

# PRC Courts' Stance on Requests to Stay Enforcement Proceedings Pending Challenges at the Seat of Arbitration

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### Introduction

In international arbitration, winning an award is not the end of the story. Instead, a favorable business outcome depends on successful enforcement of the award in the jurisdiction(s) where the opponent's assets are situated. Unfortunately for the winning party, the losing party may delay or even avoid enforcement by raising challenges and instigating proceedings in various forums. The winning party may be hauled up in national courts to fend off frivolous challenges, wasting valuable time and potentially allowing the losing party to dissipate its assets and evade successful enforcement.

To reduce uncertainties in the time between an award and its successful enforcement, many jurisdictions make efforts to provide clarity. Hong Kong courts, for example, have repeatedly demonstrated reluctance in granting a temporary stay of enforcement and have conditioned any granted stay on the losing party paying security to minimize potential prejudice caused to the winning party's interests. Similarly, in the U.K., judicial precedents attempt to set out certain relevant factors in deciding whether to suspend enforcement proceedings.

In the People's Republic of China ("**PRC**"), however, safeguards to the winning party's enforcement interests in the face of post-award challenges are less clear. As will be explained below, one recent case decided by the Shenzhen Intermediate People's Court ("**Shenzhen Court**") is an exemplar on this exact issue. While this decision, like all PRC court decisions, is not binding on future cases, *Hong Kong Water Solutions v. Shenzhen Tall & Stout* ("**Hong Kong Water Solutions**") sheds light on how PRC courts might deal with applications to suspend enforcement proceedings.

### PRC Courts' Discretion to Suspend Enforcement Proceedings

In the PRC, as with other New York Convention member states, the decision on whether to stay an enforcement proceeding and/or order security is a matter that lies within the court's discretion. Article VI of the New York Convention stipulates that:

“If an application for the setting aside or suspension of the award has been made ... the authority before which the award is sought to be relied upon may ... adjourn the decision on the enforcement of the award and may also ... order the other party to give suitable security”.

Consistently, Article 83 of the Supreme People’s Court (“SPC”) Minutes of the Second National Working Conference on Trial of Foreign-related Commercial and Maritime Cases (2005) (“Article 83”) provides that:

“... People’s Courts *may* suspend recognition and enforcement proceedings of a foreign award if setting aside proceedings are pending overseas. If [corresponding] foreign courts would not refuse to recognize and enforce the award under the same circumstances, People’s Courts shall treat the award reciprocally”. (emphasis added)

We are not aware of any case that has expressly referred to Article 83. Neither can Article 83 form a legal basis to PRC court decisions. Article 83 is nevertheless helpful in the sense that, by adopting the word “may,” it confirms the wide discretion of PRC courts under Article VI of the New York Convention to suspend enforcement proceedings pending setting aside proceedings overseas.

### **What Are the Factors That Are Likely to be Considered by PRC Courts Deciding Requests to Suspend Enforcement Proceedings?**

For the first time in the history of PRC court practice, in a 2018 judgment, *Hong Kong Water Solutions*, the Shenzhen Court refused the losing party’s application to suspend the enforcement proceeding, while the validity of the award was being challenged in the U.S.

As part of the relevant factual background, the parties submitted their dispute to an ICDR tribunal in Los Angeles. In 2015, the tribunal entered an award favorable to Hong Kong Water Solutions (the “**Award Creditor**”). Shenzhen Tall & Stout (the “**Shenzhen Award Debtor**”) and Taiwan Tall & Stout (the “**Taiwan Award Debtor**”) subsequently failed to pay the award. In 2016, the Award Creditor applied to the Shenzhen Court for recognition and enforcement of the award against the Shenzhen Award Debtor (because it presumably had assets in the PRC).

Around the same time, the Award Creditor also applied to the Los Angeles County Superior Court (“**L.A. Court**”) to confirm the validity of the award, where the Taiwan Award Debtor raised objections. Following the L.A. Court’s confirmation of the validity of the award, the Taiwan Award Debtor filed an appeal in early 2017. During pendency of the U.S. appeal, the Shenzhen Award Debtor requested the Shenzhen Court to suspend the enforcement proceeding on the basis that the award could be annulled at the seat of arbitration.

In response, the Award Creditor applied for an order that suspension of the enforcement proceeding should only be granted on the condition that the Shenzhen Award Debtor provide security. The Shenzhen Court, exercising its discretion under Article VI of the New York Convention, directed the Shenzhen Award Debtor to provide security in the equivalent amount of the awarded damages. However, the Shenzhen Award Debtor failed to do so and no suspension order was made.

The Shenzhen Court subsequently recognized and enforced the award. In refusing to suspend recognizing and enforcing the award, the Shenzhen Court considered and balanced the following

factors:

- **Security:** The Shenzhen Award Debtor failed to provide the security as requested.
- **Circumstances of the Annulment Proceeding:** Despite the ongoing appeal, the L.A. Court had already confirmed the validity of the award. Further, while the Taiwan Award Debtor applied to annul the award, the Shenzhen Award Debtor did not make the same application in the U.S. Evidence available was insufficient to show that the award would be set aside in any event.

This appears to be the only publicly available case in which a PRC court has been asked to suspend enforcement of an arbitral award on the basis of setting aside proceedings overseas. While it is difficult to generalize PRC court practice on suspension of enforcement proceedings based on this case alone, *Hong Kong Water Solutions* serves as a useful guide as to the factors that may be taken into account by PRC courts.

Among the factors to be considered, the **provision of adequate security by the award debtor** appears to be a prerequisite for enforcement proceedings to be suspended. This is directly distilled from the Shenzhen Court's reasoning, and is also consistent with the positions set out in a few provisions of law governing awards made in certain regions. One example is [Article 17 of the Provisions of the SPC on the Recognition and Enforcement of Arbitral Awards Made in Taiwan \(2015\)](#), which provides that enforcement proceedings of arbitral awards made in Taiwan "shall" be suspended if the award debtor can provide both adequate security and evidence that an application for setting aside the award has been accepted by courts in Taiwan. The same approach also applies to awards made in Macau pursuant to [Article 9 of Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards \(2007\)](#). Thus, for awards made in Taiwan and Macau at least, and as also seen in *Hong Kong Water Solutions*, enforcement proceedings will unlikely be suspended if award debtors fail to meet the prerequisite by providing adequate security.

**The circumstances of the setting aside proceeding at the seat of arbitration** also appear to be relevant to PRC courts' consideration in enforcement proceedings. As shown in *Hong Kong Water Solutions*, in deciding whether to suspend enforcement proceedings, PRC courts may give weight to whether the award debtor raised its own challenges, whether the court at the seat has already made a ruling, and the prospect of the annulment proceedings. Article 83 also appears to suggest similar considerations. In addition to confirming the "discretion" to suspend enforcement proceedings as prescribed in Article VI of the New York Convention, Article 83 further requires PRC courts to "reciprocally" enforce an award if "foreign courts" (*note the provision is not itself clear as to which foreign courts it refers to*) would not suspend enforcement proceedings under the same circumstances.

## Takeaway

In dealing with challenges to enforce arbitral awards, PRC courts have discretion to suspend the enforcement proceeding pursuant to Article VI of the New York Convention. However, it remains challenging to discern, based on *Hong Kong Water Solutions* alone, how PRC courts will exercise their discretion and what factors are likely to be considered in suspending enforcement proceedings pending annulment proceedings overseas. Moreover, the provisions which appear to be exactly on point either arguably do not have legislative effect or govern only awards made in specific regions.

It is yet to be seen whether any statute, SPC interpretations or guiding cases may come into effect to

provide further guidance on this issue in the PRC. It will also be interesting to see if future cases fall within the same line of reasoning as in *Hong Kong Water Solutions*. The limited information available appears to suggest a trend in PRC court practice to request the provision of security as a prerequisite, among various factors, to stay enforcement proceedings pending setting aside proceedings in other jurisdictions.