

**ENFORCEMENT OF
COMMERCIAL ARBITRAL
AWARDS IN CHINA**

Business Laws of China

By Clarisse von Wunschheim

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To my mother and to my father

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ABOUT THE AUTHOR

The author, Clarisse von Wunschheim, has been practicing law since 2002 in the area of international arbitration and litigation with a special focus on transnational disputes involving European companies.

After graduating from university, Clarisse started her career with a major commercial law firm in Zurich, and then moved to Beijing in 2005 where she worked as a lawyer advising and representing foreign (primarily European) and Chinese companies in cross-border arbitrations and litigations in the fields of general contract law, joint ventures, and other FDI projects, as well as IP disputes. In recent years, Clarisse has also been increasingly involved as administrative secretary of various arbitral tribunals in international commercial and investment arbitrations.

In 2010, Clarisse obtained a doctorate degree from the University of Fribourg, and was appointed lecturer at the University of Fribourg (Switzerland) and at the University Institute of European Studies of Turin (Italy), where she teaches contract and arbitration law. She is also author and co-author of several articles on arbitration law in China, and an occasional speaker at conferences.

In November 2010, Clarisse founded WunschARB with the objective of providing its clients with hands-on advice on preventing, managing and resolving cross-cultural commercial disputes, with a particular focus on international arbitration and China related disputes.

The present book is the second edited and updated version of her doctor thesis submitted on September 16, 2009, and accepted on November 27, 2009, by the faculty of law of the University of Fribourg in partial fulfillment of the requirements for the degree of Dr. iur.

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PREFACE

“Plus d’Etats ont péri parce qu’on a violé les mœurs que parce qu’on a violé les lois”

Montesquieu

A. The Subject

The present thesis deals with “*Enforcement of Commercial Arbitral Awards in China.*”

It will describe, analyze, and evaluate the legal framework and specific legal provisions applicable to the enforcement in China of arbitral awards rendered in general commercial disputes, and their application by the Chinese courts. Based on the results of this analysis, we will try to evaluate the quality of the Chinese system for enforcement of arbitral awards and how it reflects on the Chinese arbitration system in general.

- **Arbitral Awards:** We will limit our analysis to the enforcement in China of arbitral awards, i.e., awards rendered by an arbitral tribunal in the context of *ad hoc* or institutional arbitration proceedings.¹ We will not address the issue of enforcement of court judgments or other decisional tools used in other alternative dispute resolution mechanisms.
- **Recognition and Enforcement:** We will only address the stage of recognition and enforcement of an arbitral award, i.e., the stage in which one party, based on the other party’s failure to comply with the rights and obligations set forth in the award, requires the competent local authorities to implement those rights and obligations using force if necessary.² We will neither address the process of rendering such arbitral award, nor its correction, interpretation, or setting aside after it is rendered.
- **China as Mainland China:** We will limit our analysis to the enforcement of arbitral awards in China understood as

¹ For a definition of the concept of “arbitral award,” see § § 4:6 to 4:15.

² For a definition of the concepts of “recognition” and “enforcement,” see § § 4:1 to 4:5.

mainland China only, excluding “Greater China,” i.e., Hong Kong, Taiwan, and Macao, and irrespective of where such awards have been rendered. As such, the decisive aspect is the place of enforcement of the award, and not the place it was rendered: any commercial arbitral award which is to be enforced in mainland China falls within the scope of the present analysis, whereas arbitral awards rendered in mainland China but intended to be enforced outside of mainland China do not.

- **Commercial and Contractually Based Arbitrations:** We will focus on arbitral awards rendered in commercial arbitrations with a contractual basis. In the present study the term “commercial” refers to a very general notion of commerciality which includes any economic dispute between companies or between companies and public law entities.³ The concept of “contractually based arbitrations” refers to arbitrations based on a contractually concluded arbitration agreement. As such, we will not deal with public law arbitration between state entities and we will only give a limited overview of treaty based arbitration with regard to investment disputes.
- **General Commercial Arbitration:** in the present study, we will only deal with general commercial disputes and will not explore other kinds of disputes which may—according to the applicable legal framework—be subject to special forms of arbitration such as labour disputes, sports disputes, agricultural disputes, etc. In particular, unless otherwise expressly provided herein, the analysis does not include specific details of maritime arbitration and the enforcement of maritime arbitral awards.

Thus, the present study approaches enforcement issues from an arbitration law perspective, and it is not meant to be a comprehensive study of the Chinese arbitration system or of the general enforcement system of arbitral awards worldwide. As such, besides fundamental concepts and notions which are necessary to grasp the present topic, it does not address many other aspects of arbitration and enforcement in general. In particular, the author will not enter into many controversies concerning arbitration, which are currently being discussed on an international level, but which have no direct implications for the present topic. The same is true with regard to the Chinese legal system: describing the features of China’s political and legal system is a task in itself and has been the object of numerous studies.⁴ The present thesis does not aim to give an exhaustive overview of all

³ This definition is inspired by the widely accepted definition of commerciality in international arbitration, see Holtzmann/Neuhaus, *A Guide to UNCITRAL Model Law 1989*, pp. 32 fol.; Fouchard/Gaillard/Goldman, *On International Commercial Arbitration 1999*, N. 58 fol.; Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration 2003*, N.4-2 fol.

⁴ For a short and to the point overview of the Chinese Legal System and re-

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the characteristics and shortcomings of China's legal system, but simply highlights certain features which are relevant to the present topic. Consequently, references to more general studies on arbitration, enforcement and the Chinese legal system are limited to basic and classic sources, and are not deemed to be comprehensive or to have otherwise been subject to a qualitative selection process.

Finally, the present study is based on information gathered by the author to the best of her abilities as of December 20, 2011. However, in the light of the difficult access to relevant information, the frequency of legislative amendments and judiciary developments and the discrepancy between theory and practice, a certain margin of inaccuracies is unavoidable. In this respect, the author is open and grateful for any useful comment and information allowing to reduce such inaccuracies to a maximum extent.

B. Appeal of the Subject

The interest of the present thesis is twofold.

- **Theoretical Interest:** Although a lot has been written in the last decade about arbitration in China and in particular about enforcement of arbitral awards,⁵ this has too often been done—especially within the English speaking legal community—through the eyes of or with regard to foreign investors and their interests, and not in a systemic and comprehensive way. The reasons are manifold and include, for example, language and cultural barriers, problems with access to court decisions and other relevant information, the lack of official statistics as concerns enforcement issues, etc. While Chinese scholars have an extensive insight and understanding of the enforcement system in China, most of their publications are in Chinese and thus only available to a limited audience. The aim of the present study is to overcome these cultural and linguistic barriers and to describe and analyze in a systemic and comprehensive manner the laws and provisions applicable to the enforcement of commercial arbitral awards in China, in order to make the analysis accessible to a non-Chinese readership.
- **Practical interest:** China has become one of the leading powers of today's world economy. It is thus not surprising that the world is not only watching China's economic rise and political changes, but also its legal development and in particular its judicial system. Indeed, the enforceability of one's rights is an important part of a company's risk assessment and market study, which it will take into account when deciding whether or not to enter into a new market. Consequently, the quality of the national arbitration

lated books and articles, see Clarke, *The Chinese Legal System*.

⁵ See Appendix F.

system, and in particular the enforcement of arbitral awards, is an important factor for investors. In this respect, the second aim of the present analysis is to evaluate the quality of the Chinese enforcement system of arbitral awards and its implications on the efficacy of the general arbitration system.

C. Structure of the Book

The present book is divided in four parts.

Part I gives an introduction to the reader of the **relevant Chinese legal environment**, focusing on the Chinese legal system and institutions, the general arbitration environment, and the general framework of enforcement of arbitral awards in China.

Part II deals with the **enforcement process**, including basic concepts, the enforcement procedure, and the effects of a decision to or not to enforce an arbitral award.

Part III analyses the **grounds for nonenforcement** of arbitral awards and their application by the courts.

Part IV is dedicated to the **assessment of the efficacy of the Chinese arbitration system** in the light of the identified enforcement issues.

FOREWORD

As I worked on the first edition of this book, and was faced with the unending task of gathering and understanding relevant information, formulating ideas, conducting analysis and comparisons, drawing conclusions, etc., I often encouraged myself thinking of a French saying that I once heard, according to which “*un livre est une oeuvre inachevée*,” meaning that “a book is an unfinished creation.”

This saying, which became a sort of ‘mantra,’ helped me accept the idea that this book would never really be finished, and that it would in any case never be perfect. This realization was all the more important taking into account the speed and scope of legislative and judicial development in China, which meant that the information contained in this book could become obsolete at any time, even before its publication.

Thus, this third edition, which includes new legislative, judicial and practice developments from summer 2010 to end of 2011, is to be seen as a further attempt to come a bit closer to completion.

Again, I wish to thank all those, who have supported, assisted and encouraged me in the continuation of my research and analysis, and in particular Mr. Zhong (Vincent) Guan and the interns at WunschARB for their help in finding relevant information and documents and shedding light on many difficult issues.

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