THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA

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INTRODUCTION

A test for international commercial arbitration is whether the resulting arbitral award can and will be recognised and enforced. On 1 September 1995 the 1994 Arbitration Act (the Arbitration Act) came into effect in the People's Republic of China.[1] *Inter alia*, it added a further dimension to the legislative framework in China for the regulation and enforcement of arbitral awards. The objective of this article is to identify the relevant parts of the framework that relate to the recognition and enforcement of arbitral awards.

LEGISLATIVE FRAMEWORK

In recent years, China has devoted considerable effort to producing an effective and efficient framework for domestic and international arbitration. The interest in arbitration has a strong historical basis and has not been merely part of the development of its socialist market economy.[2] China has shown that it is willing to adopt a leadership role in the Asia pacific region in the use of commercial arbitration for the settling of trade disputes. It has been encouraged to do so by the support given by western states and by other states in the region.[3] Again, like other countries, China has

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* LLM. The writer wishes to thank Dr Thomas Chiu for his constructive criticism of this article.

1 Article 80 Arbitration Act. This article relies on the English translation of the Act which is found in Beaumont B et al, Chinese International Commercial Arbitration (1994, Simmonds & Hill Publishing, London) 215 et seq.

2 Shapiro M, Courts: A Comparative and Political Analysis (1981, University of Chicago Press, Chicago) chapter 3; Beaumont B and anor, Chinese Maritime Law and Arbitration (1994, Simmonds and Hill Publishing) 2; Wang, "Recent developments in the arbitration system in the Asia-Pacific region", a paper presented at the 14th Lawasia Biennial Conference, Beijing, 16-20 August 1995 at 1.

3 See Wang ibid at 7, where reference is made to some of the steps taken by China, and some in conjunction with foreign international arbitral institutions.

undoubtedly recognised the potential for earning substantial income from the export of its services in international commercial arbitration activities.[4]

There are two arbitration institutions in China with jurisdiction to hear international commercial disputes submitted to them by the disputing parties. The first is the Chinese International Commercial Arbitration Commission (CIETAC)[5] and the second is the China Maritime Arbitration Commission (CMAC).[6] The former also has jurisdiction to hear "foreign related arbitrations", a particular form of arbitration that is dealt with in Chapter 7 of the Arbitration Act. That Act provides for the creation of arbitral organisations to deal with domestic arbitrations, which are governed by rules formulated by the Chinese Arbitration Association. Statistics show that CIETAC-administered arbitrations are becoming increasingly popular. Between 1989 and 1993 the number of new cases filed with CIETAC rose from 182 to 504.[7] CMAC receives approximately 30 new cases each year.[8]

There is an underlying expectation in China that a party against whom an arbitral award has been made will give effect to the award without further action by the successful party.[9] The legislation reflects this expectation. Provision has been made for those occasions when the expectation is not met.[10]

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4 Rose FD (ed), International Commercial and Maritime Arbitration (1988, Sweet & Maxwell, London) vi.

5 Article 2 Arbitration Rules of CIETAC, as amended in 1994, gives CIETAC jurisdiction "to resolve disputes arising from international or external, contractual or non-contractual, economic and trade transactions": Beaumont note 1 at 2.

6 Article 2 Arbitration Rules of CMAC gives CMAC jurisdiction to hear disputes on a wide range of maritime matters: see Beaumont note 2.

7 Moser, "China's new international arbitration rules" (1994) 3:11 Journal of International Arbitration 5, 6.

8 Beaumont note 2 at 1.

9 [1987] China Law Yearbook (1st English ed) 51; Shen, "A review of several legal issues concerning the application by overseas parties for enforcement of arbitral awards within the territory of PR China", a paper presented at the 14th Lawasia Biennial Conference, Beijing, 16-20 August 1995 at 3, 6-7.

10 See Article 62 Arbitration Act and Article 269 Civil Procedure Law. Article 62 provides: "Parties shall perform the award. If a party fails to perform, the other party may apply for enforcement... The People's Court to which the application is made shall enforce the award". Article 269 provides: "[I]f an award...must be recognised and executed...".

The legislative framework for the recognition and enforcement of arbitral awards in China comprises the following:

(a) the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
(b) the 1991 Civil Procedure Law;[11] and
(c) the 1994 Arbitration Act.[12]

When considering this framework, it should be noted that the Chinese legal system, including the laws relating to arbitration and the relevant case-law, has been influenced by the civil code system.[13] There are four types of arbitral awards, the recognition and enforcement of which will be dealt with in this article. They are: (a) foreign arbitral awards made in the territory of contracting states to the New York Convention; (b) awards made in the territory of other states, namely, non-contracting states to the New York Convention; (c) awards resulting from domestic arbitrations; and (d) awards resulting from foreign-related arbitrations under Chapter 7 of the Arbitration Act.

THE NEW YORK CONVENTION

The Convention came into effect in China on 22 April 1987. When China acceded to the Convention on 22 January 1987,[14] it exercised its right to enter both reservations permitted under Article I(3) – as have many other

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11 The English translation of the Civil Procedure Law relied upon in this article is found in Beaumont note 2 at 127 et seq.

12 See Tang, "National report for China", in Sanders P (ed), International Handbook on Commercial Arbitration (1994, Kluwer, Deventer) 1, where various other Acts and Regulations of China that concern international commercial arbitration are noted. The Arbitration Act does not appear to deal directly with the recognition and enforcement of arbitral awards: ibid. Although the UNCITRAL Model Law on International Commercial Arbitration does not appear to have been also adopted in China, it served as a guide when the CIETAC Arbitration Rules were amended in 1989: ibid at 2. It has been suggested that China used the Model Law when amending the Civil Procedure law in 1991: Wang note 2 at 3. It does not appear that Articles 35-36 of the Model Law on the recognition and enforcement of arbitral awards had been overly influential in effecting changes.

13 Tang ibid at 2.

14 Pursuant to Article XII, the Convention entered into force 90 days after accession.

contracting states.[15] By virtue of the first reservation, China has, on the basis of reciprocity, agreed to recognise and enforce arbitral awards made only in another contracting state.[16] The second reservation was of a commercial nature. Under this reservation, the application of the Convention may be limited to disputes arising out of legal relationships, irrespective of whether they were contractual in nature. A dispute would be covered by the reservation as long as it was considered commercial under the national law of the contracting state.

Originally, the nature of these commercial disputes in China was set out in the Notice of the Supreme People's Court on Implementing the Convention on Recognition and Enforcement of Foreign Arbitral Awards dated 10 April 1987.[17] In the UNCITRAL Model Law a wide meaning is to be given to the word "commercial".[18] It is suggested that China now adopts a similarly wide interpretation for the word.

Article 257 of the Civil Procedure Law recognises that disputes arising from economic, trade, transport or maritime activities involving foreign parties may be the subject of arbitration. Article 65 of the Arbitration Act provides a similar recognition. The ambit of both provisions is reflected in the width of the jurisdiction given to CIETAC[19] and CMAC[20] under their respective Arbitration Rules. Possibly, countries that originally made the commercial reservation did so as a matter of caution. Later developments, including the

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15 Tang note 12 at 2.

16 Accordingly, non-Convention awards would be required to be recognised and enforced under Article 269 Civil Procedure Law.

17 Beaumont note 1 at 125. The Notice does not receive any mention in other current material. This suggests that in view of the rapid increase in commercial arbitration in China, the Notice may not have quite the same relevance now as it did in 1987: ibid note 38.

18 Article 1(1) note 2 UNCITRAL Model Law states that the "term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply of or exchange of goods or services; distribution agreement; consulting, engineering, licensing, investment; financing; banking; insurance; exploitation agreement or concession; joint venture; and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road".

19 Article 2 CIETAC Arbitration Rules as amended in 1994.

20 Article 2 CMAC Arbitration Rules.

UNCITRAL Model Law, have tended to erode the limiting effect which that reservation once may have had. At the same time it may be said that what was considered as "non-commercial" in domestic relations, may be considered as commercial for international purposes.[21]

There is no specific Chinese legislation that provides for the implementation of the various operative provisions of the New York Convention.[22] Chapter 28 of the Civil Procedure Law deals with arbitration. Article 238 of that Law provides that "[i]f an international treaty the People's Republic of China has concluded or acceded to contains provisions that are inconsistent with this Law, the provisions of the international treaty shall prevail, except for those provisions to which the People's Republic of China has declared its reservation".

On one view, it "therefore follows that China will regard the provisions of the New York Convention as being directly applicable in dealing with applications to enforce foreign arbitral awards rendered in other Contracting States".[23] In response, it may be argued that Article 238 is directed towards resolving doubts when the provisions of an international treaty are inconsistent with the provisions of the Civil Procedure Law, and the question is asked, which of the two should prevail.[24]

Alternatively, reference might be made to Article 269 of the Civil Procedure Law. It provides:

> [I]f an award made by a foreign arbitration organ must be recognised and executed by a People's Court of the Peoples Republic of China, the party concerned shall directly apply to the Intermediate People's Court of the place where the party subject to execution (sic) is domiciled or

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21 van den Berg AJ, The New York Arbitration Convention of 1958 (1981, Kluwer Law and Taxation Publishers, Deventer) 54.

22 For examples of such legislation, see 1974 International Arbitration Act (Australia), 1975 Arbitration Act (England), and Federal Arbitration Act (United States) 9 USC sections 201-210.

23 Beaumont note 1 at 121.

24 This view may be supported by the language of Article 238 Civil Procedure Law and by reference to Article 268 Chinese Maritime Code. They have similar, though not identical, provisions. It is presumed that Article 268 was included in the Maritime Code for the same purpose.

> where his property is located. The People's Court shall handle the matter *pursuant to international treaties concluded or acceded* to by the People's Republic of China *or* in accordance with the principle of reciprocity.

A literal reading of the English translation of that Article suggests that, in so far as an application for the recognition and enforcement of a foreign arbitral award is concerned, the relevant Intermediate People's Court is required to deal with it pursuant to the provisions of the New York Convention if two conditions exist. The first is that the arbitral award is made in another contracting state. The second is that the award concerns matters deemed by China to be commercial in nature.

In contrast, Professor Tang Houzhi is of the view that, where the award is not one to which the provisions of the New York Convention apply, recognition of the award will depend on the principle of reciprocity. To support his view, he cites Article 269 of the Civil Procedure Law.[25] For the recognition and enforcement of a Convention award, he states that "all the applying party has to do is to submit to the Intermediate People's Court a written application annexed with one certified copy each of the arbitration agreement (or arbitration clause) and the arbitral award".[26] This view would seem to ignore the language of Article 269. His description reflects the requirement that is prescribed by Article IV(1) of the New York Convention. It may be that it was only to that aspect Professor Tang Houzhi was seeking to draw attention. In the alternative, it may be implied that his view is that the New York Convention is directly applicable, and no reference need to be made to that fact.

Therefore, when making an application for the recognition and enforcement of a Convention award, nothing seems to turn on whether the New York Convention is directly applicable or is applied pursuant to the provisions of Article 269. Support for this conclusion may be drawn from the decision of the Guangzhou Maritime Court in *Guangzhou Ocean Shipping v Marships*.[27]

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25 Tang note 12 at 15.

26 Ibid.

27 For the extract of the case, see (1992) XVII ICCA Yearbook on Commercial Arbitrations 485.

The facts of the case were as follows. By separate charterparties Ocean Shipping, a Chinese company, chartered vessels to Marships, an American company on 25 October, and 7 and 19 November 1988. Disputes arose between them concerning the three charterparties. The disputes were submitted to *ad hoc* arbitration in London, in accordance with the arbitration clause in each of the charterparties. The arbitration was to be governed by English law. The arbitrators made three awards which required Marships to pay Ocean Shipping US$1,985,975.21 plus interest.

Subsequently, the parties entered into an agreement whereby Marships would pay an initial amount of US$500,000 to Ocean Shipping, with the balance to be paid by 17 monthly instalments of US$102,676.48 plus interest. Marships made only five payments, leaving an outstanding amount of US$1,232,112.00 plus interest. Meanwhile, Marships subchartered one of the subject vessels to the China National Foreign Trade Corporation. The hire and demurrage to be paid by China National to Marships totalled US$253,592.55. Ocean Shipping initiated court proceedings in China for the partial enforcement of the awards, requesting the court to order China National to transfer that amount to Ocean Shipping.

The Guangzhou Maritime Court made the following findings:

1. The provisions in the arbitration agreements, including those which required disputes to be arbitrated in London and the arbitrations to be governed by English law, had been accepted by the parties and were therefore valid.
2. After the disputes had arisen, the parties had submitted to arbitration in London as had been agreed in the charterparties. The composition of the arbitral tribunal and the arbitral procedure had been in accordance with the arbitration agreements. The arbitral awards were therefore binding on both parties.
3. Under the laws of China, the disputes between the parties were capable of settlement by arbitration.
4. Recognition and enforcement of the three arbitral awards would not be contrary to the public policy of China.[28]

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[28] It is unclear if this conclusion is the product of editorial licence. It will be further discussed below.

5. Ocean Shipping's application for recognition and enforcement of the three awards had been made within the time limits set in Article 169 of the Civil Procedure Law (Trial Implementation).[29]

Accordingly, the court supported the reasonable request of Ocean Shipping for the transfer to it of the hire and demurrage payable by China National to Marships.

From the published extract of the decision of the Guangzhou Maritime Court it would appear that the manner of presenting judgments followed the civil rather than the common law style. However, this does not prevent views being distilled from the judgment on the approach taken by the Court, on the application of the provisions of the New York Convention to the recognition and enforcement of foreign arbitral awards. Four observations might be made concerning this judgment.

First, the extract of the decision did not mention that the court was satisfied that England was a contracting state to the Convention. Neither did it mention that it was satisfied that the reciprocity reservation made by China under Article I(3) of the Convention had been met. It was presumed that this aspect was satisfied when the application was lodged with the court or was stated in the application. Having found that under the laws of China the disputes were capable of settlement by arbitration, by implication the court must have been satisfied that the commercial reservation had been met.

Secondly, the New York Convention would only apply if the arbitration agreement complied with the requirements of Article II. In particular, the agreement should be in writing; the parties should have agreed to submit their differences to arbitration; the agreement should provide for arbitration in another contracting state; the agreement should be in respect of a defined legal relationship; and the agreement should concern disputes that were capable of settlement by arbitration. The agreement could take the form of an arbitration clause that was included in a contract signed by the parties.[30] Since it appeared from the nature of the charterparties and the facts of the

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29 The Civil Procedure Law (Trial Implementation) was repealed on the same date the Civil Procedure Law came into effect on 9 April 1991 pursuant to Article 270 Civil Procedure Law. The new time limits are found in Article 219.

30 van den Berg note 21 at 56-80.

case that the above conditions had been satisfied, the court decided in favour of the applicant, Ocean Shipping.

Thirdly, the grounds for not recognising and enforcing a convention award are set out in Article V(1) of the New York Convention. The grounds found in it are exhaustive and the respondent has the onus of proving they exist.[31] In its defence, the respondent had argued that the agreements were not valid under Article V(1)(a) because they had not been given proper notice of the appointment of the arbitrator or of the proceedings, or that they were unable to present their case. After examining Article V(1), the court noted in its finding that the arbitration agreements were valid and that the parties had submitted to arbitral proceedings in London. The court rejected the argument that the composition of the court had not been agreed upon. Instead, it held that it had been properly constituted in accordance with Article V(1)(d). It therefore concluded that the awards were binding and enforceable.

Fourthly, Article V(2) of the New York Convention sets out the two grounds upon which a court may, of its own motion, refuse to recognise and enforce a Convention award. The first is found in Article V(2)(a) which contemplates the situation where the subject matter of the dispute is incapable of settlement by arbitration under the law of the country where recognition and enforcement of the arbitral award is sought. In the case, this ground was excluded as a possibility by the court. The second ground occurs when the recognition and enforcement of an award is contrary to the public policy of the contracting state where the arbitration is sought to be recognised and enforced. This is provided in Article V(2)(b). With regard to this ground, the court refused to exercise its discretion and rule on whether there was a breach of public policy.

This view accepts, at face value, that use of the expression, public policy. Article 260 of the Civil Procedure Law uses the expression "public interest". In a commentary on that provision, Beaumont made reference to "social and public interests".[32] What connotation should be given to that phrase is uncertain. In the same commentary, reference was made to the

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31 Ibid at 264-265.

32 Beaumont note 1 at 120.

public policy ground for refusing to recognise and enforce domestic awards under Article 217(3) of the Civil Procedure Law. Beaumont said:

> [T]he law does not define what constitutes social and public interests. It is said to be akin to the European concept of *ordre public* and is wider in scope than the notion of 'public policy' in common law jurisdictions. It practically covers corruption, bribery, fraud and other fundamental breaches of law, both in procedural and substantive matters.[33]

The commentary also suggests that the defence of social and public interests, as found in Article 260, must give way to a more restricted public policy exception under Article V(2)(b) of the Convention.[34]

Professor Tang Houzhi has observed, in relation to foreign arbitral awards, that "[p]ublic policy is subject to strict enforcement in China. The concept of international public policy has not yet been developed in the Chinese court decisions".[35]

Those comments possibly overlook the fact that Article XVI(1) of the New York Convention makes the Chinese text an equally authentic text of the Convention. In part, the resolution of this issue may turn on the precise translation of the authentic Chinese text of Article V(2)(b) of the New York Convention. Whether China has different concepts of public policy, depending upon the arbitral award being a Convention award or a domestic award, or even depending upon the circumstances, is not to the point; it will be the Chinese courts that determine what matters fall within Article V(2)(b) of the New York Convention.

In the extract of its findings, the court referred to the time limits for making the application for the recognition and enforcement of the arbitral award. The time limit currently imposed is set forth in Article 219 of the Civil Procedure Law. It applies to both international and domestic awards. This limit is consistent with Article III of the New York Convention which, *inter alia*, provides that contracting states shall not impose substantially more

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33 Ibid at 118.
34 Ibid at 121.
35 Tang note 12 at 15.

onerous conditions for the recognition of Convention awards than are imposed on the recognition and enforcement of domestic arbitral awards.

Turning to the question of giving effect to an arbitral award, Professor Shen Sibao has suggested that the Chinese courts have power to transfer or freeze bank deposits belonging to the respondent. This represented at least one remedy. Another remedy available to Convention awards is where the income of the respondent becomes the subject of a garnishee order, or the real or personal property of the respondent is sold to meet sums ordered to be paid, including interest if payment is delayed.[36] In his view, such remedies would ensure that awards are recognised and properly enforced.[37]

OTHER FOREIGN ARBITRAL AWARDS

There are two main reasons why a foreign arbitral award may not be considered to be a New York Convention award. The first is when the award is made in a state that is not party to the Convention. The second is when the arbitration agreement does not comply with the requirements of Article II of the Convention. If it is the latter and its recognition and enforcement are sought in China, Article 269 of the Civil Procedure Law[38] would apply.[39]

One view of Article 269 is this. If an award is a "non-Convention award, China will only recognise and enforce such an award according to the agreement for judicial assistance executed between China and the state where the foreign arbitration institution is located".[40] Another view is that "[i]f there is no such agreement [for judicial assistance] then the principle of mutual benefit or international comity will come into play. In other words, the court will require precedents of reciprocity before it will recognise and

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36 Shen note 9 at 5-6.

37 Compare Wang, "A comparative survey of the rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the arbitration rules of the China International Economic and Trade Commission" (1992) 9 Journal of International Arbitration 93 at 118; Bersani MD, The Enforcement of Arbitral awards in China (1993) 10 Journal of International Arbitration 47.

38 See above.

39 Tang note 12 at 15.

40 Beaumont note 1 at 122.

enforce an award of a foreign arbitration institution".[41] According to the latter view, "precedents of reciprocity" means that where the court of a foreign jurisdiction has enforced a Chinese judgment, or where evidence could be given in a People's Court, a foreign court should be able to enforce a Chinese judgment.[42]

However, it is unclear if this view refers to the location of the arbitration institution or the place where the award is made. This is significant because the New York Convention is concerned with the nationality of the award, not the nationality of the parties or of the arbitral institution.[43] In theory, it is possible for an award to be made in a state that is not a contracting state to the New York Convention, although the arbitral institution may be located in a contracting state. Moreover, if "precedents of reciprocity" depend on actions taken in a foreign jurisdiction, then it may transpire that the relevant location is the foreign jurisdiction where the award is made.

It can be seen from the above discussion that there are several unresolved issues related to non-Convention awards. Prudence dictates that when a foreign arbitral award may need to be enforced in China, the arbitration should be held in the territory of a contracting state to the New York Convention.

DOMESTIC AWARDS

It is necessary to discuss domestic awards as it puts in perspective the nature of domestic commercial arbitrations *vis-a-vis* international arbitral awards, especially in relation to the grounds for refusing to recognise and enforce domestic awards.

Chapter 2 of the Arbitration Act provides for the establishment of arbitration commissions. They are responsible for the supervision of arbitral tribunals that hear domestic commercial disputes. Article 62 of the Act provides for domestic awards[44] to be recognised and enforced according to

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41 Ibid.

42 Generally, Beaumont cites Dennis, "Enforcement of foreign judgments – China" in Plato C (ed), The Enforcement of Foreign Judgments Worldwide (1989, Graham & Trotman, London); ibid at 125.

43 van den Berg note 21 at 15.

44 For the character of domestic awards, see Beaumont note 1 at 117.

the Civil Procedure Law. Article 217(1) of the Civil Procedure Law provides for the recognition and enforcement of awards upon application to a competent People's Court.

Article 63 of the Arbitration Act provides that "[i]f the respondent can adduce evidence that the award is in breach of a condition under Article 217(2) of the Civil Procedure Law and if the people's court is satisfied upon findings that it is true, the enforcement of the award shall be refused". The grounds for refusal provided in Article 63 are the following:

1. the parties did not include an arbitration clause in their contract or did not later agree on a written arbitration agreement;

2. matters decided in the award exceeded the scope of the arbitration agreement or were beyond the arbitral authority of the arbitration organ;

3. the composition of the arbitral tribunal or the arbitral procedure did not conform with statutory procedure;

4. the main evidence for ascertaining the facts was insufficient;

5. the law was applied incorrectly; and

6. one or more arbitrators committed embezzlement, accepted bribes, practised favouritism or made an award that perverted the law.

Further, Article 217(3) of the Civil Procedure Law allows the People's Court to refuse the recognition and enforcement of a domestic award where its execution would be against the public interest. Presumably, this could be done of its own motion or at the instance of the respondent.

FOREIGN-RELATED ARBITRAL AWARDS

Another facet of the framework governing international arbitral awards is that which governs foreign-related awards. Chapter 7 of the Arbitration Act deals with "Special Provisions for Foreign-Related Arbitrations" and it relies on certain provisions of the Civil Procedure Law to do this. But what is a foreign-related arbitration? Is it an award that requires the use of a

different procedure for its recognition and enforcement? For their recognition and enforcement in China, are the criteria different to those which have been discussed above?

The starting point for the determination of the nature of a foreign-related arbitration is Article 65 of the Arbitration Act. It states that Chapter 7 "applies to the arbitration of disputes arising out of economic, trade, transportation and admiralty involving foreign elements". But what does "foreign elements" mean? What degree of involvement is necessary before the provision is invoked? These expressions are not defined in the provisions of the Arbitration Act nor in the Civil Procedure Law that refer to foreign-related arbitrations or disputes.[45]

The issues were raised by Moser[46] when he considered CIETAC's Arbitration Rules. Under its Arbitration Rules as amended in 1989, CIETAC's jurisdiction was limited to the arbitration of disputes that arose from international economic and trade transactions.[47] In his view, this provision raised two issues. The first concerned the proper interpretation of the word "international". Where one party was a Chinese entity and the other a foreign company, or where both were foreign companies, the requirement of the international element was undeniably met. However, it became less certain if one entity was from China and the other from Hong Kong, Macau or Taiwan. In a political sense, one could argue that Hong Kong and Macau were not states but were integral parts of China under temporary foreign administration. A similar political argument had been applied to Taiwan by China, as it considered Taiwan to be another of its provinces.

The second issue would arise when both parties were constituted as Chinese legal persons, or when one or both of them were joint venture companies or wholly foreign-owned enterprises. In China, joint ventures and wholly foreign-owned enterprises were deemed to be Chinese legal persons. Could disputes between such entities be considered international? In *China International Construction Consultant Corporation v Beijing Lido Hotel*

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45 See part 28 on Arbitration.

46 Moser note 7 at 5.

47 Article 2 CIETAC Arbitration Rules as amended in 1989.

Company[48] the Beijing Intermediate People's Court held that the answer to this question was no.

To address the above issues, the Arbitration Rules were further amended in 1994. Prior to the 1994 amendment, Article 2, a provision on CIETAC's jurisdiction to hear disputes, stated:

> [The] language states that CIETAC shall be empowered to hear disputes between the following parties – (1) foreign legal person and/or natural persons and Chinese legal persons and/or natural persons; (2) foreign legal persons and/or natural persons; and (3) Chinese legal persons and/or legal persons.

In disputes involving parties under (1) and (2) above, the international element was clearly met. However, it was not as clear under (3). Therefore, the language had to be changed and following the amendment in 1994, the word "external" was added to Article 2.

Moser understands that the word "external" is derived from the Chinese expression *shewai* and that a more precise English translation is *foreign-related.* This suggests that CIETAC's jurisdiction now extends to disputes between Chinese legal and/or natural persons, on condition the dispute involves a foreign-related element. In his view, such an element is present where the object of the dispute is outside China, for example. Further, transactions that involve companies from Hong Kong, Macau and Taiwan are deemed to have a foreign-related or external element. In conclusion, he states that it is still unclear if joint ventures and wholly foreign-owned companies in China are deemed to have a foreign-related or external element.[49]

It is submitted the better view is that there are no grounds for expecting the concept to be extended to the joint-venture or to wholly-owned situations, where the object of the dispute and the parties are within China and are subject to Chinese law. Where the dispute is between parties to a joint venture and one party is a foreign legal person, then depending on the relevant legislative and regulatory provisions governing the joint venture,

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[48] The case is referred to in Moser note 7 at 7.

[49] Ibid at 8.

the dispute may fall within the scope of a foreign-related arbitration, or perhaps be treated as an international commercial arbitration.

According to common law principles of statutory interpretation, it is unacceptable for acts to derive their meaning from rules, statutory or otherwise. Here, there is an attempt to give meaning to the Arbitration Act and the Civil Procedure Law by reference to the Arbitration Rules of CIETAC, an independent organisation. However, since this concerns China, the practice may be acceptable to the extent that China follows the civil law system and is, therefore, influenced by civil law traditions. Accordingly, when it is suggested that the source of the expressions, "a dispute involves foreign factors or foreign-related disputes" and "an external arbitration institution or an arbitration organ for foreign-related disputes" is the Civil Procedure Law, especially Part 28,[50] and it is known that the Law does not contain any definitions or explanations for the expressions, it is acceptable to rely on the knowledge and professional expertise of commentators for guidance. Thus, this type of reliance, within the context of the civil law system and traditions, justifies the use of the Arbitration Rules to explain the extent of jurisdiction granted to CIETAC pursuant to Chapter 7 of the Arbitration Act.

If this interpretation of "foreign-related" is used, the arbitration of particular categories of disputes will have to be considered a special class of domestic arbitrations and Chapter 7 will have to provide the laws for it. The categories will include disputes involving parties that are Chinese legal persons as determined under Chinese law and/or natural persons. The object or subject matter of their dispute will have to be located outside China. In addition, it will apply to disputes arising out of transactions involving companies from Hong Kong, Macau or Taiwan. However, under the New York Convention and the UNCITRAL Model Laws, these two categories also fall within the description of international commercial arbitrations.[51]

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50 Huang, "Some remarks about the 1994 Rules of CIETAC and China's new international arbitration rules" (1994) 4:11 Journal of International Arbitration 105, 106.

51 There is precedent for this approach. For example, the Federal Arbitration Act (United States) 9 USC section 202 provides that "[a]n agreement or award...which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more

Under the heading of "The Recognition and Enforcement of Foreign-Related Arbitral awards" in Chapter 7 of the Arbitration Act, there is no provision that refers to the recognition and enforcement of foreign-related arbitral awards. However, Article 259 of the Civil Procedure Law provides that after "an award has been made by an arbitration organ of the People's Republic of China for foreign-related disputes [and] a party fails to perform the arbitral award, the other party may apply for execution to the Intermediate People's Court of the place where the domicile of the person against whom an application is made is located or where the property is located".

Article 259 has to be read in conjunction with Article 71 of the Arbitration Act. The latter provides:

> If the respondent adduces evidence to prove that the award in foreign-related arbitration is in breach of the (sic) condition under Article 260(1) of the Civil Procedure Law and if it is found to be true by the people's court, enforcement of the award shall be denied.

In an application for the recognition and enforcement of an award resulting from a foreign-related arbitration, there are four grounds upon which a respondent may adduce evidence and the application may be refused:

1. the parties have not included an arbitration clause in the contract or have not subsequently concluded a written arbitration agreement;

2. the respondent to the application was not requested to appoint an arbitrator or take part in the arbitration proceedings. Or the respondent was unable to respond due to reasons for which he was not responsible;

3. the composition of the arbitral tribunal or the arbitration procedure did not conform with the rules of the arbitration; and

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foreign States". Professor van den Berg observes that as "the Convention does not impose the nationality of the parties as a requirement for its applicability...Section 202 must, in principle, be deemed incompatible with the New York Convention on this point": see note 21 at 17. Semble, a similar comment may be made about this aspect of the Civil Procedure Law and Arbitration Act.

4. matters decided in the award exceeded the scope of the arbitration agreement or were beyond the arbitral authority of the arbitration tribunal.

Further, Article 260(2) provides that if the People's Court determines that the execution of the award is contrary to public interest, it shall rule to deny the execution.

Beaumont has made the following observations regarding the above discussion. First, it shows that the grounds for refusal to enforce a foreign-related arbitral award are narrower than those established for domestic awards. Secondly, although the court has power to review the form of the award or the procedural aspects of the proceedings, it cannot examine the merits or substance of a foreign-related arbitral award. Thirdly, the grounds for refusing an application under Article 260 are similar to those found in the New York Convention. Fourthly, although there are similarities, unlike the Convention, Article 260 does not refer to the incapacity of a party or the validity of the agreement under the law that is applicable to them. Consequently, Beaumont suggests that it would be easier if China had adopted the grounds for refusal from one of the international conventions *in toto*.[52]

CONCLUSION

From the above discussion the following conclusions may be drawn:

1. The legislative framework for the recognition and enforcement of arbitral awards to which the New York Convention applies complements the framework for domestic arbitral awards.

2. The framework for the recognition and enforcement of other awards, namely, non-Convention awards, is uncertain. This applies to the manner in which the legislation operates and the nature of the concept of reciprocity. If there is any possibility that an arbitral award may require recognition and enforcement in China, provision should be made for the arbitration to be held in the territory of a contracting state to the New York Convention.

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[52] Beaumont note 1 at 120.

3. If a joint venture company or a wholly foreign-owned company in China is compelled to arbitrate under the legislation applicable to domestic arbitrations in China, the grounds that may be relied upon for refusing to recognise and enforce an award may not necessarily be disadvantageous to the parties, as long as the arbitrators have the appropriate qualifications. Furthermore, the court's approach is commercial in nature, and is not to ensure the healthy development of the socialist market economy.[53]

4. Regarding foreign arbitral awards, further clarification should be given to the meaning of public policy, public interest, and social and public interest.

5. The concept of foreign-related arbitration is unfortunate. Although inconsistent with the New York Convention, it deals with a category of arbitrations to which the provisions of that Convention would apply, except for the effect of the operation of Chinese law. This has an effect in at least two areas: (1) the grounds upon which the enforcement of an arbitral award may be resisted, are narrower; and (2) what may be considered to fall within the realms of public policy is not clear. Generally, it cannot be said that the legislative provisions for the recognition and enforcement of awards resulting from foreign-related arbitrations, interact efficaciously with the remainder of the legislative framework established in China for the recognition and enforcement of all other types of arbitral awards.

If both Hong Kong and Macau are brought within the umbrella of the domestic law of the People's Republic of China, in 1997 and 1999 respectively, then these observations will be reduced in their scope at those dates. To contemplate otherwise would be to envisage an arbitral framework which would not be conducive to the conduct of international trade. In the case of Taiwan, it would seem that these observations, on the arbitral framework of China, may remain apposite for some time to come.

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[53] Article 1 Arbitration Act.