

Effectiveness and Remedies of Arbitral Awards in OHADA (1)'s System and in the People's Republic of China

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Abstract

Arbitral justice becomes a universal phenomenon requiring the involvement of all economic and legal players in developed and developing countries.

OHADA is a common law that aims to secure legal security for regional and foreign economic agents by offering a vast economic space. The People's Republic of China (PRC) is an emerging country seeking to increase its economic participation in the global context. As economic interdependence increases, business disputes are more likely.

This article compares two legal systems in the international commercial arbitration field: the legal system of OHADA and the PRC's legal system; especially in the effectiveness and the remedies of the arbitrators' decisions.

Keywords: Arbitration awards, China Arbitration Law, Effectiveness, OHADA, Remedies

Introduction

It is worth noting that private arbitration predates the public court system. Arbitration began as an extrajudicial mechanism for resolving disputes. The ancient Sumerians, Persians, Egyptians, Greeks, and Romans all had a tradition of arbitration. In Roman law, arbitration agreements were admissible as a reflection of the recognized principle of freedom of contract. In arbitrations dating back to the Oxyrhynchus Papyri from 427 AD, merchants accepted as final the decisions of fellow merchants with knowledge and expertise in the related field. Arbitration has, for that reason, historically functioned as an independent adjudicative dispute resolution mechanism. It is characteristic that arbitration was perceived as superior for resolving price or damages disputes.

Trade exchanges compel States to modernize their legal system. It has become vital for States to develop an appropriate legal framework for an open economy and competitive market by establishing patterns of prevention and effective regulation of disputes.

Disputes between traders have several features: they involve professionalism and must be decided quickly and fairly. They frequently appear in much litigation, and have international character. This is the traditional way of dispute settlement. The modes of settlement can be expressed in two ways:

- The existence of judicial courts specialized in commercial issues;
- The admission of others modes called alternative dispute resolution (ADR).

Ordinary courts are usually rigid, slow or expensive in resolution of business disputes. But alternative dispute resolutions offer a range of choices for litigants: transaction, mediation, conciliation or arbitration. This study covers only arbitration.

OHADA has created two different sets of legislation applicable to arbitration (2):

- there is the OHADA Treaty itself, which provides for institutional arbitration under the auspices of the Common Court of Justice and Arbitration (CCJA), in accordance with the CCJA's own Rules of Arbitration (the CCJA Rules);
- there is the Uniform Act on Arbitration, which lays down basic rules that are applicable to any arbitration where the seat of the arbitral tribunal is in one of the Member States. The Uniform Act is based on the UNCITRAL model law. It supersedes existing national laws on arbitration but is subject to provisions of national laws which do not conflict with the Uniform Act (3).

Article 1 of OHADA Arbitration law states that the 'vocation' of the Uniform Act is to apply to all arbitrations where the seat of the arbitral tribunal is located in one of the Member States. This rather loose language raises the question of whether the parties to an arbitration taking place in a Member State can apply a law other than the Uniform Act, or whether the Uniform Act can be applied also to arbitrations taking place outside the OHADA region. The

intention of Article 1 is that the Uniform Act should apply to all arbitrations where the seat of the tribunal is located in a Member State. This means that the Uniform Act makes no distinction between domestic and international arbitration. It also does not restrict arbitration to commercial matters (Article 2).

The first Arbitration Act in the history of the People's Republic of China was enacted by the Standing Committee of the National People's Congress of China on 31 August 1994. The Arbitration Law of the PRC actually came into force on 1 September 1995. It is influenced by the UNCITRAL Model Law on International Commercial Arbitration. However, the PRC Arbitration Law is different from the UNCITRAL Model Law in many important aspects (4). The Arbitration Law lays down the basic principles of arbitration in China and, in doing so, reflects many of the fundamental principles of modern international arbitration. Arbitration in China is also regulated by provisions of the Civil Procedure Law of 1991, and numerous interpretations, minutes, regulations, replies and notices. Also, some arbitration commissions' rules can apply in PRC: the China International Economic and Trade Arbitration Commission (CIETAC) rules were adopted in 1994, and revised in 1995, 1998, 2000 (when CIETAC's jurisdiction was extended to domestic disputes) and 2005 to bring them into line with modern arbitration practice; the rules allow parties to select other arbitral rules (such as UNCITRAL) and apply them in a CIETAC arbitration; the parties are given greater autonomy and, unless they agree otherwise, the tribunal need not follow Chinese court procedure and may adopt an adversarial or inquisitorial approach to proceedings; the CIETAC rules for financial disputes were introduced in 2003 (and revised in 2005); the China Maritime Arbitration Commission (CMAC) rules were introduced in 2001 (and revised in 2004); the Beijing Arbitration Commission (BAC) rules were revised in 2003, with effect from March 2004.

The PRC is a party to the New York Convention of 1958 and to International Center for Settlement and Investments Disputes (ICSID), although it has entered a reservation confining ICSID to cases of misappropriation.

The PRC Arbitration Law (article 3) specified the non-arbitrable types of disputes and that are arbitrable.

The non-arbitrable disputes are: marital, adoption, guardianship, support and succession disputes; and Administrative disputes that are required by law to be handled by administrative authorities.

Disputes subject to arbitration are the: "contractual and other disputes concerning property rights and other disputes concerning property rights and obligations between citizens, legal persons and other organizations of equal status may be subject to arbitration" (article 2).

Also, articles 2 and 3 of the CIETAC Arbitration Rules provides that the Arbitration Commission will resolve "disputes arising from economic and trade transactions of a contractual and non-contractual nature", including: International or foreign-related disputes; Disputes related to the Hong Kong Special Administrative Region or the Macao Special Administrative Region or the Taiwan region; and Domestic disputes.

The PRC Arbitration Law states that "the parties adopting arbitration for dispute settlement shall reach an arbitration agreement on a mutually voluntary basis." (Article 4)

Pursuant to Article 16, a valid arbitration agreement must include a designated Arbitration Commission. Therefore, it is indicated that only institutional arbitrations are recognized under the PRC Arbitration Law. Before any person can apply to initiate arbitration, there must be a valid arbitration agreement and a specific arbitration claim (Article 21 of the PRC Arbitration Law). Such application must be within the authority of the chosen Arbitration Commission.

In PRC, the manner of enforcement depends upon the type of the award: domestic, foreign-related and foreign. Its Arbitration Law does not contain any provision allowing a party to appeal an award.

OHADA operates a uniform law regime which upon adoption becomes automatically applicable in all its member states. The Uniform Act on Arbitration Law, which provides basic rules that are applicable to any arbitration (ad hoc or institutional) where the seat of the arbitral tribunal is in a Member State; and the OHADA Treaty which provides for arbitration under the auspices of the CCJA and in accordance with the CCJA Rules of Arbitration. The CCJA has final jurisdiction on matters pertaining to OHADA Uniform Acts. Recognition and Enforcement of awards within any OHADA contracting states is governed by article 25 of the OHADA Arbitration Act. Here also, ordinary appeals are not available. So, are these two systems the arbitration law effective? And in the case of contest of validity of awards, what are the remedies?

It will be interesting to discuss about the effectiveness (I), and after the remedies (II).

I. The effectiveness of arbitral awards in OHADA's system and in PRC.

We will expose successively the effectiveness in China arbitration system (1-1) at first and after the effectiveness in the system of OHADA (1-2).

1.1 In PRC

We will analyze this part in two points: the legal basis and the enforcement of arbitral award.

1.1.1 Legal basis

A meaningful arbitral award is conditional upon an effective and reliable enforcement mechanism. In PRC, the manner of enforcement depends upon the type of the award: domestic, foreign-related and foreign. A domestic arbitration is a Chinese arbitration between domestic legal persons without foreign elements. Foreign arbitration is

Chinese arbitration concerning foreign related affairs. Foreign arbitration refers to any arbitration taken up outside China.

The recent expansion in the jurisdictional scope of the CIETAC, the CMAC and the domestic arbitration commissions means that all arbitration commissions located in China's major cities may now, in certain circumstances, handle both domestic and foreign-related arbitration cases. This change in policy reflects similar alterations to the standards used to distinguish a domestic arbitral award from a foreign-related. Distinctions pertaining to the domestic or foreign-related nature of the award turn on the character of the dispute rather than the nature of the actual arbitration body that administered the arbitration proceedings. In this article, we only focus on the foreign-related and foreign award.

The legal basis for the enforcement of foreign-related awards in PRC is:

- the Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (C.C.P.I.T.), adopted on 6 May 1954(5);
- The article 195(6) of the Trial Civil Procedure reinforced this position;
- In 1991 the Civil Procedure Law, adopted by the NPC on 9 April 1991 (and further amended on 28 October 2007 by the Standing Committee of the NPC), amended the Trial Civil Procedure Law and its articles 257, 258, 259 bring new provisions treating this enforcement;
- the Arbitration Law followed and confirmed that foreign arbitral award could enforced in China on the basis of a reciprocal agreement (articles 62, 63, 64); these provisions of the Arbitration Law allow the PRC to accede to the New Convention of 1958(7); this accession of PRC in the New York Convention influenced its national legislation regarding the recognition and enforcement of arbitral awards.

1.1.2 Enforcement of foreign-related and foreign arbitral awards

Where the intermediate People's Court determine that there is prime facie evidence that an arbitration agreement may be invalid, or determines that an arbitral award rendered by a PRC based foreign-related arbitration commission ought not to be enforce, it must first report its finding to the Higher people's Court. Only the Supreme people's Court confirmation can permit the Intermediate People's Court to refuse the enforcement of a foreign-related or foreign arbitral award, after the circumstances set forth in articles 258 of the Civil Procedure Law. For example, in *Korean Shinho Co. v. Sichuan Euro-Asia Econ. and Trade Gen. Co.*(8), the Supreme People's Court found that the parties' arbitration agreement, as drafted, was invalid, and the Court therefore affirmed the Sichuan Court's rejection of an arbitration defense. The parties' arbitration clause stated, "Any dispute arising from both parties shall be arbitrated in accordance with the commercial arbitration clause by the commercial arbitration committee of a third country which shall make a final award." The Supreme Court held that this clause was unclear and unable to be executed, since neither the method nor the institution was stipulated, and therefore the court below properly retained jurisdiction.

According to the Arbitration Law, an arbitration award is final, and the people's court must enforce an arbitration award unless a party seeks to set aside the award, and the people's court finds applicable at least one of several grounds under Article 58 of the Arbitration Law(9). On the other hand, pursuant to Article 63 Arbitration Law and Article 217 of the Civil Procedure Law, a people's court may decline to enforce an award, if: there is no written arbitration agreement; the award exceeded the scope of agreement of the arbitration agency's authority; evidence is insufficient; certain procedural defects existed; a tribunal's erroneous application of law; or an arbitrator committed malpractice; notably, if it would contradict the social or public interest.

Also, Article 260(10) of the Civil Procedure Law, referenced in Articles 70 and 71 of the Arbitration Law, specifies more narrowly-tailored circumstances under which a court may refuse to enforce a foreign-related arbitral award.

The attitude of the Court to enforcement of foreign-related arbitral awards is embodied in a notice issued by the Supreme Court on 28 August 1995 (see Notice of the Supreme People's Court on Relevant Issues in Dealing with Foreign-related Awards and Foreign Awards (Fa-Fa [1995] No. 18) issued on 28 August 1995). Pursuant to such notice, if the first instance Court (the relevant Intermediate People's

Court) decides not to enforce a foreign-related award, it must refer that decision to the Court above it, and finally to the Supreme People's Court for approval. The Supreme People's Court has to agree to non-enforcement of foreign-related arbitral awards. Without the consent from the Supreme Court, no lower Court is entitled not to enforce a foreign-related award.

For the enforcement of foreign awards, China is a signatory state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The Convention came into force in China on 22 April 1987. The accession was subject to both "commerciality" and "reciprocity" reservations. By the way of the Decision of the Standing Committee of the National People's Congress on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1986), and the Supreme People's Court Notice on the Implementation of

China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987), China has given effect to the Convention.

Articles 215 and 267 of the Civil Procedure Law governed this recognition and the 215 specified that the application for recognizing and enforcing a foreign arbitral award should be made within two years after the relevant performance date, or, failing such date, the effective date of the award. In practice, the law applicable to the arbitral proceedings and the composition of the arbitral tribunal is almost always the law of the country where the arbitration took place unless otherwise agreed by the parties.

On 25 April 1995 and 10 July 1997, the Dalian Maritime Court, in the decisions of both *Nautilus Transport and Trading Co., Ltd. (HK) v. China Jilin Province International Economic and Trade Development Corporation (China)* (11) and *Dalian Ocean Transportation Company (China) v. Tekso Pte. (Singapore)*(12), held that the arbitral clause concluded by the parties in their charter party was legally valid, the arbitral proceedings were in accordance with the law, and the application of the plaintiff for enforcement of the award made in London was not contrary to the social and public interest of the PRC.

According to Article 65 of PRC Arbitration Law, "The provisions of this Chapter shall apply to all arbitration of disputes arising from foreign economic, trade, transportation or maritime matters. In the absence of provisions in this Chapter, other relevant provisions of this Law shall apply". According to Article 178 of "Opinion and Implement and Execution of General Principles of Civil Law of the People's Republic of China", foreign affairs are ones where either two parties or of the parties which signed the contract are foreigners, stateless people, foreign artificial persons, or other economic forms; the subject, matter of the contract is "outside of China"; the juridical factors that affect civil rights and duties are "outside of China". An important issue here is whether a joint venture is deemed to be a foreign element. In the famous *China International Engineering Consultancy Company v. Lido Hotel Beijing case*, the Beijing No1 Intermediate People's Court held that a joint venture which involved a foreign partner, who assumed the status of PRC legal person, would not be considered to be a foreign case. The dispute must contain at least one foreign element, such as the establishment, modification or termination of a commercial relationship of the performance of the contract outside the PRC.

Sometimes, some difficulties appear in the enforcement of awards. Some cases have indicated that the Chinese courts' interpretation over Article V of the Convention of New York is inconsistent. In the case *Revpower Ltd. v. Shanghai Far East Aerial Technology Import and Export Corporation* (13), the Shanghai Intermediate People's Court wrongly used the Chinese law to determine the validity of the arbitration agreement between the parties instead of the applicable Swedish law. In another case *S & H Foodstuff Trading GmbH (Germany) v. Xiamen Lianfa Import & Export Corporation (China)* (14), the Xiamen Intermediate People's Court rightly interprets the validity of the arbitral clause on the basis of the applicable German law.

Some others are related to the ad hoc arbitration awards. According to Articles 16 and 18 of PRC Arbitration law, ad hoc arbitration is excluded in China. But, the Guangzhou Maritime Court, in the case *Guangdong Ocean Shipping Company (China) v. Marships of Connecticut Company Limited (USA)* (15), in 1990 granted its leave for enforcement of an *ad hoc* arbitration award made by a two-member arbitral tribunal in London. And, the case *Dalian Ocean Transportation Company (China) v. Tekso Pte. (Singapore)* in which, on 10 July 1997, the Dalian Maritime Court elected to recognize another *ad hoc* arbitral award rendered by a two-arbitrator tribunal in London on 30 September 1996. In its court decision, the Dalian Maritime Court clearly held that the application for enforcement of the award was not contrary to the social and public interest of the PRC.

Arbitral Awards made in the Hong Kong Special Administrative Region (SAR) (16) or the Macao SAR or the Taiwan region under their arbitration laws respectively are sought according to the arrangements between the Supreme People's Court of China and the Hong Kong SAR Government, or between the Supreme People's Court of China and the Macao SAR Government, or according to the decision of the Supreme People's Court of China on recognizing the civil judgment including arbitral awards of Taiwan region. The grounds for refusing enforcement of such kind of awards are almost the same as those under New York Convention with a special requirement on the awards of Taiwan region that the award shall not violate the basic legal principles of the State.

1.2 In OHADA system

We will expose the legal basis and then analyze the enforcement of arbitral award.

1.2.1 Legal basis

The OHADA signatory states are predominantly of the civil law legal tradition: French speaking and all but one (17) belong to the franc economic zone. OHADA operates a uniform law regime which upon adoption becomes automatically applicable in all its member states. The Uniform Act on Arbitration Law, which provides basic rules that are applicable to any arbitration (ad hoc or institutional) where the seat of the arbitral tribunal is in a Member State; and the OHADA Treaty which provides for arbitration under the auspices of the Common Court of Justice

and Arbitration (the CCJA) and in accordance with the CCJA Rules of Arbitration (18). The Common Court of Justice and Arbitration (CCJA) has final jurisdiction on matters pertaining to OHADA Uniform Acts.

Recognition and Enforcement of awards within any OHADA contracting states are governed by article 25 of the OHADA Arbitration Act which recognizes a valid award as final and binding on the parties with *res judicata* effect and is accorded the same status as a judgment of a national court in all OHADA member states (19). As a preliminary point, some OHADA member states are also parties to the New York Convention (20). In such states, it is for the enforcing party to choose which legal regime to ground his application on (21). In those OHADA states that are not parties to the New York Convention, enforcement and recognition can only be sought under the provisions of the Arbitration Law (22).

For the enforcement of an arbitral award under the OHADA legal system, the first step is to obtain exequatur of the award by establishing the existence of the award and the arbitration agreement on which it is based. The party seeking exequatur of the award shall produce the original award and arbitration agreement or authenticated copies of both the award and arbitration agreement (23) to the competent court, which will then grant exequatur of the arbitral award and enter that as the judgment of the court for enforcement purposes (articles 30 and 31 OHADA Arbitration Act).

The second step is that the documents (that is the award and arbitration agreement) if they are not in the French language, must be translated into French. This requirement must be interpreted as being conditional on French being the language of the national court before which exequatur and enforcement is sought. This is necessarily so since the official language of some OHADA member states is not French and a court speaks its own language (24).

The application for exequatur and enforcement under the Arbitration Law requires the other party to be put on notice. The only ground on which a request for exequatur and enforcement of the arbitral award shall be refused is where the, 'award is manifestly contrary to international public policy of the member states' (article 31).

There is no time limit when recognition and enforcement of an arbitral award may be sought under the OHADA Arbitration Law before the courts of a member state.

1.2.2 Enforcement of OHADA legal system arbitral awards and foreign awards

The efficiency of the award is assessed according to the Exequatur. Article 25 of the Treaty of OHADA compares the arbitral award to a real judicial decision that has full and rightful authority at the international level. In practice, the two levels in the enforcement of arbitral under OHADA, according to whether: the parties agreed to settle their differences in a place located within OHADA territory - in accordance with any rules they have chosen or allowed the arbitrators to chose (which could be the rules of any arbitration institution or other rules adopted for the purpose), subject to the mandatory provisions of the Uniform Act, or, the parties agreed to refer their dispute for settlement to the CCJA Arbitration Centre.

a. The Arbitration Act enforcement

To be enforceable the award must be submitted to the competent national court; that is the court in the State where enforcement is sought, for an enforcement order, known as *exequatur* (article 30). The documentary requirements are the same as those provided for in the New York Convention; the original of the award or certified copies thereof and the original arbitration agreement or duly certified copies thereof. Only one ground for refusal of recognition or enforcement of an award; *that the award is manifestly contrary to a rule of international public policy of Member State* (article 31). The article 32 of the Uniform Act allows the award-creditor to apply to the CCJA for the ruling refusing the exequatur to be set aside. It however does not extend the same privilege to the award-debtor. The ruling granting the exequatur is not subject to appeal. These accords with the fundamental principle that arbitral awards should, subject to limited exceptions, be regarded as binding and enforceable. Article 32 however departs from this principle by equating the *procedure for setting aside to recourse against an enforcement order*. This article lays down a short limitation period of one month for the filing of the application and must be read in conjunction with articles 27 and 28. In effect the setting aside of an application can be made in two phases: after the award is rendered and even after application for recognition and enforcement is made but before enforcement is ordered, or, after enforcement is ordered but within one month as from the date of notification of the enforcement order.

Under article 28, unless provisional execution has been ordered by the arbitral tribunal, the application to set aside has the effect of staying the execution of the award until a decision is made on the application. This article refers to an award that has been recognized and is ready for enforcement and leaves no room for judicial discretion. Under article 33 the refusal of the application for setting aside is tantamount to recognition of the award and decision granting the exequatur.

Finally, article 34 recognizes and gives effect to foreign awards, which have been made pursuant to rules other than those provided by the Uniform Act. This provision enshrines and gives effect to the principle that international arbitral awards must be regarded as binding and enforceable irrespective of the country in which they were made. It allows the enforcement of awards under the New York Convention.

b. The CCJA Rules enforcement.

Under article 21 of the Treaty, a dispute may be submitted to CCJA Arbitration where: - one of the parties is domiciled or has its usual place of residence in one of the Member States; or the contract has been or is to be performed, in whole or in part, on the territory of one or more Member States.

This arbitral role is exercised in two phases, recourse against the award and enforcement. The relevant provisions are article 25 of the Treaty and articles 27 to 34 of the CCJA Rules of Arbitration. Article 27 of the Rules of Arbitration (which is identical to the first part of article 25 of the Treaty), enunciates the conclusive or *res judicata* effect of arbitral awards. It sets forth the principle that awards made pursuant to the provisions of the Rules are binding and enforceable in all the Member States of OHADA. Awards are enforced by an order of *exequatur* issued by the CCJA. The arbitral awards made under the auspices of the CCJA have the same authority as judgments rendered by national courts, and are enforceable throughout OHADA territory. The enforcement is ordered by the President of the CCJA or a judge to whom the matter has been assigned (article 30.2 CCJA Rules). But, the enforcement will not be ordered where an application has been filed, challenging the validity of the award (article 30.3 CCJA Rules). If the President of the Court or judge to whom the matter has been assigned grants the application for enforcement, the order of *exequatur* must be served on the award-debtor. The award-debtor is allowed a period of 15 days, as from the date of service, within which to file an objection (article 30.4). The full bench of the Court will render a decision on the objection, after full hearing conducted in accordance with its rules of procedure (article 30.5 CCJA Rules).

The procedure for enforcement of arbitral awards under the OHADA Uniform Act and CCJA Rules would appear to have been designed to protect the interest of the parties and any third party whose rights have been infringed. There is patent incoherence in the drafting of the provisions, particularly the intertwining of recognition and setting aside or challenge proceedings which could lead to inconsistent understanding and interpretation.

c. Enforcement of International awards.

The Uniform Act sets forth that the arbitral awards are recognized by the Member States. The Article 34 made provision for the recognition of arbitral awards based on rules other than those of the Uniform Act. These grounds are similar in certain respects to those found in article 34 of the Model Law. The decision setting aside the award may itself be quashed by the CCJA.

Whereas article 28 of the Uniform Act allows the arbitral tribunal to order provisional enforcement of its award, there is no such provision under the Model Law.

Article 31 provides that recognition and enforcement shall be refused if the "award is manifestly contrary to a rule of international public policy of the member States". Arbitration instruments (national laws and treaties) uniformly permit the non-recognition of arbitral awards on the ground that they violate public policy. The OHADA Treaty, CCJA Rules and Uniform Act talk of 'international public policy'. There is a traditional distinction between domestic public policy and international public policy in Civil Law systems, from whence OHADA got its inspiration.

The concept of international public policy is supranational in character, hence its use in OHADA legislation. The distinction between the two is considered to be of prime importance in international commercial arbitration.

II. The remedies to the awards in OHADA and PRC arbitration laws.

We will expose at first the remedies in OHADA Arbitration Act (2-1), and after those in PRC Arbitration Law (2-2).

2.1 In OHADA System

Ordinary appeals are not available. A party may contest the validity of the award on a limited number of grounds. The only grounds upon which such proceedings may be based are the following:

- There was no arbitration agreement, or the arbitration agreement was null and void or had expired by the time the tribunal gave its award;
- The arbitral tribunal was improperly constituted;
- The arbitral tribunal failed to comply with its terms of reference;
- There was a lack of due process in the proceedings;
- The award does not contain reasoning; or
- The arbitral tribunal violated a rule of international public policy of Member States.

The appeals shall not constitute a dilatory measure to avoid immediate enforcement of an award rendered by an arbitral tribunal. Under article 25 of the Uniform Act, recourse against the award is not the exclusive right of the award debtor and, the setting aside procedure is not the exclusive means of recourse against an award. However the other procedures of recourse contained in article 25 are not brought before the court that has jurisdiction to set aside the award, but are laid before the arbitral tribunal. A third party who was not called, and who has suffered harm as a result of the award, may file an objection before the arbitral tribunal. Again, an application for review of the award may be made where a new fact is discovered, which could have a decisive influence, provided that such new fact

was unknown to the arbitral tribunal and the party making the application at the time the award was rendered. The inclusion of these two other means of recourse is salutary as they may serve to protect the rights of third parties and to make the resulting award more justifiable, credible and acceptable.

The Uniform Act (article 27) allows the setting aside application to be filed even after the award has been declared enforceable, though this must be done within one month as from the date of notification. Furthermore, and this is even more striking, under the Uniform Act (article 29), the setting aside of an award does not constitute a bar to the institution of fresh proceedings. An award debtor who wants to resist recognition and delay enforcement will simply initiate fresh arbitration proceedings, even though he knows full well that he has a frivolous claim and has little or no chance of success. It is difficult to see how an invalid arbitration agreement can be rendered valid by the simple initiation of fresh proceedings, unless the parties decide to enter into another agreement.

The articles 29, 32 and 33 of the CCJA Rules also are applied. Article 28 of the Rules requires that the original of the award be deposited with the Secretary General of the CCJA. The article 29 provides that a party who intends to challenge the recognition of an arbitral award and its *res judicata* effect must institute proceedings, by way of an application, before the CCJA. The national courts are completely excluded from the entire process. The wording of article 29 lends credence to the view that the award creditor need not produce documentary evidence of the award and provide that the challenge to the validity of the award can only be made if the parties have not agreed otherwise, i.e. renounced their right to challenge the award in the arbitration agreement. This provision which is not found in the Uniform Act reinforces the principle of party autonomy, which of course is qualified by the mandatory requirements of the *arbitral situs*. The CCJA Rules equate challenge to the recognition of an award which is akin to a request for refusal of recognition or enforcement filed by the party against whom recognition is invoked. The article 30 of the CCJA Rules set out the grounds for refusal of recognition or challenge of the validity of an award which are: absence of arbitration agreement, or agreement invalid or has expired; the tribunal has rendered an award on matters that are beyond the scope of the submission to arbitration; the principle of equality of arms was not respected (party unable to present his case); the tribunal has infringed a rule of international public policy of the Member States. The CCJA Rules lay down a limitation period of 2 months from the date of notification of the award for the filing of the application to challenge the recognition or validity of the award. In addition to the provisions relating to challenge of the award, the CCJA Rules contain provisions relating to review and 3rd party objection (articles 32 and 33) identical to the provisions of article 26 of the Uniform Act.

2.2 IN PRC

The recourse against arbitral awards may give to an applicant the power to seek to a court to cancel or to re-arbitrate a case. The PRC Arbitration Law does not contain any provision allowing a party to appeal an award. If a party is not satisfied with a domestic award, he may apply to set it aside pursuant to Article 58 of the PRC Arbitration Law, or if with a foreign-related award, pursuant to Article 70 of the PRC Arbitration Law and Article 258 of the Civil Procedure Law. Under Article 70 of PRC Arbitration Law, if the party that initiates the action for setting aside can present to the competent People's Court proof that a foreign-related award involved one of the circumstances set forth in the first paragraph of Article 260 of the Chinese Civil Procedure Law (CCPL) 1991, the court shall, after examination and verification, set aside the award. The grounds are stated as follows: (a) no arbitration clause in the contract nor written arbitration agreement concluded after the occurrence of the dispute by the parties; (b) the failure of the respondent to receive the notice of appointment of arbitrators or of commencement of arbitral proceedings or the inability of the respondent to present his case for reasons not due to his own fault; (c) the formation of the tribunal or the arbitration procedure was not consistent with the arbitration rules; (d) the matters decided in the award being out of scope of the arbitration agreement or beyond the authority of the arbitration institution.

It is noteworthy to highlight that "foreign-related award" does not mean foreign awards only. It also covers certain awards made by a domestic arbitration commission which involved a foreign element. As Article 260(I) of the CCPL 1991 demonstrates, all the grounds for setting aside a foreign-related award deal with procedural issues and the court cannot review the substance of the arbitral award.

Obviously, the grounds set out in Article 260 of the Civil Procedure Law are significantly narrower than those governing domestic awards in Article 58 of the Arbitration Law, which is a reflection of the policy of minimizing interference with the merits of the award and consistent with the growing international trend. Furthermore, notwithstanding the different grounds for setting aside between the domestic award regime and the foreign-related award regime, it shall be noted that the "social and public interest" ground in the second paragraph of Article 260 of the Civil Procedure Law, is expressly excluded by Article 70 of the Arbitration Law.

Article 61 of PRC Arbitration Law introduces the "re-arbitration" system to China. The People's court that has accepted an application for setting aside an arbitration award will consider whether re-arbitration can be carried out. Different from the "remission" known in most common-law jurisdictions and the UNCITRAL Model Law regime, under the unique "re-arbitration" system adopted by the CAA, on one hand, it is the court, in a setting-aside

procedure, which exercises control over the award through its discretionary power to remit the case back to the tribunal for re-arbitration. On the other, in China, remission is a relief ancillary to the setting-aside procedure. Upon a party's request, the court, where appropriate, may decide to request the tribunal to re-arbitrate the case within a specific time limit. Yet, the tribunal is under no obligation to have such a re-arbitration since the request of the court is not mandatory. If the tribunal refuses to have the case re-arbitrated, the court shall resume the setting-aside procedure. Therefore, the re-arbitration is not an independent remedy to save a defective award, which may only be qualified as a subsidiary recourse giving the former tribunal an opportunity to conclude the arbitral procedures and reconsider their award in spite of the setting-aside procedure.

Unfortunately, the "re-arbitration" system is neither regulated further in the 1994 Arbitration Law, nor have any corresponding principles been reached by the court. In practice, some issues still demand clarification. The utmost question remains: on what the grounds should cases be re-arbitrated. Obviously, re-arbitration is a subsidiary remedy that allows the former tribunal of the case to eliminate procedural defects of the case in order to save the award from being set aside by the court. As such, mainland courts can only remit a case of purely procedural defects for re-arbitration. These grounds shall include: no notice to a party to take part in the arbitral proceedings or no opportunity for it to present its case; and non-compliance of the arbitral procedure with the statutory procedure or the rules of arbitration.

Conclusion

In the two systems, enforcement mechanism works well in general. It may be said the current enforcement mechanism can guarantee that foreign arbitral awards will be recognized and enforced effectively. This is a fair and significant way to accelerate mutual benefits between foreign investors and the host country in PRC or in OHADA's system.

The recognition and enforcement of foreign judgments is a common problem for most countries. So, keeping the pace with the international community and making gradual efforts to improve the recognition and enforcement situation of foreign judgments are vital for the developing countries like PRC and OHADA's Member-States.

The importance of recognition and enforcement of foreign judgments, in the business world, can influence foreign parties' decision about whether to cooperate with OHADA's system or PRC firms.

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Notes

Note1. OHADA: Organization for Harmonization of Business Law in Africa

Note2. Article 21 of OHADA Treaty

Note3. CCJA decision 001/2001/EP, 30 April 2001

Note4. The UNCITRAL Model Law is applicable only on international commercial arbitrations (art.1); it's recognize institutional and ad hoc arbitration both; it's permit to arbitral tribunal to rule on its own jurisdiction (art.16); under the Model Law, parties have a choice of the number of arbitrators, failing which free arbitrators shall be appointed (art.10); in the Model Law, there are no minimum requirements in terms of qualifications of the arbitrators (art.13); the Model Law permits parties to apply directly to the Court for interim measures of protection (art.9).

Note5. The article 11 of this Decision provided that: "The award of the Arbitration Commission shall be executed by the parties themselves within the time fixed by the award .In case an award is not executed after the expiration of the fixed time, a People's Court of the People's Republic of China shall, upon the request of one of the parties, enforce it in accordance with the law".

Note6. Article 195: “When one of the parties concerned falls to comply with award made by a foreign-related arbitration institution of the people’s Republic of China, the other party may request that the award be executed in accordance with the provisions of this article by the Intermediate People’s Court at the place where the arbitration institution is located or where the property is located”.

Note7. The Standing Committee of the NPC adopted a decision providing for China’s accession to the New York Convention in 2 December 1986 and become effective the 22 April 1987.

Note8. Korean Shinho Co. v. Sichuan Euro-Asia Econ. And Trade Gen. Co., China law ID. CNLCAS110 (Sup. People’s Ct. 2001)

Note9. Grounds for setting aside an award under Article 58 of Arbitration Law are: 1. There is no arbitration agreement; 2. The matters ruled are outside of the agreement for arbitration or the limits of authority of an arbitration commission; 3. The composition of the arbitration tribunal or the arbitration proceeding violated the legal proceedings; 4. The evidence on which the ruling is based are forged; 5. Things that have an impact on the impartiality of ruling have discovered concealed by the opposite party; 6. Arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.

Note10. After examination and verification, a collegiate bench formed by a people’s court shall decide not to enforce a ruling rendered by a PRC agency in charge of arbitration disputes involving foreigners in any of the following circumstances as proven by the object of the application (1) where the contract does not contain an arbitration clause, or where the parties concerned do not conclude a written agreement on arbitration subsequently; (2) where the object of the application is not informed of the need to designate an arbitrator or initiate arbitration proceedings, or where the object of the application is not informed of the need to designate an arbitrator or initiate arbitration proceedings, or where the object of the application cannot state his opinion due to reasons for which he cannot be held accountable; (3) where the creation of an arbitration court, or the initiation of arbitration proceedings does not conform to arbitration rules; (4) where the matter to be arbitrated falls outside the scope of the arbitration agreement or the jurisdiction of the arbitration agency. A people’s court shall decide not to enforce an arbitration agency. A people’s court shall decide not to enforce an arbitration ruling which it deems contrary to social and public interests.

Note11. For the summary of the case, see Shengchang Wang, Recognition and Enforcement of Foreign Arbitral Awards in China, in Vol. 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1999, at pp. 519-521.

Note12. Ibid. at pp. 521-522.

Note13. For the brief summary of the case, see Guiguo Wang, One Country, Two Arbitration Systems – Recognition and Enforcement of Arbitral Awards in Hong Kong and China, 14(1) J. INT’L ARB. 3/1999 at pp. 27-28. In this case, despite the fact that the plaintiff and the defendant had agreed in their compensation trade agreement that arbitration should take place in Stockholm, Sweden, the SCC Institute had accepted the case and the arbitral tribunal which was duly formed had issued an interlocutory award holding that the SCC Institute had jurisdiction over the case, the Shanghai Intermediate People’s Court still accepted the defendant’s application for a judicial action regarding the same dispute on the basis that the arbitral clause contained in the agreement was ambiguous and incapable of being performed because the arbitration clause did not refer to the SCC Institute. Although the parties agreed that arbitration should take place in Stockholm and did not further specify the law applicable to the arbitration agreement, in the light of the uniform rules of Article V (1) (a) of the New York Convention, the law applicable to the arbitration agreement is Swedish law. Chinese law can in no way be used to determine the validity of the arbitration agreement of the parties. The case clearly indicated the lack of knowledge among the court’s judges of the New York Convention.

Note14. For the report of the case, see CHINA INSTITUTE OF THE APPLIED LAW OF THE SUPREME PEOPLE’S COURT SELECTED CASES OF THE PEOPLE’S COURT (Consolidated 1992-1996) (1997), Vol.1, at p. 2183. In the case, The Xiamen Intermediate People’s Court was of the opinion that, the defendant’s objection that the arbitral clause in the contract was not capable of settling the dispute was unfounded. The court rightly held that, the arbitration agreement between the plaintiff and the defendant stipulating that all dispute should be submitted to the tribunal of the Hamburg Exchange Commodity Association for arbitration had reflected the parties’ genuine intention, and the agreement was in itself unambiguous. The leave for enforcement should be granted. It should be observed that the court, notwithstanding that it did not indicate specifically under which law the arbitral clause was valid, apparently did not interpret the validity of the arbitral clause on the basis of Chinese law.

Note15. For the summary of the case, see Michael J. Moser, China and the Enforcement of Arbitral Awards, in ARBITRATION 5/1995 (the Journal of the Chartered Institute of Arbitrators), at pp.133-134.

Note16. On 14 July 2006, the Hong Kong and Mainland China signed an arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters (available at www.doj.gov.hk/eng/topical/pdf/mainlandrej20060719e.pdf).

Note17. The Democratic Republic of Congo is not a member of the Franc Zone.

Note18. Available at www.ohada.com/jurisprudence/php

Note19. See articles 20 and 31 OHADA Arbitration Law which details what should be contained in the award which shall be reasoned, in writing and duly signed.

Note20. These are: Benin republic, Burkina Faso, Cameroon, Central Africa Republic, Gabon, Guinea, Mali, Niger, and Senegal.

Note21. This is because article 34 preserves the obligations of its member states under such conventions.

Note22. These states are: Chad, Comoros, Congo Brazzaville, Equatorial Guinea, Guinea Bissau, and Togo

Note23. These are the same documents required under article IV of the New York Convention.

Note24. Spanish is the official language of Equatorial Guinea; Portuguese is the official language of Guinea Bissau while Cameroon is both French and English.