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Enforcement of SCMA Awards in Mainland China

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Introduction

Driven by globalization and the "Belt and Road" initiative, Chinese companies are carrying out business activities all over the world. However, given the differences in legal regimes and business cultures, various kinds of cross-border disputes could potentially arise from these business dealings. Considering that a large number of disputes are cross-border, and that time, cost, flexibility, and confidentiality are also key considerations for parties, litigating in a local court of one party rarely suits all the parties. Instead, international arbitration offers an alternative option. Carefully choosing the applicable law and drafting an appropriate arbitration clause in anticipation of potential disputes, therefore, becomes particularly important when entering into a cross-border commercial contract.

This article examines the subject of arbitration from a Chinese law perspective and aims to provide an overview of Chinese arbitration law and maritime law (which is particularly relevant as cross-border trade frequently involves maritime transport) so that parties can have a better understanding of relevant Chinese law and make a informed choice based on their actual circumstances. This article will also provide an overview of the Chinese law on recognition and enforcement of foreign arbitral awards (where the parties choose foreign arbitration), and of the foreign arbitration institutions (such as the Singapore Chamber of Maritime Arbitration ("**SCMA**")) that are often chosen by the parties, particularly when one of the parties is a Chinese company.

Overview of Chinese Law on Arbitration

In China, arbitration law is mainly comprised of (1) the Arbitration Law and the arbitration-related legal content in the Civil Procedure Law and the Civil Code; (2) the Comprehensive and Special Judicial Interpretation of the Supreme People's Court; and (3) International Treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**").

In general, parties can agree to settle disputes through arbitration by including an arbitration clause in the contract or by entering a separate written arbitration agreement either before or after the dispute occurs - except in the case of disputes arising from marriage, adoption, guardianship, child maintenance, and inheritance, and of administrative disputes which fall within the jurisdiction of the relevant administrative organs, according to the law.

Under Chinese law, four conditions need to be satisfied to ensure the enforceability of the arbitration agreement. The requirements are as follows:

- 1) the expression of the parties' intentions to submit disputes to arbitration must be set out in the arbitration agreement;
- 2) the scope of the matters to be arbitrated must be defined;
- 3) the specific arbitration commission selected by the parties must be specified; and
- 4) the arbitration agreement must be in writing and validly executed and entered into by individuals with full legal capacity or by legal persons.

Overview of Maritime Law in China

In China, maritime law is mainly comprised of (1) Laws, such as the Chinese Maritime Code (“**CMC**”) and the Special Procedure Law of the People’s Republic of China on Admiralty; (2) the Judicial Interpretation of the Supreme People’s Court; and (3) International Treaties.

In general, the CMC aims to regulate the interactions between parties engaged in maritime transport and to promote the development of maritime transport and international trade. If any international treaty concluded or acceded to by China contains provisions differing from those contained in the CMC, the provisions of the relevant international treaty shall apply, unless they are provisions China has expressed reservations about. International practice may also be applied to matters where neither the relevant laws of China nor those of any international treaty concluded or acceded to by China, contain any relevant provisions.

Enforceability of Foreign Awards in China

In China, recognition and enforcement of foreign arbitral awards is usually a two-step process, i.e. recognition followed by enforcement. Where a foreign arbitral award requires enforcement by a court in China, the party seeking enforcement must apply to the relevant Chinese Court for both the recognition and the enforcement of the arbitral award. Once the Court recognises the award, then the enforcement is carried out in accordance with the enforcement procedures of Chinese Civil Procedure Law. Where the party seeking enforcement only applies for recognition without applying for enforcement at the same time, the Chinese court will only examine whether the arbitral award can be recognised and makes a ruling accordingly.

Recognition of foreign arbitral awards means Chinese courts have confirmed that foreign arbitral awards are enforceable by law in China. Since technically speaking, the foreign arbitral award is only effective in the territory of the country where the place

of the arbitration is located (in the sense that it usually does not become automatically effective in other countries before it is recognised by the relevant judicial authority in that country), and for the award to become effective in China, the parties will need to seek confirmation on the effectiveness of the award from the Chinese courts. Recognition of a foreign arbitral award is a process in which a party applies to the court to review and make a ruling on the effectiveness of the award by the law, i.e. a judicial act to confirm whether a foreign arbitral award is effective in accordance with the procedures prescribed by Chinese law.

Although these are two independent processes, some parties may in practice apply to the court for recognition and enforcement of foreign arbitral awards through a single application. In that case, the court will still usually address the recognition issue first and, if successful, then the enforcement procedure.

The framework of Chinese recognition and enforcement of foreign arbitral awards has been taking shape over the last few decades and is based on international law and domestic law.

The international law basis includes (1) the New York Convention; (2) bilateral or multilateral agreements; and (3) the principle of reciprocity.

New York Convention

Since China acceded to the New York Convention in 1987, Chinese courts have gained extensive experience in the recognition and enforcement of foreign arbitral awards. The Convention is widely applied globally and endows foreign arbitral awards with enforceability in the contracting states, thereby promoting arbitration as a valuable dispute-resolution mechanism for international trade. The New York Convention has become one of the major legal bases for Chinese courts to recognise and enforce foreign arbitral awards.

Bilateral agreements

A bilateral agreement refers to a treaty concluded between two countries only. Increased globalization and the consequential risk of trade frictions and conflicts have led countries to seek arrangements promoting improved trading relations and judicial cooperation. To date, China has entered into bilateral treaties for civil and commercial judicial assistance with 39 countries, 36 of which have come into force and include provisions for the mutual recognition and enforcement of arbitral awards. Bilateral treaties, therefore, form an important legal basis for Chinese courts to recognise and enforce foreign arbitral awards, although the scope of application is relatively narrow given that it is only limited to those countries that have a treaty with China.

The principle of reciprocity

The principle of reciprocity, which refers to the mutual benefit agreed between countries through the mutual transfer of privileges and interests, can also play an important role in the judicial cooperation between states. However, it should be noted that since most countries have acceded to the New York Convention, it is relatively rare for current Chinese judicial practice to publish a case of recognition and enforcement of foreign arbitral awards based on the principle of reciprocity.

Institutional vs ad hoc Arbitration – Chinese Perspective

In China, the principal domestic law for recognizing and enforcing foreign arbitral awards is Article 283 of Civil Procedure Law of the People's Republic of China (Revised in 2017) ("**Civil Procedure Law**"), which stipulates that "*if an award made by a foreign arbitration institution needs to be recognised and enforced by a people's court of the People's Republic of China... the people's court shall handle the matter according to **international treaties** concluded or acceded to by the People's Republic of China or in accordance with **the principle of reciprocity***" (our emphases).

By way of further explanation, Article 545 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Revised in 2020) ("**Interpretation**") stipulates that where a party applies to a people's court for recognition and enforcement of an arbitral award rendered by an ad-hoc arbitration tribunal outside the territory of the People's Republic of China, such application shall be dealt with by the People's Court in accordance with the provisions of Article 283 of the Civil Procedure Law, the full provision of which is set out above. It indicates that ad hoc arbitration awards are in principle, recognizable in China, as long as they can meet the requirements under the applicable international treaties (mainly the New York Convention) and/or the principle of reciprocity.

Regarding international treaties, there are both multilateral treaties and bilateral treaties applicable in China. For multilateral treaties, it is usually the New York Convention that will apply. For bilateral treaties, as mentioned above, China has entered into bilateral treaties for civil and commercial judicial assistance with 39 countries. Except for the treaty with Turkey, the content of the recognition and enforcement of arbitral awards in the remaining treaties all points to the application of the New York Convention.

Therefore, the Chinese courts will essentially apply the provisions of the New York Convention to recognise and enforce foreign arbitral awards issued in member states of the New York Convention, subject to reciprocity reservation statementsⁱ and commercial reservation statements.ⁱⁱ According to Article I paragraph 2 of the New York Convention, the term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. Accordingly, **both foreign ad-hoc arbitral awards and institutional arbitral awards can, in principle, be recognised and enforced in Chinese courts in accordance with this provision.**

Regarding the principle of reciprocity mentioned in Article 283 of Civil Procedure Law and Article 545 of the Interpretation, given the wide application of the New York Convention, in practice, Chinese courts rarely recognise and enforce foreign arbitral awards based on this principle. However, in theory, foreign arbitral awards issued in non-signatory states of the New York Convention could be recognised and enforced in China under the principle of reciprocity. It is worth noting that the Chinese courts' understanding of the principle of reciprocity has been shifting from "factual reciprocity"ⁱⁱⁱ to "presumed reciprocity"^{iv} which is a more flexible standard for the recognition and enforcement of foreign judgments.

Status of SCMA Awards in China

The SCMA is a specialist arbitration institution which provides a neutral, cost-effective and flexible framework for maritime and international trade arbitrations that is responsive to the needs of industry users. Its global and regional members hail from all sectors of maritime, trade and arbitration communities. SCMA attracts disputants in the region by providing tailored solutions to suit the region's interests.^v

Parties can refer any dispute to arbitration under the SCMA Arbitration Rules. While the SCMA Arbitration Rules were designed to address the needs of the maritime community, many other sectors can benefit from choosing SCMA. SCMA's model means that disputants are given all the tools they need to self-administer their arbitration with one distinct advantage — the option of services provided by SCMA's dedicated Secretariat. This translates into maximum flexibility over the arbitration process while ensuring peace of mind that the institution can provide a range of services, where requested. Unless disputants choose to use any of SCMA's services, no costs are levied by the SCMA. The self-administered model means that a party can commence and run the arbitration entirely at its own cost. The SCMA neither imposes any mandatory deposits nor enforces a scale of fees for

arbitrator remuneration. Any fees paid to the arbitrator are mutually agreed between disputants and the arbitrator. It has strict admission criteria for inclusion in its panel of arbitrators (for instance, putative arbitrators must have at least 10 years in the shipping industry to be qualified as arbitrators for the SCMA), although parties are not restricted to choosing an arbitrator from the SCMA's panel of arbitrators only.^{vi}

According to "2020 Year in Review" issued by SCMA, in 2020, they dealt with a total of 43 cases involving parties from their own country, other countries in Asia (including China), the United Arab Emirates, and other parts of the world. The total claim amount was USD 49.37 million with an average claim amount of USD 1.23 million.

Singapore and China are both parties to the New York Convention. Therefore, once parties obtain an arbitral award issued in Singapore, the basis for applying for recognition and enforcement in China will be the New York Convention. An SCMA award is considered an institutional arbitration award in China,^{vii} which, in principle, can be recognised and enforced in Chinese courts. It is worth noting that based on the records of the existing cases published on Itslaw,^{viii} as of 1 June 2021, it seems that all the SCMA awards have been successfully recognised and enforced in China, which indicates their acceptance by Chinese courts.

Comment

Arbitration as an alternative dispute resolution method to litigation is becoming increasingly popular. Bearing in mind the issue of recognition and enforcement of awards where international parties are involved, choosing the right place for the arbitration proceedings is critical as it directly impacts whether the parties can successfully enforce the award.

For further information on this topic, you are welcome to contact the authors of this update or your usual contact at Clyde & Co.

ⁱ Article 1 of the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China stipulates that this Convention shall apply to the recognition and enforcement of an arbitral award made in the territory of another contracting State.

ⁱⁱ Article 1 of the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China stipulates that this Convention shall only apply to the disputes arising from any contractual or non-contractual commercial legal relationship.

ⁱⁱⁱ It generally refers to the premise that the judgment of a foreign court being recognised and enforced in the Chinese court is the country where the foreign court is located has a precedent of recognizing and enforcing the judgment of the Chinese court, otherwise the Chinese court will refuse to recognise and enforce it.

^{iv} Article 7 of the Nanning Declaration(第二届中国-东盟大法官论坛南宁声明) dated 8 June 2017 stated that "...states that have not yet concluded the recognition and enforcement of international treaties related to foreign civil and commercial judgments, in the judicial procedures for the recognition and enforcement of the other states' civil and commercial judgments, if there are no precedents in the courts of the opposing states that refuse to recognise

and enforce the civil and commercial judgments on the grounds of reciprocity, within the scope permitted by the domestic laws of the state it can be presumed that there is a reciprocal relationship with the opposing state. (尚未缔结有关外国民商事判决承认和执行国际条约的国家，在承认与执行对方国家民商事判决的司法程序中，如对方国家的法院不存在以互惠为理由拒绝承认和执行本国民商事判决的先例，在本国国内法允许的范围内，即可推定与对方国家之间存在互惠关系。)

^v Singapore Chamber of Maritime Arbitration website <https://www.scma.org.sg/Default.aspx?sname=scma&sid=126&pageid=2969&catid=4175&catname=About-Us> (accessed 31 May 2021).

^{vi} Singapore Chamber of Maritime Arbitration website <https://www.scma.org.sg/Default.aspx?sname=scma&sid=126&pageid=2969&catid=4206&catname=Resources#FAQ> (accessed 31 May 2021).

^{vii} (2017) J04MT No.25 (China Light TRI-UNION International Co., Ltd. vs. Tata International Metal (Asia) Co., Ltd.).

^{viii} <https://www.itslaw.com/home>.

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Clyde & Co is a leading international law firm with 440 partners and 2,500 legal staff, operating from over 50 offices and associated offices across six continents. In China, Clyde & Co established a joint law venture with Chinese local law firm Westlink Partnership in 2013 - Clyde & Co Westlink JLV. The joint law venture is able to provide seamless onshore and offshore legal advice as a single entity.

Clyde & Co Westlink JLV draws together Clyde & Co's international expertise with the full domestic Chinese law capability of Westlink Partnership for clients with an interest in China.

The firm's China qualified attorneys have rights of audience before the Chinese Courts / arbitration institutions and can advise on all facets of domestic litigation, arbitration, commercial disputes and insolvency work in China. The team has acted as lead counsel in applications, trials and appellate proceedings, before various levels of courts in China. They also have impressive track records in recognising and enforcing foreign arbitral awards in China.



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