Introduction to a Series on International Arbitration in China

Certainty in China Enforcement: a Response to China Law Blog

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Early this year, Dan Harris of China Law Blog[1] directed his attention to the erstwhile arbitration versus litigation debate. Dan Harris's position, as of 2014, was that international arbitration was a bad idea when considering China-based enforcement. He seems to have softened his position since then, but without abandoning his priors. Logic and recent available statistics should favor international arbitration in China deals. This is the Introduction to five subsequent posts in a series which addresses the international arbitration process with a particular focus on China.

Dan Harris offered a guarded appraisal for international arbitration as a dispute resolution selection for US companies engaged in China deals:

Arbitration is usually not the best way to go when dealing with Chinese companies, but sometimes it is.[2]

Arbitration acts as the form of alternative dispute resolution most similar to litigation. Just as in litigation, representatives advocate the merits for its party. Just like a court judgment, it is a formal and adversarial process that results in a written decision. A tribunal sits as 'judges' and comes to a final decision. But the representatives may be lawyers from any jurisdiction (or not licensed at all). The members of the Tribunal also may be from the United States, Canada, China, or any other country. Unlike litigation, arbitration only rarely allows for appeals on the merits. Most importantly, arbitration removes jurisdiction from a national court and places it in the hands of an institutional arbitration commission.[3] And foreign arbitral awards experience routine enforcement, even in present-day China.

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[1] The highly respected China law blog is one of the most widely read English language law blogs out there. China Law Blog's mission is to "challeng[e] various misconceptions the West has about law in China." It aims to "avoid . . .language that attempts to camouflage our views or to avoid controversy." It does not shy from scrutiny, stating, "We expect many of you to disagree with us at least some of the time and we are fine with that." *Access at*: http://www.chinalawblog.com/about/

[2] http://www.chinalawblog.com/2017/01/china-litigation-versus-arbitration-its-case-by-case.html

[3] Some arbitrations are done completely independent of institutions. These so-called *ad hoc* arbitrations are particularly popular in the UK and India. Unfortunately, arbitrations conducted in China must have institutional supervision.

This last feature alone places arbitration in a superior position to cross-border litigation. Why would a United States party, or any non-Chinese party, prefer to handle their dispute before a Chinese courtroom? Likewise, a Chinese party will balk at litigating in US federal court. No party to an international commercial contract wishes to play an 'away' game.

Dan Harris has his few answers in favor of Chinese litigation. They may be reduced to two. First, he believes Chinese courts commonly refuse to enforce awards. He remarks on the relative ease of US court judgment enforcement in countries such as South Korea or Canada. Second, Dan Harris objects to the cost of arbitration.

From 2014: *Despite China's accession to the New York Convention, they don't follow through on their obligations to enforce awards.*

From 2017: *our [the United States] biggest trading partners—China excepted—believe in arbitration.*

From 2017: *There are countries where getting a US court judgment enforced is super easy.*

China routinely recognizes and enforces arbitral awards. In fact, China's enforcement rate remains comparable to United States Federal court's willingness to enforce its own system's judgments and decisions. Forget South Korea or Canada; the United States Federal system refuses to recognize its very 'own' whenever overturns its own judgments and decisions. Scant few arbitration clauses specifically allow for a right of appeal. A litigant has a right to an appeal, but signs it away in a dispute resolution clause. And appeals certainly result in substantial delay and uncertainty after judgment. Federal appeals easily take one year to resolve, but may last as long as two years.

China only provides select statistics of published enforcements and refusals. Nonetheless, Meg Utterback and her team at King Woods Mallesons culled enforcement statistics through a sample of 100 awards.[4] The awards ranged from 1994-2015. Prior to 2011, it appears that China indeed lacked follow through on enforcement. From 2011 to 2015, KWM's sample determined that China enforced 86.4%

[4] Meg Utterback, *Enforcing foreign arbitral awards in China – a review of the past twenty years.* King & Wood Mallesons. 15 September 2016. *Access at*: http://www.kwm.com/en/knowledge/insights/enforcing-foreign-arbitral-awards-in-china-20160915

of 46 total applications for enforcement. That amounts to a recent refusal or rejection rate of 13.6%.

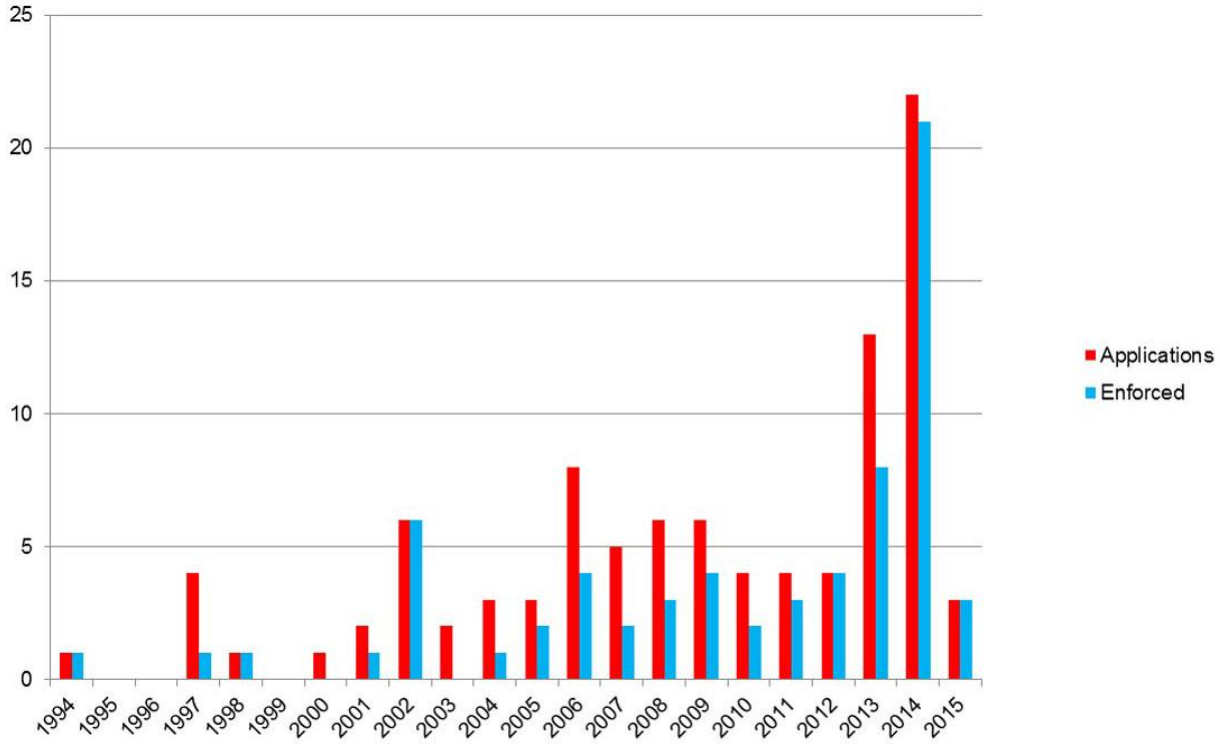

Table 1A: KWM's China's Enforcement of Foreign Awards from its Sample Data

Compare that to the success rate against appeals in the US. Across Federal Circuits, the reversal rate for 2014-2015 was 12.8%. That means 790 reversals out of 6,153 terminated on the merits (another 6,000 were dismissed for other reasons). The rates varied significantly among Circuits, from 3.8% in the 10th Circuit to 18% in the 9th Circuit. For the period of March 2011 through March 2015, all Federal US Circuits delivered 3,073 reversals for 25,766 terminations on the merits. This amounts to a reversal rate of 11.9%.

Of course, even this data-based contrast of reversals and refusals necessitates a few assumptions.[5]

[5] For any given case or award, a court's reversal or a nation's refusal may be well warranted; there is no 'right' reversal or refusal rate. This analysis measures certainty. The statistics presented here only cover foreign arbitral awards, as it is difficult to find complete records for China's enforcement of either domestic awards or China-seated foreign-related awards. Furthermore, KWM's statistics covers only the recognition and enforcement stage, and leaves aside subsequent developments at the enforcement division for collections of amounts due. However, a similar limitation also appears on the US Appeals Court side of the ledger since affirmation of judgments by US Federal Courts also precedes enforcement measures. Lastly, the predominance of US parties decline to challenge a US judgment through the appeals process. Likewise, losing parties routinely settle or

China's willingness to enforce foreign awards remains on par with the reversal rate of the average U.S. Federal Circuit. A foreign arbitration award has nearly the same power at the first stage of enforcement in China as a US federal judgment would have in the US following an appeals challenge carried through to the merits. Since at least 2011, China has followed through with good faith on its obligations under the New York Convention to enforce awards. China takes arbitration seriously.

From 2017: *"Arbitration is not always less expensive than litigating. Sometimes it is way, way, way more expensive. It would be far cheaper to litigate a case in Vietnam or in Thailand than to arbitrate it before three arbitrators in London or in Geneva. Like maybe 50 times cheaper."*

International arbitration can certainly become more expensive than litigation, especially for premier platforms. This is entirely justified. After all, international arbitration is often superior to litigation. Arbitrators can devote more time to their cases than a harried court judge. Often arbitrators offer expertise particular to the disputed point of law. If a contract involves $100 million, adjudication of any multi-million dollar dispute should be deliberate and expert. Enterprises may prefer to prioritize outcomes over costs when potential disputes exceed values of $1 million.

Dan Harris does make an important point about cost-management. For most China-related contracts, arbitration in London or Geneva (or even Singapore) can easily result in scenarios where costs exceed value. So, consider arbitration before CIETAC, BIAC, or SHIAC. Arbitration fees will be more affordable. Enforcement in China will become even more certain. Furthermore, these institutions may enact interim and preservation measures within China.

Parties can save money when they seat a prospective international arbitration in China and assign a Chinese institution to administer the arbitration. SIAC and HKIAC have the highest records of recognition and enforcement for foreign arbitral institutions in China. But parties will find the institutional fee rates associated with CIETAC, BIAC, and SHIAC to be competitive with either of the two premier foreign institutions.

voluntarily perform arbitration awards; the international standard as of a 2008 Queen Mary School of International Arbitration/Pricewaterhouscoopers survey showed 49% voluntarily compliance and only 11% of cases went to enforcement and recognition proceedings.

As Dan Harris explains, international arbitration allows for costs-follow-the-event fee recovery. The loser pays. A victorious claimant can reclaim arbitration management fees, attorney's fees, and even expert fees. This also holds true for Chinese domestic arbitration.

Cost-management remains an important consideration for any dispute resolution clause. But this is not properly a matter of arbitration versus litigation. After all, it might be cheaper to resolve a matter before a Korean sole arbitrator than a Chinese judge. But surely an American company would prefer that a Korean sole arbitrator handle its dispute.

China offers finality and recognition. China abides by its obligations to enforce awards. In most cases, international arbitration will be best for cross-border China contracts.

This post kicks off a summer series. We will issue five subsequent posts on international arbitration for non-Chinese users in China-related transactions. Part I will explore practice at China's major arbitration institutions. Part II will advise drafters on how to go beyond model clauses and tailor their arbitration agreements. Part III will address procedural management of arbitration proceedings. Part IV will explore the differences among document production in international arbitration, the common law, and perhaps China's own special practices. Part V will discuss considerations of settlement during and within the procedure of international arbitration.

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