

**SOME ISSUES RELATING TO  
RECOGNITION AND ENFORCEMENT OF  
FOREIGN ARBITRAL AWARDS IN CHINA**

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# New York Convention

- China is a member state to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
- It has made two reservations:
  - reciprocity reservation;
  - Commercial reservation;
- Recognition and Enforcement of foreign arbitral awards in Mainland China are governed by both the New York Convention and Chinese domestic law.

# Legal Framework Governing Recognition and Enforcement of Foreign Arbitral Awards in Mainland China

- Arbitration Law of the People's Republic of China (PRC) (with 2017 amendments)
  - Article 9: an arbitration award should be final, which means courts would not recognize and enforce decisions in provisional proceedings
  - Article 55: an arbitral tribunal has the power to issue an award first on certain facts (partial award)
  - Article 71: grounds for challenging enforcement of foreign arbitral awards similar to those in NYC (link to the Civil Procedure Law)
- Civil Procedure Law of PRC (with 2017 amendments)
  - Article 283: Chinese courts may deny recognition and enforcement of a foreign arbitral award under any of the grounds set out in article V of the NYC
  - Article 274: setting out grounds for challenging the enforcement of foreign arbitral awards similar to those in NYC, with slight modification: replacing “public policy” with “social and public interest” (*cf. to “public policy” under the NYC*)
  - Article 239: limitation period for commencing enforcement proceedings is two years (Guiding Case No. 37)

# Legal Framework Governing Recognition and Enforcement of Foreign Arbitral Awards in Mainland China

- Awards outside the Jurisdiction of the PRC:
  - 1987 Notice of the SPC on Implementing the New York Convention
    - Article 4: Chinese courts may deny recognition and enforcement of a foreign arbitral award under any of the grounds set out in article V of the Convention
  - Interpretation of the SPC on Certain Issues Concerning the Application of the Arbitration Law of PRC (with 2008 adjustment)
  - Interpretation of the SPC on the Application of the CPL (2015)
- Awards from Hong Kong, Macau and Taiwan:
  - SPC Arrangement in respect of Mutual Enforcement of Arbitral Awards by the Mainland and the Hong Kong Special Administrative Region
  - SPC Arrangement in respect of Mutual Acknowledgement and Enforcement of Arbitral Awards by the Mainland and the Macau Special Administrative Region
  - SPC Directives in respect of Acknowledgment and Enforcement of Arbitral Awards Rendered in Taiwan Region

# Reporting System for Refusal Decision

- Article 2 of the Notice of the SPC on Handling Relevant Issues about Foreign-related Arbitration and Foreign Arbitral Issues by the SPC (1995) requires any judicial decision by an Intermediate People's Court to refuse recognition of foreign arbitral awards to be **reviewed by the Higher People's Court and later by Supreme People's Court.**
- It is a procedural system built in **to ensure a refusal decision is made with proper justifications.**

# Reporting System for Refusal Decision

- The Prior Reporting System (PRS) was designed to apply only in the context of enforcement of foreign or foreign-related arbitral awards or arbitration agreements. It establishes a duty for the Intermediate People's Court to report and request approval from the High People's Court if the former intends to refuse enforcement. If the High People's Court concurs with the opinion of the Intermediate People's Court, the former must further report to the SPC.
- Although the law prescribes overall time limits for such cases (6 months, plus (for foreign awards) 2 months for recognition), the PRS does not provide deadlines for courts to report or to reply to a report.
- The SPC Provisions on PRS (2017) is the extension of the PRS to all arbitration-related cases, whether foreign, foreign-related, or domestic. In other words, no court in China will be able to issue a decision refusing enforcement of an award or an arbitration agreement, or annulling an award, without having obtained the higher court's prior approval. ---the SPC to ensure more consistency in judicial review of arbitration awards.
- What does it mean for the already time-consuming PRS process?

# Grounds for Refusal of Recognition and Enforcement

- **PROCEDURAL MATTERS**

- Challenges based on Article V(1) of the NYC which include:
  - Validity of the arbitration agreement
  - Proper notice
  - Scope of arbitration
  - Composition of the arbitral tribunal and arbitral procedure
  - Binding award

- **JURISDICTIONAL MATTERS**

- Challenges based on Article V(2) of the NYC which include:
  - Arbitrability
  - Social and public interests (Article 274 of the CPL)

# Grounds for Refusal of Recognition and Enforcement

- **PROCEDURAL MATTERS**

- **Courts have no inherent power to review and deny** recognition and enforcement based on grounds set out under **Article V.1** of the NYC on its own without requests from the parties. (*Laibao Recourse Co., Ltd. v Hubei Qinghe Textile Co., Ltd. reported in the Hubei Yichang People's Court (2015) E Yi Chang Intermediate People's Court Ruling No. 1*)

- **JURISDICTIONAL MATTERS**

- Courts may on its own initiative refuse the recognition and enforcement of foreign arbitral awards on grounds set out in **Article V.2** of the NYC



# Distribution of Refusal Cases according to Grounds

- Validity Ground: more than 10 cases;
- Composition Ground: more than 10 cases;
- Proper Notice Ground: around 5 cases;
- Excess of Authority: less than 5 cases;
- Arbitrability: 1 case;
- Social and public interest: 1 case;
- Set aside: 0.

# Arbitrability Ground

- The SPC refused recognition and enforcement of an arbitral award by Mongolian Arbitration Institution
- The justification is that the main decision of the award is to confirm that the applicant is the lawful successor. But Article 3 of the Arbitration Law of the PRC provides that succession disputes may not be arbitrated.

# Social and Public Interest Ground

- A jurisdictional ground for refusing the recognition of foreign arbitral award if granting of such enforcement order would be contrary to social and public interest
- There is no statutory definition of what constitute “social and public interest”
- It is an issue to be decided by judges on a case-by-case basis
- A notable interpretation by the SPC in the judgment of *TCL Air-conditioner (Zhongshan) Limited v Castel Electronics Pty Ltd* stated:
  - ‘the infringement of public interest shall be interpreted as a **violation of the basic principle, infringement of national sovereignty, jeopardizing public security, violation of public policy and other circumstances which will infringe the basic public interest**”

# Social and Public Interest Ground

- Recent case relating to definition of social and public interest:
  - ***Inconsistent finding by the arbitral tribunal with previous judicial judgment:*** When a Chinese court had already made a decision on the issues before an award on the same issues was decided by a foreign arbitral tribunal, the foreign arbitral tribunal was found to have interfered with **Chinese judicial sovereignty** and therefore contrary to public policy to enforce the award (*Hemofarm D.D. Et al v Jinan Yongning Pharmaceutical* [2008] Min Si Ta Zi No. 11) whereas enforcement order was granted because the award was issued before a court judgment so the inconsistency between the award and judgment did not give rise to public policy issue (*c.f. TCL Air-conditioner (Zhongshan) Limited v Castel Electronics Pty Ltd* [2013] Min Si Ta Zi No. 46)
  - ***ONLY ONE FOREIGN ARBITRAL AWARD HAS BEEN SET ASIDE ON THIS GROUND IN THE LAST 20 YEARS ACCORDING TO THIS STATISTICAL STUDY***

# Social and Public Interest Ground

Examples in which claims on social and public interest ground have been rejected by the SPC:

- **ED &F Man (HK) Co. Ltd. v. China National Sugar Wines Group Corp. and Mitsui Corporation (Japan) v. Hainan Textile Industry General Corporation**: violation of compulsory Chinese law does not necessarily mean contravention of social and public interest in China;
- **GRD Minproc Ltd. v. Shanghai Feilun Industrial Co.**: whether an arbitral award is fair and just on the merits is not an criterion to determine whether there is violation of social and public interest in China;
- **Tianrui Hotel Investment Co. Ltd. v. Hangzhou Yiju Hotel Management Co. Ltd.** : evasion of regulations on franchise industry entry restriction doesn't mean violation of social and public interest in China.

# Conclusion

- Strong support of arbitration as an alternative means of dispute resolutions with a goal to develop China as a preferred choice of venue for international arbitration
- Policies and interpretations are in favor of recognition and enforcement of foreign arbitral awards
- Positive judicial attitude towards recognition and enforcement of foreign arbitral awards found in recent cases—misperception about social and public interest

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