Enforcing Foreign Arbitration Awards in China

1. Introduction

Arbitration is the dispute resolution method of choice in most Sino-foreign contracts. Enforceability ranks high among the reasons for this preference. The People’s Republic of China (the “PRC” or “China”) has no bi-lateral treaties for the recognition and enforcement of court judgments with any of its major trading partners. By contrast, it is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NYC”) which provides for the direct enforcement of foreign arbitral awards. Further, the concept of res judicata is recognized in China only in the context of arbitration. This means that arbitration proceedings cannot be commenced in China in respect of matters that have already been arbitrated before. By contrast, a party to court proceedings outside of China may apply to re-litigate the dispute in China. Provided Chinese jurisdiction can be established, the Chinese court may well accept the case. Other advantages of arbitration include neutrality, the saving of time and cost, privacy, flexibility and finality.

2. The Enforcement Regime

The Chinese regime for the recognition and enforcement of arbitral awards varies, depending on whether the award qualifies as domestic, foreign-related or foreign. The first two are awards that were made in China. The third refers to awards that were made outside of China.

‘Foreign-related’ is defined as awards involving ‘foreign elements’. This was explained by the Chinese Supreme Court as including situations where at least one of the parties is foreign, the facts took place in a foreign country, or the subject-matter of the dispute is seated outside of China. Given, for example, that Sino-foreign joint venture companies, and indeed, wholly owned foreign enterprises, have Chinese nationality the regime for the enforcement of domestic awards should not be ignored by foreign investors. Importantly, of the three regimes, it is the only one that permits the enforcing court to look into the merits of the award, namely error of law, insufficient evidence and corruption of the tribunal.

Enforcement of foreign awards is governed by the NYC and corresponding provisions in domestic legislation. Applications for enforcement should be made within the prescribed time limit to the Intermediate People’s Court of the place of domicile of the Chinese respondent, or where the assets subject to enforcement are located. The fact that intermediate rather than basic level courts are charged with the enforcement of foreign and foreign-related awards reflects at attempt at securing better trained and more experienced judges. Grounds for objection to enforcement are broadly similar to those of Article V of the NYC and are limited to procedural irregularities.

Execution measures available to the successful applicant upon recognition and enforcement of an award include the freezing and confiscation of bank deposits and the sealing up, confiscation, freezing or selling of property. The court may assist by carrying out investigations and issuing search warrants. The Civil Procedure Law of the PRC also contains bankruptcy provisions which apply to all enterprises other than state enterprises.

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3. Enforcement in Practice – Cause for Concern?

Businessmen dealing with China often express concerns in relation to the existence of effective enforcement in China, citing judiciary inexperience and corruption, discrimination against foreign parties, and what is often termed ‘local protectionism’. This refers to the protection said to be extended by Chinese courts to local enterprises, particularly where they are deemed important to the local economy, or where they simply enjoy close relationship with the local judiciary.
Some view such criticism as harsh and point to the absence of cogent evidence of the court favouring Chinese parties. Further, to address concerns about ‘local protectionism’, in 1995 and 1998, the Supreme People’s Court issued notices which established an administrative control mechanism. The notices provide that an Intermediate People’s Court must follow an internal procedure when contemplating refusal of the application. According to this procedure, the proposed refusal must be sent to the Higher People’s Court for approval. A decision by the Higher People’s Court to maintain the proposed refusal must, in turn, be approved by the Supreme People’s Court. Only then will it become effective. To avoid delay, in all instances the court must make its decision within a prescribed time limit. It has been reported that this system of mandatory review of decisions made by the lower court works well. About 80% of all cases involving refusal to enforce by both the intermediate People’s Court and the High People’s Court were finally overturned by the Supreme Court.

Indeed, in terms of compliance with the provisions of the NYC, China is regarded in arbitration circles as one of the better jurisdictions available. Courts are unlikely to look into the merit of the award in breach of the NYC, and most awards are successfully enforced. Where difficulties do arise, they tend to do so if and when the respondent party fails to pay and it falls to the enforcing party to seek execution of the award. It is then that the enforcing party may experience a marked slowdown in the progress of the case and difficulties in getting information from the court.

4. What Does This Mean For Your Business

It is undeniable that problems associated with enforcement remain, and that further effort will need to be made to improve the training of judges and curb local protectionism. However, the enforcement procedure, together with the reporting system referred to above, have contributed towards the establishment of a reliable regime. Where the need arises for execution through the court, delay and confusion may set in. It is here that a good understanding of the network of relationship and power involved, and the ability to keep cool in the face of frustration become essential. On the upside, it is no longer necessary to rely solely on the court to investigate assets. Though the local offices of the State Administration of Industry and Commerce (“SAIC”), the Chinese companies registry, vary in the access to and amount of information they offer, there are now in China investigating companies that are experienced and inexpensive.