Some Thoughts on the Recognition and Enforcement of Foreign Arbitral Awards In China

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Introduction

In August 2010, an arbitrator awarded subsidiaries of Mount Gibson Iron Limited- Mount Gibson Mining Limited and Koolan Iron Ore Pty Limited ("Mount Gibson") US $114 million in damages, plus 6% interest on and from the date of the award, as well as legal costs, against a Chinese steel mill, Rizhao Steel Holding Group Co Ltd ("Rizhao"), over Rizhao's breach of a long-term supply contract. Although Mount Gibson hailed it as a victory, so far its attempts to recover the awarded damages have been long and laborious as Rizhao refused to voluntarily comply with the award.[2] Mount Gibson filed an enforcement application under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") with the Rizhao Intermediate People's Court (the "Court") on

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2 The protracted endeavour by Mount Gibson to recover the amount awarded has been well documented in the judgment of Edelmen J in *Rizhao Stell Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* [2011] WASC 207 (published on 23 August 2011). Despite obtaining judgments on the Awards in Western Australia, New York and Hong Kong, as of 15 August 2011, there is no indication that Rizhao has made any arrangements to pay the Awards. At paragraph 2 of the judgment, Edelman J stated that "Rizhao has acted, and is acting, to ensure that the Mt Gibson parties will not be able to enforce their judgment debt in this jurisdiction or in other jurisdictions". The steps taken by Rizhao to prevent enforcement of the Awards were set out by Edelman J (at paragraph 7 of the judgment) as follows:

> "(1) Rizhao sought leave to appeal from the Awards, which leave was refused on 16 November 2010.
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> (2) Rizhao appealed from this refusal to grant leave to appeal, but subsequently discontinued that appeal.
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> (3) Rizhao appealed to the Western Australian Court of Appeal from the order which granted the Mt Gibson parties leave to enforce the Awards in the same manner as judgments of this court. That appeal was heard on 12 August 2011.
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> (4) After orders were made giving the Mt Gibson parties leave to enforce the Awards in Hong Kong as if they were judgments, Rizhao applied to set aside the consequential orders for service upon its Hong Kong subsidiary. This application was dismissed on 13 July 2011 by Saunders J in the Court of First Instance of the High Court of the Hong Kong Special Administrative Region. Saunders J said of an application by Rizhao to extend the time to apply to set aside the orders granting leave to enforce the awards that it was 'as plain a delaying tactic as I have ever seen': Koolan Iron Ore Pty Ltd v Rizhao Steel Holding Group Co Ltd (unreported, High Court of the Hong Kong Special Administrative Region, Nos 25 and 26 of 2011);
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> (5) There is evidence that Rizhao has rearranged contracts with Australian suppliers citing as a reason that the dispute with the Mt Gibson parties is ongoing. There is also evidence that Rizhao has ceased to perform a multi-million dollar iron ore sales contract, and refused to take delivery of cargoes under that contract due to the existence of the Awards and judgment against it.
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> (6) On 1 June 2011, Rizhao brought an originating summons seeking order under O 26A(4) of the Rules of the Supreme Court 1971 (WA) for discovery from a potential party. The purpose of this pre-action discovery is said by Rizhao to be to investigate a potential cause of action to set aside the Awards (suppressed)."

December 10, 2010.[3] At the time of this article, Mount Gibson has failed to receive even an acknowledgement from the Court that it has failed.[4] This case therefore brings Chinese courts' attitudes towards recognition and enforcement of foreign arbitral awards into the spotlight[5] again.

On the face of it, China's current legal framework concerning the recognition and enforcement of foreign arbitral awards seems to be largely in line with international standards. However, in reality, there are still some doubts as to Chinese courts' commitment to honouring in arbitral awards according to international standards. This article will visit China's legal framework concerning recognition and enforcement of awards and some matters foreign parties need to consider before entering into an arbitration agreement with a Chinese party.

What Does 'foreign' Arbitral Award Mean

Under the *Arbitration Law of China* (the "Arbitration Law"),[6] 'foreign' arbitral award means that the place of arbitration (the seat) is outside of mainland China.[7]

There are three types of arbitral proceedings under Chinese law: domestic, foreign-related[8] and foreign[9] and the recognition and enforcement of each is treated differently under Chinese law.[10] It should be noted that:

(a) only disputes with a foreign element may be seated outside mainland China. The Arbitration Law did not specifically set out what constitutes a 'foreign element'. However, according to the *Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (For Trial Implementation)*,[11] a foreign element may be considered to be present if a dispute contains any of the following elements:

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3 In Shandong Province, China.

4 The Australian, April 25, 2011, available at http://www.theaustralian.com.au/business/chinese-court-ties-up-miners-claim/story-e6frg8zx-1226044211034. We did not find any publicly available information to suggest that the Court has given any acknowledgement since the Australian's article was published.

5 The Australian reported that Mount Gibson is also investigating whether it can seize iron ore cargoes from the ports of Rio Tinto and other miners in order to recover the awarded damages. Matt Chambers, 'Mount Gibson Iron Considers Cargo Seizures', The Australian, February 7, 2011, available at http://www.theaustralian.com.au/business/mount-gibson-iron-considers-cargo-seizures/story-e6frg8zx-1226001048099.

6 Adopted at the 8th Session of the Standing Committee of the 8th National People's Congress and promulgated on August 31, 1994, and effective as of September 1, 1995.

7 The view commonly taken is this means mainland China and excludes Hong Kong and Macau.

8 涉外仲裁. Foreign-related arbitration proceedings are arbitration with foreign elements, but where the place of arbitration is inside mainland China.

9 外国仲裁.

10 The distinction between foreign-related arbitral awards and foreign awards is important as awards rendered in China are not eligible for enforcement in China under the New York Convention. As foreign parties may be involved in arbitrations administered by Chinese arbitration institutions, either because the Chinese counterparts have stronger bargaining power, or because the foreign parties voluntarily choose to do so, foreign companies should be aware of the different legal basis for award enforcement and the potential implications.

11 关于贯彻执行<中华人民共和国民法通则>若干问题的意见（试行）promulgated on January 26, 1988, partially repealed.

i) at least one of the parties to a civil relationship is 'foreign';[12] or

ii) the subject matter of the civil relationship is within the territory of another country; or

iii) the establishment, modification or termination of civil rights and obligations occurred in a foreign country.

(b) where the place of arbitration is within mainland China, Chinese law requires that the arbitration be administered by an 'arbitration commission' (仲裁委员会 in Chinese).[13] Although some commentators believe that arbitration commissions established within mainland China do not necessarily have a monopoly over matters where the place of arbitration is within mainland China,[14] conventional wisdom and best practice indicate that until the Arbitration Law or the Supreme People's Court clarifies the point, an arbitration agreement shall specify a Chinese arbitration commission (if the place of arbitration is inside mainland China), or if the parties wish to have their disputes/disagreements determined by a foreign arbitration institution, the parties shall agree to a seat outside mainland China.[15]

Legal Basis Concerning Recognition and Enforcement of Foreign Arbitral Awards and Foreign-Related Arbitral Awards

A. Enforcement of foreign-related arbitral awards

Enforcement (or the application to the court to challenge the enforcement) of foreign-related arbitral awards handed down by a Chinese arbitration commission is carried out under the Arbitration Law and *Civil Procedure Law of China* (the "Civil Procedure Law").[16] Where a party fails to comply with an arbitral award, the other party may apply to the Intermediate People's Court at the place of

12 It should be noted that companies incorporated under the laws of China, such as Foreign Invested Enterprises (FIEs) or Wholly Foreign Owned Enterprises (WFOEs) are generally treated as domestic. Therefore, when foreign companies enter into a transaction with a Chinese company through its FIEs or WFOEs, any arbitration arrangement will be treated as domestic. Foreign companies should bear this in mind as Chinese courts have extensive powers to vacate domestic arbitration awards.

13 An ad hoc arbitration agreement with a seat in China will be deemed as invalid.

14 See Robert Briner, Arbitration in China Seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce, in New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series No. 12, 25 (Albert Jan van den Berg ed., 2004).

15 In Duferco SA v Ningbo Arts & Crafts Import Co, Ltd., Ningbo City Intermediate People's Court, 22 April 2009, the court rejected the respondent's challenge to the award and upheld an ICC award rendered in Beijing. However, the general agreement of arbitration practitioners in China is that it is still too early to state that Chinese courts now accept the validity of foreign-administered arbitrations seated in China. This is especially so since the "Opinions" of some Higher People's Court still hold that foreign administered arbitrations and ad hoc arbitrations seated in China will be deemed as invalid. See for example, the Opinions of Jiangsu Higher People's Court on Several Issues Concerning Judicial Determinations of Civil and Commercial Arbitration （关于审理民商事仲裁司法审查案件若干问题的意见）, the amendment of which came into force on 6 September 2010.

16 The original Civil Procedure Law was promulgated and came into force on April 9, 1991. In 2007, the Civil Procedure Law was repealed, and the new Civil Procedure Law was promulgated on October 28, 2007 and came into force on April 1, 2008. Hereinafter, reference to the Civil Procedure Law means the new Civil Procedure Law.

17 Article 256 of the Civil Procedure Law.

domicile of the person against whom an application is made, or where the property is located.[17]

Enforcement of an award will be denied[18] or an award will be set aside[19] where:

a) the parties have neither an arbitration clause in their contract nor reached a written arbitration agreement subsequently;

b) the person against whom an application is made did not receive notification of the appointment of an arbitrator or the initiation of the arbitral process, or was not given the opportunity to present their case due to reasons that the person is not responsible for;

c) the composition of the arbitral tribunal or the arbitral proceedings were not in conformity with the arbitration rules;

d) the matters determined in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution.

In addition, enforcement will be denied if the People's Court determines that the enforcement of the award is against public policy.[20]

In theory, therefore, apart from the public policy exception, judicial review of foreign-related arbitration awards shall be limited to an examination of the procedural issues.

B. Enforcement of foreign arbitral awards

According to Article 267 of the Civil Procedure Law:

> *"where a party wishes to apply for the recognition and enforcement of a foreign arbitral award, the party shall apply to the Intermediate People's Court of the place where the party subjected to enforcement is domiciled, or where his property is located. The people's court shall deal with the matter in accordance with international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity."*

China acceded to the New York Convention on January 22, 1987 subject to the reciprocity and commerciality reservations, and the New York Convention became effective in China on 22 April 1987.

To ensure a supervision mechanism of local courts is in place and the consistency of the decisions concerning recognition and enforcement of foreign arbitral awards, the Supreme People's Court issued the *Notice on Matters Concerning the People's Court's Handling of Foreign-Related Arbitrations and Foreign Arbitrations* in 1995 (the "Reporting Notice").[21] The Reporting Notice creates a centralised system of reporting, whereby if an Intermediate People's Court decides not to enforce, or refuses to recognise and enforce, a foreign-related award or a foreign arbitral award, the Intermediate People's Court should report such a decision to a Higher People's Court having jurisdiction. If the Higher People's Court agrees not to enforce or refuses to recognise and enforce the award, the Higher People's Court should report such a finding to the Supreme People's Court. Only when the Supreme People's Court so

18 Under Article 71 of the Arbitration Law.

19 Under Article 70 of the Arbitration Law.

20 Article 258 of the Civil Procedure Law.

21 最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知，Promulgated on and effective from August 28, 1995.

decides can an enforcement application be denied.

C. What is the time limit for initiation and determination of enforcement proceedings?

Under the old Civil Procedure Law, there were two sets of time limits for the initiation of enforcement proceedings, one for natural persons (one year if one or both parties are natural persons) and one for corporate or other organisations (if both parties are corporations or other types of organisations, then the time limit is six months, to be calculated from the final date upon which, pursuant to the award, the losing party is obliged to comply with its terms). This has met with substantial criticism as the time limit for initiation of enforcement proceedings was considered too short and contrary to international practice; it may substantially restrict a party's ability to recover its entitlements under an award. The current Civil Procedure Law provides a unified time limit for initiation of enforcement proceedings. The limit is now two years.

According to the *Regulations of the Supreme People's Court on Certain Issues Relating to the People's Courts Enforcement Work (Trial Implementation)*,[22] the court shall decide within seven days whether or not to accept an application for enforcement.

Some Issues Faced by Parties Attempting to Enforce Foreign-Related and Foreign Arbitral Awards

Some issues raised by commentators regarding the recognition and enforcement of foreign-related and foreign arbitral awards include:

a) Some courts review the merits of the award rather than just procedural matters[23] despite legal restrictions on their powers to do so;

b) Overly strict application of procedural irregularities as a ground for refusal to recognise and enforce arbitral awards;[24] and

c) Despite strict time limits imposed by legislations on the courts' decision regarding the acceptance of applications for the recognition and enforcement of foreign arbitral awards,

22 最高人民法院关于人民法院执行工作若干问题的规定（试行）Promulgated by the Supreme People's Court on 8 July 1998.

23 In Hong Kong Huaxing Development Company Ltd v Xiamen Dongfeng Rubber Manufacturing Company, the Xiamen Intermediate People's Court denied the enforcement of an award rendered by CIETAC based on the grounds that the evidence used by the arbitral tribunal for ascertaining the facts was insufficient.

24 For example, in Shin-Etsu Chemical Co., Ltd v Jiangsu Zhongtian Technologies Co. Ltd. and Shin-Etsu Chemical Co., Ltd. v Tianjin Tiancai Co., Ltd., Nantong Intermediate People's Court of Jiangsu Province and the Tianjin High People's Court respectively refused to recognise and enforce two separate JCAA awards based on the ground that the arbitral tribunals did not promptly notify the parties of extension of time for making the awards as required under the JCAA Rules. For detailed explanation of the cases, see Nakamura Tatsuya, Japanese Court Decisions on Article V of the New York Convention, paper presented at the 50th Anniversary of the New York Convention: Challenges for the Judiciary Conference (December 12, 2008).

and for rendering the courts' decision regarding recognition and enforcement, these time limits are not necessarily complied with, as demonstrated in Mount Gibson's current application (and as demonstrated in Mount Gibson, local courts may even ignore the requirement to provide a decision).[25]

While there are lingering suspicions that foreign arbitral awards may not be honoured by Chinese courts (and the Mount Gibson case demonstrates that these suspicions may not be unfounded), according to a 2008 speech by Wan E-Xiang, a deputy chief justice of the SPC, from the beginning of 2000 to the end of 2007 only a total of 12 foreign arbitral awards were not recognised and enforced by the SPC.[26] The reasons for refusing recognition and enforcement were:

a) the statute of limitation for application for enforcement had expired (4);

b) the parties did not reach an arbitration agreement or the arbitration agreement was invalid (5);

c) the party against whom the application for enforcement was made did not have any enforceable assets in China (1);

d) the party against whom the application for enforcement was made did not receive notice for the appointment of the arbitrator and the initiation of the arbitration proceeding (1); and

e) the actions of the arbitral tribunal in reappointing an arbitration did not comply with the arbitration rules (1).[27]

Conclusion

International commercial arbitration, compared to court judgement, is the preferred method for resolving disputes arising out of international commercial transactions. It seems that Chinese legislation and the Supreme People's Court's efforts do go some way towards establishing a pro-arbitration environment in China, especially for the recognition and enforcement of foreign arbitral awards. Nevertheless, foreign parties may still face delays in enforcing their rights under an award and are

25 For example, in First Investment Corp v Fujian Mawei Shipbuilding Co., Ltd., an application for recognition and enforcement was made in December 2006, but the court's decision (in the first instance by Xiamen Maritime Court, denying recognition and enforcement) was not made until May 2008. The recognition and enforcement was refused based on the reason that the award was rendered by truncated tribunal and was in breach of UK's Arbitration Act 1996.

26 As there is no central repository for cases involving recognition and enforcement of foreign arbitral awards, this statement cannot be verified. In addition, as mentioned above, many foreign parties may be forced to arbitrate in China, and there is no statistic concerning recognition and enforcement of foreign-related arbitral awards rendered by Chinese arbitration institutions. It is therefore difficult to form a view regarding China's record in recognising and enforcing arbitral awards except based on anecdotal evidence.

27 Available at http://www.rucil.com.cn/article/default.asp?id=798, last visited February 28, 2011. The deputy chief justice also mentioned that no recognition and enforcement of a foreign arbitral award was refused based on public policy ground during that period. However, soon after the deputy chief justice's speech, the Jinan Intermediate People's Court in Hemofarm D.D. et al. v Jinan Yongning Pharmaceutical Co, ruled that an ICC award, by purporting to resolve a dispute that was subject to the jurisdiction of the Chinese courts, violated China's judicial sovereignty and therefore, Chinese public policy. For detailed explanation of the case, see Nadia Darwazeh, Friven Yeoh, 'Recognition and Enforcement of Awards under the New York Convention', 25 J. Int'l Arb. 837, 847 (No. 6, 2008).

presented with some uncertainties in Chinese courts' commitment to the recognition and enforcement of foreign arbitral awards. In order to ensure enforceability of arbitral awards to the greatest extent possible, foreign parties should keep in mind when entering into commercial transactions with Chinese parties:

a) Only transactions with a foreign element may be arbitrated outside of China. The nationality of parties is one element used in determining whether a transaction contains foreign elements. Companies should consider carefully the entities used when entering into a commercial transaction with a Chinese party;

b) When the seat of an arbitration is in mainland China, until the law clearly changes, the parties should designate a Chinese arbitration commission. Ad hoc arbitration seated in China may be considered invalid in China; and

c) Arbitrations with a seat inside China are not considered as 'foreign', and the New York Convention does not apply to the recognition and enforcement of such awards.[28]

28 Mount Gibson goes as far as stating that "the lesson we've learned is that our offtake partners now are all companies and entities that either have assets in Australia or assets in Hong Kong, Japan or UK, where we can go after them and they can't hide behind the Great Wall of China". While it is certainly prudent to determine whether the other party has assets in countries that have a known record of honouring awards, practicability of such an exercise is obviously an issue.