



# First reported case of a China ICC award being enforced in China

There has long been interest over whether courts in the People's Republic of China (PRC), when confronted by an International Chamber of Commerce (ICC) award made in the PRC, would recognise and enforce it. Under local laws, arbitration agreements are only valid if they designate arbitration before one of the 'arbitration commissions' in the PRC. However, in a recent case the PRC courts were willing to recognise and enforce an ICC award made in China.

## Introduction

Uncertainty over whether an ICC award made in the PRC will be recognised and enforced by the courts stems from the prevailing view that, under the country's arbitration law, an arbitration agreement in the PRC is valid only if arbitration takes place under one of the PRC's arbitration commissions. (The most well-known of these include the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing Arbitration Commission and the Shanghai Arbitration Commission).

This has been widely interpreted to mean that PRC law does not recognise arbitration agreements that designate a foreign arbitration institution (such as the ICC, the Hong Kong International Arbitration Centre (HKIAC) or the Singapore International Arbitration Centre (SIAC)) to administer an arbitration in the PRC.

Despite such difficulties, however, ICC arbitrations seated in the PRC have been conducted in the past. While the ICC recognises that there is uncertainty over its status as an 'arbitration commission' under PRC law, it has recommended a clause for use where parties wish to have an ICC arbitration in the PRC (see <http://www.iccwbo.org/court/arbitration/id4090/index.html>).

## Recent case

The case of ICC award 14006/MS/JB/JEM is the first reported instance of a PRC court granting enforcement of an ICC (or other foreign institution) award made in the

PRC. The order for the case was first made in April 2009 and was recently reported in local publications.

In the case, the claimant commenced ICC arbitration against a Chinese company for the breach of a sale and purchase contract, which stated that disputes should be submitted to the arbitration commission of the ICC in Beijing. The ICC appointed a sole Singaporean arbitrator to adjudicate the case in Beijing; however, the respondent objected to the ICC's jurisdiction by arguing that the arbitration agreement in fact required arbitration by CIETAC, not the ICC. The objection was unsuccessful and on 21 September 2007 the ICC arbitrator awarded the claimant \$234,568.23.

The claimant then applied to the Ningbo Intermediate Court for this award to be recognised and enforced. According to the PRC publications, the objections that the respondent raised included the fact that the conduct of ICC arbitration inside the PRC violates PRC laws. However, the Ningbo court viewed the ICC award as 'not considered as [a] domestic award' under Article I of the New York Convention. As a result, it recognised and enforced the ICC award.

## Analysis

This case contrasts with earlier decisions, such as one made in 2004 which suggested that an arbitration agreement providing for ICC arbitration was invalid.

There may be some debate over whether the basis for the Ningbo court's decision is entirely correct. The court

reportedly relied on the second limb of Article I(1) of the New York Convention, which states that:

‘[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought’.

Unlike the first limb of Article I(1) – which applies the territorial criteria to the applicability of the Convention – the second limb is more obscure, and has resulted in some confusion in the past. Reference to ‘not considered as [a] domestic award’ is unclear; by adopting a traditional interpretation of Article I(1), based on the *travaux préparatoires* (preparatory work), it might be argued that the second limb of the article does not apply in this particular case.

Nonetheless, the actual decision of the Ningbo Intermediate Court does at least suggest a willingness to enforce awards made under the auspices of a foreign arbitration institution.

## Possible implications

It remains to be seen whether this decision indicates the start of a helpful trend towards future recognition of such awards by other PRC courts, or if the case is an aberration. It should also be noted that the decision was taken at the intermediate people’s court level. Under the PRC court hierarchy, this is inferior to the higher people’s court and the supreme people’s court. In addition, it is not clear how closely the Ningbo court considered the question of the legitimacy of ICC arbitrations in the PRC. It is therefore by no means certain that other PRC courts will take a similarly sympathetic view of such enforcement applications.

However, if it becomes clear that the PRC courts are willing to recognise and enforce ICC awards (and those of other foreign arbitral institutions) made in the PRC, this would be a very significant development for the following reasons:

- under PRC law, the prevailing view is that non foreign-related contracts (including those entered into by wholly foreign-owned PRC subsidiaries) may not be resolved by arbitration outside the PRC;
- even where the contracts are foreign-related, there is often considerable pressure on foreign parties to agree to arbitrate in the PRC;

- where parties agree or are obliged to arbitrate in the PRC, the commonly-held view is that they may only do so under the auspices of one of the PRC arbitration commissions. Despite recent improvements, there remains a perception among some foreign parties that these may be biased. There are also residual concerns over the procedure typically applied in such arbitrations;
- if it is now possible for arbitrations in the PRC to take place under the auspices of a foreign arbitral institution, this would remove a significant concern with conducting arbitrations in the PRC; and
- as a matter of negotiation, if a foreign party has agreed to arbitrate in the PRC, it may be difficult for the Chinese party to also insist on arbitration before one of the PRC arbitration commissions, rather than before a more recognisably ‘neutral’ arbitration institution. These would include the ICC, HKIAC and SIAC, each of which would be in a position to administer arbitrations seated in the PRC.

## Conclusion

In summary, the recent decision of the Ningbo Intermediate Court is a helpful step in the right direction. It also remains to be seen if future PRC courts will take a similarly progressive approach in dealing with such enforcement applications. Until there is greater clarity on this issue, parties who arbitrate in the PRC are advised to continue agreeing to arbitration under the auspices of a PRC arbitration commission, such as CIETAC.

Reportedly, the decision has elicited interest among members of the Supreme People’s Court and it will be interesting to see if a pronouncement is made by the court.

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