

Kluwer Arbitration Blog

Arbitration in China - The Common Misperceptions

Eleanor Taylor (Kluwer Law International) · Thursday, November 7th, 2013



For those who may have missed earlier announcements, I'm delighted to inform you of a new content set - Chinese Court Decision Summaries on Arbitration - we added to [Kluwer Arbitration](#) in September. Edited by [WunschARB](#), the cases launched last month with 126 summaries of cases concerning enforcement of arbitral awards. Another 139 summaries have just been added - this time covering decisions related to validity of arbitration clauses. And in December, we will be including summaries related to annulment of arbitral awards.

Commenting on the summaries, Georgios Petrochilos, Freshfields Bruckhaus Deringer, Paris stated:

"The Chinese court decision summaries make accessible a considerable corpus of jurisprudence that was off-limits to most scholars and practitioners. They provide a comprehensive description of the factual and legal bases for each decision, focusing on the salient points. The text is lucid, and Chinese-law concepts are rendered in a manner which requires no prior knowledge of Chinese law. This collection is a reliable tool and will be the reference work in the field."

Simon Chapman, Herbert Smith Freehills, Hong Kong commented:

"The Chinese Court Decision Summaries are an excellent tool for practitioners and academics who are interested in the development of arbitration in China. The database provides a comprehensive account of the relevant case law, with useful and practical commentary. Collating all of this information in one place was clearly no mean feat. The results are invaluable."

Placing the summaries into context, I posed the below questions to **Clarisse von Wunschheim, WunschARB**.

1) What are the common misperceptions associated with arbitrating in China and/or with Chinese parties?

I often hear foreign practitioners say “Arbitrating in China? Don’t even bother. You won’t be able to get a fair proceeding and even if you do, you won’t be able to enforce the award”. While it is true that arbitration proceedings in China and in particular enforcement can go terribly wrong and be puzzling to western parties used to the western concept of ‘due process’, there is also sufficient empirical evidence to suggest that things can work fine where the parties prepare well and seek experienced counsel.

The major problem is that there is a lack of statistics and information about the situation regarding arbitration and enforcement in China. Therefore, personal experience from practitioners are often extrapolated and develop into ever growing rumours about how terrible arbitration in China is.

This is the reason why WunschARB undertook to collect and study Chinese courts decisions on arbitration in order to find out how courts were dealing with arbitration and whether or not the situation is really so terrible.

2) - What are the current trends regarding the enforcement of foreign arbitral awards in China?

From the hundreds of court decisions we collected and analysed, we can see positive and less positive trends developing.

On the positive side, we can see the following trends:

- The Chinese courts’ practice in determining the law applicable to arbitration agreements has changed. In the past, they tended to automatically apply Chinese law to the question of the validity of the arbitration agreement. This led to frequent unenforcement of awards or invalidation of arbitration clauses because the parties did not follow the strict requirements of Chinese law, in particular the requirement to designate a specific arbitration institution. In 2006 the Supreme People’s Court issued interpretations directing the courts to rely firstly on the law chosen by the parties, and failing such choice on the law at the place of arbitration. Chinese law would come into play only where parties failed to designate a specific law or place of arbitration. From the various court decisions, one can see that the practice of the courts has evolved and that they have learned to apply foreign law to the question of the validity of the arbitration agreements. Consequently, the proportion of awards being refused enforcement because of an invalid arbitration agreement has significantly decreased.
- The practice of the courts has also evolved as concerns the review of awards with regard to issues of merits. Until 2012, courts were entitled to review and refuse enforcement of domestic awards for grounds of ‘insufficient evidence’ and ‘misapplication of the law’. This provided the courts with a welcome opportunity to review the facts of the case and the reasoning of the arbitral tribunal. In addition, while these grounds applied only to domestic awards, it was not uncommon for courts to adopt a similar approach in foreign-related cases. In recent years however, courts have adopted a stricter stand and are now commonly refusing to hear arguments

relating to the merits of the courts. In addition, with the revision of the Civil Procedure Law in 2012, the grounds of 'insufficient evidence' and 'misapplication of the law' have been replaced by the grounds of 'forged evidence' and 'misconduct of arbitrators'. This will further strengthen the current trend to move away from non-enforcement grounds relating to the facts or the merits of the case.

- Chinese courts have also become more reluctant to give room to overly formalistic arguments. More and more Chinese courts now recognize that the service of documents in arbitration is not subject to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters and the means of service can be agreed between the parties.

- Courts have also started to more consistently apply principles aimed at preventing uncooperative respondents from trying to evade enforcement without due reason. On one side, Chinese courts now regularly request that a party invoking procedural irregularities has done so already in the arbitration proceedings, otherwise courts will consider that argument to be belated. On the other side, Chinese courts have also been enforcing the principle implemented by the Supreme People's Court according to which a party may not raise in enforcement proceedings a ground that it has already and unsuccessfully raised in annulment proceedings. Parties refusing to comply with arbitral awards thus only get one shot at trying to either annul or block enforcement of the award

On the less positive side:

- Chinese courts are still confused regarding the determination of the nationality of arbitral awards. Some courts still rely on the place of the arbitration institution administering the matter in order to determine the nationality of the award, while others have learned to rely on the place of arbitration. This has led to some bizarre rulings.

- Chinese courts will in principle refuse to enforce awards against parties who have been 'dragged' into an arbitration without having signed the relevant arbitration agreement, unless there is a clear legal basis providing for the binding effect of such agreement on the third party, such as succession, merger, assignment, etc.

- One disturbing trend we noticed is the unexpected intervention of higher courts without a clear legal basis. This is disturbing because rulings of courts regarding enforcement are not subject to appeal. Based on their general 'supervisory powers', higher courts however nevertheless instruct lower courts from time to time to change their ruling. While such intervention can be sometimes welcome, it is worrying because of the parties are not involved therein and it leads to a de facto circumvention of the absence of appeal.

- In our research we have also bumped into a handful of cases in which the parties settled the matter at the stage of enforcement. While details about the settlements are unknown, it appears that the difficulties and delays encountered at the enforcement stage are regularly used as leverage by Chinese parties to negotiate discounts on arbitration awards.

3) - What recommendations do you have for international arbitrators contemplating arbitrating in China and/or with Chinese parties?

International arbitrators sitting on cases involving Chinese parties should be aware of the practice of Chinese courts with regard to annulment and enforcement. As illustrated by the above trends, Chinese court practice shows some peculiarities which may lead to the non-enforcement or annulment of awards if arbitrators are not cautious.

For example, if arbitrators decide to extend the scope of the arbitration agreement to a non-signatory party, they should take special care to motivate this decision and provide the legal basis therefore. They should also take care of designing the award so that it can be easily split into parts, so that if the Chinese courts decide to refuse enforcement against one party, the remainder of the award remains enforceable against the other parties.

Another area where Chinese courts have shown particular sensitivity is where disputes involve issues, which are subject to the jurisdiction of Chinese administrative authorities. For example, in an award where an arbitral tribunal ruled that a joint venture company should be liquidated, the courts considered that the arbitral tribunal exceeded its jurisdiction because liquidation of companies was subject to the exclusive jurisdiction of the relevant Chinese administrative authorities. Thus, when arbitrators touch upon issues which involve administrative processes in China, they should be cautious and explain clearly to what extent these issues are relevant for their case (sometimes they are just relevant as background facts and are not part of the decisional part of the award) and why their decision does not affect and does not infringe upon the jurisdiction of Chinese administrative authorities.

We hope you find the summaries valuable and enjoy using them.

Should you have any questions, please feel free to contact me at eleanor.taylor@kluwerlaw.com.

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