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Enforcement of South Korean Arbitral Awards in Mainland China

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This article reviews some recent decisions of the Supreme People's Court (SPC) of the People's Republic of China (PRC) on the recognition and enforcement of several South Korean arbitral awards. It explains the implementation of the New York Convention in the PRC and in particular the so-called Report System under the current Mainland Chinese law and judicial practice. It identifies some deficiencies in the People's Courts' approaches to the application and interpretation of the New York Convention and argues that the Mainland Chinese courts should adopt the pro-enforcement principle in the determination of the relevant issues under the New York Convention. It proposes further enhancement of the Report System and that the current categorization of 'domestic, foreign-related and foreign' in the context of arbitration agreements and arbitral awards needs to be further reviewed and clarified by the SPC. Last but not the least, it recommends some steps that South Korean parties should take to enhance the enforceability of South Korean Arbitral Awards in Mainland China.

Key Words : Enforcement of Foreign Arbitral Awards, Enforcement of South Korean Arbitral Awards in China, Application and Interpretation of the New York Convention, Pro-enforcement Principle, Applicable Law to Arbitration Agreements, Notice of Arbitration, Treaty Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs

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Ⅰ. Introduction

On 1 June 2015, the Republic of Korea (South Korea) and People's Republic of China (China or PRC) signed a historic and significant Free Trade Agreement (FTA) in Seoul. This China-South Korea FTA is, so far, China's largest such deal in terms of the trade volume affected. Prior to the FTA, China was already South Korea's largest trading partner. According to the South Korea Trade Ministry, the FTA will boost China-South Korea trade to over $300 billion a year, compared to $215 billion in 2012, the year in which the negotiations began. Although, regrettably, the FTA itself does not provide for arbitration as a mechanism to resolve disputes arising from the FTA, it is predictable that, in view of the projected continuing increase of trade and commercial transactions between the two nations, the use of arbitration to resolve China-South Korea commercial disputes will continue to increase. It is increasingly important for South Korean traders to understand how arbitral awards are recognised and enforced in China and vice versa.

Both the Republic of Korea (South Korea) and People's Republic of China (China or PRC) are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") and both have made reciprocity and commercial reservations pursuant to paragraph 3 of Article I of the New York Convention.[1] In the Mainland of China, the

1) For discussions on the PRC's reservations under the New York Convention, see Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases,* Cambridge University Press (2 Volume Hardback Set), 2015, paragraph 2.10.

Convention was implemented by the Supreme People's Court (SPC) Circular dated 10th April 1987 (No. 5 of the Supreme People's Court [1987]) ('the SPC Circular (1987)').[2] The New York Convention came into effect in China on 22nd April 1987.[3]

This article reviews some recent SPC cases on the recognition and enforcement of South Korean arbitral awards in the Mainland of China in order to (a) explain the implementation of the New York Convention in the PRC and, in particular, the so-called Report System under the current Mainland Chinese law and judicial practice; and (b) identify some deficiencies in the People's Courts' approaches to the application and interpretation of the New York Convention. The author argues that the Mainland Chinese courts should adopt the pro-enforcement principle in the determination of the relevant issues under the New York Convention. Furthermore, the author recommends some steps that South Korean parties should take to enhance the enforceability of South Korean Arbitral Awards in Mainland China.

Ⅱ. The Implementation of the New York Convention and the Report System in China

The SPC Circular (1987) sets out how the New York Convention should be implemented in China.[4] According to Article 1 of the Circular, where there are inconsistencies beween the provisions of the Convention and those of the PRC domestic Civil Procedure Law, the Convention prevails. Article 2 of the Circular then explains the PRC's Commercial Reservation under the Convention. Article 3 authorises Intermediate People's Courts to accept applications for the recognition and enforcement of foreign arbitral awards pursuant to the Convention. Particularly, Article 4 provides that if the court is of the opinion that the award contains one of the situations listed in paragraph 2 of Article V of the Convention, or, according to the evidence submitted,it could be established by the party resisting the recognition and

2) See the Circular in Chinese original: 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知 (1987年4月10日 法(经)发[1987] 5 号).

3) For discussions of the enforcement of foreign arbitral awards in South Korea, see e.g. Chang, *Article V of the New York Convention and Korea,* 25 J. Int'l Arb. 865 (2008).

4) See the Supreme People's Court (SPC) Circular dated 10th April 1987 (No. 5 of the Supreme People's Court [1987]).

enforcement of the award that the award contains one of the situations listed in paragraph 1 of Article V of the Convention, the court 'shall' issue a ruling to reject the application and to refuse recognition and enforcement of the award. Article 5 of the Circular sets out the time limit for the application for recognition and enforcement.

Some commentators have pointed out that the use of the mandatory word 'shall' in Article 4 of the SPC Circular (1987) is in contrast to Article V of the New York Convention, which uses the permissive word "may" and intends to grant the enforcement court "a somewhat discretionary power to disregard the minor defects or minor irregularities with respect to arbitration procedure, thus favouring the enforcement of awards".[5] Other commentators argued that the use of the Chinese characters "应当" (shall) in the SPC Circular explicitly eliminates any uncertainty involved in the interpretation of the word "may" under Article V of the New York Convention. The author respectfully submits that the latter argument should be rejected. As leading arbitration authority Gary Born has pointed out, the discretionary power signified by the word "may" under Article V of the Convention is further supported by Article VII of the Convention.[6] Any uncertainty remaining in the Chinese translation of the English word "may" should, therefore, be resolved in favour of using Chinese words that recognise courts' discretionary power under Article V of the Convention. The author is concerned that the intentional use of the permissive word 'may' has not been properly understood or reflected in the SPC Circular.

As to the Chinese version of the New York Convention, it is submitted that, properly construed, the use of the Chinese characters "始得" in that document is consistent with the use of the word "may" in the English version of the New York Convention. The author is of the opinion that the use of the Chinese characters "始得" clearly and correctly suggests that the grounds for refusal of recognition and enforcement under Article V of the Convention are "permissive" or "allowed" ("才得以" 或 "才可以" 或"才能") as opposed to "mandatory" or "compulsory". Given that the SPC Circular (1987) is not a piece of legislation but a judicial interpretation in nature, in the event of any

5) See e.g. Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" in ICCA Congress Series No 9, Paris (1998): Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention (Albert Jan van den Berg gen ed) (The Hague: Kluwer Law International, 1999) at p 470.

6) See Gary Born, International Commercial Arbitration (Second Edition), § 26.03. [B][6]

contradiction between the SPC Circular and the New York Convention, the latter prevails.[7)]

Furthermore, it is submitted that the use of the Chinese characters "始得" corresponds with the English text 'only if' and the prevalent view that the grounds for refusal of recognition and enforcement under Article V of the Convention are exhaustive and should be given a narrow and limited construction. As will be further demonstrated in the cases discussed below, the SPC has seemingly recognized and accepted this view.

The recognition and enforcement of foreign arbitration agreements and arbitral awards in the PRC is further subject to the so-called Report System established by the SPC in its Official Notice on Several Questions in dealing with foreign-related and foreign arbitration (dated 28 August 1995) ('Notice').[8)]

Article 1 of the Notice provides:

> When foreign-related ('涉外'), Hong Kong and Macau - related ('涉港澳') and Taiwan-related ('涉台'), economic and maritime commercial dispute cases are brought to the People's Court, if the parties concerned have stipulated to arbitration clauses in the contract or have subsequently reached an arbitration agreement, and if the People's Court is of the opinion that the concerned arbitration clauses or arbitration agreement is invalid or null and void or that its contents are unclear or inoperative, before a decision is made to accept the case, the People's Court must report the case to its Higher People's Court for review. If the Higher People's Court agrees that the lower People's Court should have jurisdiction over the case, the Higher People's Court should report its opinions to the Supreme People's Court for review. Before a final reply is given by the Supreme People's Court, the People's Court may decline jurisdiction and not accept the case.

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7) See particularly Article 1 of the SPC Circular (1987).

8) Supreme People's Court's Official Notice on Several Questions in dealing with foreign-related arbitration and foreign arbitral awards (1995): 最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知(1995.08.28); commonly known and referred to as the Report System.

It is important to note that although Article 1 of the Notice used the Chinese words '涉外' (foreign-related), as the title of the Notice suggests,[9] in practice, Article 1 also applies to foreign ('外国') arbitration agreements. Since the establishment of the Report System nearly twenty years ago, the SPC has issued more than two hundred of its 'Replies' to the lower people's courts' reports regarding the recognition and enforcement of foreign-related and foreign arbitration agreements and arbitral awards in the PRC.[10] As will be further discussed ambiguity and confusion exist in the categorisation of 'domestic, foreign-related and foreign' arbitration agreements and arbitral awards.

Article 2 of the Notice provides:

> When a party applies to the People's Court for the enforcement of an award rendered by either our country's foreign-related arbitration commissions, or for the recognition and enforcement of an award rendered by a foreign arbitral institution, if the People's Court are of the opinion that the award by our country's foreign-related arbitration commissions contains one of the situations in Article 260 of the Civil Procedure Law of the People's Republic of China (1991), or that the foreign arbitral award sought to be recognised and enforced does not comply with the provisions of the international convention to which our country is a party, or does not comply with the principle of reciprocity; before issuing a ruling to refuse recognition or enforcement of the arbitral award, the People's Court must report the case to its Higher People's Court for review. If the Higher People's Court agrees to the non-enforcement or to refuse recognition or enforcement of the arbitral award, they shall report their opinions to the Supreme People's Court. Upon receiving the reply by the Supreme People's Court, a ruling can then be passed for the non-enforcement or the refusal of recognition and enforcement of the award.

9) ibid

10) See Fan Yang, *Foreign-related Arbitration in China: Commentary and Cases,* Cambridge University Press (2 Volume Hardback Set), 2015, part IV.

It is worth noting that Article 2 only refers to arbitral awards rendered by arbitral institutions and is silent on the recognition and enforcement of *ad hoc* arbitral awards made outside the territory of the PRC. Other than some uncertainties remained in its scope of application,[11] the cases discussed below suggest that to some extend the Report System, an innovative and salient feature of the PRC arbitration law and practice, has the effect of safeguarding the recognition and enforcement of foreign arbitral awards in the PRC.

The review of several recent SPC cases on the recognition and enforcement of South Korean arbitral awards followed in this article should be understood in the light of the above contextual information.

Ⅲ. Some recent SPC cases on the recognition and enforcement of South Korean arbitral awards in the Mainland of China

In *TS Haimalu Co. Ltd v. Daqing Popeyes Food Co. Ltd* (2006),[12] TS Haimalu applied to the Intermediate People's Court of Harbin for recognition and enforcement of a Korean Commercial Arbitration Board (KCAB) arbitral award. Daqing Popeyes sought to resist recognition and enforcement on the ground that the notice of hearing and the arbitral award were not served according to the provisions of Article 4 and 8 of the Treaty Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs. During the enforcement proceedings, it was found that Wang Jianglong, the contact person of Daqing Popeyes, admitted that he did receive the arbitration notice and arbitral award sent by DHL Express Delivery. Wang Jianglong claimed that the contents in the mail did not contain any Chinese translation, and because he did not understand Korean, he was not aware that that was a notice from the arbitration board and as a result, he did not participate in the arbitration.

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11) Compared with Article 1 of the said Notice, Article 2 makes no reference to Hong Kong, Macau and Taiwan related arbitral awards.

12) *TS Haimalu Co. Ltd v. Daqing Popeyes Food Co. Ltd,* The Supreme People's Court (03 March 2006), in Yang, Foreign-related Arbitration in China pt IV.

It was also found that the delivery address of Wang Jianglong was not the business address of Daqing Popeyes. The Intermediate People's Court of Harbin in this case was of the opinion that the recognition and enforcement of the award should be denied on the grounds that there was no agreement on the choice of an arbitral institution and that the notice of arbitration and arbitral award were not served at the agreed address of Daqing Popeyes. The Higher People's Court of Heilongjiang Province in this case disagreed with the lower court. It was found that the parties agreed that the disputes "can be submitted to arbitration, the arbitrators shall be selected by the Korean Commercial Arbitration Board, the chairman or presiding arbitrator shall also be chosen by the Korean Commercial Arbitration Board." Based on this arbitration clause in the parties' agreements, the Higher People's Court of Heilongjiang Province in this case found that parties' choice of arbitration institution was clear and the lower court was wrong to deny recognition and enforcement on the ground that "no arbitration institution had been chosen by agreement".

As to the issue of whether the arbitration notice and award were served to the stipulated address, the Higher People's Court of Heilongjiang Province in this case found that Daqing Popeyes did not seek to rely on the fact that "the arbitration notice was not served to the stipulated address" as a reason to resist the recognition and enforcement of the arbitral award. Accordingly, it was found that the lower court should not use its own authority to raise and examine this issue. The Higher People's Court of Heilongjiang Province in this case, applying the Arbitration Law of the Republic of Korea, which recognizes the validity of express delivery as a method of service, found that although the KCAB had served the arbitration notice and award by DHL Express Delivery to an address that is different from the stipulated address in the relevant agreements, this delivery was not returned or rejected, but confirmed receipt by Wang Jianglong. Accordingly, it was found that the KCAB had successfully served the arbitration notice and award on Daqing Popeyes. The Higher People's Court of Heilongjiang Province in this case further rejected Daqing Popeyes' argument that the Treaty Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs should apply to arbitration.

As to Daqing Popeyes's argument that the service of notice of arbitration and arbitral award were not in accordance with the New York Convention, the Higher People's

Court of Heilongjiang Province in this case formed two different opinions. The majority view was that the arbitration proceedings should be governed by the law of the Republic of Korea as the law of the place of arbitration. According to Article 23 of the Arbitration Act of the Republic of Korea, "(1) the parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine such language or languages, and otherwise the Korean language shall be used. (2) The agreement or determination referred to in paragraph (1) shall, unless otherwise specified therein, apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. (3) The arbitral tribunal may, if considered necessary, order a party to submit any documentary evidence, accompanied by a translation into the language or languages referred to in paragraph (1)." Since both parties in this case did not stipulate in the agreement the language to be used in the arbitration, the fact that the KCAB had used Korean to notify Popeyes to participate in the arbitration did not violate the provisions of the Arbitration Act of the Republic of Korea and the notice should therefore be considered proper. It was further found that the reason Popeyes did not participate in the arbitration was because they did not exercise their duty of care as the commercial subject dealing with the Korean enterprise and did not give the attention required to the documents served. Therefore, the case did not fall into any of the valid grounds under Article V of the New York Convention, and the arbitral award should be recognized and enforced.[13)]

The minority opinion of the Higher People's Court of Heilongjiang Province in this case was that although the method of service in this case complied with the laws of the Republic of Korea, the place of arbitration chosen by the parties, since the provisions of that law differ from the relevant provisions in the international convention of which the Republic of Korea was a contracting party, then the international convention should prevail. Applying Article V of the New York Convention, in particular "the "proper notice" referred to in Article V.1.(b) of the Convention, the minority was of the view that although the Convention does not specify what exact methods of service constitute "proper notice", the provision should be understood according to the general understanding of the words and that the

13) ibid

purpose of using the words "proper" and "notice" should mean that sufficient information should be provided to enable the recipient to know or know with certainty of the following: what is received is a notice, the identity of the party sending the notice and the content of the notice, and to allow the notified party to make a judgment and a choice on whether to exercise its rights to reply as well as to show that party how to do so.

Given that Popeyes as the notified party in this case was a Chinese legal entity located within the territory of the People's Republic of China, when the KCAB served the relevant notice to Chinese citizens and legal entities within the territory of China, the language preferences of China should have been respected and a Chinese translation should have been enclosed. It was further stated in the minority opinion that Popeyes as a Chinese legal entity, when it received the express waybill and documents that contained no Chinese whatsoever, could not know for certain and should have no reason to know the sender of the mail, why it was sent, what the contents concerned, and furthermore, it had no duty to find out the contents of those documents. Therefore, the minority opinion was that the notice made to Popeyes by the KCAB in this case was improper, hence constituted a situation where the arbitral award should be refused recognition and enforcement under Article V.1(b) of the New York Convention.[14)]

The Supreme People's Court in this case found that (1) both parties had clearly stipulated in the relevant agreement that "the Arbitration Rules of the Korean Commercial Arbitration Board shall be applicable in the arbitration"; (2) the arbitral tribunal in this case had served the notice of hearing and arbitral award to the Daqing Popeyes according to the agreed arbitration rules, and (3) there was also evidence to show that the Daqing Popeyes had received the said notice of hearing and arbitral award. Although the arbitral tribunal did not include a Chinese translation along with the notice of hearing or with the arbitral award when they were served, the Supreme People's Court in this case was of the view that service by post without including any Chinese translation does not violate the provisions of the arbitration laws of the Republic of Korea nor the Arbitration Rules of the Korean Commercial Arbitration Board. The Supreme People's Court in this case further clarified that the Treaty

14) ibid

Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Affairs does not apply to arbitration institutions or to the service of documents by an arbitral tribunal in arbitration proceedings. Accordingly, the arbitral award in this case was recognized and enforced.

In *Bullsone Co. Ltd* v. *Beijing LTC Economic & Trading Co. Ltd* (2006),[15] the parties agreed to submit disputes to arbitration in Seoul under the arbitration rules of the Korean Commercial Arbitration Board (KCAB). Upon Bullsone's application for arbitration, the KCAB issued the notice of hearing and posted it to LTC's registered business address. No one signed on behalf of the respondent to acknowledge receipt of the delivery. The KCAB used the same delivery method to send LTC arbitral award no. 05113-0010. Subsequently, Bullsone sought recognition and enforcement of the award in Beijing Second Intermediate People's Court. LTC sought to resist the enforcement and recognition of the KCAB award on the following grounds: (1) it never received the notice of hearing or the arbitral award posted by the KCAB; thus, it was deprived of the opportunity to defend itself in the arbitration. LTC argued that pursuant to Article V (1) of the New York Convention and the applicable PRC laws the arbitral award should not be recognized or enforced; and (2) when China acceded to The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter referred to as 'The Hague Convention'), concluded in Hague in 1965, it made reservations regarding service by post. Therefore, the method of service by post adopted by the KCAB is invalid within the territory of China.

Both Beijing Second Intermediate People's Court and the Higher People's Court of Beijing were of the view that the recognition and enforcement of the KCAB arbitral award should be denied. In particular, the Higher People's Court of Beijing found that according to the provisions of the Treaty on Judicial Assistance in Civil and Commercial Matters signed between China and South Korea, if a document has been served, the statement of delivery should state the name and identity of the person accepting the service, the date of service and other information such as the place of receipt. In this case, Bullsone did not provide evidence to show that the KCAB had

15) *Bullsone Co., Ltd v. Beijing LTC Economic & Trading Co., Ltd,* The Supreme People's Court (14 December 2006), in Yang, *Foreign-related Arbitration in China* pt IV.

properly served the said notice of arbitration and arbitral award on LTC. Moreover, the Higher People's Court of Beijing was of the opinion that Bullsone's failure to serve the notice of arbitration and the arbitral award on LTC constituted a valid ground for denying recognition and enforcement of the arbitral award pursuant to Article V.1(b) of the New York Convention.

The Supreme People's Court in this case found that the Treaty Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Matters and the Convention on the Service Aboard of Judicial and Extrajudicial Documents in Civil or Commercial Matters were not applicable to methods of service used in arbitral proceedings. Rather, the arbitration rules should be used to determine whether the service was proper or not. It was found that LTC was unable to show that the method of postal delivery violates the relevant arbitration rules. It was also found that LTC failed to give notice of its change of address and as a result it failed to receive the post in time. The Supreme People's Court found that the situation did not fall within the ambit of awards that should be denied recognition and enforcement pursuant to Article V(1)(b) of the New York Convention. Given that no other grounds under Artilce V of the Convention were established, it was found that the award should be recognized and enforced.

More recently, in *Beijing Chaolaixinsheng Sports and Leisure Co Ltd v. Beijing Suowangzhixin Investment Consulting Co Ltd* (2013),[16] a contract to operate a golf course in Beijing was concluded between Chaolaixinsheng, a Chinese company and Suowangzhixin, a wholly foreign-owned enterprise (WFOE) that was registered in Beijing and owned by a South Korean citizen. The arbitration clause provided for arbitration at the Korean Commercial Arbitration Board (KCAB) in Seoul. A dispute involving a claim for compensation was so referred. Chaolaixinsheng sought to enforce the KCAB award in Beijing. The Beijing Second Intermediate People's Court proposed to deny enforcement of the KCAB arbitral award on the ground that the arbitration clause was invalid under the PRC law.

In particular, the Beijing Second Intermediate People's Court in this case found that the PRC law does not allow Chinese companies to submit disputes that have no

16) *Beijing Chaolaixinsheng Sports and Leisure Co Ltd v. Beijing Suowangzhixin Investment Consulting Co Ltd,* The Supreme People's Court (18 December 2013), in Yang, *Foreign-related Arbitration in China* pt IV.

foreign-related elements to foreign arbitration. Having found that both Chaolaixinsheng and Suowangzhixin are Chinese companies and their contract contains no foreign-related elements, the Beijing Second Intermediate People's Court was of the view that the submission of the dispute to KCAB arbitration in Seoul was contrary to the PRC Civil Procedure Law and the PRC Arbitration Law, hence the arbitration clause between the parties should be found invalid. Applying Articles V(1)(a) and V(2)(b) of the New York Convention, the Beijing Second Intermediate People's Court found that the KCAB award should be denied recognition or enforcement. The Higher People's Court of Beijing in this case agreed with the findings of the Beijing Second Intermediate People's Court and reported the case to the SPC for final decision.

The SPC in this case agreed and approved refusal of enforcement of the KCAB award. In particular, the SPC found that there were no foreign elements in the contract, because the subject matter (the golf course) was located in China, the contract was concluded and performed in China and the WFOE had the status of a Chinese enterprise. Further, the SPC stated in its Reply that 'the applicable law of the underlying contract and its arbitration clause, whether explicitly or [implicitly] agreed [upon] by the parties, shall be deemed as PRC law.' The SPC in this case held that the PRC law did not authorise the parties to refer domestic disputes containing no foreign element to arbitration 'outside the borders of China' ('境外'). Accordingly, the arbitration clause was found invalid and the fact that the parties did not raise this issue in the KCAB arbitration could not negate its invalidity. Thus, it was found that the KCAB tribunal had no jurisdiction over the dispute. Relying on article V1(a) of the New York Convention, the SPC in this case denied the recognition and enforcement of the KCAB award.

Ⅳ. Discussions of the three SPC decisions on the recognition and enforcement of South Korean arbitral awards in the Mainland of China

It is submitted that both the *TS Haimalu case* and the *Bullsone case* have indicated that the PRC SPC has consistently taken a pro-enforcement approach[17] in applying the

KCAB Arbitration Rules to determine whether the service of the notice of arbitration and arbitral award was proper or not under the New York Convention. In the *Bullsone* case, the SPC specifically refused to apply the Treaty Between the People's Republic of China and the Republic of Korea on Judicial Assistance in Civil and Commercial Matters and the Convention on the Service Aboard of Judicial and Extrajudicial Documents in Civil or Commercial Matters to methods of service used in arbitral proceedings and preferred the application of the arbitration rules as agreed by the parties. This pro-enforcement approach gives effect to the parties' agreed arbitration rules and recognizes that where actual notice of an arbitration has been received by the respondent but the respondent fails or refuses to participate in the arbitration, there is no violation of proper notice or due process under Article V(1)(b) of the New York Convention. The SPC is correct in finding that if a party chooses not to take part in the arbitration, this is not a ground for refusing enforcement. Furthermore, the SPC's reasoning in the *Bullsone case* that unless any other grounds under Article V of Convention could be established, the award concerned should be recognized and enforced seemingly suggest its acceptance of the exhaustive nature of the grounds listed under Article V of the Convention.

Both the *TS Haimalu case* and the *Bullsone case* also demonstrate how the Report System functions as a pre-report, review and double-checking mechanism within the PRC people's court system. Pursuant to Article 2 of the SPC Notice on Several Questions in dealing with foreign-related and foreign arbitration (dated 28 August 1995) ('Notice'),[18] the lower courts could not deny recognition or enforcement of foreign arbitral awards until their decisions or proposals to deny recognition or enforcement are finally reviewed and approved by the SPC. On the other hand, if the lower courts reach the conclusion that the foreign arbitral awards should be recognized and enforced, then the decision to recognize or enforce the foreign arbitral award is not

17) For discussions on the pro-enforcement principle under the New York Convention, see e.g. Albert J van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer Law Intl 1981) 1; Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law Intl 2014) 106; and *ICCA's Guide to the Interpretation to the 1958 New York Convention,* available at 〈http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf 〉 (last visit on August 8, 2015).

18) Supreme People's Court's Official Notice on Several Questions in dealing with foreign-related arbitration and foreign arbitral awards (1995): 最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知(1995.08.28); commonly known and referred to as the Report System.

subject to the Report System. Given that the lower courts' finding or proposal of refusal of recognition and enforcement is subject to further reviews by the higher people's court and eventually by the SPC, it is generally believed that in PRC judicial practice, the lower courts tend to be very careful in reaching their decisions or proposals for refusal of recognition and enforcement of foreign arbitral awards. In this regard, the Report System has the positive effect of deterring some lower courts from finding or recommending to the higher courts that a foreign arbitral award should be denied recognition or enforcement too easily, or without good reasons. [19]

It is submitted, however, that although the Report System may have the effect of deterring some lower courts from recommending non-recognition or non-enforcement without solid and robust reasoning in its report, it does not prohibit the lower courts from submitting two contradictory opinions in one report. For example, in the *TS Haimalu case* (2006),[20] although the proposal of the Intermediate People's Court of Harbin to deny recognition and enforcement of the KCAB award was not supported by the Higher People's Court of Heilongjiang Province, in deciding whether the service of notice of arbitration and arbitral award by the KCAB was in accordance with the New York Convention or not, the Higher People's Court of Heilongjiang Province in this case submitted two contradictory opinions in its report of the case to the SPC. According to the Higher People's Court of Heilongjiang Province in this case, the majority opinion was to recognize and enforce the KCAB arbitral award, while the minority opinion was to deny recognition and enforcement. Detailed reasoning of both views has been set out above in section II of this article. By reporting two contradictory opinions to the SPC, the Higher People's Court of Heilongjiang Province in this case effectively saved itself from making any decision or recommendation in its report to the SPC at all. It is submitted that the Report System can be further enhanced by requiring the lower courts to recognize and enforce any foreign and foreign-related arbitral award, unless the majority view of the lower courts is that the award should be denied recognition and enforcement. This proposal not only enshrines the

19) For a discussion of some problems remained in the Report System, see e.g. Teresa Cheng & Joe Liu, 'Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends', Journal of International Arbitration 31, no.5 (2014): 651-674.

20) *TS Haimalu Co. Ltd v. Daqing Popeyes Food Co. Ltd,* The Supreme People's Court (03 March 2006), in Yang, *Foreign-related Arbitration in China* pt IV.

pro-enforcement principle that is at the heart of the New York Convention but also saves time and costs in the enforcement proceedings in China. Adoption of this proposal will further promote Mainland China as an arbitration-friendly and pro-enforcement jurisdiction.

Unlike the *TS Haimalu case* and the *Bullsone case*, the *Chaolaixinsheng case* (2013),[21] however, has caused confusion and uncertainties with regard to several related issues. Firstly, the finding that the PRC law should govern the arbitration agreement concerned was not convincing. The Beijing Second Intermediate People's Court, although cited Articles II and V of the New York Convention in its Report to the SPC, did not give any reason or explain why the PRC law should govern the validity of the arbitration agreement concerned.[22] The SPC's Reply to the lower courts in this case seemingly suggested that because the contract between the parties did not contain any foreign-related element, the contract including the arbitration clauses contained therein should be governed by the PRC law, regardless whether parties have made explicit choice of a different law to govern their arbitration agreement or not. The SPC's conclusion and reasoning in the *Chaolaixinsheng case* failed to give effect to the parties' agreement and ran against the pro-enforcement objectives of the New York Convention. Some commentators have argued that the arbitration agreement concerned in this case should be found valid even if the PRC law governed it. [23] The SPC in this case did not otherwise explain why the arbitration agreement concerned should be found invalid pursuant to Article V.1(a) of the New York Convention.

It is submitted that the SPC's application and interpretation of Article V.1(a) in the *Chaolaixinsheng case* was not convincing and contrary to the pro-enforcement principle that is at the heart of the New York Convention. Article V.1(a) of the New York Convention provides that "recognition and enforcement of the award may be refused if the arbitration agreement is not valid *under the law to which the parties*

21) *Beijing Chaolaixinsheng Sports and Leisure Co Ltd v. Beijing Suowangzhixin Investment Consulting Co Ltd,* The Supreme People's Court (18 December 2013), in Yang, *Foreign-related Arbitration in China* pt IV.

22) For a detailed discussion on the law governing the arbitration agreements under current PRC law and practice, see Fan Yang, 'Applicable Laws to Arbitration Agreements under current Arbitration Law and Practice in Mainland China', International & Comparative Law Quarterly, volume 63, issue 03, pp741-754

23) Zhu, Weidong. 'The Recognition and Enforcement of the Foreign Arbitral Awards 'with No Foreign Element' in China', Journal of International Arbitration 32: 3 (2015) 351-360

have subjected it or, failing any indication thereon, under the law of the country where the award was made" (*emphasis added*). In this case, the parties did not make any stipulation to the law governing the contract or the arbitration agreement. Thus, pursuant to Article V1(a) of the New York Convention, the law governing the validity of the arbitration agreement should be the law of the country where the award was made, i.e. South Korean law. The fact that the contract is regarded as purely domestic and having no foreign-related element under the PRC law is irrelevant for the purpose of Article V1(a) of the New York Convention. Even applying the closest connection test pursuant to the PRC law, given that the seat of the arbitration is Seoul and the arbitral award was made in South Korea, it is arguable that the law that has the closest connection to the arbitration agreement is the law of the Republic of Korea.

Secondly, the finding that there was no foreign-related element in the *Chaolaixinsheng case* under the PRC law is subject to debate. Although there is no statutory definition of 'foreign-related disputes', Article 65 of the PRC Arbitration Law seemingly provides for the scope of foreign-related arbitration. It stipulates: '[T]he provisions in this Chapter (Chapter 7: Special Provisions for Foreign-related Arbitration) apply to arbitration of *disputes arising from foreign economic and trade, transportation and maritime affairs*. In the absence of any special provisions in this Chapter, other relevant provisions of this law shall apply' (*emphasis added*). Therefore, it is arguable that as long as the dispute arises from foreign-related economic and trade, transportation and maritime affairs, that dispute is foreign-related. Article 65 does not otherwise require that the parties involved in the dispute must also be foreign-related or foreign. For example, even though both parties are domestic entities or natural persons, nevertheless, they are involved in a dispute that arises from foreign-related economic and trade transactions; then arguably, that dispute is foreign-related pursuant to Article 65 of the PRC Arbitration Law.

Moreover, the PRC Arbitration Law is silent on the exact meaning or ambit of 'a dispute that arises from foreign-related economic and trade, transportation and maritime affairs' contained in Article 65. Must the dispute arise *directly* from such foreign-related economic and trade transactions? For example, two Mainland Chinese companies enter into an agency agreement purely for the purpose of buying certain goods from a foreign company. In that case, a dispute arising from the sale of goods contract

between the Chinese company and the foreign company obviously falls into the ambit of foreign-related dispute pursuant to Article 65. But, is a dispute arising from the domestic agency agreement, which is purely for the purpose of the international sale of goods contract also foreign-related for the purpose of Article 65 of the PRC Arbitration Law?

Returning to the *Chaolaixinsheng case* (2013), although Suowangzhixin is a wholly foreign-owned enterprise (WFOE) that was registered in Beijing, it was owned by a South Korean citizen. It is therefore arguable that the dispute arising from foreign-related economic and trade transactions fell under Article 65 of the PRC Arbitration Law. It remains unclear and uncertain why having a foreign investor would not or should not in a Mainland Chinese company be sufficient to render an otherwise domestic arbitration foreign-related.

It is further submitted that the scope of foreign-related disputes under the current PRC law and judicial practice should be further examined and understood pursuant to the SPC Opinion No.1 on Several Issues Concerning the Application of the Law on Applicable Law in Foreign-related Civil Matters ('2012 Opinion'), which came into effect on 7 January 2013. Article 1 of the 2012 Opinion stipulates that the following may be regarded as foreign-related civil matters:

1. one or both of the parties is a foreign citizen, foreign legal person or other entities, or person with no nationality; or

2. the habitual residence of one or both of the parties is located outside the territories of the PRC; or

3. the subject matter is located outside of the territories of the PRC; or

4. the legal facts that create, alter or extinguish the civil matters occur outside of the territories of the PRC; or

5. any other circumstances that may render the civil matters to be regarded as foreign-related.

It is not clear what any other circumstances entail in paragraph 5 of Article 1 of the 2012 Opinion above. Presumably it means that the court retains the power to find foreign-related elements in other circumstances as it deems fit? Most recently, Article 22 of the SPC Interpretation of the PRC Civil Procedure Law (effective on 4 Februray 2015) ('2015 Opinion') reiterates the above five categories of foreign-related civil

matters. It is submitted that disputes involving wholly foreign-owned enterprises (WFOEs) should be regarded as foreign-related disputes pursuant to paragraph 5 of Article 1 of the 2012 Opinion and/or Article 22 of the 2015 Opinion. The current categorization of 'domestic, foreign-related and foreign' in the context of arbitration agreements and arbitral awards needs to be further reviewed and clarified in a way that not only reconciles contradictions and inconsistencies existed in the current PRC law and judicial practice, but also, perhaps more importantly, in line with the PRC's public international law obligations under the New York Convention.

Ⅴ. Conclusion

As set out in the above analysis, both the *TS Haimalu case* (2006) and the *Bullsone case* (2006) seemingly suggest a pro-enforcement approach in giving effect to the parties' agreement to submit their disputes to international arbitration pursuant to the KCAB Arbitration Rules. However, on the other hand, the *Chaolaixinsheng case* (2013) seemingly suggests a rather arbitrary and restricted approach in determining the validity of the parties' agreement to submit the so-called Chinese domestic disputes to international arbitration under the KCAB Arbitration Rules. The discussion on the exact ambit and ambiguous boundaries among domestic, foreign-related and foreign disputes under the current PRC law and judicial practice is beyond the scope of this relatively short article. It is submitted that the PRC SPC decision in the *Chaolaixinsheng case* (2013) does not align with the vision of promoting China as an arbitration-friendly or pro-enforcement jurisdiction. It is further submitted that the parties should not and could not be prohibited from arbitrating their disputes, domestic or otherwise, outside the borders of China. It appeals to PRC People's courts to respect and give effects to parties' intentions and objectives in submitting their disputes to international commercial arbitration, as mandated by the New York Convention.

In view of the problems and some deficiencies in the People's Courts' approaches to the application and interpretation of the New York Convention as discussed above, and to further enhance the enforceability of South Korean arbitral awards in Mainland China, it is recommended that (a) arbitration conducted under the leading arbitration institutional rules, such as the KCAB Arbitration Rules should be preferred; and (b) it

remains crucial for parties negotiating arbitration clauses with Chinese parties and for contracts involving mainland Chinese elements, to carefully consider and explicitly designate not only the place of arbitration but also the law governing the arbitration agreement.

Last but not the least, in view of the confusion and uncertainties involved in the determination of the exact boundary between domestic and foreign-related disputes, as exposed in the *Chaolaixinsheng case* (2013), parties are well advised to avoid submitting purely domestic disputes to arbitration outside the border of the PRC; alternatively, means and mechanisms such as 'escrow account' or 'performance bond' should be considered well in advance for the purpose of enforcement of arbitral awards outside the border of the Mainland of China.

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