Different Types of Arbitral Awards under Chinese Law (Part I)

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The application for setting aside, recognition, and enforcement of different types of arbitral awards is governed by different legal provisions under Chinese law.

Under Chinese law, arbitral awards are classified into three types: foreign, domestic, and foreign-related arbitral awards. The recognition and enforcement (including setting aside or refusing enforcement of an arbitral award) of different types of arbitral awards is governed by different legal provisions.

**Foreign arbitral awards**

China is a Contracting State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention). Therefore, for arbitral awards that fall within the scope of New York Convention, the Convention and the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (hereinafter Supreme Court Circular of New York Convention) shall apply. For foreign arbitral awards which are out of the scope of New York Convention, article 282 (judicial scrutiny pursuant to the international treaty concluded or participated by China or in accordance with the principle of reciprocity.) of the Civil Procedure Law of China (hereinafter CPL) shall apply (article 1 para 2 of the Supreme Court Circular of New York Convention). Meanwhile, prior to making decision on not to enforce or refusing to recognize/enforce the award, the court should report to the higher People's Court within its jurisdiction for review, and if the higher People's Court agrees with the lower court, it shall report its review opinion to the Supreme People's Court. (See Circular of the Supreme People's Court on Issues in the People's Courts Handling of Foreign-related Arbitrations and Foreign Arbitrations)

**Domestic arbitral awards**

Application for enforcement shall pursuant to article 29 (the intermediate People's Court at the domicile of the party under enforcement or at the locality of the properties to be enforced shall have the jurisdiction over the application) of the Interpretation of the Supreme People's Court on Certain Issues relating to Application of the Arbitration Law of China (hereinafter Interpretation of the Arbitration Law). Application for setting aside shall follow article 58 and article 61 of the Arbitration Law of the China (hereinafter Arbitration Law) as well as article 19 and 21 of the Interpretation of the Arbitration Law (Article 19: under an arbitral award, if it contains decisions on matters beyond the scope of the submission to arbitration, that part of
decisions should be set aside, unless that part cannot be separated from other parts which within
the scope of the submission to arbitration, then the whole award should be set aside. Article 21:
the people's court may order the arbitral tribunal to re-arbitrate the case if i) the evidence on
which the arbitral award is based is forged; or ii) the other party concealed any evidence, which
has sufficient impact on the impartiality of the award.). Application for refusing enforcement
shall pursuant to article 63 of the Arbitration Law and article 237 of CPL.

Foreign-related arbitral awards

Application for enforcement shall follow article 29 of the Interpretation of the Arbitration
Law. Application for setting aside shall pursuant to article 70 of the Arbitration Law, article
274 of CPL and article 19 of the Interpretation of the Arbitration Law. Meanwhile, prior to
making decision on setting aside, or not to enforce or refusing to recognize/enforce the award,
the court should report to the higher People's Court within its jurisdiction for review; and if the
higher People's Court agrees with the lower court, it shall report its review opinion to the
Supreme People's Court. (See Circular of the Supreme People's Court on Issues in the People's
Courts Handling of Foreign-related Arbitrations and Foreign Arbitrations and Circular of the
Supreme People's Court on Issues in the People's Courts Setting aside Foreign-related
Arbitrations)

Arbitral awards related to Hong Kong, Macao and Taiwan can be divided into two
categories:

i. Arbitral awards made in Hong Kong, Macao or Taiwan (including ad hoc arbitrations
and institutional arbitrations);

ii. Arbitral awards made outside Hong Kong, Macao or Taiwan but the case merits related
to Hong Kong, Macao or Taiwan.

For category i, shall respectively follow Arrangements of the Supreme People's Court on
the Reciprocal Enforcement of Arbitral Awards by Mainland China and the Hong Kong Special
Administrative Region, Arrangement of the Supreme People's Court on Mutual Recognition
and Enforcement of Arbitral Awards Between the Mainland and Macau Special Administrative
Region, and Provisions of the Supreme People’s Court on Recognition and Enforcement of
Arbitral Awards Issued in Taiwan³.

For category ii, in accordance with article 19 of the Interpretation of the Supreme
People’s Court on Several Issues Relating to Application of the Law of China on Application
of Laws to Foreign-related Civil Relations (I) (hereinafter Interpretation of Foreign-related

1 Under these three agreements, it is stated that the arrangement applies to arbitral awards which pursuant to local
(Hong Kong, Macau, Taiwan) arbitration law/rules. However, a latter official document, Supreme People’s Court
Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland China, further
illustrates that, in order to ensure “uniform enforcement” of the arrangement, the arrangement should also apply to
ad hoc arbitral awards made in Hong Kong or awards made in Hong Kong by foreign arbitration institutions.
Therefore, it can be expected that all the three arrangements shall be respectively applied to arbitral awards which
are made in Hong Kong, Macau, and Taiwan, irrespective of whether the local rules are applied or not. Nevertheless,
a case by case analysis is still suggested to every individual case.
Civil Relations I), these cases shall be treated as the foreign-related civil relation, thus shall be treated as foreign-related arbitral awards.

It seems that the distinction among abovementioned three types of the arbitral awards is quite clear, however, in practice, things can be more complicated and confusing--- some types overlap with each other under special circumstances while grey areas still exist under the current legal framework. Therefore, one should be prudent when trying to do the classification.

As a threshold, one should have a clear picture of two pairs of concepts:

**Domestic arbitral awards, non-domestic arbitral awards, and foreign arbitral awards under New York Convention.**

**Foreign arbitral awards, domestic arbitral awards, and foreign-related arbitral awards under Chinese law.**

**Domestic arbitral awards, non-domestic arbitral awards, and foreign arbitral awards under New York Convention**

While there is no clear definition between domestic arbitral awards and foreign arbitral awards under Chinese law, there is also no universal definition adopted by the international community. The most well-known definition is found under article 1.1 of New York Convention: “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,... It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought”. Under the Introduction section of New York Convention, it confirms that it does not distinguish the “non-domestic arbitral award” and the “foreign arbitral award”. The Introduction also indicates that the non-domestic arbitral award includes the situation that “the award is made in the state of the enforcement, but due to some foreign-related elements in the proceeding, such as the application of the foreign procedural law, the award shall be recognized as a ‘foreign’ arbitral award in accordance with the national law.”

Therefore, New York Convention adopts both geographical and non-domestic standards to distinguish domestic arbitral awards and foreign arbitral awards.

**Geographical standard:** The state where the award is made is different from the state where the recognition and enforcement of such award are sought.

**Non-domestic standard:** The state making the award and the state where the recognition and enforcement of this award are sought is the same state, but due to the legal provision of this state, the arbitral award shall be treated as a non-domestic arbitral award.

New York Convention gives states the right to make reciprocity reservation in accordance with article 1.3. Contracting States can declare that “it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State”. 
Thus, if an arbitral award is made within the territory of a non-contracting state, *New York Convention* shall not apply. Article 1.3 provides for **commercial reservation** that Contracting States can apply *New York Convention* only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law.

The industry has **two understandings of the reciprocity reservation.** One opinion is that the reciprocity reservation not only excludes the application of *New York Convention* to the arbitral award made in non-contracting states, but also excludes non-domestic awards which the state making the award and the state where recognition and enforcement of the award is sought is the same state. The other view is that the reciprocity reservation does not exclude non-domestic arbitral award.

By far, there is no conclusive interpretation of reciprocity reservation. Relatively leading guidelines are *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and *ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges.* The UNCITRAL Guide uses domestic cases from the United States as examples to analyse the reciprocity reservation. It indicates that the precedents of the United States courts ruled that the reciprocity reservation does not exclude the application of *New York Convention* to non-domestic arbitral awards as it only excludes the arbitral awards made in non-contracting states. The ICCA’s Guide stipulates that “a court in a State which has made the reservation of reciprocity will apply the Convention only if the award has been made in the territory of another Contracting State, or if the award is non-domestic and shows links to another Contracting State.” It can be seen that **these two guidelines both support that the reciprocity reservation does not exclude application of New York Convention to non-domestic awards.**

To get more information about the definition of foreign arbitral awards, domestic arbitral awards, and foreign-related arbitral awards under Chinese law, please stay tuned for our follow-up article: *Different Types of Arbitral Awards under Chinese law (Part II).*

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