

Kluwer Arbitration Blog

Enforcement in China – What the Cases Show

Sapna Jhangiani (Clyde & Co Clasis Singapore Pte Ltd) · Friday, December 6th, 2013 · Clyde & Co.

and Matthew Lam, Partner, Clyde & Co

As announced recently [on this blog](#) Chinese Court Decision Summaries on Arbitration, edited by WunschARB, were recently published by Kluwer Arbitration. The case summaries are a welcome addition to the Kluwer Arbitration database, particularly given the paucity of caselaw analysis currently available in this area, and the editors' efforts for benefit of the wider arbitration community are much appreciated. WunschARB comment on some of the trends – both positive and negative – which are discernible from the cases on enforcement, notwithstanding that there is no system of binding precedent in PRC. In this blog, we explore further some of the trends apparent from our own analysis of the cases on enforcement.¹⁾

Somewhat counterintuitively, we start with the negative. One of the trends discerned by WunschARB is the “*unexpected intervention of higher courts without a clear legal basis*”. We wonder if this refers to the “*reporting*” regime applicable in the Chinese Courts, about which there is much confusion (judging from the number of questions posed on this issue at regional conferences).

As far back as 2004, Judge Xiaolong Lu, a judge of the Supreme People's Court (“SPC”) of the PRC, addressed the 17th ICCA Congress in Beijing on the recognition and enforcement of foreign arbitral awards in China.²⁾ Judge Lu described strategies put in place in the PRC to demonstrate the government's “*active and supportive policy*” towards the recognition and enforcement of foreign arbitral awards, in accordance with the New York Convention and Chinese laws. Such strategies include ensuring that all cases applying for recognition and enforcement of foreign awards fall under the jurisdiction of the Intermediate People's Court (“IPC”) (in contrast to the enforcement of domestic awards, which must be pursued at a lower level of court). In addition, a “reporting system” was set up in the courts such that any anticipated decision by the IPC not to recognise or enforce a foreign arbitral award must be reviewed by its higher level court – the Provincial Higher People's Court (“HPC”) – which must itself report the opinion to the SPC, such that the IPC can only refuse recognition or enforcement of a foreign arbitral award when the SPC agrees. So far as we are aware, that reporting system has been followed and, whilst it has caused some confusion and is perhaps categorised as a “negative trend” by WunschARB, the constructive results are clear from some of the trends analysed below.

As a strategy to assist in implementing consistent judicial standards of enforcement of foreign arbitral awards, it is worth also noting that Judge Lu referred to several judicial interpretations

which have been issued in PRC concerning arbitration, including a guidance document specifically addressing “foreign-related” arbitration (in PRC, “foreign-related” civil cases comprise those in which one or more parties are foreign, or where the subject matter or nexus of the relevant case takes place abroad).

WunschARB discerned a negative trend of some Chinese Courts considering the seat of the arbitral institution as the seat of the award, such that an award of the ICC, for example, would be considered French, regardless of the place of arbitration [see *TH&T v. Hualong Auto (2003)* and *Duferco S.A. v. Ningbo Imp. & Exp. (2009)*]. WunschARB noted that the approach of the Courts is not consistent, with some Courts determining the seat by the place of arbitration.

In our experience, this policy may emanate from the “*Letter of Reply of the Supreme People’s Court to the Request for Instructions on the Case of Not Executing the Final Award 10334/AMW/BWD/TE of the International Court of Arbitration of the International Chamber of Commerce*” sent by the SPC to the HPC of Shanxi Province, which has the status of a judicial interpretation, and which concerned the enforcement of an ICC award seated in Hong Kong. The letter indicated that since the ICC is an arbitral institution established in France, and both China and France are parties to the New York Convention, the recognition and enforcement of the award should be governed by the New York Convention rather than the “*Agreement concerning Mutual Recognition and Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region*”. It seems that ICC awards being enforced in China will be considered as “French” by the Chinese Courts, but the extent to which awards under the auspices of other arbitral institutions outside PRC will be considered seated in the location of those institutions, is not clear.

We move towards more positive trends. As remarked by WunschARB, in a significant number of cases, the Chinese Courts indicated that they would not entertain as grounds for non-enforcement overly formalistic arguments relating to the signature of the arbitration agreement, or to the service of notices relating to the arbitration [see *Unicon v. Tianbao (2010)*, *Schroeder v. Huada Food (2009)*, *Eastland v. Xinxing Rubber (2009)*, *NAFT Corp. v. Lionda Group et al. (2009)* and *Wai Lana Yoga v. Guangzhou Huanyu (2007)*].

By contrast, where the Courts determined that there was no valid arbitration agreement – whether due to lack of capacity or otherwise – this was a ground warranting non-enforcement under Article V(1)(a) of the New York Convention [see *Concordia v. Gangde Oils (2009)*, *Hanjin Shipping v. Fuhong Oil (2006)*, *Future E.N.E. v. Shenzhen Cereals (2006)*, *Glencore International v. Chongqing Machinery (2001)* and *Yideman v. Huaxin Cocoa (2003)*]. Enforcement was also refused where a member of the tribunal was prevented from participating in deliberations with other members of the tribunal, and where the tribunal failed to comply with time limits and notice requirements in the relevant arbitration rules, as well as the requirements of due process, thereby justifying non-enforcement pursuant to Articles V(1)(b) and (d) of the New York Convention [see *LM Holdings et al. v. Jiashijie Group et al. (2009)* and *FIC v. Mawei Shipbuilding (2008)*]. Where an award ruled over rights and obligations of parties who were not signatories to the arbitration agreement, the Courts ordered partial enforcement of the award – rather than refusing enforcement altogether – by simply excluding any enforcement against non-parties [see *Janful Limited v. Nanjing Skytech (2010)*, *Dongxun Investment v. Yulin Hengtong et al. (2006)*, *Chengwei Investment v. Yulin Hengtong et al. (2006)* and *GMI v. Wuhu Smelter et al. (2003)*].

It is possible to discern a reluctance on the part of the courts to invoke public policy. Whilst lower

Courts have been more ready to find that a conflict between an arbitral award and Chinese laws and administrative regulations constitutes a breach of public policy warranting non-enforcement of a foreign-related award, the SPC has repeatedly confirmed that a conflict with Chinese laws or regulations is in itself not sufficient to trigger a breach of public policy [see [Tianrui Investment v. Yiju Hotel \(2010\)](#)], even where the award appeared to be unfair [see [GRD Minproc v. Shanghai Flyingwheel \(2009\)](#)]. Surprisingly, in the 2003 case [ED & F Man v. National Sugar](#), which concerned an arbitral award in favour of a Chinese company engaging in overseas futures trading which was prohibited under Chinese law at the time, the Beijing IPC was inclined to refuse to recognize and enforce the award on the basis that it awarded benefits from an illegal contract, thereby breaching mandatory legal provisions of China, and public policy. The HPC agreed, but the SPC held that whilst the contract should have been considered invalid, and the tribunal violated Chinese mandatory law by not finding so, a violation of mandatory Chinese law did not amount to a violation of PRC public policy warranting non-enforcement under Article V(2) of the New York Convention, and therefore the award should be recognised and enforced. These cases are positive examples where the reporting system in the PRC Courts has permitted the SPC to overrule a lower court's decision not to enforce.

Judge Lu indicated in his 2004 paper that he was not aware of any case of non-enforcement of a foreign award on the grounds of public policy. The Kluwer digest, however, includes at least one case of non-enforcement on this ground, albeit a case dating back to the 1990s [see [USA Productions et al. v. Women Travel \(1997\)](#)]. We set out the facts of the case here, not least because they are rather interesting! The case concerned a performance contract between two US companies and a Chinese company in relation to performances of various US bands in several cities in China. It was agreed that the performances should conform to “*excellent songs of country style particularly popular among the Chinese audience*” and a sample tape provided by the US companies was approved by the PRC Ministry of Culture, which indicated that any heavy metal rock songs should be prohibited during the performance. The performers agreed in the contract to observe PRC laws and policies. During the tour, the band performed heavy metal rock songs, leading to dissatisfaction from audiences, and cancellation of the tour by the Ministry of Culture before it was completed. The US Companies sued their Chinese counterparty for non-payment and damages, and the Chinese party in turn counterclaimed for compensation due to cancellation of the performances. An arbitral award was rendered substantially in favour of the US performers, which the Beijing IPC refused to enforce on the ground that the bands had performed heavy metal rock songs which were inconsistent with social conventions in China and contrary to PRC public policy. The SPC agreed and enforcement was refused, in a heavily criticized decision.

We consider that, in light of the enforcement regime now prevalent in mainland China in relation to foreign-related awards, it is unlikely that the Chinese Courts would make a similar finding today. As illustrated by a brief analysis of the summaries of Chinese Court decisions published by Kluwer, the enforcement landscape in China appears to be decidedly positive. The most striking trend to remark is that, in the large majority of enforcement cases published by Kluwer, the Chinese courts ordered recognition and enforcement of foreign-related arbitral awards, notwithstanding objections to enforcement raised by parties against whom enforcement was sought.

That said, there have been challenges. Some older cases have revealed what practitioners view as “local protectionism” of the lower courts, seeking to invoke public policy as grounds for refusing to enforce foreign-related awards [see, for example, [Dongfeng Garments v. Henan Clothing et al. \(1992\)](#)] – although this issue has sought to be addressed by the reporting system described by

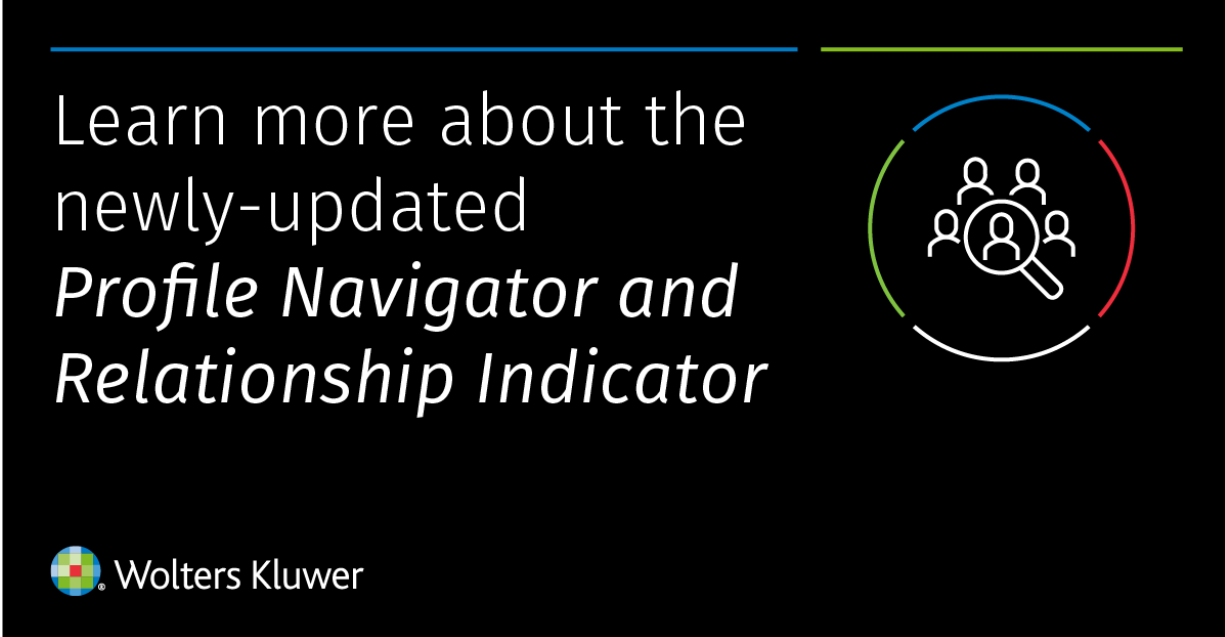
Judge Lu. Again, in some of the older cases reported, the Courts have confused the criteria for enforcement of domestic and foreign-related arbitral awards [see, for example, [Wahhing Development v. Dongfeng Latex \(1994\)](#)]. In a 1996 case [[Revpower v. SFAIC \(1996\)](#)], the Shanghai IPC refused to register an enforcement case, a phenomenon which, according to some practitioners, is still not uncommon and may lead to the expiration of the time limit for filing an enforcement application, thereby depriving the parties of an efficient remedy against the court's behaviour since no court is officially in charge of the case [see WunschARB's commentary to the case of [Revpower v. SFAIC \(1996\)](#)]. In some cases, lower courts refuse to report cases to higher courts, leaving parties remediless as they are unable to be heard before higher level courts in relation to what is essentially an internal court process [see [The Problem is Enforcement](#) by Ava Chisling]. Local protectionism by the Courts may also be evident in relation to execution against assets, which in any event is a challenge in PRC – but which merits its own discussion.

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References

?1 The cases referred to in this post are available on the Kluwer Arbitration database.

Xiaolong Lu, The Recognitions and Enforcement of Foreign Arbitral Awards in China in Albert

?2 Jan van den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond*, iCCA Congress Series, 2004 Beijing Volume 12 (Kluwer Law International 2005) pp. 346 – 350.

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