Enforcement of U.S./Canadian Judgments and Arbitral Awards in China

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Enforcement of foreign court judgments in China follows a seemingly straightforward procedure laid out by Articles 267 and 268 of the Civil Procedure Law of the PRC. However, due to the lack of binding caselaw or precedent in China's statutory civil law system, and the resulting lack of reported case decisions, the success rate of actual enforcement of foreign judgments remains difficult to determine. Enforcement of arbitral awards, on the other hand, follows an arguably onerous guideline that employs more stringent procedural requirements than the New York Convention, to which China is a party. However, empirical evidence of the rate of successful collection of foreign arbitral awards in China is much more readily available.

I. BRIEF INTRODUCTION TO CHINA'S LEGAL SYSTEM

The People's Republic of China [PRC] largely employs a system of statutory civil law. The National People's Congress [NPC], the legislative body of the PRC, makes all the national laws. The people's congresses at the provincial level and municipalities directly under the central government may adopt local regulations provided they do not contravene national laws. Only the Supreme People's Court's interpretations of the law have precedential value in the Chinese court system. Courts in China may not review the laws, and caselaw has no binding precedential value. Only the NPC may review and strike down the laws but it has never exercised that power.

A. China's System of Law

The PRC, in structure and theory, is a civil law system based on written statutes.[2] Unlike common law systems, judge-made caselaw does not constitute binding precedent.[3] China employs a unitary system of government, under which one central government directly controls

[1] The authors gratefully acknowledge the research assistance of Agatha Koprowski.

[2] Jerome A. Cohen and John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH.J.INT'L& COMP. L 345, 350 (1997)

[3] Id.

all lower levels of government.[4] The current Constitution, the fifth in China's history, was implemented in 1982 and, in theory, embodies the highest law of the PRC. In reality, the Constitution serves more as a programmatic guideline.[5] The NPC, the highest governmental authority in the PRC, convenes for two weeks every year. Select members of the NPC, the Standing Committee, work year round to draft new legislation and may issue supplements and amendments to the laws made by the NPC when that body is not in session.[6] The NPC passes China's national legislation and solely holds the power to review, and overturn if necessary, that legislation.[7] To date, the NPC has never struck down any legislation.[8] The State Council, under the leadership of the Premier, is the executive arm of the government and enacts and administers rules and regulations.[9] Under the PRC's unitary system, the State Council is subordinate to the NPC.[10] For administration purposes, China is divided into 22 provinces, five autonomous regions, and three municipalities (Beijing, Shanghai, Tianjin) under the direct control of the central government.[11] Provincial and local governments may adopt rules and regulations so long as they are not inconsistent with central government laws, rules and regulations.[12]

The national law in place in China consists of "an amalgamation of different acts, the main one being the General Principles of Civil Law."[13] The Supreme People's Court, exercising

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[4] Enter the Dragon's Lair: The New Socialism and Private Property Ownership in The People's Republic of China, 22 ST.JOHN'S J. LEGAL COMMENT. 805, 808 (2008)

[5] *Id.* at 9

[6] *Id.* at 10

[7] Enter the Dragon's Lair: The New Socialism and Private Property Ownership in The People's Republic of China, 22 ST.JOHN'S J. LEGAL COMMENT. 805, 809 (2008)

[8] *Id.*

[9] Jerome A. Cohen and John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH.J.INT'L& COMP. L 345, 350 (1997)

[10] *Id.*

[11] *Id.* at 351

[12] *Id.*

[13] Enter the Dragon's Lair: The New Socialism and Private Property Ownership in The People's Republic of China, 22 ST.JOHN'S J. LEGAL COMMENT. 805, 809 (2008)

its sole authority to give binding interpretations of the law, issued an Interpretation of the General Principles of Civil Law in 1988, which is commonly referred to as the "200 Clauses."[14]

B. China's Court System

The court system in the PRC is organized into four levels: the Elementary People's Court [EPC], the Intermediate People's Court [IPC], the High People's Court [HPC], and the Supreme People's Court [SPC].[15] These courts "contain specialized divisions for different types of cases, usually including civil, economic, administrative, and foreign–related business. An increasing number of courts are establishing intellectual property divisions and there are also several specialized courts."[16]

Under China's unitary system, the "Supreme People's court, the highest court in China, is responsible to the NPC."[17] The SPC supervises the adjudicative work of all other courts,[18] but "each court is under the command of the local government under which it sits. The presiding judges in the courts of the PRC are employed by the legislative 'branch' of the government. Therefore, the concept of 'judicial review' does not exist" in the PRC.[19] The primary role of courts in the PRC is to interpret, not review, legislation.[20] While judicial interpretation by the SPC is binding on lower courts, it remains the weakest in legal significance of the three forms of legal interpretation in China, the other two being legislative interpretation and administrative interpretation.[21]

Because of the lack of common law in the PRC, the SPC uses various forms of judicial interpretation other than case decisions to interpret the law.[22] When lower courts raise questions

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[14] *Id.*

[15] Jerome A. Cohen and John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH.J.INT'L& COMP. L 345, 351 (1997)

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Enter the Dragon's Lair: The New Socialism and Private Property Ownership in The People's Republic of China, 22 ST.JOHN'S J. LEGAL COMMENT. 805, 809 (2008)

[20] *Id.*

[21] Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 87 (1998)

[22] *Id.* at 95

about statutory interpretation common to a particular kind of case, a provincial higher court would orally answer the questions or submit then in writing to the SPC.[23] The SPC then responds to these questions in a Letter of Reply, providing interpretations.[24] Letters of Reply are the most commonly used form of judicial interpretation.[25] The SPC also uses opinions, notices, measures, and provisions to explain the general application of a specific statute.[26] Since the Chinese legal system falls within the codified civil law tradition, cases never served as binding precedent for judges.[27] As such, published cases generally only serve as samples for inexperienced judges to consult.[28] However, cases have occasionally been published for the purpose of interpreting the law.[29]

II. ENFORCEABILITY OF U.S./CANADIAN JUDGMENTS IN CHINA

The Civil Procedure Law [CPL] of the PRC of 1991 dedicates two Articles to the recognition and enforcement of foreign judgments in China. Articles 267 and 268, along with the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China [Opinions on CPL],[30] enacted in 1997, outline standards, rules and procedures that foreign judgment creditors and courts must meet or follow to have the foreign judgment enforced by Chinese courts. Although the process seems straightforward, many authors and scholars on the subject seem dubious of its success in

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[23] *Id.* at 95, 96

[24] *Id.*

[25] *Id.*

[26] *Id.* at 97. Wei also notes that whether the lower courts will apply these interpretations is unclear.

[27] *Id.* at 98

[28] *Id.* at 99

[29] *Id.* citing Wei You, Woguo Xinshi Panlide Yingyong Yu Sikao [On the Application of Case Precedent in China], Faxue, No. 11, 1991, at 47 for the following example: "On July 18, 1985, the SPC published four cases involving the crime of damage to a marriage in which at least one spouse was a soldier. Accompanying the four cases, the SPC circulated a notice that commented on the four cases, and advised that those who committed such a crime could be punished according to Article 181 of the Criminal Code: 'commit adultery knowing that the person involved is a spouse of a soldier....'

[30] A database collecting the Opinion of the Court is *available at::* http://www.lawinfochina.com/law/display.asp?id=6690&keyword=. Note, however, that it is mostly in Chinese and requires a subscription.

application. Furthermore, empirical evidence of the effectiveness, or lack thereof, of the recognition and enforcement process is unavailable as Chinese courts rarely publish decisions.

A. Applicable Statutes and Rules

The applicable law consists of the CPL and the Opinion on CPL.[31] There is currently no bilateral or multilateral treaty between the U.S. and China or between Canada and China on the reciprocal recognition and enforcement of judgments.[32] The enforcement of foreign judgments in China "is characterized by the CPL as 'judicial assistance,' a concept that also includes service of process for a foreign proceeding, taking evidence for a foreign proceeding, and enforcement of arbitral awards abroad. Articles 267 and 268 of the CPL provide the basic procedure to enforce a foreign judgment by a People's court."[33]

Article 267 of the CPL states that:

> If a legally effective judgment or written order made by a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people's court of the People's Republic of China which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by a people's court.[34]

As discussed below, the court with jurisdiction is usually the intermediate people's court where the judgment debtor is domiciled.[35] Article 267 thus provides two ways to "request

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[31] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 763 (2004)

[32] However, China has bilateral agreements with both the U.S. and Canada on mutual judicial assistance in criminal matters. See Table on Dates of Signing and Effective Dates of Bilateral Judicial Assistance Treaties, *available at:* http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2631/t39537.htm

[33] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 764 (2004)

[34] Civil Procedure Law of the People's Republic of China, Article 267, *available at:* http://www.newsgd.com/business/laws/200305220025.htm

[35] See infra, part II(B)

acknowledgement of a foreign court judgment or ruling: either upon a party's direct request to an intermediate court, or upon a foreign court's request" also to an intermediate court.[36]

Article 268 states that:

> In the case of an application or request for recognition and enforcement of a legally effective judgment or written order of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country, recognize the validity of the judgment or written order, and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of this Law; if the application or request contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security and social and public interest of the country, the people's court shall not recognize and enforce it.[37]

Accordingly, "the people's court's review on the merits, although limited in scope, is a pre-condition of recognition. While Chinese courts will not question the foreign court's determination on the facts and application of law, Chinese courts will examine and review the foreign judgment on the basis of international treaties, the principle of reciprocity, and the 'fundamental principles of the PRC law.'"[38]

Both Article 267 and 268 mention the principle of reciprocity, which China often incorporates into its bilateral treaties. Enforcement of U.S. and Canadian judgments is based on reciprocity due to the lack of bilateral judicial assistance treaties, and, in general, "[r]eciprocity means that a state will recognize and enforce a foreign judgment to the same extent that its own judgments are recognized and enforced in that foreign state."[39] In this context, "[r]eciprocity is

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[36] Fang Shen, Are You Prepared for this Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China, 72 UMKC L. REV 215, 234 (2003)

[37] Civil Procedure Law of the People's Republic of China, Article 268, *available at:* http://www.newsgd.com/business/laws/200305220025.htm

[38] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 766 (2004)

[39] Alejandro I. Garcia, 24 NO. 3 Intell. Prop. L. Newsl. 4 at FN 68

based upon the willingness of the applicable foreign Court to enforce a judgment issued by a Chinese People's Court."[40]

Also, the standard of review provision in Article 268 "does not specify the circumstances under which a Chinese court may refuse to recognize and enforce a foreign judgment."[41] However, in practice, "as reflected in the bilateral treaties for judicial assistance between China and a number of foreign countries,"[42] a court in the PRC may refuse to recognize and enforce a foreign judgment where:

> (1) the foreign judgment is made by an incompetent foreign court. The incompetency is judged under relevant provisions of international treaties and Chinese laws;
> (2) the foreign judgment has not taken effect or has no effect at all under the law of such foreign country;
> (3) the defendant is not given adequate notice for the proceedings, or was not properly represented by a guardian if lacking legal capacity;
> (4) an effective judgment has been made by a people's court for the same cause of action between the same parties, or the case is in the middle of trial in a people's
> (5) recognition and enforcement of the foreign judgment would cause harm to Chinese sovereignty, security, and/or public policy.[43]

Furthermore, CPL's Article 268 provides a "catch-all ground for non-recognition. A foreign judgment will not be recognized if it contradicts, in addition to the fundamental principles of PRC law, 'state sovereignty, security, and/or public policy.'"[44] Neither the CPL nor the Opinion on CPL defines "security" or "public policy."[45] Due to the lack of case report in China, there has no empirical study on the Chinese courts' interpretation of those terms.[46]

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[40] Terrence F. MacLaren, *Eckstrom's Licensing in Foreign and Domestic Operations: Joint Ventures*, 2 Eckstrom's Licensing: Joint Ventures § 11:34 (Database updated May 2008)

[41] Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective,* 36 GEO. WASH. INT'L L. REV. 757, 767 (2004). See also the Table of China's bilateral treaties. Again, China only has bilateral judicial assistance treaties with the U.S. and Canada for criminal matters.

[42] *Id.*

[43] *Id.*, citing Mo Zhang, International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System, 25 B.C. INT'L & COMP. L. REV. 59, 91 (2002).

[44] *Id.*

[45] *See* generally, Civil Procedure Law of the People's Republic of China, *available at:* http://www.newsgd.com/business/laws/200305220025.htm and Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China, *available at:*

B. Court or Legal Forum in which Enforcement may be Sought

Chinese law on enforcement of foreign judgment is "essentially a court-centered system."[47] Generally, the "appropriate court for the recognition and enforcement of foreign court judgments is the Intermediate People's Court [IPC] where the judgment debtor is domiciled. If the property subject to execution is located in a locality other than that of the People's Court which recognized the judgment, execution can be entrusted to a People's Court in that locality."[48] Even though the CPL does not specify, "a recognized foreign judgment is supposed to be enforced in the same way as a domestic judgment."[49] In China, "the judge or the execution officer has the exclusive authority over and responsibility for serving the debtor with notices, locating the debtor's property and levying upon such property…Judgment creditors or their attorneys, absent the sanction of courts, have no legal authority to direct inquiries about debtors' assets or to issue restraining notices to freeze debtors' assets once they are located."[50] Instead, "[e]xecution is accomplished by 'execution officers,' who operate under the auspices of 'execution organs' established by the courts. The execution officers are required to issue a notice of execution ordering the judgment debtor to perform the judgment."[51] Furthermore, "[i]f the person subject to execution does not perform within the specified time, the People's Courts are given the power to compel performance, or in the alternative to entrust a relevant work unit to perform the obligation, at the expense of the person subject to execution."[52]

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http://www.lawinfochina.com/law/display.asp?db=1&id=6690&keyword=Opinions%20of%20the%20Supreme%20People's%20Court%20on%20Some%20Issues%20Concerning%20the%20Application%20of%20the%20Civil%20Procedure%20Law%20of%20the%20People's%20Republic%20of%20China

[46] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 767 (2004)

[47] *Id.* at 773

[48] 23 Ramon E. Reyes, Jr., The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know, 23 BROOK. J. INT'L L. 241, 264 (1997)

[49] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 765 (2004)

[50] *Id.* at 773

[51] Ramon E. Reyes, Jr., The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know, 23 BROOK. J. INT'L L. 241, 264 (1997) [citing the Civil Procedure Law of 1991, Articles 209 and 220]

[52] *Id.* [citing the Civil Procedure Law of 1991, Article 231]

C. Steps which may Increase Likelihood of Enforceability

As noted above, China has bilateral judicial assistance treaties with many countries which enumerate the grounds upon which Chinese courts may refuse to recognize or enforce a foreign judgment. While China does not have such treaties with the U.S. or Canada, the conditions described in its bilateral treaties with other countries may nonetheless provide guidance as to reasons for nonenforcement of U.S. and Canadian judgments. Therefore, anyone seeking to enforce a foreign judgment in the Chinese courts should take steps to avoid creating or being in those circumstances.

Also, according to both Article 267 and 268, Chinese courts will only enforce "legally effective judgments." While "[n]either the Civil Procedure Law of the PRC or the [Opinion] by the Supreme Court provides much guidance as to what constitutes a 'legally effective judgment,"[53] the general principle of international law is that "a court looks at several factors in determining whether to enforce a judgment issued by a foreign court, including: (1) whether the foreign court had jurisdiction; (2) 'whether the defendant was properly served'; (3) whether 'the proceedings were vitiated by fraud'; and (4) whether the judgment is contrary to the public policy of the country where the judgment is to be enforced."[54]

It should also be noted that "although there may be translations of Chinese laws into English, only the Chinese versions govern and great care should be taken when using translations. Relying completely on translated versions of Chinese laws, regulations and policies can lead to serious errors in legal judgment." Therefore, anyone seeking to enforce a U.S. judgment in China should take care to be familiar with the Chinese version of Chinese laws, or at least be aware of the discrepancies between the Chinese versions and the translations.

Furthermore, Article 318 of the Opinion on CPL provides that "when neither treaty obligation nor a mutual reciprocity relationship exists, a foreign party can still make a request to

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[53] Fang Shen, Are You Prepared for this Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China, 72 UMKC L. REV 215, 234 (2003)

[54] *Id.* [citing Bureau of Consular Affairs, U.S. Dept. of State, Enforcement of Judgments, *available at:* http://http://travel.state.gov/law/judicial/judicial_691.html] As for the propriety of service of process, it is worth noting that the U.S. in general provides a much more liberal basis for both general and specific jurisdiction than China. However, there is no empirical evidence to show that the US's broader jurisdiction has been cited by a Chinese court as a reason to reject U.S. court judgments 36 Geo. Wash. Int'l L. Rev. 757, 773.

an intermediate court to enforce judgment."[55] However, "Article 319 of the [Opinion] provides that when a foreign court makes a request directly to a Chinese court without resorting to diplomatic channels and no treaty or reciprocal relationship exists, the Chinese court shall reject the request."[56] This distinction in the Opinion is a "message for the U.S. litigant that it might be safer to send a request to a Chinese court directly on behalf of your client rather than through a U.S. court."[57]

In general, sources of China's 'difficulty-in-enforcement' problem can be traced beyond the "Chinese courts' possible parochial protection of Chinese parties" to other factors, such as "the lack of judicial independence in China, the prevalence of local protectionism, the unimaginable social consequences of bankrupting state-owned enterprises (SOEs), the paucity of necessary legal provisions curbing debtor fraud and facilitating judgment collection, and the lack of understanding of and conceptual conflict between the Chinese and U.S. legal systems."[58] While some of these are clearly beyond the control of a litigant, parties seeking to enforce a U.S. or Canadian judgment in China should to the greatest extent possible mitigate the effects of these factors.

D. Prior History of Enforcement in China

As previously noted, due to lack of transparency and case reporting, and the lack of a reliable and complete law library or legal search engine, empirical history of enforcement of U.S. or Canadian judgments in Chinese courts is lacking.

In addition, since neither the U.S. nor Canada currently have mutual judicial assistance treaties with China for civil or commercial matters, enforcement of U.S. or Canadian judgments in Chinese courts would be based on reciprocity. Some scholars have commented that the

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[55] Fang Shen, Are You Prepared for this Legal Maze? How to Serve Legal Documents, Obtain Evidence, and Enforce Judgements in China, 72 UMKC L. REV 215, 234 (2003)

[56] *Id.* at 235

[57] *Id.*

[58] Arthur Anyuan Yuan, Enforcing and Collecting Money Judgments in China From A U.S. Judgment Creditor's Perspective, 36 GEO. WASH. INT'L L. REV. 757, 759 (2004)

fundamental hindrance to the enforcement of U.S. judgments in China is that there is no such reciprocity in U.S. courts.[59]

Among the only cases of enforcement of foreign judgments in Chinese courts in the post-Mao era are a few divorce cases where one of the spouses was Chinese and the other lived abroad.[60] The Chinese court in each of those cases was simply asked to recognize the divorce and none of those cases were contested.[61]

III. ENFORCEABILITY OF U.S./CANADIAN ARBITRAL AWARDS IN CHINA

Arbitral awards are enforced in China to a significant degree. China's procedural requirements for enforcement are more onerous than that of the New York Convention. Most strikingly, empirical data about the collection rate and amount of foreign arbitral awards in China is readily available, in sharp contrast to the lack of such data about enforcement of foreign court judgments. Insolvency of the respondent, rather than local protectionism or public policy reasons, accounts for the bulk of non-collection.

A. China is Party to the New York Convention

On December 2, 1986, the Standing Committee of the NPC approved China's accession to the 1958 New York Convention.[62] The following year, the SPC issued the Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[63] Taken together, "the Convention

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[59] *See* Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note* (May 27, 2004). GWU Legal Studies Research Paper No. 236 Abstract *available at:* SSRN: http://ssrn.com/abstract=943922 ("First, reciprocity does not in fact appear to exist. My research has failed to uncover a single case in which U.S. courts have enforced Chinese court judgments without inquiring into the underlying merits of the dispute. Second, Chinese courts do not believe that reciprocity exists sufficient to support the enforcement of a U.S. court judgment. My research has found no cases in which a U.S. court judgment has been enforced on any grounds.")

[60] *Id.*, citing Wang Lijian Case (No. 413), in 2 RENMIN FAYUAN ANLI XUAN -- MINSHI JUAN [Selected Cases from the People's Courts—Civil Volume] 2027 (Zuigao Renmin Fayuan Zhongguo Yingyong Faxue Yanjiusuo [Supreme People's Court Institute for Practical Legal Research] ed., 2000); Jiang Xiaomin Case (No. 416), in *Id.*, at 2036; Li Geng Case (No. 216), in *Id.*, at 2030; also reported in DU XINLI, GUOJI SIFA JIAOXUE ANLI [Cases for the Study of International Private Law] 350-51 (1999).

[61] *Id.*

[62] INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA, 2nd Ed. 2006, 46 (Philip J. McConnaughay and Thomas B. Ginsburg, eds.)

[63] *Id.*

and the Notice formed a solid basis for the recognition and enforcement of foreign arbitral awards in China."[64]

China's accession to the New York Convention included two reservations: the reciprocity reservation and the commercial reservation.[65] The reciprocity reservation makes an award unenforceable in the PRC under the Convention if it does not come from a state also party to the Convention.[66] However, since the U.S. and Canada have both ratified the Convention, this reservation has limited practical effect.[67] The commercial reservation makes the Convention applicable only to awards made on the differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the PRC.[68] As such, foreign arbitral awards which only relate to non-commercial matters are not enforceable under the Convention in China, and this also rarely arises in practice.[69]

Application for the "enforcement of a foreign or foreign-related award must be made to the relevant IPC. If the paying party is a natural person, the venue is the IPC where that person has his or her registered domicile, or where they are actually located. If the paying party is a legal person, a corporation or organization, then the proper venue is the IPC where the principal place of business is located."[70] Alternatively, if the paying party "has no registered place of residence or principal business office, then the applicant may seek enforcement before the IPC where the property is located."[71]

According to the Provision of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases involving Foreign Elements issued by the SPC in

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[64] *Id. See also* Yongping Xiao & Weidi Long, *Enforcement of International Arbitration Agreements in Chinese Courts* 25 YEARBOOK COMMERICAL ARBITRATION 569 (2009) (affirming the enforceability of foreign arbitral awards in Chine under the New York Convention.

[65] International Commercial Arbitration in Asia, *supra* note 61, at 47. *Id.*

[66] Jerome A. Cohen et al., Arbitration in China: A Practical Guide Vol. I, 2004, 301.

[67] *Id.*

[68] *Id.* at 302

[69] *Id.*

[70] *Id.* at 319-20

[71] *Id.* at 320

2002, applications for enforcement of arbitral awards must now be given to the jurisdiction of limited IPCs located in the capital cities of the provinces and special economic zones.[72] It is also the practice of courts that only one enforcement application may be made at a time.[73] The court will then "proceed with enforcement in accordance with the rule and procedures. To the extent that assets are known and located within the jurisdiction of another IPC, the process for judicial assistance between enforcement courts will be invoked," such that "only one enforcement application in the PRC should be necessary in most cases."[74] While in general the court has more control over the enforcement action than the enforcing party, the party, if it discovers new assets through its own investigations, may pass the information on to the court, who would then take enforcement actions against those assets.[75] However, because of the time restrictions in Article 219 of the CPL, the enforcing party has either six months - if the parties are citizens, or natural persons - or 12 months - if the parties are legal persons or other organizations.[76]

Article IV of the Convention sets out the procedural pre-requisites for enforcement. The practical requires in China are "more onerous."[77] Article I of the Convention "requires the enforcing party to provide a duly authenticated award and arbitration agreement, or a duly certified copy, together with a translation into Chinese if necessary. Such a translation must be certified by an official or sworn translator or by a diplomatic or consular agent."[78] Furthermore, "[i]n practice in the PRC, for foreign or foreign-related awards, the award and the arbitration agreement must be notarized. In addition, by the Enforcement Regulation Article 20 an

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[72] *Id.*

[73] *Id.*

[74] *Id.* at 321 citing Article 210 of the CPL, which states:

If a person or property subjected to execution is in another locality, the people's court in that locality may be entrusted with the carrying out of the execution. The entrusted people's court shall begin the execution within 15 days after receiving a letter of entrustment and shall not refuse to do so. After the execution has been completed, the entrusted people's court shall promptly inform the entrusting people's court, by letter, of the result of the execution. If the execution has not been completed within 30 days, the entrusted people's court shall also inform the entrusting people's court, by letter, of the particulars of the execution.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 304

[78] *Id.* at 321

application and a power of attorney must be provided, and the applicant must also provide notarized or consularized documents of its own identity, incorporation if a company, and the legal representative if a PRC entity."[79] This requirement confirms the identity of the applicant.[80] Also, power of attorney is required for a lawyer to represent an enforcing party in the relevant People's Court.[81] CPL Article 241 "makes it clear that foreign parties must entrust their case to a lawyer of the PRC."[82]

In addition, the relief sought by the applicant must be set out, and confirmation given that the enforcement meets relevant time limits.[83] An explanation of the legal basis for enforcement must also be given.[84] The applicant must also give information about the respondent, including, as far as possible, information about its assets.[85] These requirements can cause difficulties and delays.[86]

B. Other Treaties or Authorities Permitting Enforcement in China

The CPL of the PRC dedicates a chapter, Chapter XXVIII, to arbitration. Articles 257-261 outline the procedural requirements of arbitration in the Chinese system.[87]

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[79] *Id.*

[80] *Id.* at 322

[81] *Id.* at 321

[82] *Id.* at 323. Also, under Article 242, "a power of attorney sent or forwarded from outside the territory of the PRC shall become effective only after it is[sic] been notarized by a notary public n the home state of that party, and also been authenticated by the Embassy or a Consulate of the PRC in that home state." *Id.*

[83] *Id.* That is, the application must state whether the specific performance, a monetary payment, or other relief, or some combination thereof, is sought, along with supporting reasons.

[84] *Id.* Legal basis for enforcement could be, or example, that it is a foreign-related award, or a foreign award under the Convention. *Id.*

[85] *Id.* at 323. This may suggest that specific knowledge of assets is necessary to make an enforcement application, but, in practice, it seems that best efforts are accepted. *Id.*

[86] *Id.* at 324. Additional procedural requirements include that:

The application must be entitled with the relevant court, and state that the application is for recognition or enforcement of an arbitral award. The enforcing party, or applicant, must provide his/her name, address and legal representatives. The respondent's name, address and legal representative must also be stated. The nature of the award must be set out, in order that the court can verify it is an enforceable award. This includes confirming that the award has become effective and binding, including the time allowed for payment. It must be confirmed that the award has not been set aside, or is not subject to some on-going challenge. The award must be identified as ad hoc or institutional, and concerning commercial matters…This process will also identify whether the enforcement is sough against the Government, in which case the commercial reservation may have effect. *Id.*

[87] The contents of CPL Chapter XXVIII Arbitration provide:

Also, the Arbitration Law of the PRC was enacted in 1994 and took effect in 1995.[88] It outlines the principles behind and prerequisites and procedure for arbitration in China.[89] Because it requires arbitration to be based on the parties' free will, a valid written arbitration agreement is a prerequisite to an arbitration body accepting a case.[90] The 1994 Arbitration Law also clarifies that certain subject matters, such as administrative, marital, guardianship and succession disputes, are not capable of resolution through arbitration.[91] Procedurally, arbitration in China

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Article 257: In the case of a dispute arising from the foreign economic, trade, transport or maritime activities of China, if the parties have had an arbitration clause in the contract concerned or have subsequently reached a written arbitration agreement stipulating the submission of the dispute for arbitration to an arbitral organ in the People's Republic of China handling cases involving foreign element, or to any other arbitral body, they may not bring an action in a people's court. If the parties have not had an arbitration clause in the contract concerned or have not subsequently reached a written arbitration agreement, they may bring an action in a people's court.

Article 258: If a party has applied for property preservation measures, the arbitral organ of the People's Republic of China handling cases involving foreign element shall refer the party's application for a decision to the intermediate people's court of the place where the party against whom the application is made has his domicile or where his property is located.

Article 259: In a case in which an award has been made by an arbitral organ of the People's Republic of China handling cases involving foreign element, the parties may not bring an action in a people's court. If one party fails to comply with the arbitral award, the other party may apply for its enforcement to the intermediate people's court of the place where the party against whom the application for enforcement is made has his domicile or where his property is located.

Article 260: A people's court shall, after examination and verification by a collegial panel of the court, make a written order not to allow the enforcement of the award rendered by an arbitral organ of the People's Republic of China handling cases involving foreign element, if the party against whom the application for enforcement is made furnishes proof that: (1) the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement; (2) the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which he is not responsible; (3) the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate.

If the people's court determines that the enforcement of the award goes against the social and public interest of the country, the people's court shall make a written order not to allow the enforcement of the arbitral award.

Article 261: If the enforcement of an arbitral award is disallowed by a written order of a people's court, the parties may, in accordance with a written arbitration agreement reached between them, apply for arbitration again; they may also bring an action in a people's court.

[88] English translation of the 1994 Arbitration Law is *available at*:: http://www.jus.uio.no/lm/china.arbitration.law.1994/

[89] Li Hu, *An Introduction to Commercial Arbitration in China*, DISPUTE RESOLUTION JOURNAL, May-July 2003, *available at:* http://findarticles.com/p/articles/mi_qa3923/is_200305/ai_n9282731/pg_1?tag=artBody;col1

[90] *Id.* , citing Arbitration Law of 1994, Article 4

[91] *Id.* , citing Arbitration Law of 1994, Article 3

begins with the submission of an application for arbitration and a written arbitration agreement to the arbitration commission. The application "is required to include the name, sex, age, occupation, employer and domicile of each party and its legal representatives; the claim and the facts on which it is based; and the evidence and the names and domiciles of witnesses."[92] According to the 1994 Law requires "arbitration to be conducted independently, without interference from administrative authorities, social organizations or individuals."[93] An arbitral award is final, binding, and enforceable by Chinese courts.

The 1994 Arbitration Law applies to both domestic and foreign arbitration. Pertinent to international arbitration is Chapter VII of the 1994 Law, entitled Special Provisions for Arbitration Involving Foreign Elements. Most importantly, Article 70 of the 1994 Law specifies the grounds upon which foreign-related arbitral awards may be set aside, as discussed below. Article 73 also requires that for a foreign arbitral award to be enforceable in China, the party against whom the enforcement is sought and such party's property must both be located within the territory of the PRC. In order to understand its effect on enforcement of foreign arbitral awards, however, the 1994 Law should be read in conjunction with the CPL.

C. All Fora and Procedures for Enforcement in China

The procedure for enforcement of a foreign arbitral award is outlined in section III(A) above. Application for enforcement of a foreign arbitral award must be made to the appropriate IPC and applicants must meet China's procedural prerequisites and requirements. While the major two arbitration institutions in China are the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC), they are not the venues through which to seek enforcement of an award issued by a foreign arbitral body. Again, Article 269 of the CPL of the PRC instructs the IPC to "handle [enforcement] matters pursuant to international treaties which China has concluded or to which China is a party or in accordance with the principle of reciprocity."[94] Thus, the IPCs have exclusive original jurisdiction over enforcement of foreign awards.

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[92] *Id.*

[93] *Id.* , citing Arbitration Law of 1994, Article 8

[94] Civil Procedure Law, Article 269

Significantly, the Supreme People's Court in 1995 issued a Notice on Court's Handling of Issues in Relation to Matters of Foreign-Related Arbitration and Foreign Arbitration which "forbids any Intermediate People's Court from refusing to enforce an arbitral award by a foreign institution" without the pre-approval of the HPC of the jurisdiction, which must then receive consent the Supreme People's Court.[95] This "pre-reporting system is intended to deter the improper refusal to enforce international awards."[96]

D. China's Law on Setting Aside Awards

According to the Arbitration Law of 1994, the CPL's Article 260 lays out the possible grounds for setting aside foreign-related arbitral awards.[97] If a party presents evidence which proves that a foreign-related award involves one of the following circumstances set forth in the first paragraph of Article 260 of the CPL, the court shall set aside the award:[98]

> 1) the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;
> (2) the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which he is not responsible;
> (3) the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
> (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate.[99]

The social and public interest ground for setting aside an award is contained in the second paragraph of Article 260.[100]

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[95] Mauricio J. Claver-Carone, Post-Handover Recognition and Enforcement of Arbitral Awards between Mainland China and Hong Kong Sar: 1999 Agreement vs. New York Convention, 33 Law & Pol'y Int'l Bus. 369 at 379.(2002).

[96] Li Hu, *An Introduction to Commercial Arbitration in China*, DISPUTE RESOLUTION JOURNAL, May-July 2003, *available at:* http://findarticles.com/p/articles/mi_qa3923/is_200305/ai_n9282731/pg_1?tag=artBody;col1

[97] Cohen at 285

[98] *Id.*

[99] *Id.*

[100] *Id.* at 288

In addition, the Supreme People's Court in 1987 issued a Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[101] Significantly, this regulation "granted the Intermediate People's Court authority to refuse enforcement of a foreign arbitral award through the technical or procedural grounds listed in article V of the New York Convention."[102]

E. Steps which may Increase Likelihood of Enforceability

Given the grounds for setting aside a foreign arbitral award, a party seeking to enforce such an award in China should take steps to avoid causing one of those grounds to be invoked. Also, given the arguably onerous procedural requirements of applying for enforcement in the PRC, as outlined above, an enforcing party should be familiar with this procedure, particularly where China imposes more stringent requirements than the New York Convention. Finally, as insolvency of the respondent is the leading cause for non-collection, as discussed below, parties should take steps to prevent the respondent from becoming insolvent.

F. Prior History of Enforcement of Awards

According to a 1999 empirical study of 89 foreign and CIETAC arbitral award enforcement cases, almost half of all foreign and CIETAC award "were enforced in the sense that the party recovered at least some amount. The enforcement rate for foreign awards was 52%, slightly higher than the 47% success rate for CIETAC awards. Furthermore, investors can expect to recover 75-50% of the award amount in 34% of cases and half of the award at least 40% of the time."[103] Contrary to common notions of Chinese local protectionism, the study found that "insolvency of the respondent was by far the biggest obstacle to collection, accounting for 43% of all non-enforcement cases and statistically significant by conventional standards when

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[101] Mauricio J. Claver-Carone, Post-Handover Recognition and Enforcement of Arbitral Awards between Mainland China and Hong Kong Sar: 1999 Agreement vs. New York Convention, 33 Law & Pol'y Int'l Bus. 369 at 376.(2002).

[102] *Id. See e.g.*, *Hemofarm et al. v. Jinon Yongning Parmaceutical Co. Ltd*, China PR 5, Intermediate People's Court of Shangdong Province, Jinan (June 27, 2008) (excerpt reprinted in 34 YEARBOOK COMMERCIAL ARBITRATION 478 (2009) (finding that an ICC arbitration decision cannot be enforced because, *inter alia*, it would violate Chinese public policy).

[103] Randall Peerenboom, Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC 49 AM.J.COMP.L 1, 5(2001)

controlling for other factors."[104] Smaller awards were more likely to be enforced than larger awards, and the nationality of the applicant did not appear relevant.[105] Awards were also easier to enforce in Shanghai and Guangzhou than in other cities.[106]

CIETAC and the SPC suggest that "an enforcement success rate of somewhere around 90 per cent for foreign or foreign-related awards, and somewhere up to 99 per cent for all Chinese arbitrations…90 per cent is quoted at the average international success rate under the New York Convention."[107] Cohen agrees that "refusal of enforcement on the grounds of local protectionism or public policy is relatively rare."[108]

Thus, arbitrating in foreign venues such as the U.S. or Canada may allows parties to engage in arbitration under ad hoc or institutional rules "while still having the awards recognized in Mainland China through the New York Convention."[109] In addition, foreign awards are protected under the 1995 Notice. Most public policy grounds of refusals of enforcement are also not enforceable against foreign awards.[110] Therefore, "[c]hoosing to arbitrate in a foreign venue is the best option for arbitrating Mainland China-related disputes."[111]

Conclusion

Enforcement of foreign court judgments in China follows a straightforward procedure laid out by Articles 267 and 268 of the Civil Procedure Law of the PRC. Due to the lack of binding caselaw or precedent in China's statutory civil law system, and the resulting lack of reported case decisions, the success rate of actual enforcement of foreign judgments is difficult to determine. Enforcement of arbitral awards, on the other hand, follows an arguably onerous

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[104] *Id.* at 5-6

[105] *Id.* at 6

[106] *Id.*

[107] Cohen at 297-98

[108] *Id.* at 298

[109] Mauricio J. Claver-Carone, Post-Handover Recognition and Enforcement of Arbitral Awards between Mainland China and Hong Kong Sar: 1999 Agreement vs. New York Convention, 33 Law & Pol'y Int'l Bus. 369 at 403.(2002).

[110] *Id.*

[111] *Id.*

guideline that employs more stringent procedural requirements than the New York Convention, to which China is a party. Empirical evidence of the rate of successful collection of foreign arbitral awards in China is much more readily available.