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## Foreign arbitration under PRC Law – Ad Hoc Arbitration and Recognition of Foreign Award

The ad hoc arbitration is a very popular dispute resolution means adopted nowadays in the international trading and shipping transactions, e.g. it is common to set out a clause such as “*Arbitration in London, English Law applied*” in a charter party and without naming any arbitral institution. However, it is a trite law that the ad hoc arbitration is not allowed in mainland China pursuant to the *Arbitration Law of People’s Republic of China 1995*, the stipulations of which are set out for institutional arbitration only (please refer to the relevant articles in the Appendix below). With regards to whether an award made by an ad hoc Tribunal (without involving any institution) in a foreign country is enforceable in China, the approach of Chinese People’s Court was ambiguous. The reason for such an ambiguity was that local Chinese Courts viewed this issue from the China Arbitration law, which does not allow ad hoc arbitration in China.

Though China is one of the contracting states of *New York Convention 1958* (pursuant to which the ad hoc arbitral award is enforceable) and the Chinese people’s courts in several cases did acknowledge the effectiveness of awards made by ad hoc arbitral tribunals in foreign countries, there was no express legislation as to the effectiveness of such award in China until Feb 4th, 2015. On this date the *Explanations of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China* (the “Explanation”) was released and came into force, according to its Article 543, it is now expressly acknowledged by the Supreme Court of China that award issued by such ad hoc tribunal will be recognized and enforced in China (please refer to the relevant articles in the Appendix below).

However, even if the ad hoc arbitral award is now recognized in China, pitfalls still remain for applicants. For example, where an applicant files before a People’s Court for an enforcement of such award, there are still risks that the award might not be recognized owing to the irregularity in arbitration procedures.

One of the most common excuses alleged by the other party (the “Respondent”) is that they would deny the receipt of service of notice of arbitration, thereby raising an argument that they had no opportunity to defend and present their arguments in arbitration. This will assist such Respondent to raise the argument of irregularity in conducting arbitration. Therefore, to avoid this pitfall, even if a party has a very strong and good case, they must be careful of serving on the other party a proper notice of arbitration. It should usually comply with Rules/Law of seat of arbitration (e.g. the Section 76(3) of Arbitration Act 1996 of UK or if any rules is selected by a party). However, if the award were to be enforced in China, then it is suggested that parties comply with the procedural rules of Chinese Law to deny the Respondent an argument of irregularity.

Pursuant to Chinese law, no exact guidance is available as to what will constitute a proper service in

respect of a foreign arbitration. In “*the Supreme People’s court’s reply on recognition and enforcement of a London Arbitration award of ‘MV ABRA-charterparty dated on 28 Dec 2004’*” (10<sup>th</sup> Jan, 2007, [2006] MINZITAZI No.34), the Judge held that, “*During the arbitration, applicant served on the respondent, via a third party, in the means of email. Since this method is not prohibited by Chinese law, the service shall be effective as far as that the applicant could prove the respondent received the notice.*”

Therefore, our guidance to Andrew Liu’s clients is that if they are planning to apply for recognition and enforcement of an ad hoc arbitral award in China, they should bear in mind that they will have the burden of proof in Chinese Courts in relation of their providing evidence that they had served on the other party the notice of arbitration that complies with both the arbitration rules of seat of arbitration and Chinese Law. In practice, it means that the service by means the means of fax, e-mail, courier, and registered mail are recognized by Chinese People’s Court, provided the applicant is able to provide with evidence that the Respondent’s had received the service.

A special attention has to be paid on the means of service by an e-mail. In the case “*recognition and enforcement of a London Arbitration award of ‘MV ABRA-charterparty dated on 28 Dec 2004’*”, the High People’s court of Tianjin held that, “*applicant served on the other party via e-mail. We considered the service did not violate the local law of the Respondent, hence the applicant may adopt this method to serve the notice of appointment of the arbitrator*”. The respondent should reply after receipt of the notice by e-mail. In case no reply is received, *the applicant has to provide other evidence to prove the respondent’s receipt of notice, otherwise the service shall be deemed as ineffective in the Chinese Court at the time of enforcement.*

## **APPENDIX**

### ***Arbitration Law of PRC 1995***

#### **Article 18**

If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid.

### ***Explanations of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China (Came into force on 4<sup>th</sup> Feb 2015)***

#### **Article 545**

Where the party concerned applies, before the people’s court, for recognition and enforcement of an award made by a foreign ad hoc arbitral tribunal, the court shall conduct in accordance with the Article 283 of Civil Procedure Law.

### ***Civil Procedure Law of PRC 2013***

#### **Article 283**

If an award made by a foreign arbitral institution is required to be recognized and enforced by a people's court of the People's Republic of China, the party concerned shall directly apply before the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties acceded to by the People's Republic of China with the principle of reciprocity.

#### **Article 274**

Where the respondent adduces evidence that an arbitration award of an international arbitral institution of the People's Republic of China falls under any of the following circumstances, a people's court shall, upon examination and verification by a collegial bench, issue a ruling not to enforce the award: ... (2) The respondent is not notified to appoint an arbitrator or of the conduct of arbitration procedure or fails to present its case, which is not attributable to the fault of the respondent...

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