Overseas Recognition and Enforcement of China's Arbitral Awards — From the Perspective of the Enforcement of SCIA Arbitral Awards in Hong Kong

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Abstract

This Chapter reviews the early history of overseas enforcement of Chinese arbitral awards and re-examines the issues in a milestone case that brought before the courts of Hong Kong decades ago, followed by an illustration on the current state of overseas recognition and enforcement of Chinese arbitral awards from the perspective of Hong Kong. It also discusses the potential practical issues of significance to the future interaction between the New York Convention and China's international arbitration practices.

1 Background

Sixty years ago in 1958, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was adopted at a United Nations conference in New York. To date, it has 159 contracting states which include the major trading nations of the world,[1] making it one of the most successful international conventions.

Forty years ago in 1978, China[2] unveiled its reform and opening-up policy.[3] Two years later, China's first special economic zone was created in Shenzhen. From 1982, the Shenzhen Special Economic Zone (SEZ) started the planning for an international arbitration institution based on international practices to boost China's reform and opening up, the development of SEZ, and the cooperation in the Guangdong-Hong Kong-Macao region. On 19 April 1983, the Shenzhen Court of International Arbitration (i.e. South China International Economic and Trade Arbitration Commission, formerly known as China International Economic and Trade Arbitration Commission Shenzhen Sub-commission and China International Economic and Trade Arbitration Commission South China Sub-commission; hereinafter the 'SCIA') was established as the first arbitration institution in the Guangdong-Hong Kong-Macao Greater Bay Area.

The following sections will begin with reviewing the early history of overseas

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[1] United Nations Commission on International Trade Law (2019).

[2] For the purpose of this Chapter, 'China' refers to the 'People's Republic of China', 'Hong Kong' refers to the 'Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China' and 'mainland China' refers to the mainland of the People's Republic of China excluding the HKSAR, the Macao SAR and Taiwan region.

[3] The reform and opening-up policy of China was officially announced at the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China in 1978, for more information, see People's Daily Online (2019).

enforcement of Chinese arbitral awards, discuss the current state of recognition and enforcement of SCIA arbitral awards in Hong Kong, and then provide an outlook on the future interaction between the New York Convention and China's international arbitration practices.

2 Relation between the New York Convention and SEZ's International Arbitration Practices: Starting with China's First Overseas Enforced Award

On 2 December 1986, the Standing Committee of the National People's Congress (NPC) of China adopted a decision on China's accession to the New York Convention;[4] on the following 22nd of April, the New York Convention became officially binding on China.[5] On 12 July 1988, SCIA delivered an arbitral award,[6] which was later enforced by the High Court of Hong Kong (HKHC) on 29 June 1989, setting a precedent for the enforcement of Chinese awards in a foreign jurisdiction as per the New York Convention.[7]

This landmark arbitration case relates to a dispute over a sales contract between a Chinese company based in Guangdong province (the 'Claimant') and a Hong Kong-based company (the 'Respondent'). The Claimant, as the seller, exported a certain quantity of calculators to a Hong Kong-based trading company, as the original buyer, as agreed in the contract (the 'Original Contract'). After the Original Contract was executed, the original buyer, the seller and the Respondent entered into an assignment agreement under which the original buyer assigned its rights and obligations under the Original Contract to the Respondent. Those obligations were later incorporated into a new sales contract between the Claimant and the Respondent but not honored. As a result, the Claimant filed a complaint against the Respondent with SCIA. According to an arbitration agreement entered into between the Claimant and the Respondent on 1 November 1986, SCIA accepted the case in May 1987.[8] The Claimant appointed Mr. Luo Zhendong as an arbitrator; SCIA appointed Mr. Dong Yougan as an arbitrator on behalf of the Respondent; Mr. Luo and Mr. Dong jointly appointed Mr. Zhou Huandong as the presiding arbitrator of the case. The arbitral tribunal held four hearings in Shenzhen — each on 17 August 1987, 9 September 1987, 29 February 1988, and 27 June 1988 — and rendered an award on 12 July 1988.[9] Afterwards, the Claimant, acting as the plaintiff, sought leave to enforce the arbitral award before the HKHC and the defendants (two individuals who were formerly trading as the Respondent) opposed the enforcement on two grounds. The presiding judge, the Hon. Mr. Justice G.P. Nazareth, delivered a judgment in favor of the

[4] Decision of the Standing Committee of the NPC on China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [全国人大常委委员会关于我国加入《承认及执行外国仲裁裁决公约》的决定] (passed on 2 December 1986), http://www.npc.gov.cn/wxzl/gongbao/2000-12/16/content_5001874.htm.

[5] On 22 January 1987, China submitted its instrument of ratification and made declarations of reciprocal and commercial reservations in respect of the New York Convention. Three months later, on 22 April 1987, the New York Convention entered into force for China. See United Nations Commission on International Trade Law (2019).

[6] No. 216 [1988] of SCIA Arbitral Award.

[7] At that time, the sovereignty of Hong Kong had not been returned to China. China resumed its sovereignty over Hong Kong from the United Kingdom since 1 July 1997.

[8] No. 216 [1988] of SCIA Arbitral Award.

[9] No. 216 [1988] of SCIA Arbitral Award.

Claimant,[10] which found that the two grounds of opposition raised by the defendants were groundless. He held that the arbitral award rendered by the SCIA was a New York Convention award as defined by the Arbitration Ordinance (Cap. 341) of Hong Kong (HKAO)[11] as then in effect, and ruled that the arbitral award should be enforced.

This case set two precedents: It was not only China's first arbitral award enforced overseas pursuant to the New York Convention, but also the first foreign arbitral award enforced by the courts of Hong Kong in accordance with the New York Convention. By dismissing the defendants' two grounds for opposition, the HKHC provided an illustrative and valuable answer to resolving the common problems encountered in cross-border recognition and enforcement of arbitral awards. The unequivocal analysis and determination of the Court on the issues of the changes in the name of the arbitration institution and the place of origin of the arbitral award remain significant till this day in stabilizing market entities' expectations, understanding the spirit and implications of the New York Convention, and promoting cross-border recognition and enforcement of arbitral awards.

2.1 First Issue in Dispute: Change in the Name of the Arbitration Institution

In their first ground for opposing the enforcement, the defendants contended that:

> The award was not made by the arbitrators provided for in the relevant agreement, and should therefore be refused under Section 44(2)(e) of the Arbitration Ordinance (Cap. 341) which provides that enforcement may be refused if the composition of the arbitral authority was not in accordance with the agreement.[12]

Justice Nazareth found that the underlying issue here is in the change in the name of the agreed arbitration institution: When the parties agreed upon SCIA as the arbitration institution in their arbitration agreement, the former name of SCIA was still in use; while after accepting the case, SCIA rendered the arbitral award in its new name. However, the arbitral award was in fact made by the same arbitration institution; the only change was its name. The judge held that the defendants' first ground cannot be justified as the arbitral award was rendered by the same arbitration institution as agreed upon by the parties, even though the name had since been changed, which meant the argument that 'the composition of the arbitral authority … was not in accordance with the agreement' based on a name change of the agreed arbitration institution was without merit.

It should be noted that the Judiciary of Hong Kong subsequently took the same position as Justice Nazareth regarding the change in the name of an arbitration institution, i.e., a change in name does not mean a change of the arbitration institution — a position that has been reflected in the statistics provided by the Judiciary of Hong Kong on the

[10] MP 1221/1989. The case was heard under the Miscellaneous Proceedings by the High Court in the then Supreme Court of Hong Kong.

[11] The Arbitration Ordinance (Cap. 341) of Hong Kong was originally enacted in 1963 and amended in 1982 and 1990 and was based on a split regime — a regime for international arbitrations, formulated on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985, and a domestic regime based on the English Arbitration Act 1950. It has now been replaced by the Hong Kong Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong) effective from 1 June 2011. See, Weeramantry (2017).

[12] MP 1221/1989.

recognition and enforcement of arbitral awards over the years.[13] Specifically, in these published data, the Judiciary of Hong Kong has consistently noted the current and former names of a particular arbitration institution both of which refer to the same arbitral institution. Taking SCIA as an example, SCIA has changed its name several times over the years.[14] In the Hong Kong Judiciary's statistics over the years on the number of awards enforced in Hong Kong, the former Chinese and English names of SCIA have always been given notice to refer to the same arbitral institution.

2.2 Second Issue in Dispute: Nationality of the Arbitral Award

In their second ground for opposing the enforcement, the defendants argued that Section 2 of the HKAO defines a 'Convention award'[15] as 'an award made in pursuance of an arbitration agreement in a State or territory, other than Hong Kong, which is a party to the New York Convention'. The words 'in a State or territory' qualify 'arbitration agreement' instead of 'an award'. In other words, an award would not be a 'Convention award' as defined in Section 2 of the HKAO, if the country of origin of the award had not been a party to the New York Convention when the arbitration agreement was entered into, regardless of whether such country later became such a party when the award was made.

The Court listed the key facts of this case: The parties entered into the arbitration agreement on 1 November 1986; the New York Convention became binding on China in April 1987; and the arbitral award was rendered by the arbitral tribunal on 12 July 1988. The defendants pointed out that when the arbitration agreement was concluded, China was not a party to the New York Convention, and therefore the arbitral award was not a 'Convention award' as defined under Section 2 of the HKAO even if the New York Convention had become binding upon China at the time when the arbitral award was made; and if construed to the contrary, the HKAO would have retrospective operation in a sense that it would cover awards that would not have been within the definition of 'Convention award'. In view of the above, the defendants asserted that the arbitral award in question should not be enforced by the Court.

Justice Nazareth went on dismissing the defendants' argument for the following three reasons: First, in the definition of 'Convention award' in Section 2 of the HKAO, the words 'in a State or territory' qualify 'an award' rather than 'arbitration agreement'. The sections of the HKAO relating to enforcement of a 'Convention award' are procedural and have an effect only on the enforcement procedure for the arbitral award after China became a party to the New York Convention. The determination that the words 'in a State or territory' qualify 'an award' would not cause the HKAO to have a retrospective operation to cover awards that would not have been so covered by the definition of 'Convention award'. Second, the Court's approach of construction, as compared to that of the defendants, is more in line with the purpose of the HKAO as a whole. When it comes to the New York Convention, 'it is the award that is material, rather than the agreement'.[16] Third, even if the Court's approach of construction indeed gives retrospective operation

[13] The Judiciary of Hong Kong constantly publishes statistics on the recognition and enforcement of arbitral awards. See, Hong Kong International Arbitration Centre (2017).

[14] SCIA is the abbreviation for Shenzhen Court of International Arbitration and it is also known as the South China International Economic and Trade Arbitration Commission and the Shenzhen Arbitration Commission. It is formerly known as the China International Economic and Trade Arbitration Commission Shenzhen Sub-commission and the China International Economic and Trade Arbitration Commission South China Sub-commission.

[15] 'Convention' refers to the New York Convention.

[16] MP 1221/1989.

(which the Court has repeatedly said 'no') to the HKAO, such approach is 'clear upon the words and arises by necessary implication'.[17]

3 Subsequent Enforcement of China's Arbitral Awards in Hong Kong: From the Perspective of the SCIA

This landmark case has made 'Shenzhen plus Hong Kong' a 'special channel' for the implementation of the New York Convention in China. Since then, mainland China and Hong Kong have been highly cooperative in the mutual recognition and enforcement of arbitral awards according to the New York Convention. Statistics show that from 1989 till the return of Hong Kong to China in 1997, more than 150 arbitral awards made in mainland China had been enforced by the HKHC — only two of them were refused for enforcement due to procedural issues; and the courts in mainland China had, before Hong Kong's return to China, accepted 26 applications for enforcement of Hong Kong's arbitral awards in accordance with the New York Convention, about 50 per cent of which had been enforced.[18]

After the return of Hong Kong to China on 1 July 1997, the recognition and enforcement of arbitral awards between Hong Kong and mainland China has become an issue between two different jurisdictions within a sovereign nation, to which the New York Convention no longer applies. In *Ng Fung Hong Limited v ABC*,[19] the arbitral award made in mainland China was no longer recognized by the courts of Hong Kong as a 'Convention award', nor as a 'domestic award' of Hong Kong, resulting in the uncertainty of the nature of the laws governing the award. As anticipated by arbitration practitioners and scholars in mainland China and Hong Kong, the Supreme People's Court of China and the Hong Kong Special Administrative Region (HKSAR) Government signed a Memorandum of Understanding on the 'Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region'[20] (Arrangement) in Shenzhen on 21 June 1999. Mr. Shen Deyong, the then Vice Chief Justice of the Supreme People's Court, and Ms. Elsie Leung, the then Secretary for Justice of Hong Kong (currently a Council Member of the SCIA), signed the Memorandum of Understanding on the Arrangement on behalf of the Supreme People's Court and the HKSAR Government respectively. The SEZ witnessed the judicial assistance in arbitration between the two jurisdictions back on track and enter into a new historical stage.

The Arrangement was drafted in the spirit of the New York Convention to maintain the continuity and stability of the mutual enforcement of arbitral awards between Hong Kong and mainland China. In terms of its content, the Arrangement has also essentially followed the relevant parts of the New York Convention; especially with respect to refusing the enforcement of arbitral awards, the two are substantially identical to each

[17] MP 1221/1989.
[18] Shao and Gao (1999).
[19] [1998] 1 HKLRD 155, 156.
[20] English version of the Arrangement is available at: Department of Justice of the Government of the Hong Kong Special Administrative Region, 'Arrangements Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region', https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf. The Arrangement amounts to a juridical assistance agreement, which was applied in Hong Kong by an amendment to the Arbitration Ordinance in 2000 and was applied in mainland China by the Supreme People's Court's judicial interpretation (Fa Shi [2000] No.3) taking effect on 1 February 2000. See, Brock, Knapton and Kurian (2017).

other. According to the statistics provided by the Judiciary of Hong Kong,[21] most of the arbitral awards from mainland China have been enforced in accordance with the Arrangement. Since the implementation of the Arrangement, SCIA has been ranked first by the number of awards enforced in Hong Kong, accounting for 31.4 per cent of all awards from mainland China enforced in Hong Kong during 2012–2015 and 31.8 per cent of all awards from arbitration institutions around the world enforced in Hong Kong in 2017 (see Table 1 below).[22]

Table 1. Overview of the Enforcement of SCIA Arbitral Awards in Hong Kong

	Number of Enforced Mainland China Arbitral Awards	**Number of SCIA's Enforced Arbitral Awards**	Number of Not Enforced Mainland China Arbitral Awards	**Number of SCIA's Not Enforced Arbitral Awards**
2012	6	**2**	0	**0**
2013	8	**2**	0	**0**
2014	13	**5**	0	**0**
2015	8	**2**	2	**0**
2017	17	**7**	0	**0**
Total	52	**18**	2	**0**

(Note: Figures above are formulated based on information pertinent to SCIA through 2012 to 2017, as provided by Hong Kong Judiciary to Hong Kong International Arbitration Centre and published on the latter's website annually.)

Moreover, up until now, never once have courts in Hong Kong refused to enforce an award from SCIA in accordance with the Arrangement, which by and large reflects the 'outstanding quality of Shenzhen in China's international arbitration practices', the pro-arbitration approach of Hong Kong courts, and the unique role of arbitration as the primary method of resolving cross-border dispute resolution, which has much to do with the New York Convention and its underlying principles. To recognize the historic role of 'Shenzhen plus Hong Kong' in the implementation of the New York Convention in China, the United Nations Commission on International Trade Law (UNCITRAL) and the SCIA jointly held an event, in Shenzhen on 15 May 2018, celebrating the 60th anniversary of the New York Convention and the 35th anniversary of SCIA.

4 Future Interaction between the New York Convention and China's International Arbitration Practices: Issues and Recommendations

Over the past 35 years, the SCIA has gained extensive experience in the resolution of domestic and foreign economic and trade disputes. As of today, the SCIA has handled arbitration and mediation cases for parties from 118 countries. In December 2016, the SCIA Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules (Guidelines) came into effect. One of the highlights of the Guidelines is its Article 3 which provides that:

> Where the parties have agreed upon the place of arbitration, the parties' agreement shall prevail. Where the parties have not agreed on the place of

[21] Hong Kong International Arbitration Centre (2017).
[22] Hong Kong International Arbitration Centre (2017).

arbitration, unless otherwise determined by the arbitral tribunal, the place of arbitration shall be Hong Kong.

This arrangement respects the party autonomy and promotes Hong Kong as the place of arbitration, which conforms to market needs in the context of international cooperation under the Belt and Road Initiative. As is widely known, China has become the world's largest trading economy; both Chinese enterprises and investments are going global; and foreign investment in China has also been growing steadily,[23] all of which may significantly increase the number of international commercial disputes and investment controversies.

Based in Shenzhen, a growth engine of the Guangdong-Hong Kong-Macao Greater Bay Area and a bridgehead of the Maritime Silk Road, the SCIA is the first among its domestic peers to converge with internationally accepted rules by formulating the Guidelines. Predictably, an increasing number of parties may elect to have their international commercial disputes resolved through arbitration by SEZ-based SCIA and have Hong Kong or a foreign country as the place of arbitration. Therefore, interaction between the New York Convention and China's international arbitration practices promises to have broad potentials. However, there are some significant and longer-term issues that cast a cloud over the innovation to international arbitration in SEZ. Before presenting these issues, it is necessary to discuss a preliminary question, the answer to which will influence the analysis to these issues.

4.1 Determining the Nationality of Arbitral Award under Chinese Law

From the legislative perspective, it seems that the Arbitration Law of the People's Republic of China (China's Arbitration Law)[24] has already given the criterion, expressly or impliedly, by its strong institutional characteristic. The meaning of 'institutional characteristic' is twofold: first, ad hoc was not allowed under China's Arbitration Law, regardless of some recent appeal and endeavors for improvement;[25] and second, the identity of an arbitral award is closely linked to the arbitration institution by which the arbitral award was made. For instances, there is even no mentioning of the concept of 'place of arbitration' in China's Arbitration Law and 'Arbitration Commission(s)'[26] can be found throughout the text. In practice, for the courts of China to exercise their judicial authority over arbitration, it is a prerequisite that the courts will analyze the arbitral award

[23] The influence of Chinese foreign investment in global foreign direct investment has continued to expand. The investment flow is second only to the United States (USD 342.27 billion) and Japan (USD160.45 billion), ranking third in the world. From the perspective of two-way investment, China's foreign direct investment flows have been higher than attracting foreign investment for 3 consecutive years. See, Ministry of Commerce, National Bureau of Statistics and State Administration of Foreign Statistics of the People's Republic of China (2017).

[24] The Arbitration Law of the People's Republic of China was promulgated by the Standing Committee of the 8th NPC on 31 August 1994, effective on 1 September 1995, and amended in 2009 and 2017. English translation is available at: http://www.law-lib.com/law/law_view.asp?id=10684.

[25] The Supreme People's Court of China issued an Opinion on the Provision of Judicial Safeguards for the Building of Pilot Free Trade Zones (Fa Fa [2016] No.34) to allow for ad hoc arbitration in free-trade zones, but it has a very limited scope of application and does not have a binding force.

[26] 'Arbitration Commission(s)' is a term used in China's Arbitration Law and it refers to arbitration institution established in accordance with the China's laws and regulations. Civil Procedure Law of the People's Republic of China (China's Civil Procedure Law) uses 'Arbitration Institution(s)', a more internationally accepted term, to refer to the 'Arbitration Commission(s)' in China's Arbitration Law.

in question because different rules will apply accordingly.[27] Taking the enforcement procedure for example, the courts will normally divide the arbitral awards into the following kinds: (1) China's domestic arbitral awards; (2) China's foreign-related arbitral awards; (3) Foreign arbitral awards; and (4) Arbitral awards from Hong Kong, Macao and Taiwan. The courts will then scrutinize China's domestic and foreign-related arbitral awards against the standards as set out in Articles 237 and 274 of the Civil Procedure Law of the People's Republic of China (China's Civil Procedure Law), foreign arbitral awards against Article 5 of the New York Convention or the principle of reciprocity, and awards from Hong Kong, Macao and Taiwan against the criteria set out in the applicable arrangements (the criteria for non-enforcement listed in these arrangements are essentially the same as Article 5 of the New York Convention). There is no issue about such categorization but what has been left out by the laws is the criterion to determine the nationality of an arbitral award. What is exactly a Chinese arbitral award or a foreign arbitral award? The law is unclear in this regard.

As implied by the institutional feature of China's Arbitration Law and reading together with the chapters related to arbitration in China's Civil Procedure Law,[28] it was naturally widely believed in China that the legislative intent was to make the nationality of an arbitration institution determine the nationality of an arbitral award it made.[29] Consequently, an arbitral award made by a China's arbitration institution will be regarded as a Chinese arbitral award.[30] The same logic will apply to those arbitral awards made by foreign arbitration institutions or that of Hong Kong, Macao and Taiwan. This approach of interpretation was put into test in a case where the parties submitted their dispute to the International Court of Arbitration of International Chamber of Commerce (ICC Court) for arbitration with Hong Kong as the seat. The Supreme People's Court of China was of the opinion that the New York Convention, rather than the Arrangement, should apply to the recognition and enforcement of the arbitral award in question because the ICC Court is an arbitration institution established in France.[31] However, this analysis contradicted with the internationally accepted rule that the nationality of arbitral award is dependent on the place of arbitration. In addition, as provided in its Article 1, the New York Convention included both the 'territorial criterion'[32] and the 'non-domestic criterion',[33] but neither

[27] Gao (2017).

[28] China's Civil Procedure Law was promulgated by the Standing Committee of the 7th NPC on 9 April 1991, effective on the same day, and amended in 2007, 2012 and 2017. English translation is available at: http://en.pkulaw.cn/display.aspx?cgid=297379&lib=law.

[29] Gao (2017).

[30] On a separate note, at the early stage, only China's foreign-related arbitration institution could accept foreign-related cases, whereas China's domestic arbitration institutions could only hear domestic cases. This division was abolished in 1996 according to Article 3 of the Circular of the General Office of the State Council Regarding Some Problems Which Need to be Clarified for the Implementation of the Arbitration Law of the People's Republic of China, 8 June 1996, Guo Fa Ban [1996] No. 22. Since then China's domestic arbitration institutions can hear foreign-related cases just as its counterparts do, as long as the parties so agreed. Therefore, there is no need to distinguish an arbitral award of a China's domestic arbitration institution from that of a China's foreign-related arbitration institution.

[31] Supreme People's Court of China, Reply of the Supreme People's Court to the Request for the Refusal to Enforce the Final Award of ICC Court 10334/AMW/BWD/TE [最高人民法院关于不予执行国际商会仲裁院 10334/AMW/BWD/TE 最终裁决一案的请示的复函] (5 June 2004), [2004] Min Si Ta Zi No. 6, http://china.findlaw.cn/info/zhongcai/zcfl/zcfl/360623.html.

[32] See, United Nations Commission on International Trade Law (2016), pp. 18–19. The legal basis for the 'territorial criterion' is the first sentence of Article 1 of the New York Convention which provides that: 'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.'

[33] United Nations Commission on International Trade Law (2016), pp. 18–19. The legal basis for the 'non-domestic criterion' is the second sentence of Article 1 of the New York Convention which provides

of which will lead to a conclusion that the nationality of an arbitral award has any bearing on the place of incorporation of an arbitration institution. In 2009, the Supreme People's Court of China changed its view on this question by issuing the Notice on Issues Concerning the Enforcement of Hong Kong Arbitral Awards in the Mainland (Notice)[34] and according to this document:

> Where a party applies to the people's courts for enforcement of an ad hoc arbitral award made in the Hong Kong Special Administrative Region or an arbitral award made in the Hong Kong Special Administrative Region by ICC Court or other foreign arbitration institutions, the people's courts shall conduct a review in accordance with the provisions of the Arrangement. Where there not exist circumstances under Article 7 of the Arrangement, the arbitral award may be enforced in the Mainland.

It is contended that the Notice has clarified the criterion to determine the nationality of an arbitral award is the place of arbitration,[35] and the judicial practice appears to turn into another direction subsequently. In 2016, a court in Nanjing gave a judgment allowing enforcement of an arbitral award made in Hong Kong by a mainland arbitration institution's Hong Kong branch.[36] The case *Ennead Architects International LLP v R&F Nanjing Real Estate Development Co., Ltd* (*Ennead* Case) concerns a dispute between a United States (US) entity and a Chinese entity, and the parties agreed to submit their dispute for arbitration to China International Economic and Trade Arbitration Commission (CIETAC), an arbitration institution incorporated in mainland China, as per its applicable arbitration rules. They further agreed that the place of arbitration is Hong Kong. By virtue of the applicable arbitration rules, where the parties agreed for arbitration in Hong Kong, it is the CIETAC Hong Kong Arbitration Center, an entity incorporated in Hong Kong with liability limited by guarantee, that accepts and administers the relevant case. The CIETAC Hong Kong Arbitration Center later rendered an award and the US claimant applied for enforcement before the Intermediate People's Court of Nanjing. The court eventually held in favor of the claimant based on the Arrangement, meaning that the court regarded the award as a Hong Kong award in light of its place of arbitration and enforced it.[37] This judgment was regarded as a milestone one for it is the first mainland China's judgment that allows the enforcement of an arbitral award of the Hong Kong branch of a mainland China's arbitration institution.[38]

Undoubtedly, the Notice and the *Ennead* Case are welcomed developments for, to some extent, they brought China's judicial practice in line with the internationally acknowledged standards. Nevertheless, this never suggests that the place of arbitration as the criterion to determine the nationality of arbitral award has been well established under Chinese law. The uncertainty lies in two aspects. First, at the legislative level, place of

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that: 'It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

[34] Supreme People's Court of China, *Notice of the Supreme People's Court on Issues concerning the Enforcement of Hong Kong Arbitral Awards in the Mainland*, Supreme People's Court, China [最高人民法院关于香港仲裁裁决在内地执行的有关问题的通知] (30 December 2009), Fa [2009] No. 415, http://www.court.gov.cn/shenpan-xiangqing-117.html.

[35] Gao (2017).

[36] *Ennead Architects International LLP v R&F Nanjing Real Estate Development Co., Ltd* with regard to enforcement of arbitral award before the Intermediate People's Court of Nanjing, Jiangsu Province, (2016) Su 01 Ren Gang No. 1 (hereafter '*Ennead* Case').

[37] *Ennead* Case.

[38] Gao (2017).

arbitration is still largely in an unchartered waters of Chinese legislation. To make it a nationally applicable rule, it has to be incorporated into the wordings of arbitration legislation, mainly China's Arbitration Law and China's Civil Procedure Law. It will involve systematic amendments to the current arbitration legislation and will take time. What is worth mentioning here is that China's conflict of laws rule, the Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations,[39] mentions the concept of place of arbitration in its Article 16, by designating the law of the place of arbitration one of the laws applicable to determining the validity of foreign-related arbitration agreement. But there is no provision that directly links the place of arbitration and the nationality of arbitral award at the legislative level. This partly explains why the Notice asks the courts to apply the Arrangement without expressly clarifying that the determining factor is the place of arbitration. The Supreme People's Court is a judicial organ and cannot legislate.

Second, the significance of the Notice and the *Ennead* Case might be overstated and the judicial practice hasn't established the principle of the place of arbitration in all aspects. With regard to the scenario which involves a Hong Kong arbitral award (i.e. the place of arbitration is Hong Kong) made by a mainland China's arbitration institution, it is unclear that whether this award will be regarded as a Hong Kong arbitration award. First, as discussed earlier in this section, a perusal of China's Arbitration Law will instead favor the institutional approach, meaning that this award will be viewed as a mainland China's arbitral award. And this is not contrary to the Notice because the Notice only clarified an arbitral award made in Hong Kong by ICC Court or other 'foreign' arbitration institutions will be regarded as a Hong Kong award. Second, will the *Ennead* Case be relied to reverse the institutional approach, as it is believed to be so? The answer is not crystal clear. One key fact of the *Ennead* Case that should be distinguished is that the arbitral award in question is technically not an award made by mainland China's arbitration institution but rather an award made by a Hong Kong arbitration institution, because CIETAC Hong Kong Arbitration Center is an independent entity incorporated in accordance with and under the laws of Hong Kong. The scenario about which the *Ennead* Case concerns is different from that in which a mainland China arbitration institution rendered an arbitral award with Hong Kong as the place of arbitration. Strictly speaking, there is neither legislation nor judicial authority to be relied upon to confirm the award is a Hong Kong award in the latter scenario. These ambiguities of law result in the uncertainties in the development of international arbitration in China. On the other hand, they unintentionally give some advantages to the mainland China's arbitration institutions. The following section will discuss the potential issues in details.

4.2 Issues and Suggestions

First, if the parties have chosen SCIA as the arbitration institution and Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for interim measures? This question involves the governing law of the arbitration procedure. According to the general theory and practice of international commercial arbitration, the answer is obvious in a sense that the court in the seat (i.e. the place of arbitration) often possesses such a power to grant interim measures.[40] However, it is worth noting that

[39] Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations was promulgated by the Standing Committee of the 11th NPC on 28 October 2010 and effective on 1 April 2011. English translation is available at: https://wipolex.wipo.int/zh/text/206611.

[40] The 2006 revisions to the UNCITRAL Model Law on International Commercial Arbitration even

there is no such concept of place of arbitration under China's Arbitration Law. By contrast, China's Arbitration Law has a strong institutional characteristic, meaning that the identity of an arbitral award is closely linked to the arbitration institution. Therefore, the answer depends on how to identify such arbitral award.

If the arbitration procedure is deemed to be governed by the laws of mainland China, meaning that it is a mainland China arbitration, the courts of Hong Kong will grant interim measures in accordance with Section 45 of HKAO,[41] because the place of arbitration is Hong Kong. At the same time, the parties will not be precluded from applying in mainland China for interim measures before and during the arbitration under China's Arbitration Law and China's Civil Procedure Law, on the grounds that such arbitration is deemed as administered by a mainland China's arbitration institution. On the other hand, if the arbitration procedure is deemed to be governed by the laws of Hong Kong, meaning that it is a Hong Kong arbitration, the courts of Hong Kong will certainly grant interim measures in accordance with Section 45 of HKAO. But in mainland China, China's Arbitration Law and Civil Procedure Law only allow parties in its domestic or foreign-related arbitration procedure to apply for interim measures, and except for certain maritime cases, courts in mainland China are unable to offer court-ordered interim measures for parties in overseas arbitration, even including those in Hong Kong. The Arrangement is also silent in this regard.

Therefore, it is suggested that, in the interest of the development of the Guangdong-Hong Kong-Macao Greater Bay Area, the legislative and judicial authorities of mainland China may adopt a more positive and flexible view to ensure that the parties to arbitration can successfully apply for interim measures in both mainland China and Hong Kong. On 2 April 2019, the Supreme People's Court of China and the HKSAR Government signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region[42] (Interim Measures Arrangement) which materializes the industry's expectation. According to this Interim Measures Arrangement, parties in 'arbitral proceedings in Hong Kong' (as defined in Article 2) may apply to the courts in mainland China for interim measures by reference to China's Arbitration Law, China's Civil Procedure Law and related judicial interpretations. Another feature of the Interim Measures Arrangement is that it reflects the penetration of the concept of place of arbitration into mainland China's judicial practice, though China's Arbitration Law remains intact. When defining the 'arbitral proceedings in Hong Kong', Article 2 of the Interim Measures Arrangement expressly provides that they 'shall be seated in HKSAR'. Undoubtedly, the Interim Measures Arrangement marks new prospects for arbitration in both sides.

Second, if the parties have chosen SCIA as the arbitration institution and Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for enforcement of the arbitral award? This question involves the determination of the

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provide another possibility for the courts outside the seat to grant measures. See, Born (2015), pp. 111–128).

[41] Court-ordered interim measures. See, Article 45 of HKAO.

[42] A courtesy English translation of the Interim Measures Arrangement is available at: Department of Justice of the Government of the Hong Kong Special Administrative Region, 'Arrangements Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region', http://gia.info.gov.hk/general/201904/02/P2019040200782_307637_1_1554256987961.pdf. Effective date of the Interim Measures Arrangement is to be announced after the authorities of both sides have gone through the relevant procedures.

nationality of the arbitral award. If the arbitral award is deemed as one made in Hong Kong, the parties should apply for its enforcement in accordance with the HKAO in Hong Kong and the Arrangement in mainland China. On the other hand, if the arbitral award is deemed as one made in mainland China, the parties should apply for its enforcement in accordance with the Arrangement in Hong Kong and China's Civil Procedure Law in mainland China.

Third, if the parties have chosen SCIA as the arbitration institution and Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for setting aside the arbitral award? This question, like the second one, also involves the nationality of the arbitral award. If the arbitral award is deemed as one rendered in Hong Kong, the courts of Hong Kong should have jurisdiction over whether or not it should be set aside. Conversely, if it is deemed as one rendered in mainland China, the courts in mainland China should have such jurisdiction.

With regard to the second and third issues, the certainty rests on a uniform standard to determine the nationality of the arbitral award. Therefore, it is suggested that legislative and judicial authorities of mainland China should incorporate the principle of place of arbitration or seat of arbitration.[43] Advantages of a uniform standard are manifold. First, it is more consistent with the spirit of the New York Convention. Pursuant to Article 1 of the New York Convention, the arbitral awards to be recognized and enforced should be 'arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought', rather than arbitral awards made based on the arbitration institution. Second, it may eliminate the asymmetry in the scope of application of the Arrangement resulted from the different altitudes of courts from both sides. In the preface of the Arrangement, it states that: 'The People's Courts of the Mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR'. Meanwhile, it also provides that:

> The Courts of the HKSAR agree to enforce the awards made pursuant to the Arbitration Law of the People's Republic of China by the arbitral authorities in the Mainland (the list to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office the State Council).[44]

There is clearly an issue of asymmetry in terms of the scope of application between courts of Hong Kong and mainland China because the courts of Hong Kong only recognize the arbitral awards rendered by the arbitration institutions in mainland China, rather than arbitral awards made within the physical boundaries of mainland China. If the principle of place of arbitration is established, the courts of mainland China should enforce all arbitral awards which are made in Hong Kong, irrespective of whether they are made by domestic or foreign arbitration institutions, unless they fall within the conditions for non-enforcement. This will provide more certainties than what the *Ennead* Case gave. Mainland arbitration institutions are free to render a Hong Kong arbitral award simply by designating Hong Kong as the place of arbitration without incorporating an entity, either being a branch office or subsidiary.

Fourth, if the parties have chosen to apply the UNCITRAL Arbitration Rules (hereafter

[43] It means that the identity of an arbitral award should be based on its seat or place of arbitration, instead of the seat or place of the arbitration institution from which the award is rendered.

[44] See the preface of the Arrangement.

'UNCITRAL Rules'), have arbitrators appointed by SCIA (i.e. SCIA only acts as the appointing authority), and have Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for interim measures? This question involves the governing law of an ad hoc arbitration procedure. If 'the place of arbitration' principle is applied, the ad hoc arbitration procedure should be governed by the laws of Hong Kong, and the parties to the ad hoc arbitration will not be precluded from seeking interim measures in Hong Kong, but to do so in mainland China will still face some uncertainties even after the Interim Measures Arrangement became effective. The reason is that the Interim Measures Arrangement does not include ad hoc arbitral proceedings in both mainland China and HKSAR. Article 2 defines 'arbitral proceedings in Hong Kong' as those administered by the stipulated institutions or permanent offices, which adds a second layer requirement in addition to the first layer requirement: seat is Hong Kong. Similarly, Article 6 mentions only the arbitral proceedings administered by a mainland China arbitration institution. On the other hand, if the ad hoc arbitration procedure is governed by the laws of mainland China, the parties will also not be precluded from applying interim measures in Hong Kong as HKAO covers both institutional and ad hoc arbitration; but given that ad hoc arbitration procedures are neither recognized in principle by the laws of mainland China nor covered by the Interim Measures Arrangement, there will be no legal basis for parties in such arbitration to apply for interim measures before courts in mainland China.

Therefore, it is suggested that the legislative and judicial authorities of mainland China adopt a more positive and flexible view to support arbitration institutions in the China (Guangdong) Pilot Free-Trade Zone to explore the use of ad hoc arbitration in the Guangdong-Hong Kong-Macao Greater Bay Area.

Fifth, if the parties have chosen to apply the UNCITRAL Rules, have arbitrators appointed by SCIA (i.e. SCIA only acts as the appointing authority), and have Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for enforcement of the arbitral award? This question involves the nationality of the ad hoc arbitral award. If the ad hoc arbitral award is deemed as one made in Hong Kong, the parties should apply for its enforcement in accordance with the HKAO in Hong Kong and the Arrangement in mainland China. On the other hand, if the ad hoc arbitral award is deemed as one made in mainland China, the parties should in theory not apply for its enforcement in accordance with China's Civil Procedure Law in mainland China and the Arrangement in Hong Kong, given that China's Civil Procedure Law does not recognize ad hoc arbitration and the Arrangement only allows courts in Hong Kong to recognize arbitral awards made by arbitration institutions in mainland China.

Therefore, it is suggested that the 'place of arbitration' principle should be adopted according to the spirit of the New York Convention to allow Hong Kong's courts to accept applications for the enforcement of such ad hoc arbitral awards made in mainland China.

Sixth, if the parties have chosen to apply the UNCITRAL Rules, have arbitrators appointed by SCIA (i.e. SCIA only acts as the appointing authority), and have Hong Kong as the place of arbitration, can they apply to a court in mainland China or Hong Kong for setting aside the arbitral award? This question also involves the nationality of the ad hoc arbitral award. If the ad hoc arbitral award is deemed as one made in Hong Kong, the courts in Hong Kong should have jurisdiction over whether or not to set aside the arbitral award. If the ad hoc arbitral award is deemed as one made in mainland China, the courts in mainland China should have such jurisdiction.

It is suggested that the legislative and judicial authorities of the mainland China should incorporate the ‘place of arbitration’ principle according to the spirit of the New York Convention.

Lastly, if the parties have chosen to apply the UNCITRAL Rules, have arbitrators appointed by SCIA (i.e. SCIA only acts as the appointing authority), and have any other State to the New York Convention as the place of arbitration, when they apply for interim measures, enforcement of the arbitral award or setting aside of the arbitral award, etc., they will also encounter issues as complex as those described above. The suggestions in this paper may provide the starting point to answer these questions.

References

Born G (2015) International Arbitration: Law and Practice, 2nd edn. Kluwer Law International, Alphen aan den Rijn, The Netherlands.

Brock D, Knapton S and Kurian A (2017) Recognition and Enforcement of the Arbitral Award. In: Ma G, Brock D (eds), Arbitration in Hong Kong: A Practical Guide, 4th edn. Thomson Reuters Hong Kong Limited, Hong Kong, pp 664-693.

Gao X (2017) Judiciary Shall Determine the Nationality of Arbitral Award based on the Place of Arbitration rather than Place of the Arbitration Institution [司法应依仲裁地而非仲裁机构所在地确定仲裁裁决籍属]. People’s Justice (Cases) 20:68–74.

Hong Kong International Arbitration Centre (2017) Enforcement of Awards. http://www.hkiac.org/about-us/statistics/enforcement-awards.

Ministry of Commerce, National Bureau of Statistics and State Administration of Foreign Statistics of the People’s Republic of China (2017) Statistical Bulletin of China’s Outward Foreign Direct Investment. http://images.mofcom.gov.cn/fec/201810/20181029160824080.pdf.

People’s Daily Online (2019) 40 Years of Reform and Opening-up: Into the New Era. http://en.people.cn/102775/414303/index.html.

Shao W and Gao S (1999) Understanding and Application of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region [关于《内地与香港特别行政区相互执行仲裁裁决的安排》的理解与适用]. People’s Justice 10:4–5.

United Nations Commission on International Trade Law (2016) UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2016 edn. United Nations Publication, Vienna.

United Nations Commission on International Trade Law (2019) Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Weeramantry R (2017) The Arbitration Ordinance. In: Ma G and Brock D (eds), Arbitration in Hong Kong: A Practical Guide, 4th edn. Thomson Reuters Hong Kong Limited, Hong Kong, pp 1-16.