Introduction
On the 3rd and 4th of March 2016, China hosted for the first time the International Bar Association Conference in Shanghai. The conference comprised a series of seminars and discussion panels on international arbitration and litigation with a focus on Chinese law and the Chinese legal system. On the morning of the second day of the conference, Justice Hongyu Shen of the People’s Supreme Court of the People’s Republic of China gave an address on the enforcement of foreign arbitration awards in China. What she had to say was of great interest to the delegates and will give a significant degree of comfort to arbitration practitioners and parties doing business in China.

In this article, we highlight the key points of Justice Shen’s address, set out the procedure for enforcing foreign arbitration awards in China and considers China’s track record of enforcing foreign arbitral awards. We also look at the future of international arbitration in China and give our views on how we see international arbitration developing in the middle kingdom.

International arbitration in China – separating fact from fiction
Since the remarkable rise of China’s economy, much has been written about the Chinese legal system, some of which has cast China in a negative light. In reality, the Chinese legal system compares favourably to the legal systems of other developing economies, particularly when it comes to arbitration and the enforcement of foreign arbitral awards.

In her address to the IBA, Justice Shen pointed out that the Chinese courts actually have a fairly robust record of enforcing foreign arbitral awards, which is considerably better than that of many other jurisdictions. Justice Shen noted that China is a signatory to the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention) and takes its obligations under the convention seriously. She went on to say that of the cases that have come before the Chinese courts since China acceded to the New York Convention, only a handful of awards have been dismissed.

In order to put Justice Shen’s remarks in context, it is necessary to consider the procedure for the recognition and enforcement of foreign arbitral awards in China and the Chinese courts’ track record of enforcing foreign awards.

Recognition and enforcement of foreign arbitral awards in the PRC under the New York Convention
China’s ratification of the New York Convention
The New York Convention was acceded to by China and entered into force in 1987. The notice confirming the implementation of the New York Convention was issued by the Supreme People’s Court (the Notice) with two reservations:
1. A reciprocity reservation; and,
2. A commercial reservation.

Pursuant to the reciprocity reservation, China will only recognise and enforce awards made in the territory of another contracting state. In the situation of any discrepancy between the stipulations of the New York Convention and those of the Chinese law, the New York Convention prevails.

Pursuant to the commercial reservation, China will apply the New York Convention only to awards where the underlying dispute arises out of a contractual or commercial legal relationship. This covers any relationship of economic rights and obligations arising in contract, tort or specific commercial relationships. Disputes between a foreign investor and a government of a host state are not included.
Recognising an award
In order to have an award recognised under the New York Convention, the party seeking to enforce the award must file an application with the Intermediate People’s Court in the province where –
1. (in the case of a natural person) the counterparty is domiciled or has a place of residence; or
2. (in the case of a company) the counterparty’s principal place of business is located; or
3. (in the case of a counterparty which does not have any domicile, residence or principal business office in China) the counterparty has property located.

Grounds for invalidating an award
Article 4 of the Notice and Article 274 of the PRC Civil Procedure Law set out the circumstances where a foreign arbitral award may be invalidated. Those provisions in turn make reference to Articles V(1) and V(2) of the New York Convention, which provide that a contracting state may decline to recognise an award if:
1. The parties to the agreement containing the arbitration clause were under some incapacity or the agreement is not valid under either the law of the agreement or the law of the country where the award was issued (Article V(1)(a));
2. The party against whom the award is made was not given proper notice of the appointment of the tribunal (Article V(1)(b));
3. The award deals with issues falling outside the tribunal’s terms of reference V(1)(c);
4. The composition of the tribunal was not in accordance with the agreement or the law of the country where the arbitration took place (Article V(1)(d));
5. The award has not become binding, or has been set aside or suspended by a competent authority of the country where the award was issued (Article V(1)(e));
6. The subject matter of the dispute is not capable of being referred to arbitration under the law of the country where enforcement is sought (Article V(2)(a));
7. The recognition or enforcement of the award would be contrary to public policy Article (V(2)(b)).

The reporting mechanism
An interesting feature of the Chinese court system in relation to international arbitration is the internal reporting system.

If the Intermediate People’s Court declines to recognise and enforce a foreign arbitral award, this must be reported to the Higher People’s Court in that province (or municipality, city or autonomous region as the case may be).

Where the Higher People’s Court upholds the decision of the Intermediate People’s Court, that decision in turn must be reported to the Supreme People’s Court for a final review. No final ruling on the award can be given until the Supreme People’s Court has completed its review.

Where the court declines to recognise and enforce a foreign arbitral award, the Higher People’s Court or the Supreme People’s Court, as the case may be, can reverse that decision and order the award to be recognised and enforced.

It is important to note here that the reporting mechanism is asymmetrical. If an intermediate people’s court decides to recognise and enforce a foreign arbitral award, it can do so on its own accord, without having to report it to the superior courts.

While this procedure takes time, it provides an important safety valve in cases where there may have been a miscarriage of justice.

Enforcement
When an award has been recognised, the successful party can request the court enforces it against the award debtor.

Upon receipt of application for enforcement, the competent court issues a ‘Notice of Enforcement’ to the award debtor requiring to pay the award. Where the debtor fails to perform its obligations in the Notice of Enforcement, the debtor is required to report its financial status to the court. If the debtor refuses to cooperate or provides a false report, the court may impose a fine or order the detention of the debtor. The debtor will also be liable to pay penalty interest until the debt is finally paid.

The Chinese courts have a number of tools at their disposal to enforce awards. These include the power to seize, freeze,
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transfer or sell the property of the debtor and the power to order the freezing and transfer of money. The courts can also issue a ‘Notice of Assistance in Enforcement’ to relevant authorities to assist with the tracing, seizure and transfer of the debtor’s property and money, and the detention of the debtor.

China’s track record on the recognition of foreign arbitral awards
Justice Shen noted in her address to the IBA that since China acceded to the New York Convention, there have been less than 30 cases where an arbitration award was not ratified by the PRC courts. The majority of those cases have concerned situations where there was found to be no arbitration agreement between the parties or where the tribunal ruled on issues that fell outside its terms of reference.

According to Chinese government statistics issued in 2014, only 14 percent of applications to annul an award (whether domestic or international) were successful. In the majority of cases, the award was ratified and enforced. By any measure, that makes China a fairly arbitration-friendly jurisdiction.

That is not to say the picture is entirely rosy. While China has a reasonably good record in recognising and enforcing foreign arbitral awards, enforcement can sometimes be difficult in certain parts of the country. In the major cities and commercial hubs, the courts tend to enforce foreign arbitral awards without too many issues. However, this is not necessarily the case in some of the provinces. Outside of the big cities, parties seeking to enforce foreign arbitral awards may encounter local protectionism and bureaucratic red tape, which may make enforcement difficult.

The future of international arbitration in China
In the last 20 years, the popularity of arbitration in China has risen with the country’s economy.

According to government statistics, the overall arbitration case load in Mainland China now exceeds 110,000 cases a year, making China the biggest user of arbitration in the world. In 2014, there were 1785 foreign arbitrations (including cases arising under contracts between a Chinese entity and a foreign entity or which contained a foreign element), rising from 1219 in 2010.

Altogether, China has 258 regional and international arbitration centres and commissions. Of those, the most important is the China International Economic and Trade Arbitration Commission (CIETAC). Established in 1956, CIETAC has offices all over China operating as a single unified institution. CIETAC’s rules reflect international best practice and its panel of arbitrators include some of the leading arbitration practitioners in the Asia Pacific region. Since its inception, CIETAC has heard over 20,000 concluded arbitration cases involving more than 70 countries. Its awards have been recognised and enforced in more than 60 countries and regions outside China. Since 1990, CIETAC’s caseload has been one of the heaviest among the world’s major arbitration institutions, averaging approximately 1,300 cases annually.

In response to the growing demand for arbitration services in China, earlier this year, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the International Commercial Court all opened representative offices in Shanghai to promote international arbitration in the region. All of these developments, coupled with China’s solid record of recognising foreign arbitral awards, are testament to the growing popularity and acceptance of arbitration in China.

Given China’s increasing focus on foreign investment, which has been encouraged by the government under the ‘One Belt One Road’ policy, it is anticipated that international arbitration will continue to grow in popularity as more and more state owned and private sector enterprises invest in overseas markets.

Conclusion
Contrary to the perceptions that many observers hold, China has a robust system for the recognition and enforcement of foreign arbitral awards, and a fairly good track record in upholding foreign arbitral awards.

Given the increasing popularity of arbitration in China, the expected increase in international trade between China and the rest of the world under the One Belt One Road initiative and the increasing attention being paid to China by other international arbitration centres, the future for international arbitration in China seems very bright. Based on what we have seen to date, China will continue to grow as a force in international arbitration. As to whether it will become a superpower, only time will tell.