurisdiction to enforce. The subject arbitration is an international commercial arbitration as defined in the Model Law. Further, and if I am wrong that the Model Law does not apply, that does not prevent reformulation within the Application to rely on the Convention.

Conclusion

[52] The Application is therefore allowed. Judgment shall issue recognizing and making enforceable the Award in Ontario and requiring Xu to pay to the Applicants an amount in Canadian currency sufficient to purchase the sum of RMB 51,398,996 at a bank in Ontario listed in Schedule I to the *Bank Act*, S.C. 1991, c. 46 as at the close of business at today's date.

[53] If there is any issue as to what the Canadian currency equivalent is, I may be spoken to.

[54] The parties shall make submissions in writing with respect to both pre and post judgment interest and costs. The Applicants shall file brief submissions of no more than five (5) pages together with a Cost Outline within 10 days of today. Xu shall file her reply, also no more than five (5) pages, together with her Cost Outline, no later than 10 days following receipt of the Applicants' submissions.

L. A. Pattillo J.

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Released: March 8, 2019

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CITATION: Tianjin v. Xu, 2019 ONSC 628
COURT FILE NO.: CV-18-00602425-00CL
DATE: 20190308

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SUPERIOR COURT OF JUSTICE

APPLICATION UNDER the *International Commercial Arbitration Act*, *2017*, S.O., 2017, c. 2, Sched. 5 Rule 14.05(3)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

BETWEEN:

TIANJIN HUARONG EQUITY INVESTMENT FUND PARTNERSHIP (LIMITED PARTNERSHIP) and SHANGHAI LIYI EQUITY INVESTMENT CENTER (LIMITED PARTNERSHIP)

Applicants

– and –

SHUQIN XU

Respondent

REASONS FOR JUDGMENT

PATTILLO J.

Released: March 8, 2019

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