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FEATURES OF THE SYSTEM OF APPEALING AGAINST CHINESE PEOPLE'S COURTS RULINGS ON REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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Introduction: *the article deals with the issues of appealing against rulings of Chinese people's courts on refusal of recognition and enforcement of foreign arbitral awards.*
Purpose: *to systemize the existing problems of these appeals. The objectives of the article are as follows: to analyze the issues of appealing against rulings of Chinese people's courts on refusal of recognition and enforcement of foreign arbitral awards, to reveal gaps in the PRC legislation in this sphere, to make a comparison with the relevant legislation of Russia, as well as to suggest the ways to fill the gaps and improve the legislation of the PRC.*
Methods: *the study is based on general scientific methods (analysis, induction and deduction, and others) and a specific scientific method (legal comparative method).*
Conclusions and results: *the right to appeal against court rulings is a crucial guarantee for protection of rights and interests of legal persons as well as individuals in order to fairly decide a controversy. The PRC legislation does not clearly regulate the procedure for recognition and enforcement of foreign arbitral awards in whole, as well as in part of issues related to appealing against decisions of the PRC People's Courts in respect to refusal of the abovementioned recognition and enforcement. The "preliminary report" system, introduced in the PRC in 1995, to some extent replaced the procedure of appealing against People's Court rulings on the said category of cases. However, this system has the following problems: 1. the trial of such cases passes through three instances, contradicting Chinese legislation, where only two instances are officially applied; 2. the principle of exclusive jurisdiction is violated; 3. the principle of court's independence is abused. In comparison with the PRC, the Russian legislation in this sphere got more specific development, in particular cassational procedure grants the right to appeal. Therefore, the "preliminary report" system is outdated and has a transitional character. Thus, in order to strengthen the position of arbitration as a way to settle disputes, it is necessary to prepare and conduct the relevant reform of the PRC's legislation.*

Keywords: foreign arbitral award; recognition, enforcement; New York Convention; Supreme People's Court; notice; intermediate people's court; Chinese People's Court rulings; refusal of recognition and enforcement of foreign arbitral awards

Information in Russian

ОСОБЕННОСТИ СИСТЕМЫ ОБЖАЛОВАНИЯ ОПРЕДЕЛЕНИЙ НАРОДНЫХ СУДОВ КНР ОБ ОТКАЗЕ В ПРИЗНАНИИ И ПРИВЕДЕНИИ В ИСПОЛНЕНИЕ ИНОСТРАННЫХ АРБИТРАЖНЫХ РЕШЕНИЙ

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Введение: в статье рассматриваются проблемы обжалования определений народных судов КНР об отказе в признании и приведении в исполнение иностранных арбитражных решений. **Цель:** систематизировать существующие проблемы обжалования определений народных судов КНР об отказе в признании и приведении в исполнение иностранных арбитражных решений. **Задачи:** проанализировать проблемы обжалования определений народных судов КНР об отказе в признании и приведении в исполнение иностранных арбитражных решений, установить пробелы в законодательстве КНР в данной сфере, провести сравнение с законодательством РФ, а также предложить пути восполнения таких пробелов и совершенствования законодательства КНР. **Методы:** в статье использованы общенаучные методы (анализ, индукция, дедукция и другие), а также частнонаучный метод (сравнительно-правовой). **Выводы:** право на обжалование судебных актов представляет собой важную гарантию защиты прав и интересов как юридических, так и физических лиц в части справедливого решения возникшего спора. Законодательство КНР нечетко регламентирует как процедуру признания и приведения в исполнение иностранных арбитражных решений на территории КНР в целом, так и вопросы обжалования определений народных судов КНР в отношении отказа в таком признании и приведении в исполнение. Система «предварительного доклада», введенная в КНР в 1995 г., в определенной степени заменила процедуру обжалования определений народных судов по вышеуказанным категориям дел. Однако у данной системы существуют следующие проблемы: 1) рассмотрение указанных категорий дел проходит через три судебные инстанции, что противоречит законодательству Китая, где применяется система рассмотрения дел только в двух инстанциях; 2) нарушается принцип родовой подсудности; 3) нарушается принцип независимости народных судов при рассмотрении дел. В отличие от КНР законодательство РФ в области данных категорий дел получило более детальное развитие, в частности кассационный порядок предоставляет право на обжалование. Следовательно, система «предварительного доклада» является устаревшей и имеет переходный характер. Поэтому в целях укрепления положения арбитража как способа разрешения споров необходимо подготовить и провести реформу законодательства КНР.

Ключевые слова: иностранное арбитражное решение; признание; приведение в исполнение; Нью-Йоркская конвенция; Верховный Народный Суд; уведомление; народный суд средней ступени; определение народных судов КНР; отказ в признании и приведении в исполнение иностранных арбитражных решений

Introduction

At the present due to conditions of development, support and provision of guarantees to the international arbitration as a form to resolve the disputes with foreign element, great attention is

paid to the procedure of recognition and enforcement of foreign arbitral awards.

With weak poorly developed and legislatively regulated system of recognition and enforcement of foreign arbitral awards, the appeal itself as well as application of arbitration to protect violated

rights and interests of the participants of the process becomes a great challenge.

In this article the author opens and analyzes one of the key moments of the procedure of recognition and enforcement of foreign arbitral awards in China – the right of the participants to appeal against Chinese People’s Court rulings for the cases of refusal of such recognition.

The right to appeal is a procedural right granted by the law to the civil procedure participants, who disagree with the decision and the ruling of the Court of Original Jurisdiction, to appeal to a higher court for review within reasonable period of time.

As a general approach, the ruling of the Chinese People’s Court refers to the form of a judicial act, which is imposed by the Chinese People’s Court on issues requiring resolution during the trial, but that does not solve the case per se.

The existing system of appeal against the Chinese People’s Court rulings for refusal of recognition and enforcement of foreign arbitral awards

It’s necessary to notice in the beginning that at the present there are no provisions exist for the appeal system alone for Chinese People’s Court rulings for recognition and enforcement of foreign arbitral awards or for refusal of their recognition and enforcement in the PRC. This judicial document is issued by Chinese People’s Court of First Jurisdiction and appears to be a stable one.

The ban to receive the claims for appeal against the abovementioned Chinese People’s Court rulings contains the following substrata.

According to Article 154 of the PRC Civil Procedure Code as of April 9, 1991, with amendment as of August 31, 2012, (hereinafter – PRC CPC) a ruling is issued in cases of:

- 1) refusal to receive the legal claim;
- 2) objections regarding subject-matter jurisdiction;
- 3) return of the legal claim;
- 4) interim measures and provisional executions;
- 5) receive or non-receive of refusal from the legal claim;
- 6) suspension or termination of proceedings on the case;
- 7) writ of errors for court awards;
- 8) suspension or termination of executive proceeding;

9) cancelation or refusal to execute the arbitral award;

10) refusal to execute the debt obligation document justified by a notary office and providing obligatory execution;

11) in other cases needed the issue of the ruling.

The ruling issued under the paragraphs 1, 2, and 3, mentioned above, can become a matter of appeal¹.

In 1987 The Supreme Chinese People’s Court published the Notice on Implementing the convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – Notice)². It stipulates that a competent Chinese People’s Court must check the circumstances provided by the New York Convention as of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – New York Convention)³, after acceptance of claims for recognition and enforcement of foreign arbitral award, a people’s court must admit the legal value of a foreign arbitral award and enforce it according to the procedure provided by PRC law except by the circumstances listed in paragraphs 1, 2 of Article 5 of New York Convention.

Upon determining one of the abovementioned circumstances, the Chinese People’s Court imposes a ruling of refusal of recognition and enforcement of foreign arbitral awards. Thus, the Supreme Chinese People’s Court hasn’t settled the provisions on appeals against rulings of Chinese People’s Courts to refuse recognition and enforcement of foreign arbitral awards.

However, after a more detailed analysis of Chinese legislation, there can be made an assumption about the absence of sufficient grounds for the ban to appeal against the rulings of Chinese People’s Courts to refuse recognition and enforcement of foreign arbitral awards.

The PRC CPC does not define clearly the possibility of appeal the Chinese People’s Court rulings in respect of namely the cases of recognition and enforcement of foreign arbitral awards, as Article 154 of PRC CPC does not permit to submit the appeals for the cases of refusal to execute the arbitral awards, and it does not determine whether

¹ Available at: http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=183386&keyword=%E8%AF%89%E8%AE%BC%E6%B3%95&EncodingName=&Search_Mode=accurate (accessed 13.09.2015).

² Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=3255> (accessed 13.09.2015).

³ Available at: <http://www.uncitral.org/pdf/1958NYConvention.pdf> (accessed 13.09.2015).

it is possible to ban the submission of appeals in cases involving the recognition of foreign arbitral awards.

The PRC CPC contains only Article 283 related to the recognition and enforcement of foreign arbitral awards in China: "...the recognition and enforcement of foreign arbitral awards in China is carried out by direct submission by the party itself of the claim to the Intermediate People's Court at the area of residence (location) of the debtor or the area of his property, and the People's Court shall decide on the recognition and enforcement of a foreign arbitral award in accordance with the international agreements, signed by the PRC or in which it is involved, or on the basis of reciprocity".

In this article PRC CPC does not provide a clear rule whether it is allowed or not to appeal against a ruling on refusal to recognize foreign arbitral awards, as well as it does not provide possible legal actions in case of failure to submit appeals. Therefore, there appear certain doubts about the application of the provisions of Article 154 of PRC CPC for the ban to appeal against the Chinese People's Courts rulings to refuse the enforcement of arbitral awards for the rulings related to the recognition of foreign arbitral awards.

In order to fill some gap appeared regarding the interpretation of the provisions of Article 154 of PRC CPC, the Supreme Chinese People's Court has issued several Clarifications on individual cases of appeal against People's Courts rulings, namely:

1. June 26, 1996, Clarifications On the People's Courts' Refusal to Receive for Consideration the Cases of Disagreement and Revision of Rulings about Refusal to Enforce Arbitral Awards of the Supreme People's Court of China¹.

2. April 23, 1997, Clarifications On the Matters of Appeal against People's Courts Rulings of Cancellation of Arbitral Awards or Refusal to Receive the Claims, of the Supreme People's Court of China².

3. February 11, 1999, Clarifications On the Matters of Receive Claims by People's Courts for Revision of Chinese People's Courts Rulings Regarding Cancellation of Arbitral Awards, of the Supreme People's Court of China³.

¹ Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=15049> (accessed 13.09.2015).

² Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=17117> (accessed 13.09.2015).

³ Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=21350> (accessed 13.09.2015).

But according to the abovementioned acts of the Supreme Chinese People's Court the matters of appeal against people's courts' rulings regarding the refusal to recognize arbitral awards have not received clarification.

“Preliminary Report” System and its Comparative Legal Analysis with the existing system of the Russian Federation

At the moment the system of “preliminary report” regarding the cases of refusal of recognition and enforcement of foreign arbitral awards is a unique system of appeal against the Chinese People's Courts rulings on the recognition and enforcement of foreign arbitral awards [3, p. 53]. It was implemented by the Supreme Chinese People's Court Notification On Consideration of the People's Courts Matters Related to Foreign Arbitration, and Foreign-related Arbitration, as of August 28, 1995⁴.

Under this system, if the Intermediate People's Court of the PRC after receive for consideration a case of recognition and enforcement of foreign arbitral awards finds the reasons to refuse the recognition and enforcement, it must send a request to the higher court, and subsequently to the Supreme People's Court of China.

Thus, on the basis of the abovementioned facts it is possible to make the following conclusions:

1. Consideration of these categories of cases goes through three court instances, contrary to Chinese law, which applies the system of cases consideration in two instances only.

2. It violates the principle of tribal jurisdiction [5, p. 413–414], since, in accordance with Article 283 of the PRC CPC, the cases on the recognition and enforcement of foreign arbitral awards are under jurisdiction of intermediate national courts, but in fact the right to put the decision regarding the recognition and enforcement of foreign arbitral awards is handed to the Supreme Chinese People's Court and high and intermediate people's courts just perform the function of conduct a preliminary consideration of such cases.

3. It violates the principle of independence of the people's courts in consideration of cases [4, p. 5, 8].

The “preliminary report” system was created by the Supreme Chinese People's Court in order to

⁴ Available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=13496> (accessed 13.09.2015).

prevent abuse, errors and violations of the law by lower courts. But in this case, “the reverse side of the coin” is the absence of clear procedural rules, which adversely affects the administration of justice by the judicial bodies.

Unlike the PRC, the Russian Arbitral Court rulings of the recognition and enforcement of foreign arbitral awards, or cancelation of their recognition and enforcement may be appealed in a higher court on appeal under cassational procedure, as P. 3 of Art. 245 of the Russian Arbitral Procedure Code states, as well as it is further explained in the Resolution 36 On the Application of the Russian Arbitral Procedure Code for Hearing of Cases in the Arbitral Court of Appeal Instance, of the Plenum of the Supreme Russian Arbitral Court as of May 28, 2009¹, and the Resolution 52 On the Application of the Provisions of the Russian Arbitral Procedural Code for the Revision of the Judicial Acts due to New or Newly Discovered Facts, of the Plenum of the Supreme Russian Arbitral Court, as of June 30, 2011².

Conclusion

The author thinks that the “preliminary report” system which included some of the functions of the system of appeal is a transitional period in the sphere of recognition and enforcement of foreign arbitral awards in the PRC and is obviously outdated. It does not meet the principles of modern civil procedure and cannot completely protect the interests of its participants [2, p. 165].

Before, in his article published in 2011 [1, p. 134–137], the author has touched upon the subject of necessity to reform China’s legislation on the recognition and enforcement of foreign arbitral awards, but till now nothing has changed.

That is why in order to strengthen the arbitration as a method of dispute resolution there should be put a focus on the preparation and implementation of the Chinese law reform in relation to the appeal system of the Chinese People’s Courts rulings of refusal of recognition and enforcement of foreign arbitral awards.

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