

Enforcement of Foreign Arbitration Awards in the People's Republic of China ("PRC")



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Maritime Arbitration

- The preferred dispute resolution method
- Model Arbitration Clause (CIETAC)
"Any dispute arising from or in connection with this Contract shall be submitted to the China international Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

New York Convention

- New York Convention
 - 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards

- PRC
 - a member state of the New York Convention
 - if the award emanates from a State which is not party to New York Convention and no bilateral agreement between that State and PRC,
 - need to commence Court proceedings in PRC and PRC courts will hear the substantive issues and the Award will merely be evidence

Foreign, Foreign-Related, Domestic Awards

- Foreign Award
 - Obtained in Convention State
 - Obtained in Non-Convention State
- Foreign-Related Award
 - PRC local arbitration commissions
 - China International Economic and Trade Arbitration Commission ("CIETAC")
 - Foreign related?
- Domestic Award

Seat of Arbitration

- Important in enforcing under the New York Convention

Written Agreement to Arbitrate

- Exchange of correspondence or e-mails resulting in an agreement will do

Award final, interim or provisional?

- Provisional -> Not enforceable
- Final -> Enforceable
- Interim -> Uncertainty

PRC Reservations

- Reciprocity
- Commercial legal dispute

Procedure Requirements (1)

- Which Court?
 - Intermediate People's Court
 - Where the business is located
 - Where the losing parties' assets are based

Procedure Requirements (2)

- What documents?
 - Duly authenticated original or certified copy of the Award
 - Copy of the written agreement to arbitrate
 - Certified translation of the Award
 - Notarised document of the applicant's identity
 - Power of Attorney to the firm making the application
 - Original (other) documents in support of the application

Procedure Requirements (3)

- Time Limit?
 - Used to be 1 year (for individual applicant) and 6 months (for company applicant) from the last date for performance of the award
 - Now, **2 years** for both individual and company applicants

Grounds for Refusing to Enforce (1)

- For both foreign and foreign-related awards, PRC Courts cannot look at the merits of the arbitration
- BUT, beware of the various grounds for refusing enforcement (different for foreign and foreign-related awards)

Grounds for Refusing to Enforce (2)

- For foreign-related awards (Civil Procedure Law)
 1. The parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement
 2. The person was not notified to appoint an arbitrator or take part in the arbitration proceedings or was unable to state his opinions due to reasons for which he is not responsible

Grounds for Refusing to Enforce (3)

- For foreign-related awards (Civil Procedure Law) (cont'd)
 3. The composition of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of arbitration
 4. Matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ

Grounds for Refusing to Enforce (4)

- For foreign awards (New York Convention)
 1. Incapacity – one or more of the parties was under some incapacity or the arbitration agreement is not valid under *the applicable laws*
 2. Due Process - the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case

Grounds for Refusing to Enforce (5)

- For foreign awards (New York Convention) (cont'd)
 3. The Award deals with matters falling outside the Arbitration Agreement
 4. The composition of the Tribunal was not in accordance with the Arbitration Agreement or the laws
 5. The Award is not yet binding on the parties, has been set aside or suspended

Grounds for Refusing to Enforce (6)

- For foreign awards (New York Convention) (cont'd)
 6. The subject matter is not capable of settlement under the laws of the country in which the arbitration took place
 7. These are marital, adoption, guardianship, administrative matters and criminal cases
 8. Recognition and enforcement is contrary to public policy in the place where the award is being enforced

Discretion to Allow Enforcement

- New York Convention vs Civil Procedure Law
- The use of the word "shall" in Art. 260 of Civil Procedure Law
 - *"if the person against whom the application is made presents evidence which proves that the arbitral award made by an arbitration organ of the PRC for foreign-related disputes involving any of the following circumstances, the People's Court shall after examination and verification by a collegiate bench formed by the People's Court, rule to deny enforcement of the award....."*

PRC Court Review of Decisions (1)

- Intermediate Court is required to issue its decision within 2 months from the application
- If the Court decides not to grant the order, it should report to the superior court within the same 2 months
- If Intermediate People's Court refuses to recognise and enforce the award, the decision is sent to Higher People's Court for further review
- If Higher People's Court refuses to recognise and enforce the award, the decision is sent to Supreme People's Court ("SPC") for further review

PRC Court Review of Decisions (2)

- Only after the review of SPC then the Intermediate People's Court can publish its written decision
- The process is not public and the parties are not involved
- 80% of awards referred to the SPC are remitted back to lower court for enforcement

Appeals

- Court's decision cannot be appealed (Chapter 16 of the Civil Procedure Law)
- But can be subject to a special review process
- Unlikely to be successful if it has been reviewed by SPC

Procedure for Execution (1)

- Court's enforcement officer has power to automatically enforce against assets of the paying party
- In practice, not always happen
- The applicant should make a further application to Court seeking immediate execution

Procedure for Execution (2)

- Accompanied by an up to date company search
- "local protectionism" may hinder applicants actually obtaining an execution order and payment of sums due

Reciprocal Recognition Regime Between Hong Kong and PRC (1)

- Mutual Enforcement of Arbitration Awards between Mainland China and the Hong Kong SAR
 - A Hong Kong award is treated as a Foreign Award in the PRC
 - Recognition grounds are very similar to those of New York Convention
 - Public policy ground is different – the Court can refuse to enforce a Hong Kong award on grounds that the award violates the "social public interest of the PRC"

Reciprocal Recognition Regime Between Hong Kong and PRC (2)

- Mutual Enforcement of Arbitration Awards between Mainland China and the Hong Kong SAR (cont'd)
 - PRC Courts are limited to challenge the nature of a Hong Kong Award on procedure grounds only
 - Cannot have simultaneous enforcement applications

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