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Enforcement of Foreign Arbitral Awards – China

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Why Arbitration?

- Confidentiality of proceedings
- Neutrality of arbitrators
- Specialized arbitrators
- Cost
- Speed
- Flexibility
- Language
- Finality of the award (AAA offers appeal process)
- Lack of Treaties/Conventions for enforcement of judicial judgments

Convention and the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)

- Per UNCITRAL:

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term “non-domestic” appears to embrace awards which, although made in the state of enforcement, are treated as “foreign” under its law because of some foreign element in the proceedings, e.g. another State’s procedural laws are applied.

Convention and the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”), cont.

The Convention’s principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Convention and the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”), cont.

How to become a party

The Convention is open to accession by any Member State of the United Nations, any other State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

Convention and the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”), cont.

- The goal of the Convention per the U.S. Supreme Court is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced.
- Unfortunately the Convention does not make enforcement of foreign arbitral awards any easier than the enforcement of domestic awards in the county in which recognition and enforcement is sought; however, the Convention does require that an award be presumed valid with the burden of proving invalidity on the party opposing enforcement.

- 150+ countries, including China and the United States, are signatories to the Convention. Countries may make certain reservations in connection with their adoption of the Convention.
 - Limit to recognition and enforcement of awards made in the territory of another contracting state
 - Reciprocity in the event of awards made in the territory of non-contracting states
 - Applicable only to commercial contracts or relationships
 - Not applicable to immovable property

- Article I of the Convention provides that the Convention applies to awards made in the territory of a state other than the state where recognition and enforcement is sought or in a state where an arbitral award is not considered “domestic.” (For example, an award that is made pursuant to foreign law or involving parties that have their principal place of business outside the enforcing jurisdiction.)

- Article V of the Convention sets forth the basic grounds upon which a court may refuse to enforce an award. The reasons include:
 - Parties were suffering under some type of incapacity;
 - The arbitral agreement was invalid;
 - The party challenging the award did not receive proper notice regarding the arbitrator's appointment, the proceedings or could not present their case;
 - The Award deals with matters outside the scope of the arbitration agreement;

- Either the arbitral panel or the procedure used in the arbitration is outside the scope of the agreement or applicable law;
- The award is not binding or was set aside or otherwise rendered invalid by a competent authority of the country where the award was issued;
- The subject matter is not properly the subject of the arbitration; or
- The recognition or enforcement of the award is contrary to public policy in the state of recognition or enforcement.

Enforcement of an Arbitral Award in China

A 2015 study by King & Wood Mallesons provides interesting insight into the enforcement of foreign arbitral awards by courts in China.

- The overall average enforcement rate for reported decisions or orders from 1994 to 2015 was approximately 70%.
- Because enforcement will most likely be made within a region of China, it is important to look at enforcement rates in the courts of the various regions. The region with the highest enforcement rate in China (100%) was Shanghai with the lowest at 40% in the Jiangsu province.

Enforcement of an Arbitral Award in China, cont.

- The arbitration association through which the award is rendered does not appear to influence the enforcement of the award. Smaller trade associations as well as large arbitration centers appear to be equally successful in having arbitration awards enforced.
- The reasons for a failure to enforce arbitral awards focused more on invalid arbitral agreements, the arbitral tribunal, the arbitral procedure was not in accordance with the parties' agreement or there was a lack of proper notice. Failure to enforce for a violation of public policy was far down on the list.