



仲裁地的概念及裁决的执行

Seat of arbitration and enforcement of awards

在国际商事仲裁中，“仲裁地”（seat of arbitration）是一个牢固确立且为国际上很多国家认可的基本概念，对仲裁的进行和仲裁裁决的执行有着至关重要的影响。简单来说，仲裁地指仲裁的法律地或者司法管辖地，它决定了管理仲裁程序所适用的法律为仲裁地法（*lex arbitri*），以及仲裁地法院对仲裁的支持管理或监督介入的范围和程度。尽管在许多案件中，仲裁地也是实际开庭的所在地，但仲裁地这一概念发展至今，更多的是一个法律上而非纯地理上的概念。

对仲裁双方而言，仲裁地的选择关乎对法律框架与仲裁法的比较。在伦敦玛丽皇后大学于2015年开展的一项国际仲裁调查中，受访者表示影响仲裁地选择的因素包括：仲裁地的法律体制和国内仲裁法是否较完善、

The concept of the “seat of arbitration” is a well established one that is recognized by many countries, and which has a critical impact on the conduct of international arbitrations and enforcement of arbitral awards.

The seat of an arbitration refers to the legal place of the arbitration or the legal jurisdiction to which the arbitration is anchored. It determines that the arbitration law of the seat will be the *lex arbitri* applicable to the arbitral proceedings, and the scope and extent of the support, supervision or intervention the court in the seat of arbitration has over the arbitration. While in many cases the seat is also the

place in which the hearing is conducted, the concept of the “seat of arbitration” is nowadays seen as more of a legal than geographical concept.

The choice of arbitration seat is often seen by parties as a choice between legal frameworks and arbitration laws. In a 2015 survey on international arbitration conducted by Queen Mary University of London, respondents stated that their preference for certain seats over others is premised upon certain factors, including the seat’s established formal legal structure, the neutrality and impartiality of its legal system, the national arbitration law and its track record for enforcing agreements to arbitrate and arbitral awards.

公平和中立程度，执行仲裁与仲裁裁决记录是否良好等。

一般而言，仲裁地决定了仲裁裁决的“国籍”。例如，如当事人选择在英国仲裁，则该案中产生的仲裁裁决为英国仲裁裁决，无论仲裁管理机构、当事人或合同的实体法是否与英国相关。

仲裁裁决国籍对于裁决如何得到承认和执行起着关键作用。许多国家根据仲裁地对境内和境外裁决加以区分，并为两类裁决的承认和执行订立相关的法律制度。例如，《1996年英国仲裁法》第三条对“仲裁地”（seat of arbitration）进行了定义、《香港仲裁条例》（法例第609章）和《新加坡国际仲裁法》（法例第143A章）中均明确使用了“仲裁地点”（place of arbitration）这一词。

中国对于境内外裁决也有分类，但并未按照上述通行的仲裁地的概念来划分。事实上，中国目前的立法中并没有明确的“仲裁地”的概念。《中华人民共和国仲裁法》没有仲裁地（seat）一词，而是创造了“仲裁委员会所在地”（place of arbitration commission）这一概念。这一规定曾一度导致司法实践对裁决国籍的认定存在偏差和不确定性。例如，司法实践对于如何认定外国仲裁机构在中国仲裁产生的裁决国籍存在不确定性。

以国际商会仲裁院为例，该仲裁院在中国仲裁产生的裁决，按照上述讨论的国际仲裁的一般立法与实践，该等裁决应为中国作出的裁决，但由于现行仲裁立法中的不明确性，有些司法实践按照仲裁机构的国籍确定仲裁裁决的国籍，将该等裁决作为境外裁决。司法判例中不乏人民法院将国际商会在法国以外的地区的仲裁案中产生的裁决认定为法国裁决的情况。

《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》中，就国际商会国际仲裁院的仲裁庭在香港作出的裁决，当时最高人民法院认为，由于国际商会系在法国设立的仲裁机构，因此审查相关裁决的承认和执行应适用《1958年关于承认和执行仲裁裁决公约》（《纽约公约》）的规定，而不应适用《最高人民法院关于内地与香港特别行政区相互承认和执行仲裁裁决的安排》（《安排》）的规定。

在“瑞士德高钢铁公司（DUFERCO）与宁波市工艺品进出口有限公司合同争议案”中，涉及国际商会仲裁院在北京进行的仲裁所做出的裁决。宁波市中级人民法院在有关裁决的承认与执行程序中，根据《纽约公约》

In most major arbitration jurisdictions, the seat of an arbitration is determinative of the eventual award's nationality. For example, when parties choose to arbitrate in England, the arbitral award made in this arbitration will be an English arbitral award, regardless of the nationality of the arbitral institution, the parties, or the law governing the substantive dispute.

The principal significance of the nationality of an arbitral award is that it ultimately determines how it will be recognized and enforced. Most major arbitration jurisdictions maintain a distinction between domestic awards and foreign awards, and set out a separate

been uncertainty regarding the determination of the nationality of an award arising out of an arbitration conducted in the PRC by a foreign arbitral institution.

Taking the example of an award arising from arbitral proceedings administered in China by the Court of Arbitration of the International Chamber of Commerce (ICC), such an award would ordinarily be recognized as a Chinese award in accordance with the prevalent approach in international arbitration practice. However, due to the ambiguity referred to above under the current PRC framework, there were instances where such an award were treated as a foreign award in the PRC by virtue of the fact



仲裁裁决国籍对于裁决如何得到承认和执行起着关键作用

The principal significance of the nationality of an arbitral award is that it ultimately determines how it will be recognized and enforced

statutory regime governs the recognition and enforcement of each category. For example, section 3 of the UK Arbitration Act 1996 defines the “seat of arbitration”, and both the Hong Kong Arbitration Ordinance (Cap. 609) and Singapore International Arbitration Act (Cap. 143A) refer to the term “place of arbitration”.

This dichotomy of regimes for domestic and foreign awards likewise exists in the People's Republic of China, but the means by which a foreign award is distinguished from a domestic award is very different. The current Arbitration Law does not have a concept of the “seat of arbitration”. Instead, it creates a concept called “place of arbitration commission” (仲裁委员会所在地). This term has caused a degree of uncertainty and ambiguity in determining the nationality of an arbitral award. For example, there has

that the ICC is a foreign arbitral institution. In this regard, there were cases where the PRC courts have recognized ICC awards as French awards, despite the fact that the proceedings were not conducted in France.

The Supreme People's Court (SPC), in its Reply Regarding Not Enforcing ICC Final Award, was of the view at the time that an ICC award arising out of proceedings conducted in Hong Kong ought to be recognized and enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), instead of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (the arrangement) because ICC was an arbitral institution established in France.

第一条裁定该裁决为一个法国(因此为非境内的)裁决,原因是作为仲裁机构的国际商会总部设于法国。

在“TH&T 国际公司 (TH&T International Corp.) 与成都华龙汽车配件有限公司申请承认和执行国际商会国际仲裁院裁决纠纷案”中,双方签署的仲裁协议订明,仲裁“根据国际商会国际仲裁院的仲裁规则在洛杉矶进行”。在仲裁的承认和执行程序中,成都市中级人民法院裁定有关裁决为法国裁决而不是美国裁决(尽管仲裁在洛杉矶进行),原因同样是国际商会总部位于法国。

当裁决的国籍根据仲裁机构的国籍而非仲裁地决定时,会导致概念混淆继而影响裁决执行的依据。这种做法忽略了仲裁地法和监督法院在仲裁程序中所扮演的角色。

令人鼓舞的是,近期的发展显示中国在司法实践中正逐渐接受认可仲裁地或仲裁所在地的概念。例如,《中华人民共和国涉外民事关系法律适用法》有明确使用“仲裁地”(place of arbitration)一词。另外,最高人民法院在《关于香港仲裁裁决在内地执行的有关问题的通知》中明确指示,当事人向人民法院申请执行在香港作出的临时仲裁裁决、国际商会仲裁院等国外机构在香港作出的仲裁裁决的,应当依照《安排》进行审查,从而确定了该等裁决的“国籍”为香港。

近期,《最高人民法院关于不予执行国际商会仲裁院第 18295 / CYK 号仲裁裁决一案请示的复函》中再次确认了对香港作出的裁决的“国籍”的认定标准。该案当事人向泰州市中级人民法院申请执行国际商会仲裁院指定的独任仲裁员在香港作出的裁决,最高人民法院确认人民法院应当依照《安排》的规定进行审查。

同样的,如当事人选择中国仲裁机构在海外仲裁,执行中也将涉及对裁决“国籍”的确认。2016 年 12 月,南京市中级人民法院在首例执行中国国际经济贸易仲裁委员会香港仲裁中心(贸仲香港)的仲裁裁决案中,确定按照《安排》的有关规定执行,将贸仲香港管理的仲裁案中产生的裁决作为香港裁决进行执行审查。

综上所述,近年来司法实践越来越与国际接轨,作出了许多符合国际仲裁惯例的判定。但由于历史局限性,中国的仲裁立法关于国际商事仲裁的规范与国际认可的惯例间尚存一定出入。如在修订《仲裁法》时明确引入“仲裁地”的概念,将为仲裁裁决的“国籍”认定提供明确法律依据和指引,有利于境外或境外机构作出的仲裁裁决在国内的执行。

In the case of *Duferco v Ningbo Arts & Crafts Import & Export*, the award in question arose out of an ICC arbitration conducted in Beijing. The Ningbo Intermediate People's Court ruled that the award was considered a French (and therefore non-domestic) award within the context of article I of the New York Convention because the arbitral institution, the ICC, was headquartered in France.

This approach is also exemplified in the case of *TH&T International v Chengdu Hualong Automobile Parts*, where the arbitration agreement between the parties provided for arbitration “under the Rules of Arbitration of the International Chamber of Commerce in Los Angeles”. In recognition and enforcement proceedings, the Chengdu Intermediate People's Court held that the award in question was a French award again by virtue of the French origin of the ICC, as opposed to an American award by virtue of the fact that proceedings were seated in Los Angeles, for the same reason that the ICC was headquartered in France.

Conceptual difficulties arise when the nationality of an award is determined with regard to the nationality of the arbitral institution rather than the seat of arbitration. This approach ignores the fact of the *lex arbitri* and the role that supervisory courts play in arbitral proceedings.

It is inspiring to see that recent developments hint at PRC jurisprudence warming to the concept of a seat or place of arbitration. For example, the PRC Law on Choice of Law for Foreign-related Civil Relationships makes express reference to the term “place of arbitration” (仲裁地). Further, the SPC has issued a notification stating that awards rendered in *ad hoc* arbitrations, or ICC awards made in Hong Kong, should be enforced in accordance with the arrangement, which in a way confirms that the “nationality” of such awards is Hong Kong.

Recently, in its Reply Regarding Non-Enforcement of ICC Arbitral Award, the SPC again confirmed the standard of

determining the nationality of an award arising out of Hong Kong arbitral proceedings. In that case, an application was made to the Taizhou Intermediate People's Court for the enforcement of an award made by an ICC-appointed sole arbitrator in Hong Kong. The SPC confirmed that the Intermediate People's Court should review the enforcement application in accordance with the arrangement.

Similarly, where the parties opt for overseas arbitral proceedings to be administered by Chinese arbitral institutions, it would also involve the question of determining the nationality of the award. In December 2016, in the case of *Ennead Architects International LLP v R & F Nanjing Real Estate Development*, which involved enforcement proceedings in respect of an award arising out of proceedings conducted by the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Arbitration Centre, the Nanjing Intermediate People's Court confirmed that it would consider enforcement of the award in accordance with the provisions of the arrangement.

Recent developments in PRC judicial practices have gradually brought the PRC arbitration framework more in line with prevalent international arbitration practices. Due to historical factors, there remain to be some disparities between the PRC and international arbitration spheres. In this regard, the introduction of the concept of the “seat of arbitration” would provide greater clarity as to the determination of the nationality of arbitral awards, which would be of considerable assistance in the enforcement of arbitral awards made in a foreign country, or by a tribunal appointed by a foreign arbitral institution.

杨炎龙是瑞生律师事务所驻香港合伙人。
颜鸿杰、王骁是瑞生律师事务所驻香港律师
Ing Loong Yang is a partner at Latham & Watkins
in Hong Kong. Desmond Gan and Tina Wang are
associates at the firm in Hong Kong