

NEWSLETTER



中國國際經濟貿易仲裁委員會
香港仲裁中心
CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION
HONG KONG ARBITRATION CENTER

CIETAC HKAC 2014 Release: Global Enforcement Report of China-Seated Awards (1)

We have witnessed in the past numerous seminars and workshops introducing how to enforce a foreign seated award in China.

But we have found studies of enforcement in the opposite direction missing.

We believe that articles of this nature will encourage Chinese parties into international arbitration. Also we are convinced that arbitration service users in China, especially those who have been or are “going global” will appreciate the sharing of those experiences.

That is why CIETAC HKAC has invited experienced practitioners worldwide to join our GERCSA series initiative in 2014, and to share their experiences and findings.

I would also like to take this opportunity to express my sincere thanks to all the contributors.

Dr. WANG Wenying

Secretary General of CIETAC Hong Kong Arbitration Center

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GERCSA Series (1):

1. Hong Kong SAR Perspective
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For the subscription of the Newsletter, please contact:

Email: hk@cietac.org

Tel: +852 2529 8066

Fax: +852 2529 8266

CFI Struck Out First Ever Claim Against An Arbitration Institution in Hong Kong

The Hong Kong Court of First Instance has struck down a claim against an arbitration institution in Hong Kong arising from its decision rejecting a challenge to two arbitrators in an ongoing arbitration. The Chinese edition of the decision made by a judge of CFI was released this March.

Among the reasons for dismissing the action, the Court observed:

The arbitral institution was not the proper defendant to the Court Proceeding - it should have been respondent in the arbitration.

The claim had been time-barred because it was filed more than 30 days after the arbitral institution's decision on applicant's challenge against arbitrators, which is in breach of the limitation period in Art. 13 (3) of the Model Law.

Moreover, arbitral institutions seated in Hong Kong are immune to claims arising from the honest performance of their administrative functions, by virtue of s105 of Hong Kong's Arbitration Ordinance.



CIETAC HK Administered Arbitration
SAMPLE CLAUSE

"Any dispute arising from or in connection with this contract shall be submitted to CIETAC Hong Kong Arbitration Center for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration.

The arbitral award is final and binding upon both parties."

Validity of CIETAC+UNCITRAL Rules Hybrid Arbitration Clause Confirmed by Court in China



(Hearing Room of CIETAC Hong Kong Arbitration Center)

A case containing a hybrid arbitration clause finally fell into the jurisdiction of CIETAC, confirmed by Ningbo Intermediate People's Court. The disputed arbitration clause generally says "Arbitration shall take place at CIETAC" and UNCITRAL Arbitration Rules applies.

The decision of the Mainland Court again showcases its pro-arbitration stance.

CIETAC is innately compatible with incorporation of arbitration rules other than its own. However, parties are advised to be careful with hybrid arbitration clause due to complexity in carrying out the procedure of arbitration in practice. In addition, incorporation of sample arbitration clauses provided by arbitration centers is strongly suggested because they are refined and proven.

HOW CHINA-SEATED ARBITRATION AWARDS HAVE BEEN ENFORCED OVERSEAS? - THE HONG KONG PERSPECTIVE

BY: Paul Starr, David Bateson and Rachel Chan



1 Introduction

1.1 21 June 2014 marked the 15th anniversary of the signing of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong SAR (the “Mutual Enforcement Arrangement”). During these fifteen years, China has increasingly integrated itself into the world’s economy. More and more cross-border transactions have arisen between the Mainland and Hong Kong, inevitably leading to a large increase in international arbitration and litigation.

1.2 It is important for those engaging in cross-border transactions, or “going global”, to understand how an arbitral award obtained in the Mainland can be enforced in Hong Kong, and learn from past experience in formulating their dispute resolution and enforcement strategy.

1.3 In this article, we will not only examine the background and principles relating to the enforcement of PRC awards in Hong Kong. We will also highlight practical issues and considerations which should always be taken in account in any comprehensive enforcement strategy.

2 Background and History of the Mutual Enforcement Arrangement

2.1 Before 30 June 1997, reciprocal enforcement of arbitral awards between Hong Kong, then a British colony, and Mainland China was mainly regulated by the New York Convention. The return of Hong Kong made it doubtful whether a Mainland award would still be enforceable in Hong Kong pursuant to the New York Convention, and vice versa.

2.2 The problem was exemplified in *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213. In his judgment, Findlay J held that a Mainland award could not be enforced in Hong Kong as a Convention award, because the New York Convention did not apply between two jurisdictions of the same State.

2.3 After two years of negotiations, these concerns were finally put to rest with the signing on 21 June 1999 of the Mutual Enforcement Arrangement.

2.4 By virtue of Part 10 Division 3 of the Arbitration Ordinance (Cap 609) (the “AO”), “Mainland awards” can be enforced in Hong Kong in the same manner as Convention awards.

3 Definition of “Mainland Awards”

3.1 It should be noted that not all arbitral awards made in the Mainland are eligible for enforcement in Hong Kong under the Mutual Enforcement Arrangement.

“Mainland awards”, for the purpose of the Mutual Enforcement Arrangement and the AO, refers to awards made by Chinese arbitration organisations designated by the legislative affairs office of the State Council. The list of the designated institutions includes CIETAC, the China Maritime Arbitration Commission (“CMAC”) and most domestic commissions established pursuant to the PRC Arbitration Law.

3.2 One significant effect of the definition of “Mainland awards” is that ad hoc awards, including awards rendered by a tribunal established in Beijing pursuant to the rules of the International Chamber of Commerce (“ICC”), will fall outside the scope of the Mutual Enforcement Arrangement. In a Mainland case, *Dufercos S.A. v Ningbo Arts & Crafts Import & Export Co. Ltd* on 22 April 2009 (“Ningbo Case”), the Ningbo Intermediate Court was asked to decide whether a ICC award made in Beijing was enforceable in China. While ad hoc arbitration is not recognized in China, the Ningbo Intermediate Court ruled that this award was a “non-domestic award” under the New York Convention, and hence enforceable as a Convention award in China. The Court’s reasoning appears to be that as the ICC International Court of Arbitration was located in Paris, France, the Ningbo Intermediate Court could treat the ad hoc ICC awards rendered in Beijing as if they were “French awards”, and the interested parties could therefore apply to Chinese courts for recognition and enforcement of ICC awards pursuant to the New York Convention.

3.3 That being the position pursuant to the Ningbo Case in China, however, if an application for enforcement of an ad hoc ICC award rendered in the Mainland was made in Hong Kong; it remains doubtful whether the Hong Kong Court would interpret the award the same way. If it is determined to be a “PRC award” in accordance with the place of arbitration, the consequence will be an ad hoc ICC award made in Beijing (or indeed, any award rendered by an ad hoc tribunal in China) can neither be enforced in Hong Kong pursuant to the New York Convention nor the Mutual Enforcement Arrangement (as it does not fall under the definition of “Mainland awards” pursuant to the Mutual Enforcement Arrangement).

3.4 Pausing here, in relation to Hong Kong awards, the Supreme Court of China clarified in a letter dated 25 October 2007 that Hong Kong ad hoc awards would not face a similar difficulty, and they are enforceable in the PRC Court. Accordingly, when negotiating arbitration clauses, the parties should carefully consider their choice over the venue/seat of the arbitration and the arbitration institution. In particular:

(a) If the parties want to use international arbitration institutions such as ICC, they should avoid choosing a city of the Mainland China as the seat of the arbitration. However, parties can choose the seat of the arbitration to be somewhere outside of the Mainland, such as Hong Kong or Singapore, but with hearings to be held in a specific city in the Mainland, for example Beijing by express terms of the Contract.

(b) However, if parties want the seat of the arbitration to be a city of the Mainland, they are advised to agree for arbitration by CIETAC, CMAC or other recognized domestic arbitrations to secure enforcement.

4 Procedures for enforcing Mainland arbitral award in Hong Kong

4.1 Another important consideration in formulating a dispute resolution strategy is to have a general understanding of the procedures for enforcing an award in Hong Kong and the possible grounds which might be relied upon to challenge the enforcement.

4.2 In brief, to enforce a Mainland arbitral award in Hong Kong, the applicant must apply to the court in the form of an ex parte application as set out in Order 73, Rule 10 of the Rules of the Hong Kong High Court (the “Rules”). If a party seeking to enforce the award fails to use this procedure, the court may disallow the party’s costs of the first return day¹. Additionally, the application must be made to the judge in charge of the Construction and Arbitration List as directed by the Practice Direction: Construction and Arbitration List, otherwise, the court may, at its discretion, make an order against the applicant’s legal representatives².

4.3 As with any ex parte application, it must be accompanied by an affidavit/affirmation by the applicant disclosing all material facts of which the judge should be made aware. Examples of material facts include refusal of leave to enforce the arbitral award by a competent court in the place where the award was made, or an order by a superior court suspending or setting aside such leave³. Any non-disclosure of material facts may lead to the refusal by the court to enforce the arbitral award.

4.4 In addition to the affidavit/affirmation, section 94 of the AO requires that the applicant produce (1) the duly authenticated original or certified copy of the award; (2) the original or certified copy of the arbitration agreement; and (3) if the award or the agreement is in a foreign language other than either or both of the official languages of Hong Kong, a certified translation.

4.5 If the papers are in order, it would normally take the Hong Kong Court one to two weeks to approve the draft order. The approved order would then need to be served upon the respondent party.

4.6 Within 14 days of service of the order, the respondent may apply to set aside the order for enforcement. If this happens, the successful party may sometimes apply for an order for security of costs and/or security of award. We will examine the grounds for challenging the enforcement of arbitration awards in more detail below.

4.7 If the respondent does not contest the enforcement, or the application to set aside the enforcement order is dismissed, the applicant may proceed with execution of the award as if it is a judgment granted by the Hong Kong Court. Depending on the information and the type of assets available, the applicant could apply for various specific orders (such as garnishee or other charging order) in aid of the enforcement. Generally, the enforcement of a Mainland award would not be refused. The approach taken by the Hong Kong Courts is a pro-enforcement stance, therefore, with rare exceptions, the court exercises a discretion in favour of enforcement⁴. This discretion will be exercised unless the court determines that the rights of the party seeking to resist enforcement can be shown to be violated in a material way.

5 Grounds for Denying the Enforcement of Arbitral Award in the Mainland and Hong Kong and the Practical Implications

Grounds for denying the enforcement of awards

5.1 Under PRC Law, Mainland awards are divided into two categories, namely domestic awards and foreign-related awards⁵. While both kinds of awards are awards given by arbitration institutions established in China, foreign-related awards refer to those involving foreign-related factors, such as a foreign party.

5.2 The practical implication of the distinction, in terms of enforcement, is that while a PRC Court only conducts a “procedural review” when deciding whether or not to enforce a foreign-related award, a domestic award can be set aside based on not only “procedural grounds” but also on “substantive grounds” in China.

5.3 In Hong Kong, however, the Court will only look at the procedural issues when considering whether or not to enforce a Mainland award, no matter whether domestic or foreign-related in nature.

5.4 According to section 95 of the AO, a Hong Kong Court will only refuse to enforce a Mainland award on the basis of the following grounds:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by, or not falling within, the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the tribunal or the arbitral procedure was not in accordance with the parties’ agreement or Hong Kong law;
- the subject matter cannot be settled by arbitration under Hong Kong law; or
- the award conflicts with Hong Kong public policy.

Practical Implications – domestic awards

5.5 In contrast, article 58 of the PRC Arbitration Law allows a PRC intermediate court to examine a domestic award based on a number of substantive grounds, in addition to the general procedural and public policy grounds. These include whether the evidence on which the award was made had been forged and whether any material evidence was concealed by the other party. As the PRC Court would have the power to reconsider the evidence of the case, this may sometimes lead to a re-opening of the decision. As such, a losing party might wish to set aside a domestic award first in the Mainland, rather than simply waiting for and defending an enforcement action brought by the successful party in Hong Kong.

5.6 A point to note is that, if any of the parties want to challenge a domestic award based on the ground that it is contrary to public policy, Hong Kong case law suggests that they should challenge it in the court of the seat of the arbitration first, and if they have failed to do, the enforcement Court will generally be reluctant to resist the enforcement of the award on such grounds. In *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 4 HKLRD 972⁶, in refusing to set aside an ex parte order of

enforcement, the Hong Kong Court held that if the applicants genuinely felt that the award was now rendered invalid by reasons of public policy grounds, they should challenge it in the court of the seat of the arbitration (in that case the Beijing Court). Reyes J further stated that when deciding whether the enforcement of a Mainland arbitral award should be refused on public policy grounds, the court must not second-guess how the arbitration tribunal or the court of supervision (ie the Beijing Court) might assess the relevant facts and law. The Hong Kong Court's role is essentially that of an overseer and should be "as mechanistic as possible".

Foreign-related awards

5.7 On the other hand, pursuant to Article 260 of the Civil Procedure Law, neither the incapacity of a party nor public policy grounds are valid grounds available for setting aside a foreign-related award in the Mainland. Relatively speaking, therefore, it is more difficult to set aside a foreign-related award than a pure domestic one in the Mainland.

5.8 Nevertheless, in *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd* [1998] 1 HKC 676, it was confirmed by the Hong Kong Court that the defendant's failure to challenge a CIETAC award in a PRC Court does not eliminate his right to challenge the plaintiff's legal capacity in enforcement proceedings in Hong Kong⁷.

5.9 It is important to note that the Court's powers to deny the enforcement of an arbitral award in a given jurisdiction is only one of the many important factors that a party should take into account when deciding the forum to enforce or set aside an award. There are other factors that one should be aware of when formulating enforcement strategy, such as location of the property, litigation cost and time limitations. We will discuss this issue further below.

6 Other practical considerations

6.1 In this section, we will look at several issues which would have a direct impact upon the successful party's strategy in enforcement.

Possibility of concurrent enforcement of a Mainland arbitral award in more than one jurisdiction

6.2 Practitioners are familiar with the notion of taking out parallel or concurrent enforcement proceedings in multiple jurisdictions against the paying party. This happens when the paying party has a multinational business operation and is perceived to have assets (such as bank accounts) in more than one jurisdiction in addition to its headquarters or operational base.

6.3 For instance, it is quite common that the successful party in a Singapore-seated arbitration might attempt to enforce its award against the other party in, say Singapore, Hong Kong and some other jurisdictions.

6.4 In most cases, the purpose of bringing enforcement proceedings in more than one jurisdiction is to maximize potential recovery. Sometimes, the successful party might apply for certain reliefs or orders (such as an order for examination of officers) in one country, which are not available in the other jurisdiction.

6.5 As regards awards rendered in the major jurisdictions which are signatories to the New York Convention, as long as the successful party has the resources to finance the enforcement proceedings in multiple jurisdictions, there is generally no prohibition against those multiple proceedings. As far as Hong Kong is concerned, the overriding principle is that there should not be any double recovery of the award arising out of the multiple proceedings.

6.6 Indeed, from our experience in advising parties on dispute resolution provisions during the contract negotiation stage, the question of whether an arbitration award could be enforced in multiple jurisdictions concurrently or during the same time frame is an important consideration influencing the choice of the governing law and the seat of the arbitration. For contracts with international elements, more often than not the parties would like the flexibility of being able to enforce any arbitration award in more than one jurisdiction.

6.7 However, in relation to the enforcement of a Mainland award in Hong Kong (and similarly as regards the enforcement of a Hong Kong award in the PRC), paragraph 2 of the Mutual Enforcement Arrangement imposes a specific restriction against concurrent enforcement of the award in both jurisdictions as mentioned above.

6.8 In particular, section 93 of AO provides as follows:

“(1) A Mainland award is not, subject to subsection (2), enforceable under this Division if an application has been made on the Mainland for enforcement of the award.

(2) If-

- (a) an application has been made on the Mainland for enforcement of a Mainland award; and
- (b) the award has not been fully satisfied by way of that enforcement,

then, to the extent that the award has not been so satisfied, the award is enforceable under this Division.”

6.9 This section has been carried over from section 40C of the old Arbitration Ordinance (now repealed). Pursuant to this section, even if the paying party is perceived to have assets in both the Mainland as well as Hong Kong which may be used to satisfy an arbitral award, the successful party is prohibited from filing an application for enforcement with the Hong Kong Court and the PRC Court at the same time. Attempts to file applications in both jurisdictions concurrently could be challenged and set aside.

6.10 It is only when the result of the enforcement of the award by the court of one place is insufficient to satisfy the arbitral award, that the successful party may apply to the court of another place for enforcement of the outstanding liabilities. In any case, the total amount recovered from enforcing the award in the courts of the two places, one after the other, shall not exceed the amount awarded.

6.11 This position was affirmed by the Hong Kong Court in *Shenzhen Kai Loong Investment & Development Co, Ltd v CEC Electrical Manufactory (International) Co Ltd* [2003] 3 HKLRD 776, [2001 – 2003] HKCLRT 649.

In that case, Andrew Chung J explained that on the proper construction of section 40C of the repealed Ordinance, the mischief that it aims to address includes both double recovery and double enforcement. Although similar restrictions do not exist in relation to the enforcement of an award made under the New York Convention, the learned judge was of the view that in the context of reciprocal enforcement of awards, there is nothing unreasonable in designating double enforcement as a potential mischief, and provisions were enacted to rectify that.

6.12 Note that however this restriction applies only in relation to concurrent enforcement in both Hong Kong and the Mainland pursuant to the Mutual Enforcement Arrangement. It appears that if a party seeks to enforce a Mainland award in other foreign jurisdictions (say in Australia or Singapore) pursuant to the New York Convention, there is no restriction prohibiting concurrent enforcement in Hong Kong. As such, a successful party may bring enforcement actions in say, Australia and Singapore concurrently, plus either China or Hong Kong at the same time.

6.13 Nevertheless, in view of this express restriction, the usual strategy of bringing multiple enforcement proceedings does require some careful rethinking. In particular, it is often difficult for the successful party to decide whether it should start enforcement proceedings in Hong Kong or the PRC first as it may not possess sufficient information as to the details of the other party's assets in these two places to make an informed choice.

6.14 To complicate this issue, the successful party would need to consider the different time limits in bringing enforcement actions in different jurisdiction. In Hong Kong, unless otherwise extended by the Court, a party would have 6 years to enforce its award but it would only have 2 years to bring enforcement action in China. Similar to most other proceedings in Hong Kong, the enforcement proceedings in Hong Kong could be fairly time-consuming. This is especially so when the paying party decides to contest the enforcement actions by, for instance, applying to set aside the order for enforcement of the award.

6.15 Further, Shenzhen Kai Loong highlights the importance of understanding the detailed enforcement process and the procedural laws of both jurisdictions. In that case, a central question was whether the successful party might seek to enforce the award in Hong Kong when the Mainland enforcement process was being suspended pending the outcome of the liquidation in accordance with the order of the PRC Court. Upon hearing expert evidence on PRC procedural laws from both parties, the Court held that the Chinese enforcement process had yet to be concluded or completed merely because of the suspension order by the PRC Court. Once the liquidation process was concluded, the enforcement process in China could be restored. It followed that the successful party should not be allowed to enforce the award in Hong Kong at that juncture.

6.16 The lesson from this case is therefore the successful party is required to choose wisely as to whether to commence enforcement action in Hong Kong or the Mainland, taking into account the possibility of challenging a Mainland domestic award on substantive grounds before a PRC Court.

6.17 In any event, for more complicated cases, the procedural framework and legislative restrictions have made it impractical to assume that a sequential enforcement in both jurisdictions could always be achieved. In practical terms, it might mean that a party would need to choose and focus its resources in the enforcement action commenced in the chosen jurisdictions. As noted above, this does not however limit the successful party's right to start enforcement actions in other foreign jurisdictions.

Enforcement of Mainland “med-arb” awards

6.18 It is permissible in both the Mainland and in Hong Kong, for arbitrators to act as mediators, subject to consent of the parties, during the course of the arbitration for the purpose of resolving the dispute (“med-arb process”).

6.19 While the obvious advantages of a med-arb process are cost and time saving, because the mediation would be conducted by a person already having knowledge of the facts of the case, it also gives rise to concerns regarding how an arbitrator would treat the confidential information obtained during the mediation if the mediation is unsuccessful, and whether a party would be subject to any bias in the resumed arbitration proceeding if, say, it refused a settlement encouraged by the mediator/arbitrator.

6.20 Under common law, if a party wishes to object to any irregularity during the arbitration or the med-arb process, it must do so promptly and should not proceed with the arbitration “keeping the point up his sleeve for later use”⁸.

6.21 This was affirmed by the Court of Appeal in *Gao Haiyan and another v Keeneye Holdings and another* [2012] 1 HKLRD 627. In that case, the losing party (the “Applicant”) contended that the tribunal was apparently biased, as it held a private mediation session in a five-star hotel with the winning party and a third party, who was considered “friendly” with the Applicant, in the absence of the Applicant. The Applicant first appealed against the award to the Xi’an Intermediate Court, but failed.

6.22 During the Hong Kong proceedings, the Mainland award was initially set aside by the Court of First Instance on the ground that it was contrary to public policy. However, the Court of Appeal overruled that decision and approved enforcement on two principal grounds:

(a) The Applicant waived its right to object to any non-compliance with the arbitration rules by failing to raise complaint during the arbitration proceedings.

(b) Enforcement should be refused on the ground of “contrary to public policy” only if it would be “contrary to the fundamental conceptions of morality and fairness of Hong Kong” to enforce the award. The Court of Appeal also confirmed that when deciding whether to enforce an award, weight should be accorded to the decision of the court of the seat, ie the Xi’an Intermediate Court.

6.23 The Court of Appeal’s guidance re-affirms Hong Kong’s pro-enforcement stance and gives parties some comfort when trying to enforce a Mainland award obtained by a med-arb process in Hong Kong. The more important message it delivered was that where parties believe some irregularity has occurred during the arbitral or med-arb process, they must raise it promptly, otherwise they may be found to have waived the right to object in a later enforcement proceeding.

The effect of a supplemental opinion of the CIETAC tribunal after rendering the award

6.24 The CIETAC Arbitration Rules 2012 (the “CIETAC Rules 2012”) provide for instances where the arbitral tribunal may issue an ancillary award in addition to the final award. The types of ancillary award include: an additional award under Article 52.3; a decision that the tribunal does not have jurisdiction under Article 6.7 and 44.4; and

decision to dismiss the proceedings upon withdrawal by a party under Article 44.3 and 44.4.

6.25 In considering what constitutes an “additional award” by the tribunal, parties now have the clearer assurance that the seal of CIETAC would be affixed on an arbitral award, including an additional award, issued by the tribunal pursuant to Article 47.4.

6.26 This requirement is consistent with an earlier ruling by the Hong Kong Court of Appeal in *Re Petro China International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604.

6.27 In that case, a CIETAC arbitral tribunal made an award in favour of Hongri Acron regarding a sale and purchase dispute between Hongri Acron and PetroChina. The tribunal’s award ordered Hongri Acron to return the remaining goods which were held to be of incorrect specifications, and for PetroChina to return the balance of the payment to Hongri Acron, without specifying whether the refund by PetroChina was contingent upon Hongri Acron’s fulfilment of its obligations.

6.28 In alleging that its payment obligation was contingent upon Hongri Acron’s return of the remaining goods, PetroChina relied on three letters issued by the CIETAC Secretariat and the tribunal. The first two letters from the CIETAC Secretariat confirmed PetroChina’s interpretation of the award, and the third letter from the tribunal stated that the first two letters were “supplementary explanations” of the award and formed part of it. The Court of First Instance held in favour of PetroChina that the letters together constituted a supplementary award.

6.29 In deciding that the award itself did not stipulate payment obligations of PetroChina to be conditional upon the return of the remaining goods by Hongri Acron to PetroChina, the Court of Appeal reversed the lower court’s ruling and held that the three letters relied upon by PetroChina could not be construed as a supplemental award under article 48 of the repealed CIETAC Rules 2005 governing additional awards. Firstly, the letters were issued out of time, that is, after 30 days from the date on which the arbitral award was received. Secondly, the letters from the CIETAC Secretariat were not signed and were only affixed with the stamp of the CIETAC Secretariat. Moreover, to allow the letters to constitute a supplemental award would be a breach of natural justice, since Hongri Acron was not notified of PetroChina’s requests to the CIETAC Secretariat and the tribunal, and was never given the opportunity to make submissions to the tribunal before the second and third letters were issued.

6.30 The case highlights the importance of complying with the strict procedures in the CIETAC rules when seeking to obtain a supplementary award from an arbitral tribunal after a final award has been issued. Parties are well-advised to comply with the time limit of 30 days under article 52 of the CIETAC Rules 2012 in submitting a written request to the tribunal for an additional award based on a claim or counterclaim which was advanced in the arbitral proceedings but was omitted from an award. It would be imprudent to assume subsequent notices or letters issued either by the CIETAC Secretariat or the tribunal to be supplemental or additional awards. As mentioned above, the CIETAC Rules 2012 have provided more certainty to this point by ensuring that arbitral awards and other ancillary decisions, including an additional award, shall be affixed by the seal of CIETAC. On another level, the case underscores the mechanistic approach taken by the court in enforcing an arbitral award, and its reluctance in delving into the tribunal’s reasoning for its decision.

6.31 In conclusion, this article has looked into a developing area where law and practice continue to evolve. We have tried to provide insight into the practical issues which may arise in enforcing a China-seated arbitral award in Hong Kong. Part of the difficulties relate to the fact that, as arbitration proceedings are private and confidential between the parties, a third party will not be able to find out the details of the arbitration nor the award enforcement unless the enforcement is contested beyond the interlocutory stages. Parties and their advisers must therefore continue to tread with care and prudence.

Footnotes:

1. *Zhejiang Province Garment Import and Export Co v Siemssen & Co (Hong Kong) Trading Ltd* [1993] ADRLJ 183
2. *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39
3. *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485
4. *Memorandum by Department of Justice (LC Paper No CB(2)2546/08-09(04))*
5. *There is a third category of arbitral awards in China, ie foreign awards, which are not awards rendered by foreign tribunals and are not covered by the Mutual Enforcement Arrangement.*
6. *The judgement was upheld by the Court of Appeal; see [2009] 4 HKLRD 353.*
7. *However, it does not exclude the possibility that failure to raise a point before the arbitration and/or the court of supervisory jurisdiction by a party may amount to a waiver and the party may be estopped from raising the same point before the court of enforcement. See: Gao Haiyan and another v Keeneye Holdings and another [2012] 1 HKLRD 627.*
8. *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 691.

Messrs Starr and Bateson are CIETAC Arbitrators, based in Hong Kong since 1985 and 1980 respectively

HOW CHINA-SEATED ARBITRATION AWARDS HAVE BEEN ENFORCED OVERSEAS? - THE PORTUGUESE PERSPECTIVE

BY: ABREU ADVOGADOS and Nuno Pimentel Gomes

The Arbitration Procedures, in Portugal, are governed by Law no. 63/2011, of 14 December 2011, also known as the Portuguese Law on Voluntary Arbitration (LAV). Among the several rules that establish the main framework, one can find the rules governing the international aspects of the procedure as well as the rules applicable to the enforceability proceedings.



So, is fair to say that, LAV governs both domestic and international arbitration, considering that, from the Portuguese point of view, international arbitration is defined as arbitration which implicates the interests of international trade.

On Chapter IX of LAV, the one governing the international aspects of arbitration includes specific provisions. Save for them, the provisions for domestic arbitration applies *mutatis mutandi*, as subsidiary law in cases of a loophole.

Within the specific provisions we can name: (a) the inadmissibility of pleas based on domestic law of a party; (b) rules on the substantial validity of the arbitration agreement; (c) rules on the determination of the applicable law; (d) the admissibility and rules of procedure of the appeal of the arbitral award.

Although there is, as a rule, no appeal of the arbitral award either in domestic or international arbitration; latter, parties may expressly agree on the possibility of appeal to another arbitral tribunal and regulate its terms, while in domestic arbitration, the appeal is necessarily to the competent judicial court; and a breach of international public policy of the Portuguese Republic, as a ground for having an award set aside or non-forced in Portugal in arbitrations where non-Portuguese law has been applied to the subject-matter of the dispute.

The above mention regime, and save for other perspectives, represents one of the primary liabilities of an international arbitral procedure. The need of applying domestic rules to regulate a matter that, in the limit, the only connection with Portugal is where is seated.

The implementation of the UNCITRAL model as well as other transnational instruments are a key point to minimize that contingency.

UNCITRAL model is the base of the Portuguese regime but, in spite of that, there are some differences that must be highlighted, for instance the **concept of arbitrable disputes**, which are disputes involving economic interests and disputes which, although not involving economic interests may be the object of settlement by the parties. Also the **concept of international arbitration: In Portugal, arbitration is considered to be international** when it connects with interests of international trade. The concept of **Third parties, is different too**, LAV regulates the conditions, timing and formalities for the intervention of third parties in arbitral proceedings.

The arbitral tribunal shall only allow a joinder if this does not unduly disrupt the normal course of the arbitral proceedings and if there are relevant reasons that justify the joinder. The list of divergences continues with the definition of **Multiple claimants or respondents**: In Portugal, when claimants or respondents fail to agree on the appointment of an arbitrator, the competent court, upon request of any party, may appoint all arbitrators, “*if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute*”. **Inadmissibility of pleas based on domestic law of a party**: When the arbitration is international and one of the parties to the arbitration agreement is a State, a State-controlled organization or a State-controlled company, this party may not invoke its domestic law to either contest the arbitrability of the dispute or its capacity to be a party to the arbitration, or to evade its obligations arising from such agreement in any other way **Substantial validity of the arbitration agreement**: In international arbitration, the validity of an arbitration agreement is assessed under (i) the law chosen by the parties to govern the arbitration agreement, (ii) the law applicable to the subject-matter of the dispute or under (*lex causae*), and (iii) Portuguese law (*lex fori*). **Arbitrators’ fees and costs**: If parties fail to regulate such matters in the arbitration agreement, the arbitrator’s fees and costs shall be agreed upon in writing by the parties and the arbitrators. If parties and arbitrators fail to do so, the arbitrators shall, taking into consideration the complexity of the issues decided, the amount of the dispute and the time spent or to be spent with the arbitral proceedings until its conclusion, fix the amount of their fees and expenses, and furthermore determine the payment by the parties of their advance payments. And the applicability of rules such as the one of if the parties agreed to have the dispute decided *ex aequo et bono* or as *amiable compositeur*, and then **the arbitral award may not be subject to appeal to the competent State court**. (i) **Time limit to render an award**: There is a time limit of 12 months, counting from the date of acceptance of the last arbitrator, extendable by agreement of the parties or by the arbitral tribunal, for the arbitrators to notify the parties of the final arbitral award. If the final award is not dispatched to the parties within the maximum term, the arbitral process shall automatically terminate, and the arbitrators will no longer have jurisdiction to decide on the dispute conferred to them. Another peculiarity of LAV is the **Confidentiality**: As a rule, the arbitrators, the parties and the arbitral institutions are obliged to maintain confidentiality regarding all information they obtain and documents brought to their attention in the course of the arbitration proceedings.

In what concerns, the existence of mandatory rules to be apply to the international arbitration proceedings, there are a few stated at LAV that should be regarded, for example the **inadmissibility of pleas based on domestic law of a party, rules of law applicable to the merits of the dispute**: The parties may choose the rules of law to be applied by the arbitrators, if they have not authorized the arbitrators to decide *ex aequo et bono*. Failing any designation by the parties, the arbitral tribunal shall apply the law of the State to which the subject-matter of the dispute has the closest connection. The arbitral tribunal shall take into consideration the contractual terms agreed by the parties and the relevant trade usages, **no appeal of the award to a State court**, for the international arbitrations, the award made by the arbitral tribunal is not subject to appeal, unless the parties have expressly agreed on the possibility of appeal to another arbitral tribunal and regulated its terms and the aspects regarding, **International public policy**, the award rendered in Portugal, in an international arbitration in which non-Portuguese law has been applied to the subject-matter of the dispute, may be set aside on the grounds provided for in art. 46 LAV, as well as if such award is to be enforced or to produce other effects in the national territory, whenever

such enforcement leads to a result that is clearly incompatible with the principles of international public policy.

In addition to the international aspects of Portuguese arbitration rules, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC) was ratified on March, 10, 1994. This international instrument was an addition in what regards the enforceability of international arbitration awards.

Portugal, however, made a reservation that provides as quoted: *“In accordance with the principle of reciprocity, Portugal will only apply the Convention when the arbitral awards are made in states which are bound by the Convention”*.

So, saving the mandatory provisions of the NYC, as well as other treaties or conventions which are binding for the Portuguese State, LAV establishes that the awards made in arbitrations seated abroad are only effective in Portugal, regardless of the nationality of the parties, if such awards have been recognized by the competent Portuguese State court.

To ensure the mentioned rule LAV sets the grounds for refusal of recognition and enforcement and to govern that procedure.

Alongside with the NYC, Portugal signed the following protocols: **(a)** the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention); **(b)** the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA); **(c)** the Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975; **(d)** the Geneva Protocol on Arbitration Clauses of 24 September 1923; and **(e)** the Geneva Convention on Execution dated 26 September 1927.

From the regime now in place, one can say that Portuguese law is highly favorable to foreign arbitration and that Portuguese courts favor the recognition of foreign arbitral awards in Portugal, notably under the NYC.

LAV is the statute governing the recognition and enforcement of foreign arbitral awards. According to it, and save for the mandatory provisions of NYC, as well as for other treaties or conventions which are binding on the Portuguese State, the awards made in arbitrations seated abroad are only effective in Portugal, regardless of the nationality of the parties, if such awards have been recognized by the competent Portuguese State court, under the provisions of LAV.

Regarding the steps parties are required to take, Portuguese Law differentiates whether or not the NYC applies, for instance, in the situation where the NYC applies, foreign awards are directly enforceable before the competent Court of First Instance. Thus, if the award was rendered by a tribunal seated in Portugal, international or not, it does not need recognition and will be directly enforced before a Court of First Instance.

Now, if the NYC or any other convention does not apply, then LAV rules the procedure and grounds for refusal of recognition and enforcement. The competent court is the Court of Appeal.

In addition to those international instruments Portugal also ratified the Energy Charter Treaty in Lisbon on 17 December 1994, having deposited its instruments of accession and ratification on December 16 1997 and the ICSID Convention in 1984.

In what concerns the defense of state immunity regarding jurisdiction and execution, Portugal has ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2005, whereby, the country is bind to follow certain rules, such as, a State cannot invoke immunity from jurisdiction in commercial transactions with a foreign natural or juridical person which led to differences that fall within the jurisdiction of a court of another State, save for commercial transactions between States or when there is an expressed agreement otherwise by the parties, and a State cannot invoke immunity from jurisdiction before a competent court of another State in case it enters into an arbitration agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction and if such proceedings relate to the validity, interpretation or application of the arbitration agreement, to the arbitration procedure or to the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

Thus, as a rule, Portuguese courts consider that a State can invoke immunity from jurisdiction from acts that are *jus imperii*, and immunity from execution from assets that are used within such *jus imperii*. It cannot, however, invoke immunity from jurisdiction where the acts have a *juri gestionis nature*.

Conclusion

China and Portugal, in spite of the differences of both regimes, have widely implemented the arbitration proceedings as a reliable alternative to solve disputes.

Although we have no record up till now of arbitration proceeding involving these two countries and resulting in an enforcement procedure in Portugal of an award rendered in China, we are sure that in the future such reality shall occur. Both jurisdictions ratified and apply international principles and instruments that establish common grounds to minimize contingencies between jurisdictions, which are the starting point to allow mutual recognition and enforcement of awards rendered in both countries.

Authors:

José Maria Corrêa de Sampaio is a Partner at Abreu Advogados in Lisbon.

Nuno Pimentel Gomes is an Associate Lawyer at Abreu Advogados in Lisbon.

www.abreuadvogados.com



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