

An Empirical Study of China's Recognition and Enforcement of Foreign Arbitral Awards Under the Belt and Road Initiative

LIU Jingdong

Chinese Academy of Social Science, Beijing, China

WANG Lulu

Beijing Chance Bridge Law Firm, Beijing, China

Since 2015, the Supreme People's Court of China has published several important judicial documents, requiring the correct interpretation and application of the New York Convention, the unification of judicial standards, and the lawful and timely recognition and enforcement of foreign arbitral awards relating to the Belt and Road Initiative. By studying cases concerning the recognition and enforcement of foreign arbitral awards ruled by Chinese courts between 2015 and 2017 and referring to official replies made by the Supreme People's Court to lower courts' requests for instructions before 2015, this article examines the achievements and shortcomings in Chinese courts' exercise of the judicial review power under the New York Convention in the context of pursuing the Belt and Road Initiative, thus providing an empirical foundation to develop and improve China's system of judicial review of foreign-related arbitration in the future.

Keywords: New York Convention, judicial review, foreign arbitral awards

Introduction

As an internationally recognized mechanism for settling cross-border disputes, international arbitration will play an indispensable and unique role in the pursuit of the Belt and Road Initiative. As the Belt and Road Initiative evolves, an increasing number of Chinese enterprises are going global, and at the same time, more foreign enterprises are coming to China, which will certainly lead to more transnational commercial disputes. Due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, international commercial arbitration—characterized by neutrality, finality, enforceability, and confidentiality—will undoubtedly play a more prominent role in solving disputes relating to the Belt and Road Initiative. Therefore, the correct interpretation and application of the New York Convention and the timely recognition and enforcement of foreign arbitral awards are conducive to promptly and efficiently resolving disputes arising in pursuit of the Belt and Road Initiative.

Furthermore, it should be stressed that the correct interpretation and application of the New York Convention and timely recognition and enforcement of foreign arbitral awards are important not only for protecting lawful

LIU Jingdong, director, researcher, Department of International Economic Law, Institute of International Law, Chinese Academy of Social Science; vice president, China Academy of Arbitration Law; expert member, International Commercial Expert Committee of the Supreme People's Court of the People's Republic of China, Beijing, China.

WANG Lulu, doctor, Department of International Trade and Compliance, Beijing Chance Bridge Law Firm, Beijing, China.

rights and interests of Chinese enterprises in foreign countries, but also for protecting and attracting foreign investments in China. It can be seen from recent international investment arbitration cases, such as *Saipem v. Bangladesh* and *Romak v. Uzbekistan*, that a country might be adjudicated breaching a relevant international investment agreement by reason that any of its domestic courts interpreted the New York Convention unlawfully (Reisman & Richardson, 2012). China is a country that has acceded to 110 effective international investment agreements.¹ On the one hand, if any of the Chinese courts deviate from the New York Convention when reviewing foreign arbitral awards, China will run the risk of being accused of breaching relevant international investment treaties and assuming collateral liabilities. On the other hand, Chinese enterprises “going global” also have the right to accuse host countries of violating relevant Chinese Investment Treaties on the grounds that any court of their host country violates the New York Convention so as to safeguard their own lawful rights and interests.

China acceded to the New York Convention in 1986 and had implemented it since April 1987. As authorities that recognize and enforce foreign arbitral awards, Chinese courts assume the international obligation of accurately interpreting and applying the New York Convention. Under the guidance of the Supreme People's Court, competent courts across the country have exerted enormous efforts to ensure the correct and consistent application of the New York Convention in reviewing foreign arbitral awards. In 1995, the Notice of the Supreme People's Court on the Handling by People's Courts of Issues Concerning Foreign-Related Arbitration and Foreign Arbitration established a reporting system. According to this system, before refusing the recognition and enforcement of a foreign arbitral award, competent intermediary courts have to report to the competent high people's court. If the high people's court agrees to deny recognition and enforcement, it will report its opinions to the Supreme People's Court. A ruling on the refusal of recognition and enforcement can only be made after the Supreme People's Court gives an affirmative reply ([1995] Fa Fa No. 18).

To serve the Belt and Road Initiative, the Supreme People's Court has taken a number of important measures to advance the development of international arbitration, which are welcomed and spoken highly of by the international community. For instance, on June 16, 2015, the Supreme People's Court promulgated the Several Opinions on Providing Judicial Services and Safeguards for the Belt and Road Initiative by People's Courts, which clearly indicate that the people's courts

shall accurately understand and apply the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), timely recognize and enforce foreign commercial and maritime arbitral awards relating to the Belt and Road Initiative according to the law... shall explore the improvement of judicial review systems on annulment and non-enforcement of Chinese arbitral awards involving foreign countries, Hong Kong, Macao, and Taiwan and refusal to recognize and enforce foreign arbitral awards, unify the judicial standard, and support the development of arbitration. ([2015] Fa Fa No. 9, Para. 8)

Additionally, the Opinions on Further Deepening the Reform of Diversified Dispute Resolution Mechanisms in People's Courts ([2016] Fa Fa No. 14) and the Opinions on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones ([2016] Fa Fa No. 34) subsequently promulgated by the Supreme People's Court also expressed support for the reform of the arbitral system and for the innovative development of arbitral authorities so as to “enhance the international competitiveness and credibility of China's dispute resolution mechanisms”.

¹ Data source: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> (last visited on December 12, 2017).

Such important judicial documents promulgated by the Supreme People's Court demonstrate that China's highest judicial authority has been sufficiently aware of the importance of unifying judicial standards for the recognition and enforcement of foreign arbitral awards. How have these documents been implemented? What changes have they facilitated in the judicial review of foreign arbitral awards in Chinese courts?² This article reviews the achievements and shortcomings of Chinese courts' interpretation and application of the New York Convention based on an empirical study of 81 cases concerning the recognition and enforcement of foreign arbitral awards ruled by Chinese courts between 2015 and 2017 available on the Internet³, with reference to the Supreme People's Court's reply to lower courts' requests on whether to recognize and enforce foreign arbitral awards before 2015. The conclusions of this article may contribute to the future development and improvement of China's foreign-related arbitration judicial review system.

As of December 2017, the authors have retrieved a total of 81 cases of recognizing or enforcing foreign arbitral awards from China Judgments Online and the PKULAW.COM Database. Nine of the cases involved the Supreme People's Court's reply to the lower courts' requests for instructions on whether to recognize and enforce foreign arbitral awards between 2015 and 2017, and 75 were ruled by intermediate people's courts between 2015 and 2017 (since three of these are also cases for which the Supreme People's Court made official replies, they are not counted again in the total of cases collected). With regard to the reference samples, the authors have collected a total of 35 official replies from the Supreme People's Court in response to the lower courts' requests for instructions on whether to recognize and enforce foreign arbitral awards prior to 2015.

Among the 81 cases to be reviewed, there are three cases in which the foreign arbitral awards were rejected to be recognized or enforced entirely, four cases in which the *ultra vires* portions of the foreign arbitral awards were rejected to be recognized or enforced because the arbitral tribunals made the awards *ultra vires*, 61 cases in which the foreign arbitral awards were recognized and (or) enforced by the courts, eight cases in which the applicants withdrew suits, one case which was dismissed because the materials provided by the applicant failed to comply with certification practices, one case which was transferred to the other court, and three cases which were dismissed for jurisdictional reasons.

The results of these cases indicate Chinese courts recognized and (or) enforced most foreign arbitral awards, thus demonstrating China's well performance of its treaty obligations under the New York Convention. The primary purpose of this article is to analyze Chinese courts' exercise of the judicial review power granted by the New York Convention to the courts of the country where recognition and enforcement are sought. We will examine Chinese courts' application of Articles I and V of the New York Convention through cases considering that Article I of the New York Convention specifies the scope of application of the New York Convention, and Article V specifies the review power of the court of the country where the recognition and enforcement are sought.

Application Scope of New York Convention and Judicial Practice of China

The scope of application of the New York Convention has always been contested within the framework of

² It is clarified that due to the "one country, two systems" policy, this article only examines the relevant practice of people's courts of China mainland.

³ Although the authors fail to get hold of rulings made by the intermediate people's courts in respect of six cases for which the Supreme People's Court has made official replies, they include these cases in those ruled between 2015 and 2017 because the results of these cases are predictable.

China's legal system. What has been most disputed is the nationality judgment standard for foreign arbitral awards. Because China adopted the "reciprocity reservation" when acceding to the New York Convention, only arbitral awards made in the territory of another party of the New York Convention can be recognized and (or) enforced through the New York Convention in Chinese courts. However, according to the provisions of China's Civil Procedure Law and Arbitration Law, the nationality of an arbitral award has always been judged based on the seats of the arbitral institutions administering foreign arbitration. In order to decide whether a foreign arbitral award can be recognized and enforced through New York Convention, China's people's courts have to decide whether the seat of the arbitral institution administering the arbitration process which gives rise to the award in issue is in the territory of a party to the New York Convention ([2004] Min Si Ta Zi No. 6; [2009] Min Si Ta Zi No. 46; [2011] Min Si Ta Zi No. 21; [2012] Min Si Ta Zi No. 54). This practice obviously contradicts the seat of arbitration standard established in Article I of the New York Convention and is also inconsistent with the common practice of international commercial arbitration. How do Chinese courts decide the scope of application of the New York Convention after the implementation of the Belt and Road Initiative, especially after the promulgation of the aforesaid reformatory or supportive documents?

Of the 81 cases ruled by Chinese courts between 2015 and 2017 that the authors have collected, there are 50 cases in which the competent courts adopted the seat of arbitration standard to identify the nationality of foreign arbitral awards, 16 cases in which the competent courts still adopted the seat of relevant arbitral institution standard, and three cases in which the trial courts were suspected of adopting the nationality of applicant standard. Twelve of the 81 cases have no available information for nationalities of foreign arbitral awards, which were sought to be recognized and (or) enforced due to early discontinuation of proceedings.⁴

The main judgment standard of this conclusion is whether the competent court emphasizes the seat of arbitration or the location of the relevant arbitral institution when judging whether to apply the New York Convention. The basic logic applied by competent courts that adopt the seat of arbitration standard is that the foreign arbitral award involved is made in the territory of a New York Convention party; therefore, the New York Convention shall apply when deciding whether to recognize and enforce the arbitral award. For example, as mentioned in the Reply of the Supreme People's Court to the Request for Instructions on Recognition and Enforcement of *Paul Reinhart AG v. Hubei Qinghe Textile Corp.* Arbitral Award,

the arbitral award involved was made in the territory of the UK which is a state party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), so the case shall be governed by the provisions of the New York Convention. ([2016] Zui Gao Fa Min Ta No. 11)

In some cases, although the courts did not fully express the foregoing logic in the rulings, the seats of arbitration of foreign arbitral awards were mentioned explicitly and, in some cases, repeatedly. These cases were also deemed to apply the seat of arbitration standard to identify the nationalities of foreign arbitral awards. For instance, in *Noble Resources Pte Ltd. v. Kairuide Holding Co., Ltd.*, the Intermediate People's Court of Dezhou, Shandong repeatedly stressed in its ruling that "China only applies the Convention (the New York Convention) to arbitral

⁴ The statistical result shown in this paragraph is based on the viewpoints of corresponding intermediate people's courts, except six cases for which the Supreme People's Court made official replies and of which the rulings are unavailable (with regard to these cases, the viewpoints of the Supreme People's Court are based on).

awards made in the territory of another contracting party” ([2015] De Zhong Min Chu Zi No. 3), and further indicated that China and the UK are both parties to the New York Convention. Therefore, the authors infer that the Intermediate People’s Court of Dezhou used the seat of arbitration standard.

The basic logic applied by competent courts that adopted the seats of relevant arbitral institutions standard is that the foreign arbitral award in dispute was administered by an arbitral institution that is located in the territory of a party to the New York Convention; therefore, the New York Convention shall apply to the case. In *SPS EUROCHIM Ltd. v. Panjin Heyun Industrial Group Co., Ltd.* (Application for Recognition and Enforcement of Arbitral Award), the presentation made by the Intermediate People’s Court of Dalian, Liaoning is the classic expression of this logic:

Sweden, where the Arbitration Institute of the Stockholm Chamber of Commerce is located, is a party to this Convention (New York Convention)... Therefore, the 1958 New York Convention and relevant provisions of the Civil Procedure Law of China shall be applied when deciding whether to “recognize and enforce the final arbitral award of the Arbitration V (2014/143) made by the Arbitration Institute of the Stockholm Chamber of Commerce”. ([2016] Liao 02 Xie Wai Ren No. 12)

Additionally, this logic has another somewhat “covert” means of expression. When making rulings, some competent courts simply indicated that the seats of relevant arbitral institutions were within the territories of a party to the New York Convention, without mentioning the seats of relevant arbitrations or the specific names of relevant arbitration institutions. The rulings made by the Secondary Intermediate People’s Court of Tianjin on *Xcoal Energy & Resources v. Zhongneng Binhai Electric Power Fuel Tianjin Co., Ltd.* ([2016] Jin 02 Xie Wai Ren No. 4-10) are representative of this type of expression. In addition, the Reply of the Supreme People’s Court to the Request for Instructions on the Application of Spliethoff’s Bevrachtungskantoor B. V. for Recognition of the Arbitral Award HULL XXK06-039 Made by the London Arbitral Tribunal also belonged to this type. Its specific expression is:

This case is on the application for recognition of an arbitral award made by the London Arbitral Tribunal. As both China and UK are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, whether the arbitral award shall be recognized shall be reviewed in accordance with the provisions of this Convention. ([2015] Min Si Ta Zi No. 48)

Note that in this case, the arbitral award seeking recognition was proposed by an ad hoc tribunal, which clearly stated that the seat of arbitration should be London. Without an arbitral institution involved, China’s Supreme People’s Court could have used the seat of the arbitration to identify the nationality of the award. However, the court seemed to use the seat of the arbitration to identify the seat of the ad hoc arbitral tribunal and then to decide the nationality of the award based on the seat of the ad hoc arbitral tribunal.

In another three cases, the competent courts adopted neither the seat of arbitration standard nor the seat of relevant arbitral institution standard but, instead, adopted the nationality of the applicant standard. For example, in *Columbia Grain Trading Inc. v. Shandong Shenyang Coal Trading Co., Ltd.*, the parties to the contract agreed that they would submit any dispute to arbitration seated in London in accordance with the arbitration rules of the Federation of Oils, Seeds, and Fats Associations, which is also located in London. The Intermediate People’s Court of Rizhao, Shandong, however, in determining whether to apply the New York Convention, stressed: “Both the People’s Republic of China and the United States are parties to the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards” ([2017] Lu 11 Xie Wai Ren No. 1). The only factor associated with the United States, in this case, is that the applicant has United States nationality. In the cases of *ADM Asia-Pacific Trading Pte Ltd. v. Shandong Yahe Agriculture Co., Ltd.* ([2017] Lu 11 Xie Wai Ren No. 2) and *Minaj Holdings Limited v. Rizhao Qihan International Import and Export Trade Co., Ltd.* ([2014] Ri Min San Chu Zi No. 10), the logics of competent courts are very similar. Therefore, it can be inferred that the courts that made the foregoing rulings adopted the nationality of applicant standard to identify the nationalities of the arbitral awards in dispute and then decided whether the New York Convention was applicable to the awards.

Lastly, the Reply to the Request for Instructions on Non-enforcement of the International Chamber of Commerce International Court of Arbitration’s No. 18295/CYK Arbitral Award issued by the Supreme People’s Court in 2016 ([2016] Zui Gao Fa Min Ta No. 8) deserves special attention. In the request, both the High People’s Court of Jiangsu Province and the Intermediate People’s Court of Taizhou held that the New York Convention should apply to the case for the following reason:

The seat of the arbitral award involved is Hong Kong, but the arbitral institution making this award is the International Chamber of Commerce International Court of Arbitration, so this arbitral award shall be deemed as a French arbitral award. Both France and China are parties to the New York Convention. Therefore, the New York Convention shall apply to the recognition and enforcement of this arbitral award. ([2016] Zui Gao Fa Min Ta No. 8)

This viewpoint is consistent with the opinions expressed in the Reply of the Supreme People’s Court to the Request for Instructions on Non-enforcement of the International Chamber of Commerce International Court of Arbitration’s Final Arbitral Award No. 10334/AMW/BWD/TE issued in 2004.⁵ However, the Supreme People’s Court explicitly corrected this viewpoint in their reply referred to at the beginning of this paragraph. The Supreme People’s Court held that the arbitral award involved was made in the Hong Kong Special Administrative Region; thus, the Notice of the Supreme People’s Court on Issues Concerning the Enforcement of Hong Kong Arbitral Awards in the Mainland, rather than the New York Convention, shall be applied to review this award. Considering the long-standing chaos regarding nationalities of foreign arbitral awards sought to be recognized and (or) enforced when judging whether the New York Convention is applicable, the significance of this Supreme People’s Court’s reply lies in the establishment of the following rule: Where the seat of arbitration standard and the seat of relevant arbitral institution standard would lead to different outcomes of the nationality of the foreign arbitral award in dispute and thereby application of different law (including the New York Convention), the competent court shall give preference to the seat of arbitration standard to identify the nationality of the award and relevant applicable law.

We can draw the following conclusions from the above empirical survey: First, in the context of the Belt and Road Initiative, most Chinese courts have gradually abandoned the seat of relevant arbitral institution standard and instead adopted the seat of arbitration standard specified in Article I of the New York Convention

⁵ The Supreme People’s Court stated in this reply ([2004] Min Si Ta Zi No. 6) that “The award involved is an institutional arbitral award made by the International Chamber of Commerce International Court of Arbitration according to the arbitration agreement between and the application by the parties. The International Chamber of Commerce International Court of Arbitration is an arbitral authority established in France and both China and France are the state parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so the provisions of this convention rather than the Arrangements of the Supreme People’s Court on the Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region shall be applied to review the recognition and enforcement of the award involved”.

when judging the application scope of the New York Convention. Second, China's Supreme People's Court clearly established through its reply to lower courts that a competent people's court shall give preference to the seat of arbitration over the seat of relevant arbitral institution standard to determine the nationality of an arbitral award involving foreign factors. These facts indicate that Chinese courts have achieved substantive progress in the judicial review of arbitration. It is, of course, worth noting that there are still some intermediate people's courts that misunderstood the scope of application of the New York Convention, thus requiring the Supreme People's Court to take measures to make timely corrections.

Another important issue relating to the application scope of the New York Convention in Chinese courts concerns the commercial reservation. When acceding to the New York Convention, China adopted the commercial reservation with regard to the scope of disputes which can be submitted to arbitration. As specified in the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China:

In accordance with the commercial reservation declaration made by China upon its accession to this Convention, China will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the People's Republic of China.⁶

In the 44 replies made by the Supreme People's Court prior to 2015 that have been collected by the authors, the Supreme People's Court expressed no opinion concerning the "commercial reservation". Among the cases ruled on between 2015 and 2017, the authors have identified only one case, namely, *TAJCO Co., Ltd. v. Yan Yan*, in which the respondent raised a defense of "commercial reservation". The respondent, Yan Yan, claimed that the labor dispute leading to the foreign arbitral award in dispute was not commercial. The Intermediate People's Court of Shenyang held:

The dispute relates to the economic relationship of rights and obligations arising from the contract for appointment of general manager between the parties and thus belongs to the commercial legal relationship defined in the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China. ([2015] Shen Zhong Min Si Te Zi No. 29)

It can be seen that Chinese courts tend to interpret the commercial reservation narrowly, which facilitates the recognition and enforcement of foreign arbitral awards.

Review Power Under the New York Convention and China's Judicial Practice

Article V of the New York Convention stipulates the circumstances under which foreign arbitral awards may be refused to recognition and enforcement and distinguishes between the circumstances under which the court may conduct a review at the request of the parties and those under which the court may conduct a review *ex officio*. Under any of the five circumstances set forth in Paragraph 1, Article V of the New York Convention, the court may conduct a review only at the request of the parties; under any of the circumstances set forth in

⁶ The "legal relationship, whether contractual or not" refers to the economic relationship of rights and obligations arising under any contract or law or from tort, such as sales of goods, lease of property, project contracting, processing contracting, technology transfer, joint venture, cooperative business operation, exploration and development of natural resources, insurance, credit, labor, agency and consulting services, passenger and goods transportation by sea, air, railway and highway, and product liability, environmental pollution, marine accident and ownership dispute, but excludes the dispute between a foreign investor and his host government.

Paragraph 2, Article V, the court may conduct a review *ex officio*. As early as 2001, China's Supreme People's Court explicitly stated in replies to lower courts that the court shall not conduct a review and shall not refuse the recognition and enforcement according to any of the grounds provided in Paragraph 1, Article V of the New York Convention, unless at the requests of the parties. Then do Chinese courts abide by this rule in practice under the background of the Belt and Road Initiative?

Of the 20 cases collected by the authors in which the respondents did not raise any objection (including 18 cases ruled by competent intermediate people's courts and two cases involving the Supreme People's Court's replies),⁷ and excluding one case in which the application of recognizing and enforcing a foreign arbitral award was dismissed for jurisdictional reasons ([2014] Guang Hai Fa Ta Zi No. 2), there are seven cases in which the competent courts abided by the provisions of Paragraph 1, Article V of the New York Convention, explicitly stating in their rulings that they would not review whether the circumstances stipulated in Paragraph 1, Article V of the New York Convention existed because neither party raised any defense based on Paragraph 1, Article V of the New York Convention; there is one case in which the competent court could be deemed to refrain from reviewing the circumstances set forth in Paragraphs 1, Article V of the Convention actively, stating that, "After the hearing process none of circumstances set forth in Paragraphs 1 and 2, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been found" ([2016] Shan 04 Xie Wai Ren No. 1); and there are 11 cases in which the competent courts reviewed the foreign arbitral awards *ex officio* in accordance with Paragraph 1, Article V of the New York Convention. In cases in which the courts conducted the Paragraph 1, Article V of the New York Convention review *ex officio*, some courts reviewed extensively by examining whether the five grounds set forth in Paragraph 1, Article V of the New York Convention can be established one by one (for example, [2016] E 72 Xie Wai Ren No. 2; [2015] De Zhong Min Chu Zi No. 3), some courts conducted the Paragraph 1, Article V of the New York Convention review selectively by choosing one or two grounds to review (for instance, [2015] Xi Shang Wai Zhong Shen Zi No. 4), and some courts in their rulings only stated the results of Paragraph 1, Article V of the New York Convention review without mentioning any detail (for example, [2015] Si Zhong Min (Shang) Te Zi No. 00195).

Thanks to the reporting system aforementioned, among the 81 cases collected by the authors, none of the foreign arbitral awards was refused to be recognized and enforced due to the *ex officio* review of Paragraph 1, Article V of the New York Convention by competent courts. For example, in the two cases for which the Supreme People's Court made official replies, the competent courts conducted the relevant review under Paragraph 1, Article V of the New York Convention with the intention of refusing recognition and enforcement of the relevant foreign arbitral awards on the grounds of "*ultra vires* arbitration". In its official replies to the competent courts' requests for instructions, the Supreme People's Court explicitly corrected their act of taking the initiative to conduct the review under Paragraph 1, Article V of the New York Convention. The Supreme People's Court indicated that

People's courts must review whether an arbitral award meets the conditions for refusing recognition and enforcement set forth in Paragraph 1, Article V of the New York Convention at the parties' request. If no request is made by the parties, the people's court shall not do the review... It lacks corresponding legal basis for you to do the review *ex officio* and thereby

⁷ With regard to cases for which the Supreme People's Court made official replies, the statistics in this paragraph are based on the initial opinions of the intermediate people's courts that are responsible for hearing them.

intend to refuse recognition and enforcement of the award in accordance with Paragraph 1, Article V of the New York Convention. ([2016] Zui Gao Fa Min Ta No. 11; [2016] Zui Gao Fa Min Ta No. 12)

In a nutshell, the above judicial practice indicates that some courts still fail to refrain from exercising their review power *ex officio* in the context of the Belt and Road Initiative. It is worth noting that, even after the Supreme People's Court issued relevant official replies in 2016, there were still incidents of courts reviewing *ex officio* whether the arbitral awards met the conditions set forth in Paragraph 1, Article V of the New York Convention in 2017 ([2016] E 72 Xie Wai Ren No. 2). Local courts should exercise self-restraint over the review power set forth in Paragraph 1, Article V of the New York Convention and carry out the guiding rules in the official replies of the Supreme People's Court to create a judicial atmosphere more conducive to arbitration.

Valid Arbitration Agreement

In accordance with Subparagraph (a), Paragraph 1, Article V of the New York Convention,⁸ in the absence of any valid arbitration agreement specified in Article II of the New York Convention, a competent court may refuse recognition and enforcement of a foreign arbitral award at the request of the parties.

There are two specific circumstances under this provision. The first is the incapacity of the parties to the arbitration agreement referred to in Article II of the New York Convention. The New York Convention specifies no law governing the determination of the capacity of the parties, so each contracting party shall have legislative and judicial discretion. In the determination of the capacity of the parties, China adopts the principle of nationality. For example, it is pointed out in the Reply of the Supreme People's Court to the Request for Instructions on Glencore Plc's Application for Recognition and Enforcement of the London Metal Exchange's Arbitral Award ([2001] Min Si Ta Zi No. 2) that the determination of the capacity of the parties shall be governed by personal law. The second circumstance is the invalidity of the arbitration agreement. In this respect, the New York Convention specifies the law governing the validity of the arbitration agreement, i.e., the law agreed upon by the parties applies first and the law of the seat of arbitration applies second. Moreover, in the practice of China, if there is no arbitration agreement between the parties referred to in Article II of the New York Convention, the court may also refuse recognition and enforcement in accordance with Subparagraph (a), Paragraph 1, Article V of the New York Convention (for example, [2013] Min Si Ta Zi No. 28; [2013] Min Si Ta Zi No. 28). This matter is considered an issue of fact by the Supreme People's Court and shall be determined by competent intermediate people's courts based on facts (for example, [2013] Min Si Ta Zi No. 40; [2013] Min Si Ta Zi No. 28). Additionally, in the Reply of the Supreme People's Court to the Request for Instructions on *Ruierma Foods Co., Ltd. v. Zhanjiang Asia-Win Foods Co., Ltd.* (Application for Recognition and Enforcement of Foreign Arbitral Award) issued in 2013, the Supreme People's Court held that the respondent should bear the burden of proof of the absence of an arbitration agreement ([2005] Min Si Ta Zi No. 53).⁹ This interpretation aligns with the spirit of the New York Convention, which facilitates the enforcement of arbitral awards.

The authors have collected 24 cases relating to Subparagraph (a), Paragraph 1, Article V of the New York

⁸ "The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

⁹ However, in an earlier official reply, the Supreme People's Court seems to place the burden of proof on the applicant.

Convention between 2015 and 2017, including two cases for which the Supreme People's Court made official replies. In the Reply of the Supreme People's Court to the Request of Shandong High People's Court for Instructions on *Toyoshima & Co., Ltd. v. Changyi Kunfu Textile Co., Ltd.* (Application for Recognition and Enforcement of Foreign Arbitral Award), the Supreme People's Court held that, in the event that no governing law was agreed upon by the parties, the validity of the arbitration agreement shall be determined in pursuance of the law of the seat of arbitration, rather than the law of China ([2015] Min Si Ta Zi No. 31), and corrected the opinion of the Intermediate People's Court of Weifang that the law of China shall apply. In the Reply of the Supreme People's Court to the Request of Shandong High People's Court for Instructions on ECOM AGROINDUSTRIAL ASIA PTE LTD's Application for Recognition and Enforcement of the International Cotton Association's Arbitral Award, the Supreme People's Court held that whether the parties concerned had entered into an arbitration agreement was a question of fact and, thus, should be determined by the people's court that accepted the case after hearing. "If the fact that the parties concerned failed to enter into an arbitration agreement can be confirmed, recognition and enforcement of the arbitral award in question shall be refused in accordance with relevant provisions of the New York Convention" ([2015] Min Si Ta Zi No. 29). Thus, the viewpoints of the Supreme People's Court in these two official replies are consistent with its position established in official replies issued prior to 2015.

Regarding the foregoing three types of matters relating to the validity of arbitration agreements, 17 cases involved questions of fact. Specifically, the competent courts of seven cases held that the questions of whether there were arbitration agreements between relevant parties were substantive questions and beyond the scope of judicial review ([2016] Jin 02 Xie Wai Ren No. 4-10). The competent courts of three cases stated that the law of the seat of arbitration shall apply when reviewing the existence of an arbitration agreement, but they actually decided based on the proof offered by the parties (in two cases, the applicant assumed the burden of proof ([2013] Xi Shang Wai Zhong Shen Zi No. 0009; [2013] Xi Shang Wai Zhong Shen Zi No. 0003)). The competent court of one case conducted the review in accordance with Article IV of the New York Convention ([2014] Fo Zhong Fa Min Er Chu Zi No. 125), and the competent courts of two cases conducted the reviews in accordance with Article II of the New York Convention ([2014] Yan Min She Chu Zi No. 15; [2016] Hu 01 Xie Wai Ren No. 12). The competent court of one case acknowledged the existence of the arbitration agreement on the grounds that the respondent had participated in the arbitration ([2015] Zi Min Te Zi No. 1), and the competent court of one case claimed that the review would be carried out according to the law of the forum, namely, the law of China, under the circumstance that the parties had specified the seat of arbitration ([2015] Zhe Yong Zhong Que Zi No. 4). Finally, the competent courts of two cases affirmed the existence of the arbitration agreements straightly based on the proof ([2015] Ji Shang Wai Chu Zi No. 7; [2015] He Min Te Zi No. 00004).

Of these cases, eight involve the question of the invalidity of the arbitration agreement. In four cases, the competent courts affirmed the validity of the arbitration agreement according to the law agreed upon by the parties. In two cases, the competent courts affirmed the validity of the arbitration agreements according to the law of the seats of the arbitrations (in the absence of the law agreed upon by parties). In two cases, the competent courts affirmed the validity of the arbitration agreements in accordance with the law of the forum, namely, the law of China. In three cases involving the question of the capacity of the parties, the competent courts of two cases held that a party was incapable when contracting the relevant agreement in accordance with the law of the

seat of arbitration, and the competent court of the remaining case held that the parties were capable when contracting the agreement applying personal law.¹⁰

From the above analysis, the following can be concluded: First, in general, the Supreme People's Court of China's interpretation of Subparagraph 1(a), Article V of the New York Convention is consistent; second, some courts still fail to apply personal law when determining the capacity of the parties according to the opinions of the Supreme People's Court; third, there were few cases that courts did not follow the rule stipulated by the New York Convention regarding the applicable law in the determination of invalidity of arbitration agreements; fourth, regarding the existence of arbitration agreements, the practice of Chinese courts is divergent.¹¹ It should be noted that in the three cases in which foreign arbitral awards were refused to recognition and enforcement, the competent courts held that the applicants should bear the consequence of the "inability to prove" the existence of arbitration agreements and thereby determined that no arbitration agreement existed.

Proper Notice to Respondents or Inability to Defend

In accordance with Subparagraph (b), Paragraph 1, Article V of the New York Convention, when a competent court is sure that the respondent was not given proper notice of the appointment of the arbitrator, of the arbitration proceedings, or was otherwise unable to present the case, it may refuse to recognize or enforce the relevant arbitral award. Because this provision covers a wide range of circumstances, the contracting parties have great autonomy in interpreting and applying this provision. The Supreme People's Court of China has adopted the following position regarding this provision in practice. First, in the event that the parties reached an agreement regarding the arbitration rules, a competent court shall determine whether the respondent was given proper notice of the appointment of the arbitrator or of the arbitration proceedings according to such arbitration rules; so long as the arbitral tribunal made notices in compliance with such arbitration rules, the court shall not refuse to recognize or enforce the relevant award even though the respondent failed to receive notices ([2011] Min Si Ta Zi No. 21; [2007] Min Si Ta Zi No. 26; [2006] Min Si Ta Zi No. 36). However, in one case where the applicant sent the notice through a third person to the respondent, the Supreme People's Court required the applicant to provide proof that the respondent received the notice ([2006] Min Si Ta Zi No. 34). Second, when it is proved that the respondent was not given notices of relevant arbitration proceedings, the people's court shall refuse to recognize or enforce the relevant arbitral award ([2009] Min Si Ta Zi No. 46). Besides, it should be noted that, in an earlier official reply, the Supreme People's Court reviewed whether the relevant notice met with requirements of both the arbitration rules agreed upon by the parties and the law of the seat of arbitration ([2005] Min Si Ta Zi No. 46).

In 29 of 81 cases ruled between 2015 and 2017 that the authors have collected, respondents raised objections based on Subparagraph (b), Paragraph 1, Article V of the New York Convention, but none was upheld by the people's courts. From the perspective of the logic of the courts' rulings, the competent courts of 10 cases made judgments according to the proof offered by the parties, the competent courts of 17 cases conducted the review according to the arbitration rules agreed upon by the parties, and the competent court of one case conducted the review pursuant to both the arbitration rules agreed upon by the parties and the law of the seat of arbitration

¹⁰ The statistical results in this section are based on the initial opinions of the relevant intermediate people's courts.

¹¹ It is one same court who tried the aforesaid seven cases in which questions of fact were deemed as substantive questions.

([2014] Shen Zhong Fa She Wai Chu Zi No. 60). In the remaining case, the competent court held that “the arbitral tribunal’s failure to adopt the respondent’s opinion” was a substantive question rather than a question under Subparagraph (b), Paragraph 1, Article V of the New York Convention ([2015] Sui Zhong Fa Min Si Chu Zi No. 4).

In the context of the Belt and Road Initiative, it can be seen from the above cases that the local intermediate people’s courts are highly consistent with the position of the Supreme People’s Court on Subparagraph (b), Paragraph 1, Article V of the New York Convention. It is worth noting, however, that in some cases, it seems too harsh for the courts to do the review under Subparagraph (b), Paragraph 1, Article V of the New York Convention according to both the arbitration rules agreed upon by the parties and the law of the seat of arbitration, which fails to respect the spirit of the New York Convention.

Issues of *Ultra Vires*

In accordance with Subparagraph (c), Paragraph 1, Article V of the New York Convention, in cases where arbitral tribunals made awards beyond the scope of arbitration agreements or without respecting the limits of their authority, the court may refuse to recognize and enforce the award. Prior to 2015, in two official replies, the Supreme People’s Court confirmed that the relevant arbitral awards were beyond the scope of the authority granted by the arbitration agreements and refused to recognize and enforce the *ultra vires* parts of the awards ([2008] Min Si Ta Zi No. 11; [2003] Min Si Ta Zi No. 12).

In six of the 81 cases ruled on between 2015 and 2017 that the authors have collected, the respondents raised defenses that the arbitral tribunals made awards beyond their authority, including three cases for which the Supreme People’s Court made official replies. According to the logic of the courts’ rulings,¹² in four cases, the competent courts conducted the review pursuant to the arbitration agreements between the parties (including two cases for which the Supreme People’s Court made official replies), and in one case, the competent court conducted the review according to the requests of arbitration made by the parties. In another case for which the Supreme People’s Court made an official reply, the Supreme People’s Court, while confirming the arbitral tribunal’s authority in pursuance of the arbitration agreement, held that the arbitral tribunal failed to decide the relevant matter on merit, belonging to circumstances defined in Subparagraph (c), Paragraph 1, Article V of the New York Convention and, thus, refused to recognize and enforce the corresponding portion of the award ([2015] Min Si Ta Zi No. 34). The results of the above cases are that four of six arbitral tribunals were deemed to overstep their authority.

The above analysis shows that the Supreme People’s Court tends to carry out strict reviews of the scope of competence of the arbitral tribunal and, in general, supports the competence of the arbitral tribunal when interpreting and applying Subparagraph (c), Paragraph 1, Article V of the New York Convention. It should be a warning that the review of the scope of competence of the arbitral tribunal may infringe upon the autonomy of arbitration because it may involve the review of the substantive content of the arbitral tribunal’s award. Therefore, the relevant court shall exercise self-restraint and adopt a cautious stance to avoid the substantive review of the arbitral award.

¹² With regard to cases for which the Supreme People’s Court made official replies, the opinions of the Supreme People’s Court should be based on.

Composition of Arbitral Authority and Procedural Deficiency

In accordance with Subparagraph (d), Paragraph 1, Article V of the New York Convention, when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place, the court may refuse to recognize and enforce the award. It is explicitly prescribed in this subparagraph that the agreement of parties shall apply first when reviewing the composition of an arbitral tribunal or an arbitral procedure.

In judicial practice prior to 2015, the Supreme People's Court strictly applied this provision. In many official replies, it stressed that the review under Subparagraph (d), Paragraph 1, Article V of the New York Convention should base on the agreements of parties ([2012] Min Si Ta Zi No. 54; [2008] Min Si Ta Zi No. 18; [2007] Min Si Ta Zi No. 35; [2006] Min Si Ta Zi No. 41). In 10 of the 81 cases ruled between 2015 and 2017, the respondents raised defenses based on Subparagraph (d), Paragraph 1, Article V of the New York Convention. In two of 10 cases, the Supreme People's Court made official replies and maintained its prior position, carrying out the review strictly according to the arbitration rules or law agreed upon by the parties and holding that no circumstance, as set out in Subparagraph (d), Paragraph 1, Article V of the New York Convention, existed ([2015] Min Si Ta Zi No. 30; [2015] Min Si Ta Zi No. 48). Among eight cases ruled by intermediate people's courts, the competent courts of two cases conducted the review in accordance with the agreement of the parties ([2014] Zhe Yong Zhong Que Zi No. 1; [2015] Xin Zhong Min San Chu Zi No. 53), the competent courts of three cases conducted the review in accordance with the law of the seats of arbitrations in the absence of agreements of parties ([2013] Xi Shang Wai Zhong Shen Zi No. 0005; [2015] Zi Min Te Zi No. 1; Daewoo Shipbuilding & Marine Engineering Co., Ltd.'s Application for Recognition of Foreign Arbitral Award), and the competent court of one case directly rejected the objection of Subparagraph (d), Paragraph 1, Article V of the New York Convention on the grounds that the time limit for arbitration was not the matter that parties can adjust through agreements ([2015] Shen Zhong Min Si Te Zi No. 29; this viewpoint appears to conflict with the opinions shown in the Report of the Supreme People's Court on Non-Recognition of Arbitral Award No. 04-05 (Tokyo) of the Japan Commercial Arbitration Association). In the other two cases, the competent courts held that, in the absence of relevant objections, the true intent indicated by the parties should be presumed to use the relevant arbitration rules in force at the time of the conclusion of the contract, and courts should base on these rules to conduct the review under Subparagraph (d), Paragraph 1, Article V of the New York Convention in accordance with such rules ([2015] Zhe Yong Zhong Que Zi No. 3; [2016] Hu 01 Xie Wai Ren No. 12). This interpretation is in keeping with the spirit of the New York Convention that favors the enforcement of arbitral awards.

The above rulings indicate that the Supreme People's Court has consistently and strictly observed the provisions of Subparagraph (d), Paragraph 1, Article V of the New York Convention. They also indicate that the local intermediate people's courts have implemented the guiding principles reflected in the official replies of the Supreme People's Court and have interpreted and applied Subparagraph (d), Paragraph 1, Article V of the New York Convention in a way favoring the recognition and enforcement of arbitral awards.

Arbitral Awards Yet to Become Binding, Set Aside, or Suspended

In accordance with Subparagraph (e), Paragraph 1, Article V of the New York Convention, courts may refuse to recognize and enforce arbitral awards that have not yet become binding on the parties or that have been

set aside or suspended by a competent authority of the country in which the awards are made. The Supreme People's Court of China made no reply on this provision prior to 2015.

Of the 81 cases collected by the authors, there is only one in which a party raised the defense that the arbitral award had not been received and thus was not binding. However, based on the arbitration rules agreed upon by the parties, the competent court determined that such a defense was untenable ([2017] Lu 02 Xie Wai Ren No. 4). This ruling shows respect for the autonomy of the parties in that the court applied the arbitration rules or the governing law agreed upon by the parties when deciding the bindingness of the award.

Issue of Arbitrability

According to Subparagraph (a), Paragraph 2, Article V of the New York Convention, where the subject matter of the difference is not capable of settlement by arbitration under the law of the forum, the court may refuse to recognize and enforce the relevant arbitral award. According to the Arbitration Law of China, marriage, adoption, guardianship, maintenance, inheritance disputes, and administrative disputes, which should be resolved by administrative authorities according to law, shall not be submitted to arbitration. In the judicial practice of China thus far, there is only one case in which the court refused to recognize and enforce the arbitral award under Subparagraph (a), Paragraph 2, Article V of the New York Convention on the grounds that it was caused by an inheritance dispute (Liu & Shen, 2012).

The Supreme People's Court made no reply on this provision between 2015 and 2017. In the aforementioned case concerning China's commercial reservation, the competent court stated that "a labor dispute is not incapable of settlement by arbitration in accordance with Articles 3 and 77 of the Arbitration Law of China" ([2015] Shen Zhong Min Si Te Zi No. 29), in rejecting the respondent's defense that a labor dispute was not commercial. This interpretation accurately reflects the true meaning of the relevant provisions of the Arbitration Law of China and the New York Convention.

Issue of Public Policy

In accordance with Subparagraph (b), Paragraph 2, Article V of the New York Convention, the court may refuse to recognize and enforce an arbitral award when the recognition or enforcement of the award would be contrary to the public policy of the country. The Supreme People's Court has always strictly interpreted China's public policy. Chinese courts can refuse to recognize or enforce an arbitral award only when the recognition or enforcement of the award is considered to be contrary to China's basic legal systems or detrimental to the country's fundamental public interest or fundamental principles ([2013] Min Si Ta Zi No. 46; [2010] Min Si Ta Zi No. 32; [2008] Min Si Ta Zi No. 48). In judicial practice, there are only two cases in which the Chinese courts refused to recognize and enforce the foreign arbitral awards because of a violation of public policy. Specifically, one foreign award was deemed to be detrimental to China's cultural atmosphere ([1997] Ta No. 35), and the other was deemed to violate the judicial sovereignty and jurisdiction of China ([2008] Min Si Ta Zi No. 11).

In 11 of the 81 cases ruled between 2015 and 2017, the respondents raised defenses that the relevant arbitral awards were contrary to the public policy of China. In none of these cases, however, did the Chinese courts consider the arbitral awards to be incompatible with China's public policy? In two cases, the lower courts initially intended to refuse to recognize and enforce the arbitral awards on the grounds that they were contrary to China's

public policy, but these positions were reversed by the Supreme People's Court ([2015] Min Si Ta Zi No. 48; [2015] Min Si Ta Zi No. 5). It can be seen from the above that the people's courts of China at all levels have well implemented the spirit of the New York Convention by interpreting the scope of public policy narrowly.

Conclusion

In the context of the Belt and Road Initiative, this article provides evidence that Chinese courts made significant achievements in the understanding and application of the judicial review power under the New York Convention between 2015 and 2017. First, when deciding the application scope of the New York Convention, most of the Chinese courts adopted the seat of arbitration standard prescribed in Article I of the New York Convention to determine the nationality of an award. Second, most courts correctly interpreted and applied the provisions of Subparagraphs (b) and (d), Paragraph 1, Article V of the New York Convention and, on this basis, made rulings in favor of the recognition and enforcement of foreign arbitral awards. Finally, the Supreme People's Court and relevant local courts always adopted strict positions on the interpretation of public policy and arbitrability.

In addition to the above progress, the empirical study also finds several shortcomings in China's judicial review of foreign arbitral awards: First, some intermediate people's courts failed to exercise self-restraint and conducted the review under Paragraph 1, Article V of the New York Convention *ex officio*; second, when reviewing whether a valid arbitration agreement was entered into, the judicial practice was divergent; and third, when determining whether an arbitral tribunal was *ultra vires*, several Chinese courts were suspected of being too harsh in the review of the competence of the arbitral tribunal.

In conclusion, this empirical study finds that mainland China has become a jurisdiction that is friendly for recognition and enforcement of foreign arbitral awards in the context of the Belt and Road Initiative. Over the past few years, the inclusive judicial attitude in support of international arbitration adopted by the Supreme People's Court has prevailed, and a judicial atmosphere friendly to arbitration has been consolidated. Chinese courts have recognized and enforced most foreign arbitral awards sought to be recognized and enforced, and most Chinese courts have interpreted and applied the New York Convention correctly. However, the empirical study also identified some shortcomings. The people's courts at all levels shall make efforts to improve the judicial review of foreign arbitral awards under the guidance of the Supreme People's Court and to facilitate that international arbitration plays an increasingly greater role in the Belt and Road Initiative.

References

- Liu, G. X., & Shen, H. Y. (2012). Comments on the judicial practice of China in recognition and enforcement of foreign arbitral awards. *Beijing Arbitration Quarterly*, 18(1), 1-24.
- Reisman, W. M., & Richardson, B. (2012). The present—Commercial arbitration as a transnational system of justice: Tribunals and courts: An interpretation of the architecture of international commercial arbitration. In A. J. Berg (Ed.), *Arbitration: The next fifty years, ICCA Congress series* (Volume 16, pp. 17-65). Biggleswade: Kluwer Law International.