

IMPLEMENTATION OF THE NEW YORK CONVENTION IN CHINA

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I. Introduction

In China, the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards² gained the force of law by virtue of the “Decision of the Standing Committee of the National People’s Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Awards” which was adopted on 2 December 1986, and the Convention entered into force on April 22, 1987.³ Since that time, China has recognized and enforced many foreign arbitral awards. According to statistics from a survey by the Supreme People’s Court,⁴ among 74 cases of application for the recognition and enforcement of foreign arbitral awards, arbitral awards were recognized and enforced in 58 cases; and only in 5 cases the applications were denied.⁵

In recent years, China has begun to favor international commercial arbitration. The New York Convention is being implemented strictly, and Chinese courts are trying to interpret it appropriately so as not to pose any unreasonable barrier to international commercial arbitration.

II. Laws and Interpretation of Law about the Application of the New York Convention

The New York Convention is one of the international treaties that can be enforced directly in China. This means that, even though the provisions of the New York Convention are not

transferred into national law,⁶ they can still be invoked in court decisions.

A. Laws and Interpretation of Law

1. Civil Procedure Law

Chinese Civil Procedure Law⁷ contains some fundamental provisions that support international arbitration. Specifically, Chinese courts respect foreign-related arbitration agreements⁸ and allow the party of a foreign arbitral award to apply directly to the competent Chinese court for the recognition and enforcement of that award.⁹

2. Arbitration Law

The Arbitration Law of the People’s Republic of China¹⁰ does not mention the recognition and enforcement of foreign arbitral awards directly, but its provisions regarding respect and validity of arbitration agreements¹¹ mirror those of the New York Convention. Additionally, this law will be applied if the seat of the arbitration is in mainland China.

3. Interpretation by the Supreme People’s Court on Certain Issues

Based on judicial practice, an Interpretation¹² concerning the application of Arbitration Law was passed by the Judicial Committee of the Supreme People’s Court on December 26,

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² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention], available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

³ The New York Convention gained the force of law by virtue of the *Decision of the Standing Committee of the National People’s Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Awards*, adopted on Dec. 2, 1986.

⁴ For this survey, the Supreme People’s Court cooperated with 17 High People’s Courts, from 2002 to 2006.

⁵ Some cases were settled after the date of the statistics. See Honglei Yang, *Report on the Judicial Review of International Arbitration in China Courts*, 1 WUHAN UNIV. INT’L LAW REV. 2009.

⁶ National law, however, plays an important role in the application of the New York Convention.

⁷ Civil Procedure Law of the People’s Republic of China [hereinafter Chinese Civil Procedure Law], promulgated by Order No. 44 of the President of the People’s Republic of China, 9 Apr. 1991, amended 28 Oct. 2007, effective Apr. 1, 2008, available at <http://en.chinacourt.org/public/detail.php?id=2694> (China).

⁸ *Id.* at art. 269 (“The people’s court shall deal with the matter in accordance with the relevant provisions of the international treaties concluded or acceded to by the People’s Republic of China or on the principle of reciprocity.”)

⁹ *Id.* at art. 257 (“If the parties have not stipulated clauses on arbitration in the contract or have not subsequently reached a written agreement on arbitration, they may file a lawsuit in the people’s court.”).

¹⁰ Arbitration Law of the People’s Republic of China art. 17, promulgated by Order No. 31 of the President of the People’s Republic of China, Aug. 31, 1994, effective Sep. 1, 1995, available at <http://en.chinacourt.org/public/detail.php?id=101>(China) [hereinafter Chinese Arbitration Law].

¹¹ *Id.* at art. 9 (“The arbitration award is final. After the award is given, the arbitration commission or the people’s court shall not accept the re-application of the suit concerning the same dispute by any of the parties concerned.”).

¹² *Interpretation of the Supreme People’s Court on Certain Issues Relating to Application of the Arbitration Law of the People’s Republic of China*, Doc. Fa- Shi [Court Explanation] No. 7 (promulgated by the 1375th session of the Jud. Comm. of the Sup. People’s Ct., Aug. 23, 2006) (China).

¹³ Effective Sept. 8, 2006.

2005.¹³ This Interpretation includes many flexible and positive provisions for arbitration.¹⁴ For example, deeming the arbitration institution as selected if it is “determinable” (even if its name is not described in an accurate way in the arbitration agreement).¹⁵ Also, in cases where an arbitration agreement indicates that arbitration will be conducted by an arbitration institution at a certain place, and there is only one arbitration institution in that place, “such arbitration institution shall be deemed the agreed-upon arbitration institution.”¹⁶

B. Salient Features

1. Domestic Arbitration, Foreign-related Arbitration and Foreign Arbitration

According to Chinese Civil Procedure Law and Arbitration Law, arbitration in China can be divided into three types: domestic arbitration, foreign-related arbitration, and foreign arbitration. The enforcement of arbitral awards depends on the type of arbitration. For domestic arbitration Article 217¹⁷ of Civil Procedure Law is applied; for foreign-related arbitration, Article 260¹⁸ of Civil Procedure Law is applied; for foreign arbitral awards, Article 269¹⁹ of Civil Procedure Law is applied.

2. Institutional Arbitration and Ad hoc Arbitration

Ad hoc arbitration cannot take place in China for domestic and foreign-related arbitration, but foreign *ad hoc* arbitration awards can be recognized and enforced in China as a result of the New York Convention. When acceding to the New York Convention, China accepted that awards under the New York Convention include not only institutional arbitration awards but also *ad hoc* arbitration awards.²⁰ However, if the applicable law to the arbitration agreement is the law of China, the arbitration agreement must specify an arbitration institution, or the arbitration institution can be determined; otherwise, the arbitration agreement will be null and void.²¹

3. Absence of Appeal Procedures

In China, there is no formal system of appeal for cases of application for the recognition and enforcement of foreign arbitral awards. However, an “automatic appeal” system makes up for this absence.²² This system will be discussed in the next part.

III. Mechanism to Apply the New York Convention

This part describes the salient features of the procedural mechanism to apply the New York Convention.

A. “Automatic Appeal” System

In the event that a party applies to a People’s Court²³ for the recognition and enforcement of a foreign arbitral award, the People’s Court—if convinced that the arbitral award is inconsistent with a provision of the New York Convention—must submit the matter to the High People’s Court before ruling on the refusal of recognition and enforcement. If the High People’s Court approves the refusal of recognition and enforcement, that court shall submit its opinion for examination to the Supreme People’s Court. Only after receiving a reply from the Supreme People’s Court can the original People’s Court confirm the ruling on refusal of recognition and enforcement.

This procedure is similar to the traditional appeal procedure, except the “appeal” in this case is automatic. This means that if the court of the first instance considers that the arbitral award should be recognized and enforced under the New York Convention, it will make the decision by itself. Otherwise, if the court of the first instance considers the award should not be recognized and enforced, the case will be submitted to a higher court.

There are several reasons why this automatic appeal system is a positive step towards the implementation of the New York Convention in China. First, the aim of the automatic appeal system is to implement the New York Convention strictly. This system requires the People’s Courts to apply the New York Convention correctly, and also represents a step towards a uniform interpretation of the New York Convention. Consequently, local courts in mainland China will render the same interpretation of the Convention regardless of what court it is or where it is located.

Second, the automatic appeal system is consistent with the New York Convention. It does not impose “substantially more onerous conditions or higher fees or charges”²⁴ on the recognition and enforcement of foreign arbitral awards. On the contrary, it gives “more favorable treatment” to applications under the New York Convention.

Third, this system renders refusals to recognize and enforce arbitral awards more difficult. Statistics show that—from 2002 to 2006—9 cases were submitted by the High People’s Courts to the Supreme People’s Court. However, in 4 of those cases the Supreme People’s Courts deemed that the foreign arbitral award should be recognized and enforced.²⁵

This system, nevertheless, has some drawbacks. It is not regulated by law but in the form of a “Notice” that is only effective in the courts system. The greatest criticism of this

¹⁴ See *supra* note 12 at arts. 1-11, 16.

¹⁵ See *id.* at art. 3.

¹⁶ See *id.* at art. 7.

¹⁷ Chinese Civil Procedure Law art. 217 (prior to the amendments of Oct. 28, 2007) (China).

¹⁸ *Id.* at art. 260.

¹⁹ *Id.* at art. 269.

²⁰ See New York Convention arts. I, II (“Arbitral awards shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”).

²¹ See Chinese Arbitration Law arts. 16, 18 (China).

²² This special “automatic appeal” system was established in 1995.

²³ It is normally an Intermediate People’s Court that is a subordinate of the High People’s Court.

²⁴ New York Convention, art. III.

²⁵ See “Chinese Courts Strictly Implement the Convention to Recognize and Enforce Foreign Arbitral Awards,” *Legal Daily*, 15 Dec. 2008, available at http://www.legaldaily.com.cn/bm/2008-12/15/content_1001345.htm (accessed Mar. 15, 2009).

“automatic appeal” system is that, while it is free for the applicant, it is not optional. The applicant is forced to wait, without information about the progress of the case through the judicial system.

B. Centralization of Jurisdiction

The courts’ jurisdiction over cases seeking the recognition and enforcement of foreign arbitral awards is centralized to the appropriate Intermediate People’s Courts. This is so because the higher courts are more likely to be able to properly interpret the New York Convention and use it correctly than the subordinate courts.²⁶

C. Regulation about Fees and Time Limitation for Examination

When a people’s court accepts an application for recognition and enforcement of a foreign arbitral award, the court will collect a set non-refundable monetary fee. The court will also collect a refundable enforcement fee that is proportionate to either the amount to be enforced or the subject matter. Courts are forbidden from collecting fees twice for recognition and enforcement.

The people’s court that accepts an application for recognition and enforcement of a foreign arbitral award has two months—from the moment it accepted the application—to either issue a decision or notify the Supreme People’s Court of its denial to recognize and enforce the award. If the people’s court decides to enforce the award, the enforcement must occur within six months of having made the decision—unless there are special circumstances.

IV. Cases about the Implementation of the Convention

The main reason why recognition and enforcement of foreign arbitral awards has been refused in recent cases is that the arbitral awards fell into Article V of the New York Convention. Article V states that recognition and enforcement of an arbitral award may be refused provided one of several conditions.²⁷

A. Application of Article V of the Convention

Since 2000, there have been 17 cases reported to the Supreme People’s Court in which the recognition and enforcement of a foreign arbitral award was refused due to a condition prescribed in Article 5 of the New York Convention. As a result of the “automatic appeal” system, this must have included all such cases originated in China.²⁸ These cases are detailed below:

No.	Case (the Serial Number of the Reply of the Supreme People’s Court)	Facts	Provisions in the Convention
1	[2001] Min Si Ta Zi No. 2	A clerk of the party in China concluded a contract on behalf of a company without authorization. There was no ratification after the conclusion of that contract. The applicable law of the capacity of the party is Chinese law.	Article V (1) (a)
2	[2001] Min Si Ta Zi No. 43	Faxes between the parties showed that there wasn’t an arbitration agreement. The arbitration was based on an arbitration clause made by only one party.	Article V (1) (a)
3	[2002] Min Si Ta Zi No. 10	The arbitration was raised according to an arbitration clause in Contract No. 623, which actually had been substituted by later contracts. The arbitral tribunal decided on the dispute arising from Contract No. 624 which actually included a different arbitration clause.	Article V (1) (a)
4	[2003] Min Si Ta Zi No. 12	The arbitration clause was provided in a sales contract between two parties, but the arbitral tribunal added a third party as respondent and made a decision about this third party.	Article V (1) (c)
5	[2004] Min Si Ta Zi No. 46 [2003] Min Si Ta Zi No. 23	The arbitration agreement was invalid according to the existing court’s Decision.	Article V (1) (a)
6	[2005] Min Si Ta Zi No. 53	It was stated on the back of the B/L that the arbitration clause prescribed in a certain Charter should be incorporated into this B/L, but the Charter the claimant presented was apparently irrelevant.	Article V (1) (a)
7	[2006] Min Si Ta Zi No. 34	The applicant claimed he asked another person to notify the defendant by e-mail about the arbitration proceedings and the appointment of the arbitrator. However, the applicant did not present any evidence to prove that the defendant had received such e-mails.	Article V (1) (b)
8	[2006] Min Si Ta Zi No. 41	Procedure to re-appoint the arbitrator violated the arbitration rules.	Article V (1) (d)

²⁶ See Sup. People’s Ct., Doc. Fa (Jing) Fa [Court Issuance] No. 5 (promulgated Apr. 10, 1987) (China); Sup. People’s Ct., Doc. Fa-Shi [Court Explanation] No. 5 (promulgated Dec. 25, 2001) (China) (providing an explanation on jurisdiction over civil and commercial cases involving foreign elements).

²⁷ See New York Convention art. V.

²⁸ See Xiaohong Xia, Study on the Application of the New York Convention in China (May 2010) (unpublished Ph. D dissertation, Renmen University of China) (on file with author).

9	[2007] Min Si Ta Zi No. 26	The arbitral tribunal did not make the award in the time limitation prescribed in the arbitration rules, and did not inform the party the extension of the time of making the award as provided in the arbitration rules and applicable arbitration law.	Article V (1) (b) (d)
10	[2007] Min Si Ta Zi No. 35	The arbitration clause provided that the arbitral tribunal should be composed of 3 arbitrators. The applicable arbitration law has provisions such as re-appointment of the arbitrator. During the arbitration process, one arbitrator disappeared and failed to participate in all the deliberations about the draft of the final award, but the other 2 arbitrators formed a truncated tribunal and made the final award without re-appointment of another arbitrator.	Article V (1) (d)
11	[2007] Min Si Ta Zi No. 41	The arbitration clause prescribed there should be a 90-day negotiation period before submission to arbitration, but the claimant submitted the dispute to arbitration without negotiation.	Article V (1) (d)
12	[2007] Min Si Ta Zi No. 42	The arbitration clause prescribed there should be a 45-day negotiation period before submission to arbitration, but the claimant submitted the dispute to arbitration without negotiation.	Article V (1) (d)
13	[2008] Min Si Ta Zi No. 11	The arbitral tribunal decided on a dispute about which the People’s Court had made a judgment. The arbitral award to some extent denied the result of the litigation in China. The arbitration clause was in a joint venture contract between different investors, but the arbitral tribunal made a decision on the dispute between the established joint venture and the investor.	Article V (1) (c), Article V (2) (b)
14	[2008] Min Si Ta Zi No. 17	The appointment of a sole arbitrator was irregular according to the applicable arbitration law.	Article V (1) (d)
15	[2008] Min Si Ta Zi No. 18	The arbitral tribunal, when deciding to end the hearing, did not inform the party of the date of making the award as required by the arbitration rules. The defendant did not get the notice to present his opinion on the changing of the claims.	Article V (1) (b) (d)
16	[2008] Min Si Ta Zi No. 51	There was not an arbitration agreement.	Article V (1) (a)
17	[2009] Min Si Ta Zi No. 33	The dispute (over an inheritance) was non-arbitrable according to Chinese law.	Article V (2) (a)

Breakdown of the cases above:

Provisions in the Convention	Reason of the Refusal	Quantity of Cases	Percentage	Cases
Article V (1) (a)	Invalidity of the Arbitration Agreement	6	35.3%	No. 1, 2, 3, 5, 6, 16
Article V (1) (b)	Violation of Due Process	3	17.6%	No. 7, 9, 15
Article V (1) (c)	Excess by Arbitrator of His Authority	2	11.8%	No. 4, 13
Article V (1) (d)	Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure	7	41.2%	No. 8, 9, 10, 11, 12, 14, 15
Article V (1) (e)	Award Not Binding or Set Aside	0	0%	
Article V (2) (a)	Non-arbitrable Subject Matter	1	5.9%	No. 17
Article V (2) (b)	Violation of Public Policy	1	5.9%	No. 13
Total:		17	100%	

B. Procedural Issues That Affect the Result of the Case

If the application exceeds the limited time period, or there is not a competent court according to the relevant provisions, the foreign arbitral award cannot be recognized and enforced.

1. Limited Time Period of the Application

Prior to the 2007 amendments to the Chinese Civil Procedure Law, the limited time period for the application for enforcement of arbitral awards was one year²⁹ or six months.³⁰ However, those amendments increased the limit to two years.³¹ This limitation for enforcement is designed to facilitate business and to allow for the possibility of property to be executed. It is not contrary to the New York Convention because it does not focus particularly on the recognition and enforcement of foreign arbitral awards, rather, it applies generally to all the cases—including domestic cases— regarding execution.

²⁹ Chinese Civil Procedure Law, art. 219 (prior to the amendments of Oct. 28, 2007) (China) (“The time limit for the submission of an application for execution shall be one year if one or both of the parties are citizens.”).

³⁰ *Id.* (“it shall be six months if both parties are legal persons or other organizations”).

³¹ See “Decision of the Standing Committee of the National People’s Congress on Amending the Civil Procedure Law of the People’s Republic of China,” art. 15 (promulgated by Order No. 75 of the President of the People’s Republic of China, Apr. 1, 2008) http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471601.htm (China).

Since 2000, there have been two cases in which the petition for the recognition and enforcement of an arbitral award failed because the application exceeded the limited time period.³² Both of these cases occurred prior to the amendment of the Civil Procedure Law.

2. Jurisdiction

In one case, the application failed because there was not a competent court. There was no domicile or principal place of business in China for the party against whom the award could be enforced, nor the property that could be enforced.³³

V. Conclusion

The New York Convention is now being strictly implemented in China. On one hand, in judicial practice, the courts have made great achievements in interpreting and applying the New York Convention properly to favor international commercial arbitration. On the other hand, there are still some unsettled problems because the courts practices are limited by outdated legislation. Additionally, Chinese Arbitration Law differs with that of the countries where international commercial arbitration is highly developed.³⁴ Therefore, it is important that more efforts are made at the legislative level.

³² See Sup. People's Ct., Reply [2004] Min Si Ta Zi No. 32; Sup. People's Ct. Reply [2006] Min Si Ta Zi No 35; Xiaohong Xia, Study on the Application of the New York Convention in China (May 2010) (unpublished Ph. D dissertation, Renmen University of China) (on file with author).

³³ See Sup. People's Ct., Reply [2008] Min Si Ta Zi No. 47; Xiaohong Xia, Study on the Application of the New York Convention in China (May 2010) (unpublished Ph. D dissertation, Renmen University of China) (on file with author).

³⁴ For instance, Article 267 of Civil Procedure Law adopts criteria of "foreign arbitral body" to decide whether an arbitral award is "foreign" or not, and Arbitration Law only recognizes institutional arbitration.