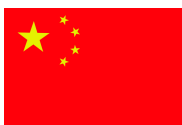


PRACTICAL ASPECTS OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA

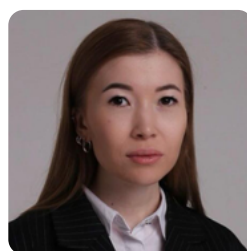


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PRACTICAL ASPECTS OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA



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China's large-scale infrastructure projects within the framework of the Belt and Road Initiative (known within China as the One Belt One Road), cooperation in key sectors, participation in the Shanghai Cooperation Organization, and other factors contribute to the further development of trade and economic relations between the countries of the Commonwealth of Independent States and China, making the issue of recognition and enforcement of foreign arbitral awards in China even more relevant.

THE LEGAL FRAMEWORK FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In 1987, China acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter – the New York Convention).

When acceding to the New York Convention, China made two reservations.

1

One of them is that the New York Convention only applies to the recognition and enforcement of arbitral awards made in the territory of another contracting state. This is known as the "reciprocity reservation".

2

Another so-called "commercial reservation" stipulates that the New York Convention should only apply to those legal relationships that are considered commercial under the national law of the PRC.

In this article, we will not review the list of necessary documents for recognition and enforcement of foreign arbitral awards in the PRC, since the national legislation of the PRC, which regulates the recognition and enforcement of foreign arbitral awards, complies with the New York Convention subject to the above-indicated two reservations.



Article 290 of the Civil Procedure Code of the PRC provides that in cases where an arbitral award of a foreign arbitral institution needs to be recognized and enforced by Chinese courts, the parties concerned must directly apply to the People's Court at the place of residence of the defendant or the location of the defendant's property. The court will consider this issue in accordance with the international treaties, i.e., the New York Convention, bilateral international agreements, and the principle of reciprocity.

In order to implement the provisions of the New York Convention, the Supreme People's Court of the PRC issued the Notice of Enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1987, which clarifies the rules applicable to the New York Convention, including jurisdiction, terms for filing applications, standards of appeal for recognition and enforcement, etc.

The Notice 2008 clarifies the circumstances under which Chinese courts may refuse to recognize or enforce foreign arbitral awards. In addition, the Notice 2008 also strengthens the supervision of the People's Courts over the recognition and enforcement of foreign arbitral awards by establishing an internal reporting system.

Under this reporting system, when the People's Court is inclined to refuse recognition or enforcement of a foreign arbitral award, it must submit a report to the superior People's Court of appellate instance (People's High Court) for further consideration.



If the People's High Court is also of the opinion that the recognition should be refused, the case must be referred to the Supreme People's Court of the PRC for the final consideration and resolution before the application for recognition can be refused.

THUS, THE PEOPLE'S COURT HAS A RIGHT ONLY TO RECOGNIZE A FOREIGN ARBITRAL AWARD, WHILE THE REFUSAL TO RECOGNIZE A FOREIGN ARBITRAL AWARD CAN ONLY BE MADE BY THE SUPREME PEOPLE'S COURT OF THE PRC.

On December 31, 2021, the Supreme People's Court of the PRC has published a summary of the Supreme Court Symposium with clarifications on the implementation of the New York Convention. [1] The key clarifications in 2021 address the following issues:



- Failure to engage in "negotiations prior to arbitration" is not a procedural violation under Article V(1)(d) of the New York Convention.

- If a Chinese court has already ruled that the arbitration agreement between the parties is not concluded, void, invalid, or the statute of limitation has expired, and recognition and enforcement of the arbitral award would be contrary to the decision of the Chinese court that has entered into force, the Chinese court must refuse to recognize such an arbitral award as it violates a public order, as provided for in Article 5(2)(b) of the New York Convention.

[1] <http://cicc.court.gov.cn/html/1/218/62/409/2172.html> Supreme Court Symposium with clarifications on the implementation of the New York Convention

It should be noted that the summary of the symposium only confirms the previous practice of the Chinese People's Courts.

In the 2018 case, the basis for the refusal of the Chinese court was that the court had upheld the invalidity of the arbitration clause.



Since China's accession to the New York Convention, Chinese courts have only twice (in 2008 and 2018) refused to recognize and enforce foreign arbitral awards on grounds that are contrary to the public order. [2]

The opinions of the Chinese courts in the 2018 and the 2008 cases can be summarized as follows.

In the 2018 case, the concerned parties applied for arbitration in a foreign state, even when the Chinese court had already declared the invalidity of the arbitration agreement.

Accordingly, the Chinese court ruled that the arbitral award violated China's public order.

In the 2008 case, the Chinese court ruled that the arbitral award contained decisions on issues that were not submitted for consideration in arbitration and, thus, simultaneously violated China's public order.

THE PRACTICE OF RECOGNITION OF FOREIGN ARBITRAL AWARDS IN CHINA

Based on the research of the database of court decisions, from 2001 to 2022, there were 243 cases related to the recognition and enforcement of foreign arbitral awards, of which only 43 cases resulted in the refusal of recognition and enforcement.



The information on the percentage of successful recognition cases varies in different sources. This is due to the fact that in the relevant calculations, most often the subject of the analysis are the cases in which civil proceedings have been initiated, while some calculations also take into account the cases in which civil proceedings have not been initiated, and applications for recognition have been returned or withdrawn.

As such, according to the research by the China Justice Observer (CJO) in 2018-2019,

87.5%

of applications for recognition and enforcement of foreign arbitral awards were successfully recognized and enforced. [3]



[2] <https://zh-tw.chinajusticeobserver.com/a/china-refuses-to-recognize-a-foreign-arbitral-award-on-the-grounds-of-public-policy-for-the-2nd-time>
[3] <https://www.cjoglobal.com/index.php/2021/12/10/can-foreign-arbitral-awards-be-enforced-in-china/>



In 2019, Chinese courts considered a total of 30 cases on the recognition and enforcement of foreign arbitral awards. Chinese courts recognized and enforced foreign arbitral awards in whole or in part in 21 cases; in three cases, the Chinese courts refused recognition, and in the remaining six cases, there was a dispute over jurisdiction, or the applications were withdrawn by the applicants.

In other words, a total of 24 cases were considered on the merits, 21 of which concerned the recognition and enforcement of arbitral awards, which led CJO to conclude that the success rate of recognition of foreign arbitral awards is 87.5%.

According to other sources, from 2005 to 2015, 68% of cases were recognized, while from 2015 to 2017, the average recognition rate was 75.3%, and from 2018 to 2022, 66.7% of cases were recognized. [4]

These calculations took into account all cases, including those withdrawn or not accepted for consideration on the merits, in which the civil proceedings were not initiated.



THE STATE FEES

The state fee for the application for recognition of a foreign arbitral award is 500 Chinese yuan (approximately US\$ 71).

The court fees for enforcement proceedings are calculated based on the amount subject to enforcement. In particular, the fee rates for each enforcement proceeding are as follows:

- from 50 yuan to 500 yuan for non-property disputes;
- 50 yuan if an enforcement includes the amount that does not exceed 10,000 yuan;
- 1.5% of the amount exceeding 10,000 yuan but less than 500,000 yuan;
- 1% of the amount exceeding 500,000 yuan but less than 5 million yuan;
- 0.5% of the amount exceeding 5 million yuan but less than 10 million yuan;
- 0.1% of any amount exceeding 10 million yuan.

When planning expenses, it is also necessary to take into account the fees of Chinese lawyers, since foreign lawyers are not entitled to represent interests of the clients in Chinese People's Courts. Only citizens of the PRC can be licensed lawyers.

According to the World Bank's Doing Business 2020 report, the legal fees of Chinese lawyers averages to

7.6%
of the claim amount. [5]

Until 2018, the Chinese government set the state-regulated fees of the lawyers. While the government is no longer restricting legal fees, in practice, the fees of Chinese lawyers generally do not differ from the approximate costs indicated in the report of the World Bank.

According to the latest fee charging standard issued by the Beijing Municipal Government in 2016, Chinese lawyers can determine contingent fees proportional to the claim amount for each stage of the litigation, and the calculation method is also progressive.

According to the progressive formula of the government of Beijing:

For a case with a claim amount of US\$ 1 million, the court fees for each stage amount to US\$ 44,000, and the total court fees for two stages amount to approximately 8.8%.



For a case with a claim amount of US\$ 2 million, the court fees for each stage amount to US\$ 74,000, and the total court fees for two stages amount to 7.4%.



This standard also correlates with the statistics of the World Bank.

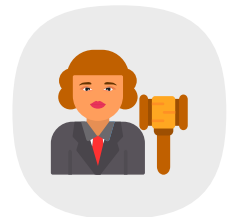
TERMS OF CONSIDERATION

Applications for recognition and enforcement of an arbitral award must be filed within two years from the date of execution provided in the arbitral award. [6] If the arbitral award does not specify the term for execution, the two-year period is calculated from the date the arbitral award comes into effect.

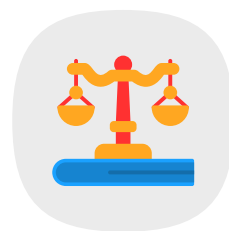
According to the PRC legislation, if the court approves the application for recognition, the court must make such a decision within a period of two to six months from the date of acceptance of the application. [7] In special circumstances, an extension of the above terms shall be approved by the Chairman of the People's Court, and such terms may be extended for additional six months. [8]

However, if the court rejects the application for recognition of the foreign arbitral award, the court rejecting the application must report the refusal to the superior People's Court in accordance with the requirements of the above Notice 2008. If the People's High Court takes the position that the application for recognition should be granted, the court will directly return its conclusion to the People's Court of first instance. If the People's High Court agrees with the refusal of the People's Court to satisfy the application, it must report about the refusal the Supreme People's Court of the PRC. Only after the Supreme People's Court of the PRC agrees to reject the application for recognition, the People's Court of first instance can issue a decision to reject the foreign arbitral award.

Thus, the terms for consideration of applications for recognition, in cases where it is a question of a refusal on recognition of the foreign arbitral award, in practice, can range from one to two years.



In 42 analyzed court decisions, the average term for consideration of recognition was 356 days, with a maximum consideration period of 1727 days and the minimum period of 41 days. [9]



[5] <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>

[6] Article 290 of the Civil Procedure Law of the People's Republic of China

[7] Law on arbitration of the PRC 1994

[8] 中国国际经济贸易仲裁委员会 <http://www.cietac.org/index.php?m=Article&a=show&id=256>

[9] <https://zh-cn.chinajusticeobserver.com/a/time-and-expenses-recognition-and-enforcement-of-foreign-arbitral-awards-in-china>

Once recognized, the enforcement of foreign arbitral awards is no different from that of Chinese court judgments. According to the World Bank data, it takes an average of 240 days to enforce a court decision. [10]

REASONS FOR REJECTION OF RECOGNITION

The results of the analysis of cases show that the refusal is mainly due to procedural defects, with the largest number of cases related ineffective arbitration agreements or procedural defects. While as noted above, a less commonly cited ground of refusal is the violation of public policy.

Reasons for refusal of recognition (analyzed period from 1994-2015)	Ground of refusal	Amount	%
Invalidity of arbitration agreement	New York Convention Article 5(1)(a)	8	23.53 %
Composition of arbitration body or the arbitration procedure was not in accordance with agreement of parties or law of the country of arbitration	New York Convention Article 5(1)(d)	8	23.53 %
The party against whom the decision was made was not properly notified of the appointment of an arbitrator or of the arbitration proceeding, or was otherwise unable to submit an explanation	New York Convention Article 5(1)(b)	6	17.65 %
The duly certified (notarized and legalized), translated, original arbitration award is not submitted	New York Convention Article 4	3	8.82%
The decision is made on a dispute, which is not contemplated by or not falling within the terms of the arbitration agreement or arbitration clause in the agreement, or contains rulings on matters that go beyond the scope of the arbitration agreement or arbitration clause in the agreement	New York Convention Article 5(1)(c)	3	8.82%
No evidence that the defendant or the property belonging to the defendant is located in China	New York Convention Article 1	2	5.88%
Recognition and enforcement of award is contrary to the public order of the country	New York Convention Article 5(2)(b)	1	2.94%
Parties replaced the arbitration clause and preferred to be considered by the People's Court of PRC	New York Convention Articles 1, 2	1	2.94%

FINAL RECOMMENDATIONS

Given the duration of consideration of decisions on recognition, the high cost of the fees of Chinese lawyers, for contract amounts not exceeding 1-2 million US dollars, many cases do not reach the stage of initiating proceedings for recognition of foreign arbitral awards due to the lack of economic feasibility for the party in whose favor the arbitral award was rendered, for example, in the CIS countries.

Therefore, such decisions of foreign arbitration are not included in the formation of impressively successful statistics on the recognition of foreign arbitral awards in the PRC.

It is also necessary to take into account the peculiarities of Chinese hieroglyphs, and it is recommended to conclude contracts in at least two languages, one of which is Chinese. In one of the cases from our practice, the court refused to initiate proceedings for the recognition of a foreign arbitral award due to the improper claimant.



Regarding the Chinese Agricultural Holding (hereinafter - the Holding), an arbitral award was made in one of the CIS countries. As it turned out at the stage of recognition and enforcement of the arbitral award, the Holding could not act as a defendant in the case, since it did not enter into any contractual relations with the claimant.

The Chinese company, which concluded a contract with the claimant and received payment, has the same transliteration of the name as the specified Holding, but consists of different hieroglyphs. Translations of the title deeds and the copy of the extract from the unified state database of the Holding were presented to conclude the transaction. However, the deal was concluded by a fraudulent company created specifically for these purposes with an identical name.

This example demonstrates that in China it is very important to take into account its linguistic peculiarities. Due to the writing system based on hieroglyphs, there can be thousands of different companies with identical phonetic names. For instance, the Chinese name of Volkswagen Group is Dazhong (Da Zhong), wherein the sound "Da" can be expressed by 77 different hieroglyphs (大, 打, 达, 搭, 答, 哒, 沓, 瘩, 塔, 奘, 鞑, 烎, 拏, 掎), and the sound "Zhong" by 84 different hieroglyphs (中, 种, 重, 终, 众, 肿, 忠, 衷, 種, 恫, 汝, 盅, 馑, 鍾). Thus, the name of the company can be expressed in countless combinations, and each of these combinations, based on legitimate grounds in the transliteration of title deeds and contracts, will be the same.



In this regard, even at the stage of concluding a contract, including the Chinese version of the contract, it is recommended to consider the potential costs of recognition and enforcement of a foreign arbitration award and the subsequent economic feasibility of taking appropriate measures for recognition and enforcement. It is recommended to consider Chinese arbitration commissions, whose decisions do not require recognition. The panel of arbitrators in the PRC arbitration commissions includes a significant number of professional arbitrators, both Chinese and foreign, who are fluent in Chinese, English and Russian languages.

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