



International Centre for
Settlement of Investment Disputes



Organisation for Economic
Co-operation and Development



UNITED NATIONS
CONFERENCE
ON TRADE AND
DEVELOPMENT

SYMPOSIUM CO-ORGANISED BY ICSID, OECD AND UNCTAD

**MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS:
A COMMON AGENDA**

*12 December 2005, Paris
Room 1, OECD Headquarters, Paris*

**Is Enforcement of Arbitral Awards an Issue for
Consideration and Improvement? —The Case of China**

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For either judicial proceedings or arbitral proceedings, their crucial points are the same: justice and efficiency.

As to efficiency, arbitral proceedings are superior to and more preferable than judicial proceedings because the disputed parties can receive a final resolution after only one instance in the arbitral proceedings.

However, if the final award can not be timely recognized and enforced by the competent court, the superiority of arbitration in respect of efficiency will certainly be weakened or even thoroughly frustrated.

Therefore, the issue of enforcement of arbitral awards in a foreign country is one of the key issues for discussion in international arbitration circles.

In terms of enforcement of arbitral awards in the People's Republic of China, it could be roughly divided into **three** stages: (I) 1949~1978; (II) 1979~1994; (III) 1995~present.

I 1949~1978(about 30 years) : Related-Legislation Blank

In China, after the establishment of the People's Republic of China and before the end of 1978, when China decided to open to the outside world as a fundamental national policy, there had been no formal legislation on the issues of recognition and enforcement for foreign arbitral awards. .

The main reason for this phenomenon was that since 1840, when China was defeated in the notorious "Opium War", a series of unequal treaties were imposed upon her by the western imperialist powers. During the period of 1840~1949, China became a semi-colonial country who increasingly lost her political and economic sovereignty. The so-called "consular jurisdiction" system deprived China of her power to exercise judicial jurisdiction in her own territory. These humiliating and miserable experiences, which lasted for more than one hundred years, sensitized the Chinese people to the possible replay of history by

the potential erosion of their hard-won independence, and hence, the re-subjection into the state of a pitiful respondent or defendant confronted by some uncertain foreign or international arbitral tribunals. The fear of a reoccurrence of the “consular jurisdiction” in any new form is as real as it is palpable. Feelings along the lines of the saying, “once bitten, twice shy; a burnt child dreads fire”, are indeed understandable and pardonable.

II 1979~1994(15 years) : Domestic Legislation Established and International Conventions Acceded To

(1) Promulgating PRC’s Civil Procedure Law (For Trial Use)

The said legislation blank had not been formally filled up until the first promulgation of the PRC’s Civil Procedure Law (For Trial Implementation) , on 8 March 1982. The Article 204 thereof expressly provides:

When a people’s court of the Republic of China is entrusted by a foreign court with the enforcement of a final judgment or arbitral award, the people’s court shall examine it in accordance with any international treaty concluded or acceded to by the People’s Republic of China, or on the principle of reciprocity. If the court deems that the judgment or award does not violate the fundamental principles of the law of the People’s Republic of China or its national and social interests, it shall order to recognize the validity of the judgment or award and enforce it according to the procedure specified in this Law; Otherwise, the people’s court shall return the judgment or award to the foreign court.

However, even though there were contexts referring to “any international treaty concluded or acceded to by” China, China had actually not concluded or acceded to either of the two most important conventions in the world pertaining to foreign or international arbitrations, namely: the United Nations Convention on the Recognition and Enforcement of Foreign Awards of 1958 (hereinafter referred to as the “New York Convention of 1958”) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (hereinafter referred to as the “Washington Convention of 1965”). In other words, China was not then their contracting party.

(2) Acceding to The New York Convention of 1958

It was on 2 December 1986, more than four years later, that China did decide to conclude the New York Convention of 1958, and entered it into force for China on 22 April, 1987. Shortly before this date, on 10 April 1987, the PRC’s Supreme Court released a formal notice asking the courts of all levels in China to seriously enforce the New York Convention. It urged that the Chinese courts of all levels should “immediately organize the economic, civil judges, the executive staffs and other persons related, to study this important convention and carry it out strictly according to its articles.”

(3) Acceding to The Washington Convention of 1965

Even though the New York Convention of 1958 really touched upon the historically sensitive issues relating to China’s judicial jurisdiction and limited its juridical sovereignty, the directly effected people are only the Chinese legal persons and natural persons. And thus, China’s acceding to the New York Convention of 1958 and assuming the related international duties was comparatively understandable and acceptable to China’s officials and legal experts during the mid-1980s. .

However, complications arose when the question became whether China should accede to the Washington Convention of 1965 and accept the ICSID system by agreeing that the State itself or its independent government could be subjected to the role of a respondent or defendant confronted by an uncertain foreign arbitral tribunal. Because it is not only an issue of limiting China’s judicial jurisdiction, but also the issue of potentially undermining China’s political sovereignty as well. As a result, during the

period of the mid-1980s to the early 1990s, there existed long-standing divergences and corresponding discussions among the Chinese officials as well as scholars, around the question of whether China should accede to the Washington Convention of 1965 and accept the ICSID mechanism.

Up to February 1990, after widely absorbing the suggestions of all circles and repeatedly weighing the gains and losses, China eventually decided to participate in the Washington Convention and instructed the then Chinese Ambassador to the United States, Mr. Zhu Qizhen, to sign the Convention of 1965. But actually it was only in early 1993, three years later, that the National People's Congress of China (China's supreme legislative organ) finally ratified the Convention. Consequently, the Convention formally entered into force for China on 6 February 1993.

Due to the history mentioned above, China's sober-hesitation, and weighty consideration prior to accepting the ICSID system is readily seen. It reflects the long-standing resistance of the Chinese people in accepting uncertain foreign arbitration awards.

However, these worries have been gradually overcome in the past fifteen years.

(4) Promulgating PRC's Civil Procedure Law (Formal)

In order to meet the needs of acceding to both the New York Convention of 1958 and the Washington Convention of 1965, and to perform its international obligations therein, a specific Article 269 particularly for the recognition and enforcement of foreign arbitral awards was enacted in the PRC's formal Civil Procedure Law, promulgated in April 1991. It expressly stipulates:

If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court of the place where the party subject to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.

(5) Promulgating PRC's Arbitration Law

Furthermore, the Arbitration Law of the People's Republic of China was adopted by the Standing Committee of the National Peoples Congress on 31 August 1994, and came into force on 1 September 1995. It contains eighty articles in eight chapters, and spells out basic provisions in respect of the scope of arbitration, the arbitration organ, the arbitration agreement, arbitration procedure, the arbitral award and its enforcement, arbitration supervision, foreign-related arbitration, etc. Among others, Articles 9 and 62 of this Law provide that the arbitral award is final and the parties shall have it enforced. If one party fails to comply with it, the other party may apply to court for enforcement. The above provisions are in accordance with the current advanced experiences of arbitration legislation of other countries and international customs. They are designed to effectively expedite China's arbitration system toward modernization and internationalization and are not only welcomed domestically, but also accepted by the international society. To sum up, the Arbitration Law is worthy of praise as a whole.

From the history mentioned above, we can find two main points:

[A] The hesitation, prudence and seriousness of China in acceding to the conventions and accepting related mechanisms had been prolonged for more than forty years since 1949 when the New China was established. It reflects the long existing worries of Chinese people to accept uncertain foreign arbitration awards.

[B] These worries have been gradually overcome during a period of 15 years after 1978 when China began to pursue a New Policy of opening to the outside world.

However, it seems that there are still some points in wording or substantive provisions in the current Arbitration Law that needs to be discussed and further completed.

III 1995~Present(10 years) : Domestic Legislation to be Further Improved

(1) Obstacles from “local-protectionism”

One of the points needed to be discussed and further completed is the absence of detailed provisions on the recognition and enforcement of foreign awards.

In judicial practice in China during the last decade, the recognition and enforcement of foreign awards in some cases have occasionally been confronted with the obstacles from “local-protectionism”. As mentioned above, the tasks of recognition and enforcement of foreign awards are authorized to the local competent courts. On some occasions, the local competent courts could be impacted by the “pressure” from the officials of the local governments, to partially protect the local parties who are subject to enforcement of the foreign awards. In brief, the recognition and enforcement of foreign award may be delayed and/or frustrated by the impacts of “local-protectionism”.

Nevertheless, in a survey of trends in national enactments of other countries, a kind of phenomenon is worthy of note: in order to more strongly prevent the reverse and negative effect of “local protectionism” imposed on the recognition and enforcement of a foreign award, and also in order to more effectively prevent the possible mistakes made by some judges of local courts in judicial examination and supervision over a foreign arbitral award (probably due to their lower professional proficiency), some advanced experience in the practice of international arbitration enactments should be taken for reference. That is, the supervision power to conduct both procedural and substantive examination over domestic and foreign arbitral awards is authorized without exception to some high level courts, which would have judges of a higher caliber, so as to show prudence and to guarantee both justice and efficiency.

For example, such supervision power is granted to the High Court in the United Kingdom¹. Similarly, the supervision and examination power over domestic and foreign arbitral awards is authorized to the Supreme Court in Indonesia and in Australia.² Swiss law provides that such supervision power shall be exercised in principle by the Federal Supreme Court, with the exception that both parties may agree that this power shall be exercised by the specific state court where the arbitration tribunal is located, instead of the Federal Supreme Court.³

Taking into account the special characteristics of China, in particular a large land and unbalanced economy in different provinces-- and on the basis of deep investigation and research--if Chinese legislators deem it necessary to transplant the above experience, they may consider it necessary to stipulate in the Arbitration Law that a special tribunal be established in the Supreme Court, or some high courts of several

1 See Sections 1 (2) , (4) , Arbitration Act 1979 of England; ICA, Doc. VII K. 3, pp.35,37, 1985. After that the Arbitration Act 1996 made some amendments and supplements to the jurisdictional court who accepts the appeal to the arbitral award. It authorized the Lord Chancellor to make provision (a) allocating proceedings under this Act to the High Court or to county courts; or (b) specifying proceedings under this Act which may be commenced or taken only in the High Court or in a county court. See Section 105(1) , (2) , Arbitration Act 1996 of England.;

2 See Article 641, Civil Procedure Law of Indonesia; Article 38, New South Wales 1984 Commercial Arbitration Act (Australia) .

3 See Article 191, Private International Law Act of Switzerland.

developed provinces, which are authorized to deal with those complaints over foreign-related and foreign-made arbitral awards, and to perform overall supervision over both the procedural operation and substantive content of the awards.

(2) “Double Report System” established: to overcome the“local-protectionism”

Since August 8 1995, there is a growing trend in Chinese judicial circles in support of transplanting the aforesaid foreign experiences into China. This indication/sign is reflected mainly in a special “Notice”⁴ which stated expressly that:

The Supreme People’s Court now decides to establish a report system for such issues as a people’s court accepting for dealing with a case of foreign-related economic dispute when there is an arbitration agreement between the parties, or a case of requesting the people’s court to refuse the enforcement of a foreign-related arbitral award, or a case of requesting the people’s court to refuse the recognition and enforcement of a foreign-made arbitral award.”

Such a report system contains two main points: “accepting a case for dealing with” and“making an order”.

First, as to “accepting a case for dealing with”: Any case concerning economic, marine or maritime disputes involving a foreign element, Hong Kong, Macao and Taiwan which is filed upon the local court, if the parties have an arbitration clause specified in their contract or they reach an arbitration agreement afterwards, but the local court considers that the arbitration clause or arbitration agreement is void, has ceased to be effective or cannot be executed due to its vague content, it shall be submitted for examination to the provincial high court in charge of this local district before the local court decides to accept for dealing with the complaint by one party. If the provincial high court agrees to accept the case for dealing with, the provincial high court shall submit its examination opinion to the Supreme Court. Temporarily, the case may not be accepted before the reply from the Supreme Court is given.

Second, as to“making an order”: When any party applies to the local court for the enforcement of an arbitral award made by a Chinese foreign-related arbitration institution, or for the recognition and enforcement of an arbitral award made by a foreign arbitration institution, if the local court considers that the award made by a Chinese foreign-related arbitration institution contains any situation stated in Article 260 of the PRC’s Civil Procedure Law, or the award made by a foreign arbitration institution does not comply with the provisions of international conventions acceded to by China or does not comply with reciprocal rules, the local court shall submit it for examination to the provincial high court in charge of the local district before the local court makes any order refusing the enforcement of the foreign-related award ,or refusing to recognize and enforce the foreign-made award. If the provincial high court agrees to refuse the enforcement of the foreign-related award or agrees to refuse the recognition and enforcement of the foreign-made award, it shall report its examination opinion to the Supreme Court. The local court may not make any order refusing the enforcement of the foreign-related award or refusing the recognition and enforcement of the foreign-made award until the Supreme Court replies.

The purpose of such a“Notice”by the Supreme Court is obviously to strengthen the judicial supervision by the Supreme Court and the provincial high courts over local courts of lower level, through establishing the strict system of “double”reporting and requesting instruction beforehand. Thus, by the strict “double checks”, it may prevent in advance the local courts of a lower level from being affected by the“local-protectionism” in dealing with the recognition and enforcement of a foreign-related award as well as a foreign-made award, thus making an ultra vires order to accept the case with an arbitration

4 See Notice Concerning the People’s Court Dealing with Issues of Foreign-related Arbitration and Foreign Arbitration , by the Chinese Supreme People’s Court , Doc. FA-FA (Court Issuance) No. 18, 1995, August 28,1995..(emphasis is added)

clause (or arbitration agreement) for dealing with without advanced authorization, or making a mistaken order refusing the enforcement of the foreign-related award as well as foreign-made award.

No doubt, such a “double report system” is helpful to maintain the legal effect of the original arbitration agreement made by and between the parties, and to guarantee the correctness and justice of the order “refusing the enforcement” of the foreign-related award as well as foreign-made award. In short, this “Notice” not only provides the effective precautions against “local- protectionism”, but also shows the rule of simultaneous emphasis on both the finality and justice of any correct arbitral award.

However, because the above notice of 28 August 1995 didn’t expressly put down the time limit for the local court and the provincial high court to report upwards step by step, prevention of local-protectionism still cannot be effectuated. In order to amend such a defect, on 21 October 1998, about three years later, the judicial committee of the Supreme Court released another “judicial explanation”⁵, which says:

In case a party applies to the competent local court for the recognition and enforcement of a foreign-made arbitral award according to Article 4 of New York Convention, and the court decides to recognize and enforce the award, the court shall make an order on it within two months after the day it accepts the application. And, if there is no other special situations, the court shall finish the execution within six months right after the day it makes the order. In case the court decides to refuse the recognition and enforcement of the award, it shall report the case for examination to the Supreme People’s Court within two months right after the day it accepts the application, in accordance with the regulations of Notice Concerning the People’s Courts Dealing with Issues of Foreign-related Arbitration and Foreign Arbitration, Doc. FA-FA (Court Issuance) No. 18, 1995, issued by the Chinese Supreme People’s Court

The practical meaning of the new “judicial explanation” is that in case the local competent court wishes to decide not to recognize and enforce the said award, the court must finish three steps **within two months** after it accepts the application. The steps include: (1) the competent local court initially decides not to recognize and enforce the award; then, (2) the competent local court shall report its initial decision on the case to its upper provincial high court for its exam ; (3) in case the provincial high court agrees with the lower charged court not to recognize and enforce the award, the provincial high court shall further report the case to the Supreme Court for its review.

(3) Domestic Legislations need to be further improved

Nevertheless, there is no explicit regulation yet on the time limit within which the Supreme Court itself should give out its final replies on whether it agrees or disagrees with the lower courts. It is certainly a loophole in the new “judicial explanation”. Therefore, **it seems necessary to improve the said judicial explanation at least in the two aspects as follows:**

【 A】 The above “judicial explanation” is not at the highest rank in the legal system in China, and thus, its legally binding effect is not the strongest. So, the said explanation and related regulations should be enacted in the future amended Arbitration Law and its implemental rules, or in the future amended Civil Procedure Law and its implemental rules.

【 B】 In the said law or regulations, a time limit should be stipulated for the Supreme Court to give its final reply to the said competent local court. The time limit should also be no more than two months from the day that the Supreme Court receives the related report from the provincial high court. Such a

5 Regulations on the Recognition and Enforcement of Foreign Arbitral Award, adopted by the 1029 Session, Judicial Committee of the Supreme People’s Court, Doc. FA-SHI (Court Explanation) No. 28, 1998., October 21, 1998.

supplement could certainly be helpful to the timely recognition and enforcement of foreign-related and/or foreign-made arbitral awards without any unreasonable delay.

In brief, as the biggest developing country, China has absorbed a huge amount of foreign investment. It really needs to further improve the Chinese legal environment for foreign investment, bettering its related measures on the enforcement of foreign awards. This is a fair and significant way to accelerate mutual benefits between foreign investors and the host country, and to promote the common prosperity of the world