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# Recognition and Enforcement of International Commercial Arbitration Awards

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RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL  
ARBITRATION AWARDS----

FOCUSING ON REGULATIONS AND PRACTICE IN CHINA

by

SHOUHUA YU

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

Arbitration is an effective way to solve disputes, through which parties from different countries can be partially free from anyone's local jurisdiction. However, the recognition and enforcement of international arbitration awards still rely on the national court system. Since China opened its door to the world, more and more commercial disputes have been settled through arbitration. However, many foreign investors and writers have complained about the defects in the recognition and enforcement of arbitration awards in China. This paper will look into the causes of these defects in, and try to find ways to resolve the defects.

INDEX WORDS: recognition and enforcement of international arbitration awards, China

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## CHAPTER 1

### INTRODUCTION

Arbitration, the most formal and oldest method of Alternative Dispute Resolution<sup>1</sup> in international commerce,<sup>2</sup> has become the most popular method to resolve international commercial disputes since the mid-1980s<sup>3</sup> Parties welcome arbitration mainly because it provides a certain degree of neutrality. Arbitration helps the parties to be partially free from anyone's local jurisdiction, a very important factor to foreign investors.<sup>4</sup>

However, arbitration cannot be completely independent from a national jurisdiction system, especially since the arbitration award must be recognized and enforced by local courts. For decades, many conventions attempted to fascinate the recognition and enforcement of international arbitration awards throughout the world. These conventions such as the New York Convention had a significant impact on the development of arbitration in the international context.

After China opened its door to the world, arbitration was used as a means to meet the requirement of daily increasing foreign investments in the country. Its arbitration system has been built up and its national arbitration law was made after the UNCITRAL Model Law. After China became a new member of World Trade Organization, international investment is expected to grow even more quickly, so arbitration in China should develop in line with recognized

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<sup>1</sup> Details (hereinafter "ADR")

<sup>2</sup> Lucy V. Katz, *Enforcing an ADR Clause – Are Good Intentions All You Have?*, 26 Am. Bus. L.J. 575, 577 (1988).

<sup>3</sup> Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 Bus. Law. 557, 581 (1990).

<sup>4</sup> Shengchang Wang, *Resolving Disputes in the P.R.C.* 48 (1996).

international standards. However, since the importance and influence of arbitration in China has only developed in recent years, there are still some defects in its regulations and practice. One group of defects involves the recognition and enforcement of arbitration awards in China, as many foreign investors and writers have complained.<sup>5</sup> Some foreign writers criticized the defects in the enforcement of arbitration awards as “legendary for victorious parties seeking to enforce awards in China.”<sup>6</sup> Others claim that “China’s spotty record in honoring international arbitration awards even constitute one of the reasons cited for the delay in China’s admittance to the World Trade Organization.”<sup>7</sup> This paper will examine these defects, introduce the efforts made by Chinese legal authorities, discuss the regulations and practices in other countries such as the US, and try to find ways to minimize these defects.

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<sup>5</sup> Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 Am. J. Comp. L., 249, 250 (2001 Spring). Also see Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investor’s Risk in China*, 8 Pac. Kim L. & Pol’y 393 (March, 1999).

<sup>6</sup> Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 Va. J. Int’l L. 615, 639(1994).

<sup>7</sup> Brown & Rogers, *supra* note 143, at 348.

**CHAPTER 2**  
**RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL**  
**ARBITRATION AWARD**

**A. A Brief Introduction to International Commercial Arbitration**

**I. The Development of International Commercial Arbitration**

Arbitration, one type of ADR method,<sup>8</sup> is a dispute resolution process where a neutral third party who is authorized voluntarily by the disputing parties and in accordance with certain procedural rules renders a decision that is final and binding on those parties.<sup>9</sup> “Arbitration is a private, generally informal, and non judicial trial procedure for adjudication disputes.”<sup>10</sup> It occupies “a space between business and politics,”<sup>11</sup> and has long–existed throughout the world as an alternative to judicial resolution of local disputes.<sup>12</sup>

After World War II, with the explosive development of international transactions and business,<sup>13</sup> the number of international commercial disputes continues increasing.<sup>14</sup> Compared with disputes in domestic business, disputes in international business are more likely to occur due to the different cultural background of the parties involved, language barriers, and other

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<sup>8</sup> Andrew & Sagartz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 Ohio St. J. on Disp. Resol. 675, 675 (1998).

<sup>9</sup> Wang, supra note 4, at 5. For other definition of “arbitration”, see Gary B. Born, *International Commercial Arbitration in the United States*, Commentary & Materials, 1 (1994).

<sup>10</sup> Thomas E. Carbonneau, *Cases and Materials on The Law and Practice of Arbitration* 2 (2<sup>nd</sup> ed. 2000).

<sup>11</sup> Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* 274 (1996).

<sup>12</sup> Wang, supra note 4, at 5.

<sup>13</sup> Frank L. Acuff, How to Negotiate Anything with Anyone Anywhere Around the World 11-13 (1993). Transnational business involves six main types of transactions: joint ventures, licensing agreements, turnkey projects, subcontracts, management contracts and financial arrangements.

<sup>14</sup> Thomas S. Mackey, *Litigation Involving Damages to U.S. Plaintiffs Caused by Private Corporate Japanese Defendants*, 5 Transnat'l Law. 131, 150 (1992).

cultural reasons.<sup>15</sup> Since arbitration resembles the familiar litigation scheme<sup>16</sup> by permitting the parties to avoid many of the problems associated with litigation<sup>17</sup> while having its own merits over litigation<sup>18</sup>, arbitration is viewed as a normal way to solve international commercial disputes, making international arbitration grow quickly.<sup>19</sup>

## **II. The Merits of International Commercial Arbitration**

Foreign investors look at arbitration as a main method to solve disputes mainly because of the following natures. First, flexibility and adaptability of the arbitration procedure is the primary advantage of international commercial arbitration. This scheme permits parties from two different countries to exercise a great deal of control over how a dispute is resolved.<sup>20</sup> Parties can choose the place of arbitration, the nationality or qualifications of the arbitrators, and the language of the arbitration process. Furthermore, the parties can even choose the applicable substantive law, thus “circumventing a country’s fledgling commercial law that may not provide the predictability that the parties seek.”<sup>21</sup>

Second, neutrality is another advantage of arbitration since the parties are able to insulate themselves, at least partially, from real and perceived local biases that can influence a proceeding existing in a hostile jurisdiction, in a foreign language, and before an adjudicator who may be

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<sup>15</sup> Jeswald W. Salacuse, *Making Global Deals* 45 (1991).

<sup>16</sup> Like judgment, arbitration award is binding and enforceable.

<sup>17</sup> For foreign investors, to have disputes solved in other countries always means unfamiliar laws, legal procedures, foreign languages, possible preferences of the judge, and even national bias.

<sup>18</sup> Compared with litigation, arbitration is efficient and cost saving. Furthermore, arbitration provides privacy, sophisticated arbitrators and so on. The merits of arbitration are introduced clearly in section B of part II.

<sup>19</sup> W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *Tex. Int’l L.J.* 1, 1 (1995).

<sup>20</sup> Dezalay & Garth, *supra* note 9, at 273.

<sup>21</sup> Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 *Wm. Mitchell L. Rev.* 941, 951 (1996).

more sympathetic to the local party.<sup>22</sup> This allows the parties to extend more control over the resolution process.

Third, arbitration provides the protection of parties' privacy. Almost all types of arbitration proceeding remain confidential.<sup>23</sup> Some arbitration tribunals are not required to keep a record of the hearing either in writing or by tape,<sup>24</sup> thus making the parties' commercial secrets remaining uncovered.

Fourth, compared with the use of litigation, the use of arbitration reduces legal expenses and time needed to settle disputes.<sup>25</sup> The arbitration process is normally measured in months instead of years it can take to resolve disputes in the litigation system. While trials are dictated by detailed rules and procedures that evolved to accommodate an extremely broad array of disputes in society, arbitration procedures developed as "a streamlined alternative" to provide fast, fair and final resolution.<sup>26</sup> Furthermore, arbitration can reduce cost because of significantly reduced attorney fees and transaction costs since the party can choose the place of arbitration that is easy for all parties to access.<sup>27</sup> In the United States, people favor international arbitration mostly because of this efficiency and cost.<sup>28</sup>

Fifth, since the parties of the dispute have the right to appoint their own arbitrators,<sup>29</sup> and most arbitrators serve on different arbitration commissions are experts in certain areas.<sup>30</sup> This

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<sup>22</sup> Wang, *supra* note 4, at 48.

<sup>23</sup> *Id.*

<sup>24</sup> Arbitration Rules of China International Economic and Trade Arbitration Commission (Hereinafter CIETAC) art.43 (2000).

<sup>25</sup> Michael F. Hoellering, *World Trade: To Arbitrate or Mediate—That the Question*, *Disp. Resol. J.* 65, 67 (1994).

<sup>26</sup> Fischer & Haydock, *supra* note 19, at 954.

<sup>27</sup> *Id.*

<sup>28</sup> Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 *Geo. Wash. Int'l L. Rev.* 17, 17 (2002) The United States Senate was urged to be a contracting state of the New York Convention and adopted the Convention Act in its Chapter 2 of Federal Arbitration Act (FAA). "because the people engaged in foreign trade consider arbitration... a very economical and speedy way of settling commercial disputes." See also S. Comm on Foreign Relations, *Foreign Arbitral Awards*, S. Rep. No. 91-702, at 10 (1970) (Statement of Richard D. Kearney, Office of the Legal Adviser, Department of State).

<sup>29</sup> Robert Donald Fischer and Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable*

allows disputes to be efficiently solved by experienced arbitrators who are appointed because of their special expertise and background in a certain area.<sup>31</sup> This, too, makes arbitration a preferred way to resolve disputes.

Sixth, the multilateral conventions for the recognition and enforcement of foreign judgments are rare,<sup>32</sup> so it is difficult to enforce foreign judgments in other countries.<sup>33</sup> On the contrary, international arbitration awards are enforceable in most countries under current international conventions<sup>34</sup> especially the UNCITRAL<sup>35</sup> Model Law<sup>36</sup> and the New York Convention,<sup>37</sup> which excludes any judicial review of the substantive content of a foreign arbitration award by the court where enforcement is sought.<sup>38</sup> In some countries such as the United States, national courts even offer greater deference to international arbitral awards than to domestic arbitration awards under the New York Convention.<sup>39</sup>

Lastly, a national court judgment will not be final until after one or more appellate review, thus causing the final judgment to be very time consuming and uncertain.<sup>40</sup> However, arbitration awards are usually binding and final once they are rendered, and by allowing the parties to choose the place of arbitration, the nationality or qualifications of the arbitrators, and the

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Arbitration Agreement, 21 Wm. Mitchell L. Rev. 941, 964-965 (Spring, 1996).

<sup>30</sup> Fischer & Haydock, *supra* note 19, at 950.

<sup>31</sup> Stephen Patrick Doyle & Roger Silve Haydock, *Without Punches: Resolving Disputes Without Litigation* 17 (1991).

<sup>32</sup> Craig, *supra* note 17, at 3.

<sup>33</sup> Michael J. Mustill, *Arbitration: History and Background*, J. Int'l Arb. 41, 43 (1989).

<sup>34</sup> Mackey, *supra* note 12, at 180.

<sup>35</sup> United Nations Commission on International Trade Law, hereinafter UNCITRAL.

<sup>36</sup> The Model Law on International Commercial Arbitration, hereinafter UNCITRAL Model Law. U.N. Gaor, 40<sup>th</sup> Sess., Supp. No. 17, Annex I, at 81, U.N.Doc. A/40/17 (1985) ; 24 I.L.M. 1302. For introduction on Model Law, see Part II (III) of this paper.

<sup>37</sup> Also called Convention on The Recognition and Enforcement of Foreign Arbitral Awards, hereinafter the New York Convention, 21 U.S.T. at 2519, 330 U.N.T.S. at 38. For discussion about the New York Convention, see Part II (III) of this paper.

<sup>38</sup> The New York Convention, *supra* note 35, art. I-III.

<sup>39</sup> Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence*, 30 Tex. Int'l L.J. 205, 207-208 (1995).

<sup>40</sup> See Justice Blackmun's dissent in *Shearson v. McMahon*, 482 U.S. 220, 257-58 (1987).

applicable substantive law, it is much easier for the parties to predict the result of the dispute concerning the parties.<sup>41</sup>

## **B. Definition of Recognition and Enforcement of Arbitration Awards**

Although arbitration is viewed as a “private rule of law”,<sup>42</sup> the parties’ control over their legal destiny through arbitration is far from absolute. Since it is inherently a private system of dispute resolution, international commercial arbitration cannot supplant or function completely independently of the national court system.<sup>43</sup> “In arbitration proceedings, national courts serve two functions: assistance and control.”<sup>44</sup> National courts can be liable for refusing the application of a party to commence a lawsuit when an arbitration agreement exists in advance of the dispute. In some instances, national courts can assist in the appointment, revocation, or replacement of arbitrators.<sup>45</sup> What’s more, the recognition and enforcement of international commercial arbitration, a key function of the international commercial arbitration system, relies on national courts.<sup>46</sup> Recognition of an arbitration award means “giving effect to the award to bar litigation on the same issues settled in arbitration” while enforcement means “applying judicial remedies to assure that the award is carried out.”<sup>47</sup> In practice, if a court chooses to enforce a foreign arbitral award, it will first recognize the award then order the award’s validity and binding effect

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<sup>41</sup> Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974).

<sup>42</sup> Henry P. Devries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 Tul. L. Rev. 42, 61 (1982)

<sup>43</sup> Id. at 72.

<sup>44</sup> Id. at 47.

<sup>45</sup> Id. at 61.

<sup>46</sup> Hang Song, *Recognition and Enforcement of Arbitration Awards in International Commercial Arbitration* 24 (1<sup>st</sup> ed. 2000)

<sup>47</sup> James H. Carter, *Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues*, Presentation Before the American Bar Association Center for Continuing Legal Education, National Institute, Doing Business Worldwide (Feb. 8-10 1998), at 7.

on all parties. Recognition of an award is “an integral part of enforcement,” so recognition and enforcement are “always inextricably linked.”<sup>48</sup>

### **C. Conventions on the Recognition and Enforcement of International Arbitration Awards**

Compared with the enforcement of domestic international arbitral awards, the enforcement of international arbitral awards is much more complex and is commonly regulated by international treaties.<sup>49</sup> Historically, many international organizations have attempted to ensure the enforceability of arbitral awards by creating international treaties. Among them, the New York Convention is currently the most important international treaty concerning the recognition and enforcement of international arbitration awards.<sup>50</sup> To some degree, the enforcement of international arbitration awards means the actual enforcement of the New York Convention.<sup>51</sup> However, this does not discount the importance of other multilateral conventions such as the UNCITRAL Model Law and the Convention on the Settlement of Investment Disputes of 1965.<sup>52</sup>

#### **I. The New York Convention**

As early as 1953, to rectify the deficiencies in the Geneva Treaties<sup>53</sup> and to further facilitate the enforcement of international arbitral awards, the International Chamber of Commerce devised a draft of the New York Convention and submitted it to the United Nations Economic and Social Council. The New York Convention was discussed in the United Nations International Commercial Arbitration Conference in New York in May 1958, officially passed

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<sup>48</sup> Xiaoyang Zhang, *Settlement of Commercial Disputes with Foreign Elements Involved in Arbitration: Legal Theories and Practice in the United Kingdom*, 12 Fla. J.Int'l L. 167, 179 (1998).

<sup>49</sup> Hu Li, *Enforcement of the International Commercial Arbitration Award* 57 (1<sup>st</sup> ed. 2000).

<sup>50</sup> Mustill, *supra* note 31, at 49.

<sup>51</sup> Li, *supra* note 47, at 57.

<sup>52</sup> Hereinafter ICSID Convention. For discussion about ICSID Convention, see Part II (III) of this paper.

<sup>53</sup> The Geneva Convention consisted of the 1923 Geneva Protocol on Arbitration Clauses (Geneva Protocol) and the Geneva Convention on the Execution of Foreign Arbitral Awards (Geneva Convention). Although the Geneva Convention was replaced by the New York Convention, it marked the beginning attempt to unify and liberalize

on May 10, 1958, and took effect on July 7, 1959.<sup>54</sup> It is currently the most important convention related to the recognition and enforcement of international arbitral awards and has been hailed as the “cornerstone of current international commercial arbitration.”<sup>55</sup> Until August of 1998, one hundred and forty-five state or areas acceded to the New York Convention,<sup>56</sup> demonstrating the states’ satisfaction.

The New York Convention stipulates that international arbitral awards shall be enforced by each contracting state “in accordance with the rules of procedure of the territory where the award is relied upon.”<sup>57</sup> The reasons for refusing to enforce international arbitral awards are expressly limited to five grounds under the Article V.<sup>58</sup> The New York Convention serves to ensure the enforcement of arbitration agreements, thus freeing arbitration from the limitations of laws and regulations applied in the arbitration place, and to promote the enforcement of an arbitral award, whether commercial or not,<sup>59</sup> on an international scale.<sup>60</sup> We can safely say that without the New York Convention, there is no international commercial arbitration.

## **II. The UNCITRAL Model Law**

To create uniform arbitration laws and to assist developing countries with arbitration laws, the United Nations Commission on International Trade Law (hereinafter UNCITRAL) approved a Model Law on International Commercial Arbitration (hereinafter Model Law) in 1985.<sup>61</sup> The Model Law provides a “modern procedural framework which ... is liberal in its provisions and

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international commercial arbitration, and created the “fundamental underpinnings” of the New York Convention.

<sup>54</sup> Li, *supra* note 47, at 57.

<sup>55</sup> Albert J. Van Den Berg, *The New York Convention of 1958* 1 (1981).

<sup>56</sup> Li, *supra* note 47, at 57.

<sup>57</sup> The New York Convention, *supra* note 35, art. III.

<sup>58</sup> *Id.* at art. V.

<sup>59</sup> However, the New York Convention permits contracting states make “commercial reservation.”

<sup>60</sup> While the New York Convention permits contracting states make “reciprocity reservation,” it intends to fascinate the enforcement of arbitral award all over the world.

<sup>61</sup> Houston P. Lowry, *International Commercial Law and Arbitration* 251, 345 (1991). UNCITRAL Model Law on International Commercial Arbitration, U.N. Gaor, 40<sup>th</sup> Sess., Supp. No. 17, Annex I, at 81, U.N.Doc. A/40/17 (1985)

... delocalized, without neglecting fundamental requirements of procedural justice or due process.”<sup>62</sup> It “reflects an attempt to fashion and codify an international consensus on the statutory framework that should apply to arbitration in national jurisdiction.”<sup>63</sup> The purpose of the provisions is to clarify the areas where local courts may or may not intervene.<sup>64</sup> Since the Model Law was finally completed in 1985,<sup>65</sup> over twenty nations, including China, have adopted at least some version of the Model Law without making substantial modifications in their following establishment or rectification of arbitration laws.<sup>66</sup> As a model recommended by the UNCITRAL, the Model Law has deeply influenced the development of international arbitration.

Unlike the New York Convention, the Model Law applies only to international commercial arbitration, whether the arbitration is “ad hoc in nature or administered by a permanent arbitral institution.”<sup>67</sup> However, the Model Law can also be adopted to regulate domestic arbitration.<sup>68</sup> In the course of adopting the Model Law, some countries made a few modifications or supplements, but were noted as not being substantial.<sup>69</sup> In addition, because domestic arbitration laws in different countries are at quite different levels, the Model Law could be used to regulate the assistance and control of the courts and to provide uniform enforcement of arbitral awards.<sup>70</sup>

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; 24 I.L.M. 1302 hereinafter the Model Law.

<sup>62</sup> Carl-August Fleischhauer, *UNCITRAL Model Law on International Commercial Arbitration*, 41 Arb. J. 17, 19 (1986).

<sup>63</sup> Carbonneau, *supra* note 8, at 800.

<sup>64</sup> Possible areas that courts may intervene and that the Model Law does not regulate, include: the impact of state immunity, the competence of the arbitral tribunal to adopt contracts, the period of time for enforcement of arbitral awards, and the fixing of fees and deposits. See Isaak Dore, *the UNCITRAL Framework for Arbitration in Contemporary Perspective* 104 (1993).

<sup>65</sup> Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL’s Model Law on International Commercial Arbitration*, 25 Colum. J. Transnat’l L. 717, 719 (1987).

<sup>66</sup> Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L. Rev. 867, 886 (1996).

<sup>67</sup> Melissa Gerardi, *Jumpstarting APEC in the Race to “Open Regionalism:” A Proposal for the Multilateral Adoption of UNCITRAL’s Model Law on International Commercial Arbitration*, 15 J. Intl. L. Bus. 668, 686 (1995).

<sup>68</sup> Li, *Supra* note 47, at 21. For example, Hong Kong established its law on domestic arbitration following the Model Law.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Although the New York Convention provides for a satisfactory means of enforcing international arbitral awards, over one half the United Nations members has not adopted it.<sup>71</sup> By adopting some rules on the recognition and enforcement of international arbitral awards from the New York Convention, the Model Law provides basic rules for the recognition and enforcement of international arbitral awards.<sup>72</sup> Such basic rules do not conflict with the rules of the New York Convention, but instead constitute an alternative to the rules of the New York Convention for those nations that were reluctant to accede to the New York Convention due to political motivation.<sup>73</sup>

Further, unlike the New York Convention which draws a line between "foreign" or "not domestic" and "domestic" awards, the Model Law draws a new line between "international" and "non-international" awards by treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made.<sup>74</sup> This new line is based on substantive grounds<sup>75</sup> instead of territorial borders, "which are inappropriate in view of the limited importance of the place of arbitration in international cases."<sup>76</sup> As a result, the recognition and enforcement of "international" awards, whether "foreign," "not domestic," or "domestic," are governed by the same provisions of the Model Law.<sup>77</sup> Therefore, "by modeling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model

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<sup>71</sup> Volz & Haydock, *supra* note 64, at 887.

<sup>72</sup> Jernej Sekolec, *The Need for Modern and Harmonized Regime for International Arbitration*, 1 *Croat. Arbit. Yearb.* 27, 30-31 (1994).

<sup>73</sup> UNCITRAL Model Law provides a "back door" means of acceding to the New York Convention." See Para. 46 of the Note by the Secretariat on UNCITRAL Model Law on International Commercial Arbitration. at:

<http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>.

<sup>74</sup> *Id.*

<sup>75</sup> For the grounds for "international" arbitration, see article I (3) of UNCITRAL Model Law.

<sup>76</sup> See Para. 46 of the Note by the Secretariat on UNCITRAL Model Law on International Commercial Arbitration. *Supra* note 81.

<sup>77</sup> *Id.*

Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.”<sup>78</sup>

### III. ICSID Convention

The Convention on the Settlement of Investment Disputes of 1965 (ICSID Convention),<sup>79</sup> often referred to as the Washington Convention of 1965, established a truly autonomous and self-contained dispute resolution system on the investment disputes.<sup>80</sup> The International Center for Settlement of Investment Disputes (ICSID), an international institution created by the ICSID Convention, administers the system<sup>81</sup> to solve investment disputes between governments and foreign investors.<sup>82</sup>

ICSID deals with a dispute that is: (1) a “legal” dispute arising “directly out of an investment;” (2) a dispute between a contracting state, or its designated constituent and a national of another contracting state; and (3) the parties of the dispute agreed to have their dispute settled by ICSID.<sup>83</sup> Since the ICSID was adopted in 1965, one hundred and forty-five countries have become signatories of the ICSID Convention by 1995 and nearly thirty investment disputes were solved by the ICSID during that time.<sup>84</sup>

The ICSID Convention established a “truly international” form of arbitration for dealing with investment disputes that arise between foreign investors and host states.<sup>85</sup> One significant nature of the ICSID Convention is that the arbitration procedure is governed entirely and exclusively by

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<sup>78</sup> Id. at para. 47.

<sup>79</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 hereinafter ICSID Convention.

<sup>80</sup> Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev. 321, 322 (1991).

<sup>81</sup> Id. at 322.

<sup>82</sup> William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 Wake Forest L. Rev. 41, 45 (1996).

<sup>83</sup> Michael F. Hoellering, *Arbitration Involving Foreign Governments and Their Instrumentalities*, in *Arbitration & the Law: AAA General Counsel’s Annual Report, 1992-93* 124, 127 (1993).

<sup>84</sup> Song, *supra* note 46, at 46.

<sup>85</sup> Carbonneau, *supra* note 8, at 783.

the ICSID Convention.<sup>86</sup> Once the arbitral award is rendered pursuant to the ICSID Convention, it “shall be binding on the parties and shall not be subject to appeal or to any other remedy except those provided for in the ICSID Convention.”<sup>87</sup> All the contracting states should recognize and enforce the ICSID arbitral awards as the final judgments rendered by domestic courts unless the ICSID itself set them aside pursuant to the ICSID Convention.<sup>88</sup>

Compared with the New York Convention, ICSID Convention establishes an independent field in which arbitration cases are only governed by the ICSID Convention itself while not subject to the jurisdiction of a contracting party’s domestic arbitration laws.<sup>89</sup> Generally, the ICSID Convention shall apply as long as the party meets the requirements of accepting a case as noted by the Convention.<sup>90</sup>

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<sup>86</sup> Broches, *supra* note 78, at 322.

<sup>87</sup> ICSID Convention, *supra* note 84, at art. 50-53.

<sup>88</sup> Song, *supra* note 46, at 46.

<sup>89</sup> Li, *supra* note 47, at 114.

<sup>90</sup> *Id.*

**CHAPTER 3**  
**RECOGNITION AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS**  
**IN CHINA**

**A. Introduction to Arbitration in China**

As a means of settling disputes in China, arbitration has been adopted in China since 1954, but only thirty-eight cases were arbitrated between 1956 and 1979.<sup>91</sup> Before the adoption of the Arbitration Law of the People's Republic of China<sup>92</sup> in 1995, there were fourteen laws, eighty central administrative regulations and about two hundred local administrative regulations involving arbitration.<sup>93</sup> However, most provisions were quite different from the standard arbitration principles used throughout the world.<sup>94</sup> The importance and influence of arbitration has grown significantly only over the last few decades.<sup>95</sup> Unlike arbitration in the U.S. where the growth of arbitration has been driven by the expense and burden of domestic litigation,<sup>96</sup> arbitration is welcomed by foreign investors in China because it is an effective way to solve international commercial disputes. After China opened its door to the world in 1978, the development of international and domestic business required reform of its law related to arbitration and China's 1995 Arbitration Law was adopted to meet this need.<sup>97</sup> Consequently, the importance and influence of arbitration in China has grown significantly over the last few

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<sup>91</sup> Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Development, and Current Practice*, 28 J. Marshall L. Rev. 539, 541 (1995).

<sup>92</sup> Arbitration Law of P.R.C. was passed at the Ninth Standing Community Session of the Eighth National People's Congress on August 31, 1994 and took into effect on September 1, 1995 (Hereinafter "1995 Arbitration Law"). An English version of 1995 Arbitration Law is available at [www.chinaexpo.com/laws](http://www.chinaexpo.com/laws).

<sup>93</sup> Li, *supra* note 47, at 120.

<sup>94</sup> Min Chen, *Arbitration Law of People's Republic of China---Substantive Progress*, Chinese Int'l A. 78, 78 (1995).

<sup>95</sup> Wang, *supra* note 4, at 5.

<sup>96</sup> W. Laurence Craig, *Relationship Between ADR and Arbitration: Some Observations*, 57 Arb. 178, 178 (1991).

decades.<sup>98</sup> However, arbitration in China is still somewhat different from other countries. For example, while arbitration is divided into domestic and international arbitration in most other countries, in China, arbitration is divided into domestic, foreign-related and foreign arbitration. In practice, this division causes the deficiency surrounding Chinese arbitration.

## **I. 1995 Arbitration Law**

As the first unified and relatively complete law that regulates both domestic and foreign-related arbitration in China, the 1995 Arbitration Law brings great systematic and procedural development in the field of arbitration in China.<sup>99</sup> This legislation was an effort to normalize economic relationships between China and foreign parties.<sup>100</sup> The 1995 Arbitration Law, modeled after the UNCITRAL Model Law, consists of eight chapters and two hundred and sixty articles, all of which establish the institutional framework for the creation of Arbitration Commissions that are administratively independent from the Chinese government.<sup>101</sup> It regulates the requirements for the establishment of Arbitration Commissions that will administer domestic arbitrations in centrally governed municipalities, capital cities of the provinces, and other major commercial and industrial cities,<sup>102</sup> the composition of the Arbitration Commissions,<sup>103</sup> and the qualifications for appointment of arbitrators.<sup>104</sup>

The 1995 Arbitration Law also calls for the establishment of the China Arbitration Association (CAA), a non-governmental, self-regulating organization overseeing its member

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<sup>97</sup> Li, *supra* note 47, at 120.

<sup>98</sup> Wang, *supra* note 4, at 5.

<sup>99</sup> Lui & Lourie, *supra* note 89, at 539.

<sup>100</sup> Harer, *supra* note 5, at 399.

<sup>101</sup> 1995 Arbitration Law, *supra* note 90, at art. 10-12, 14.

<sup>102</sup> *Id.* at art 11.

<sup>103</sup> *Id.* at art 12.

<sup>104</sup> *Id.* at art 13.

Commissions in China, to supervise the work of the Arbitration Commissions.<sup>105</sup> The CAA is a separate legal entity including all members of the various arbitration commissions.<sup>106</sup>

The 1995 Arbitration Law is a procedural law in nature and does not directly affect the nature or proceedings of international arbitration in China.<sup>107</sup> It divides arbitration in China into domestic and foreign-related arbitration.<sup>108</sup> In Chapter 7, it provides “special provisions” on the “arbitration of disputes involving a foreign element and trade, transport and maritime interests.”<sup>109</sup> These special provisions not only clarify that domestic arbitration is different from foreign-related arbitration, but also impose relatively fewer limits on foreign-related arbitration in China that is more flexible and independent.<sup>110</sup> However, unlike the French statute,<sup>111</sup> the Arbitration Law does not clearly provide whether the parties of an international commercial dispute can choose to have the arbitration governed by law other than Chinese laws. Furthermore, under the 1995 arbitration law, the parties cannot exclude judicial recourse or Chinese arbitral procedures.<sup>112</sup> While in England the parties may exclude judicial recourse but not English arbitral procedures. In France, the opposite is true as the parties may exclude arbitral procedures but not judicial recourse.<sup>113</sup>

## II. Domestic arbitration

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<sup>105</sup> Id. at art 15.

<sup>106</sup> Id. at art 15.

<sup>107</sup> Dejun Cheng et al, *International Arbitration in the People’s Republic of China: Commentary, Cases and Materials* 293 (1994).

<sup>108</sup> This practice is different from England. England’s arbitration law—the Arbitration Acts of 1950 and 1979, as modified – are of general applicability. The Arbitration Acts are supposed to apply equally to all arbitrations based in England, whether domestic or international.

<sup>109</sup> 1995 Arbitration Law, *supra* note 90, at art 65-73.

<sup>110</sup> Li, *supra* note 47, at 122.

<sup>111</sup> In France, arbitration law was completely revised by the modification of the Code de Procedure Civil (N.C.P.C.) in 1980.

<sup>112</sup> Chapter 4 of 1995 Arbitration Law stipulates Chinese arbitration procedures, Chapter 5 and 6 stipulates judicial recourse.

<sup>113</sup> Craig, *supra* note 17, at 32.

Before the Arbitration Law took into effect in 1995, domestic Arbitration Commissions were set up in the State and Local Administration of Industry and Commerce Agencies in accordance with the enabling Regulations on Arbitration for Economic Contracts of China.<sup>114</sup> These Arbitration Commissions dealt with domestic arbitration that were mainly related to economic contract disputes through these Commissions' regulative authority without proper arbitration agreements between the parties. In contrary, the arbitration agreement prior to the application for arbitration is a prerequisite of arbitration in the Arbitration Law of 1995<sup>115</sup>. Furthermore, an arbitration award is not final because parties can appeal to the courts and courts can deal with the same disputes.<sup>116</sup> In the past, arbitration was a coercive administrative measure to solve economic disputes that was far different from the definition of traditional arbitration.<sup>117</sup> It is obvious that arbitration under the centralized planning economy could not adapt to the development of market economy in China.<sup>118</sup>

The 1995 Arbitration Law has brought dramatic changes to the arbitration process in China. This law requires that all former Arbitration Commissions cease to work and from that point on, new and government independent Arbitration Commissions are established to follow the Arbitration Law.<sup>119</sup> Now, a unified and independent domestic arbitration system has been established. Presently, there are almost one hundred and fifty domestic Arbitration Commissions in China.<sup>120</sup>

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<sup>114</sup> Ge Liu & Alexander Lourie, *China on the Horizon: Exploring Current Legal Issues: Article: International Commercial Arbitration in China: History, New Development, and Current Practice*, 28 J. Marshall L. Rev. 539, 541 (Spring, 1995).

<sup>115</sup> 1995 Arbitration Law, *supra* note 90, at art. 4.

<sup>116</sup> Li, *supra* note 47, at 122.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> 1995 Arbitration Law, *supra* note 90, at art. 14.

<sup>120</sup> Li, *supra* note 47, at 122.

According to the 1995 Arbitration Law, a dispute can be arbitrated only if there is a valid arbitration agreement between the parties.<sup>121</sup> The arbitration agreement must be in writing whether it is a clause in the contract or a separate agreement concluded before or after a dispute arises.<sup>122</sup> In either way, an arbitration agreement must always include: (1) a clear expression of the intention to submit disputes to arbitration,<sup>123</sup> (2) the specific matters that are subject to arbitration,<sup>124</sup> and (3) the selected arbitration commission to resolve the dispute.<sup>125</sup> If the first two elements are not clearly written into the agreement, it is invalid; while the arbitration commission can be selected at a later date.<sup>126</sup> The subsequent modification, rescission, termination, nullification, or invalidity of a contract does not necessarily invalidate an arbitration agreement.<sup>127</sup> However, if the parties contest the validity of an arbitration agreement, either the court or the arbitration commission can decide the validity of the agreement.<sup>128</sup> If one party appeal to a court while the other party appeals to an arbitration commission, the court will decide the validity of the arbitration agreement.<sup>129</sup>

The jurisdiction of arbitration commissions is substantially enlarged under the 1995 Arbitration Law. Except for a few family-related disputes expressly excluded by this law, such as “cases arising from marriage, adoption, guardianship, child support, inheritance,<sup>130</sup> and disputes that have been stipulated by law to be settled by administrative organs,”<sup>131</sup> most domestic

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<sup>121</sup> 1995 Arbitration Law, *supra* note 90, at art. 5.

<sup>122</sup> *Id.* at art. 16.

<sup>123</sup> *Id.* at art. 16 (1).

<sup>124</sup> *Id.* at art. 16 (2).

<sup>125</sup> *Id.* at art. 16 (3).

<sup>126</sup> Harer, *supra* note 5, at 399.

<sup>127</sup> 1995 Arbitration Law, *supra* note 90, at art. 19.

<sup>128</sup> *Id.* at art. 20.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at art. 3 (1).

<sup>131</sup> *Id.* at art. 3 (2). 1995 Arbitration Law does not define “administrative disputes”, however, it seems that the term refers to the disputes involving government departments.

disputes including the validity and infringement of patents, trademarks, and copyrights,<sup>132</sup> are arbitrable if there is a valid arbitration agreement between the parties.<sup>133</sup> A Domestic Arbitration Commission can also deal with international or foreign-related disputes if the parties have agreed to submit their disputes to this Arbitration Commission according to several regulations imposed after 1995.<sup>134</sup> These regulations changed the situation that only international Arbitration Commissions are permitted to resolve international or foreign-related disputes.<sup>135</sup>

### III. Foreign-related arbitration

On May 6, 1954, the central government of China issued a Decision to establish an international commercial arbitration institution.<sup>136</sup> To meet the requirement of this Decision, the Foreign Trade Arbitration Commission of China (FTAC) was set up within China's Council for the Promotion of International Trade (CCPIT).<sup>137</sup> FTAC was directed "to settle such disputes as may arise from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other,"<sup>138</sup> i.e., foreign-related disputes. To fulfill this charge, FTAC promulgated its Arbitration Rules--the Provisional Rules of the Foreign Trade Arbitration Commission of China.<sup>139</sup> Furthermore, the State Council of China issued a decree on

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<sup>132</sup> Xiaomin Sun & Ying Zeng, *Settling Out of Court, New Rules Codify Existing Practices in an Attempt to Improve Enforcement of Commercial Arbitration Awards*, China Bus. Rev., Sept. 1, 1996, available in 1996 WL 8669523.

<sup>133</sup> 1995 Arbitration Law, *supra* note 90, at art. 17. An arbitration agreement is void if (1) the subject matter of the arbitration is outside the legally regulated scope of arbitration; (2) the arbitration agreement was concluded by persons with no civil capacity or only limited civil capacity; (3) the arbitration agreement was obtained by coercion or intimidation.

<sup>134</sup> Decisions on the Relative Problems on the Enforcement of Arbitration Law, the Supreme People's Court of P.R.C., March 26, 1997, art. 3. And Notice on the Several Problems on the Enforcement of Arbitration Law, the State Council, June 8, 1996, art. 3.

<sup>135</sup> Stanley Lubman, *Setback for China- Wide Rule of Law*, Far E. Econ. Rev., Nov.7 1996, at 38.

<sup>136</sup> Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade, May 6, 1954, Art. 1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the

November 21, 1958 authorizing CCPIT to establish the Maritime Arbitration Commission (MAC) to handle international maritime arbitrations.<sup>140</sup> However, due to the international isolation policy, highly centralized planning economics, and internal political and economic turmoil during the 1960s and 1970s, international arbitrations in China were rare until the 1980s.<sup>141</sup>

Since China opened its door to the world in 1978, the economy of China has witnessed dramatic growth.<sup>142</sup> While international trade always involves trading partners from diverse cultural backgrounds, the distinction between eastern and western legal traditions is much more pronounced than the distinctions among different western legal traditions.<sup>143</sup> Since there is no international court for the resolution of business disputes and it is normal for the investor to be reluctant to have the dispute solved by a court in the other party's home country applying its domestic laws,<sup>144</sup> arbitration helps bridge the gap between East and West. Arbitration provides both a forum and a process by which both parties can agree to participate while disagreeing about anything else.<sup>145</sup> The nature of investment and the role of law in China make international arbitration a particularly attractive alternative for both foreign investors in China and Chinese

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Promotion of International Trade, Mar. 31, 1956.

<sup>140</sup> Provisional Rules of Procedure of the Maritime Arbitration Commission of the China Council for the Promotion of International Trade, Jan. 8, 1959.

<sup>141</sup> Benjamin P. Fishburne, III & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. Pa. J. Int'l Econ. L. 297, 304 (1997).

<sup>142</sup> Jingzhou Tao, *Commercial Divorce*, China Bus. Rev., Nov. 1, 1998, available in 1998 WL 10921766. There have been about 316,280 foreign-invested enterprises formed in China from 1979 to 1998. Foreign-invested enterprises include joint ventures and wholly foreign owned Chinese entities. This number does not include business transactional where foreign parties only trade with Chinese parties.

<sup>143</sup> Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 Stan. L. Rev. 303, 327 (1986)

<sup>144</sup> Ge Jun, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 131 (1996). The main reasons that lead to such reluctance are: "uncertainty about the process in foreign courts, concern about the possibility of local bias, questions about enforceability, and lack of confidentiality of the court process". In fact, even arbitration can't solve all the problems above.

<sup>145</sup> Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 Berk. J. Int'l Law 329, 337 (1997).

businesspersons. Parties often take for granted that since arbitrators are more independent from government than Chinese judges, the fairness of arbitration must be more guaranteed.<sup>146</sup>

To meet the requirement of the development of the economy, newly established Arbitration Commissions, rules and regulations dealing with domestic and international economic transactions and other affairs have emerged and received positive acceptance. Today, international arbitration is an important and frequently used method for settling international disputes in China, as evidenced by the prevalence of arbitration as a primary dispute resolution device in China's business-related legislation<sup>147</sup> and the heavy caseload of international arbitration commissions in China.<sup>148</sup>

Compared with domestic arbitration institutes, Chinese international arbitration bodies are relatively independent and competent.<sup>149</sup> The premier international arbitration institution in China is the China International Economic and Trade Arbitration Commission (CIETAC) that was formed from FTAC in 1988.<sup>150</sup> According to the Arbitration Rules of CIETAC<sup>151</sup>, the scope of its jurisdiction includes not only domestic disputes, but also international or foreign-related disputes, both commercial and other common disputes.<sup>152</sup> The rules of CIETAC are also much more in line with recognized international standards. For example: (1) They permit foreign

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<sup>146</sup> Guo Xiaowen, *Efficiency of Arbitration*, 77 *Arbitration & Law* 6, 6 (2001).

<sup>147</sup> The Foreign Economic Contract Law of P.R.C., art.37, enacted by the Fifth National People's Congress on December 13, 1981, as amended; The Law of The People's Republic of China Using Chinese and Foreign Investment, art. 14, adopted at the second Session of the Fifth National People's Congress on July 1, 1979.

<sup>148</sup> Michael J. Moser, *China's New International Arbitration Rules*, 11 *J. Int'l Arb.* 1, 5-6 (1994).

<sup>149</sup> Li, *supra* note 47, at 124-126.

<sup>150</sup> Congress's Reply to the Form of China International Economic and Trade Arbitration Commission.

<sup>151</sup> Since the Arbitration Rules of CIETAC first promulgated in 1988, they have been revised for several times. The latest Rules were effective from October 1, 2000.

<sup>152</sup> Arbitration Rules of CIETAC, at art 2, 2000. There used to be a hot debate over the scope of CIETAC's jurisdiction. At first, the Arbitration Rules of CIETAC defined its subject matter in general terms, providing that its jurisdiction extended to "disputes arising from international economic and trade transactions". Under this statement, a debate developed about whether CIETAC, as an international arbitration body, could exercise jurisdiction over disputes between two Chinese entities, and if so, under what circumstances. This debate has significant consequences because Chinese-foreign joint ventures are defined as Chinese legal persons under Chinese Joint Venture Law. See Brown & Rogers, *supra* note 143, at 344-45.

arbitrators to be included in the panel of arbitrator <sup>153</sup>(currently 296 members, including eighty foreign nationals).<sup>154</sup> (2) They permit foreign parties to use their own non-Chinese attorneys.<sup>155</sup> (3) They permit parties to agree on the language used during arbitration.<sup>156</sup> (4) They require an arbitration tribunal to render an arbitration award within nine months as from the date when the tribunal is formed.<sup>157</sup> (5) The arbitration award made by CIETAC is final and binding upon both disputing parties. Neither party may bring the same suit before a law court or make a request to any other institution to revise the arbitration award.<sup>158</sup> (6) The Rules provide a summary procedure for cases where the amount of the claim totals no more than \$500,000 RMB without the parties' permission (over that amount only if the parties agree).<sup>159</sup> Under this system, only one arbitrator, appointed by the parties or the Chairman of CIETAC,<sup>160</sup> will handle the case, mainly relying on the documents when an oral hearing is not necessary.<sup>161</sup> This summary procedure simplifies the handling of certain types of disputes to ensure a speedy arbitration resolve.<sup>162</sup> (7) They set up a specific chapter of domestic arbitration which is different with the provisions on international or foreign-related arbitration.<sup>163</sup>

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<sup>153</sup> Arbitration Rules of CIETAC, supra note 150, at art. 10.

<sup>154</sup> Robert C.H. Lee, *Arbitration in the P.R.C.: Now a Viable Option?*, E.Asian Executive Rep., Sept. 15, 1994, at 6.

<sup>155</sup> Arbitration Rules of CIETAC, supra note 150, at art. 22.

<sup>156</sup> Id. at art 85.

<sup>157</sup> Id. at art 52. However, the time limit can be extended if the Secretary-General of CIETAC thinks that it is necessary and reasonable.

<sup>158</sup> Id. at art. 60.

<sup>159</sup> Id. at art 64.

<sup>160</sup> Id. at art 65.

<sup>161</sup> Id. at art 67.

<sup>162</sup> Id. at art 73. The time limit for summary procedure is different from normal one. When a case is heard orally, the arbitration award should be made within 30 days from the date of the oral hearing if only one hearing is to be held, or from the date of the second oral hearing if two oral hearings are to be held. When a case is decided on the basis of documents only, the arbitration award should be made within 90 days from the date on which the arbitration tribunal is formed. However, the Secretary-General of the Arbitration Commission may extend the time limit if such extension is necessary and justified.

<sup>163</sup> First, according to article 76 of Arbitration Rules of CIETAC, after receipt of the application for arbitration, the Arbitration Commission should decide whether the domestic dispute is arbitrable under article 14 of the Rules, while for international dispute, the Arbitration Commission only need to examine whether the Claimant has completed the formalities required for arbitration (article 15). Second, several requirements on time limits for domestic arbitration are different from those for international arbitration, for example, article 79 (2) says that the

With these new regulations and after years of development, CIETAC arbitration has become much more sophisticated than in earlier days.<sup>164</sup> Nearly all international or foreign-related commercial arbitrations in China are conducted in Beijing at CIETAC or in Shenzhen or Shanghai where CIETAC operates its sub-commissions.<sup>165</sup> The caseload of CIETAC has continued to increase rapidly, reaching 902 admitted cases in 1995,<sup>166</sup> an estimated 600 cases in 1996<sup>167</sup> and 723 cases in 1997.<sup>168</sup> At present, CIETAC has more international arbitration cases than any other arbitration body in the world.<sup>169</sup>

Another international arbitration body in China is the China Maritime Arbitration Commission (CMAC)<sup>170</sup> which works with CIETAC to resolve almost all international business disputes in China.<sup>171</sup> The arbitration rules and practices of CMAC are quite similar to those of CIETAC.<sup>172</sup> CMAC is the only Maritime arbitration agency in China and has 97 maritime law experts.<sup>173</sup> Compared with CIETAC, CMAC handles a relative small number of international cases each year.<sup>174</sup>

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Respondent of domestic arbitration shall, at the latest within 45 days from the date of receipt of the Notice of Arbitration, file with the Arbitration Commission his counterclaim in writing, while such time limit for Respondent of international arbitration is 60 days. Third, for domestic arbitration, the arbitration tribunal shall make a record of the hearings in writing according to article 82, while during the hearing of international arbitration, the arbitration tribunal may make a record in writing and /or by tape-recording according to article 43.

<sup>164</sup> Dezalay & Garth, *supra* note 9, at 278-79.

<sup>165</sup> Kerry Wong, *China Talks on Arbitration Rules*, South China Morning Post, Mar. 14, 1994.

<sup>166</sup> Sun & Zeng, *supra* note 130.

<sup>167</sup> Dejun Cheng, Michael J. Moser & Shengchang Wang, *International Arbitration in the People's Republic of China* 6 (1995).

<sup>168</sup> *China to Strengthen Trade Arbitration*. Xinhua News Agency, May 15, 1998, available in 1998 WL 4802283.

<sup>169</sup> China Tops Dispute League, *The Fin. Times*, Mar. 21, 1996, at 6.

<sup>170</sup> CMAC was established by the China Council for the Promotion of International Trade in 1958. The Provisional Rules of CMAC were promulgated on January 8, 1959. See also Fishburne & Lian, *supra* note 139, at 303.

<sup>171</sup> Li, *supra* note 47, at 123.

<sup>172</sup> Ge Jun, *supra* note 142, at 131.

<sup>173</sup> China: Courts Handle Maritime Cases, *China Daily*, Sept. 22, 1998, available in 1998 WL 7598316.

<sup>174</sup> *Id.* CMAC handles only 20 international cases a year.

## **B. Recognition and Enforcement of Foreign-Related Arbitration Awards in China**

Arbitration awards rendered by Chinese Arbitration Institutes can be divided into domestic arbitration awards and foreign-related ones,<sup>175</sup> and they are treated differently in some ways including the recognition and enforcement.<sup>176</sup> Here, I will only discuss the recognition and enforcement of foreign-related arbitration awards.

Prior to 1982, there was no legal provision in Chinese law for the enforcement of arbitration awards,<sup>177</sup> not to mention for the recognition and enforcement of foreign-related arbitration awards. Today in China, the recognition and enforcement of foreign-related arbitration awards follow the 1995 Arbitration Law, the Law of Civil Procedure of the People's Republic of China<sup>178</sup> and the transparency in the Chinese legal system to encourage international trade in China provided by the New York Convention.<sup>179</sup>

## **I. Recognition and Enforcement of Foreign-Related Arbitration Awards under Civil Procedure Law**

Under the 1991 Civil Procedure Law in China, the parties of foreign-related arbitration may seek enforcement in China of the arbitral award decided by a Chinese arbitration commission.<sup>180</sup> The party seeking enforcement of an award must apply in writing to the Intermediate People's Court in the place where the unwilling party resides or has property.<sup>181</sup> The time limit for the enforcement, if neither party is an individual, is six months but it is one year if one or both of the

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<sup>175</sup> Li, *supra* note 47, at 132.

<sup>176</sup> 1995 Arbitration Law, *supra* note 90, Chapter 7 "Special provision for arbitration involving foreign concerns."

<sup>177</sup> Wang, *supra* note 4, at 166.

<sup>178</sup> Civil Procedure Law of P.R.C. (adopted April 9, 1991, by the 4<sup>th</sup> Sess. of the Standing Comm. of the 7<sup>th</sup> NPC), art. 88, reprinted in China Laws for Foreign Business (CCH), Business Regulation ¶ 19-201. (hereinafter "Civil Procedure Law"). An English version of Civil Procedure Law is available at [www.chinaexpo.com/laws](http://www.chinaexpo.com/laws).

<sup>179</sup> Stanley B. Lubman, *There's no Rushing China's Slow March to a Rule of Law*, L.A. Times, Oct. 19, 1997, available in 1997 WL 13991303. The World Trade Organization requires transparency in legal systems of its members in publishing laws that affect foreign trade, and requires rational and uniform administration of the laws.

<sup>180</sup> Civil Procedure Law, *supra* note 176, at art. 259.

<sup>181</sup> *Id.* at art 259.

parties are individuals,<sup>182</sup> starting on the last day of the fixed period of time under which the award was executed.<sup>183</sup> Compared with such time limit in other countries, such as three years in the United States and six years in British, this six months or one year time period is relatively shorter and should be reasonably lengthened.<sup>184</sup> Generally, the People's Courts enforce a foreign-related arbitration award within six months after deciding to initiate an arbitration award enforcement case.<sup>185</sup>

## II. Refusal to Enforce Foreign-Related Arbitration Awards in China

According to Article 71 of the 1995 Arbitration Law, a court shall refuse to enforce a foreign-related arbitration award if the objecting party can provide sufficient evidence to prove that the award falls within one or more of the following circumstances proscribed in Section 1 of Article 260 of the 1991 Civil Procedure Law:<sup>186</sup>

(1) parties have not stipulated clauses on arbitration in the contract or have not subsequently reached a written agreement on arbitration;<sup>187</sup> (2) party against whom the application is made is not duly notified to appoint an arbitrator or to proceed with the arbitration, or fails to state his/her opinions due to reasons for which he is not held responsible;<sup>188</sup> (3) the composition of the arbitration division or the procedure for arbitration is not in conformity with the rules of the arbitration commission where the award is rendered;<sup>189</sup> and (4) matters decided exceed the scope of the arbitration agreement or the limits of authority of the arbitration agency.<sup>190</sup>

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<sup>182</sup> Id. at art. 219.

<sup>183</sup> Dejun Cheng et al., *International Customs and Foreign Arbitration Practice* 253-54 (1993).

<sup>184</sup> Id.

<sup>185</sup> Xiao Dong & Baoguo Sun, *Related Questions on the Enforcement of Foreign - Related Arbitration Awards in China*, *Arb. & L* 16, 16 (June 1999).

<sup>186</sup> 1995 Arbitration Law, *supra* note 90, at art. 71.

<sup>187</sup> Civil Procedure Law, *supra* note 176, at art.260 (1).

<sup>188</sup> Id. at art. 260 (2).

<sup>189</sup> Id. at art. 260 (3).

<sup>190</sup> Id. at art. 260 (4).

The losing party who failed to fulfill its obligations of the award has the burden to prove the ground for the refusal.<sup>191</sup> If the court holds that the enforcement will undermine “social or public interest,” it will refuse to enforce the award without losing party’s petition.<sup>192</sup>

The above mentioned circumstances under which a court shall refuse to enforce a foreign-related arbitration award are similar to the seven circumstances listed in Article V of the New York Convention<sup>193</sup> because China became a contracting country of the New York Convention before the Chinese Civil Procedure Law was promulgated in 1991<sup>194</sup> (some rules of the 1991 Civil Procedure law were made after the New York Convention).<sup>195</sup> However, there are still some differences between the regulations in the 1991 Chinese Civil Procedure Law and those in the New York Convention such as reasons to refuse to recognize and enforce a foreign-related arbitration award.

First, under Article V (1) (a) of the New York Convention, the incapacity of the parties to reach an arbitration agreement or the invalidity of the arbitration agreement is a ground to refuse

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<sup>191</sup> Id. at art 260.

<sup>192</sup> Id.

<sup>193</sup> According to the article V of the New York Convention, recognition and enforcement of the award may be refused if the requesting party show the proof that “(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a different not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated form those not so submitted, that part of the award which contains decision on matters submitted to arbitration may be recognized and enforced; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” In addition, “recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought after finds that: (a) the subject matter or the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.” See the New York Convention, *supra* note 35, at art. V.

<sup>194</sup> Li, *supra* note 47, at 57.

<sup>195</sup> Id, at 134.

enforcement.<sup>196</sup> In Article 260 (1) of the Civil Procedure Law, the non-existence of a written arbitration agreement is the ground for refusal.<sup>197</sup> The ground under the Chinese Civil Procedure Law looks narrower than the New York Convention provision, but in practice the incapacity of the parties and the invalidity of the arbitration agreement will lead to the non-existence of an arbitration agreement.<sup>198</sup> Even with these differences, the consequences of the two provisions remain the same.

Next, under Article 260 (3) of the Chinese Civil Procedure Law, another reason leading to non-enforcement is that the composition of the arbitration tribunal or the procedure of arbitration conflicts with rules of the arbitration commission<sup>199</sup> even if the composing is in accordance with the agreement made by the parties, or absent such agreement, with the law of the country where the arbitration took place.<sup>200</sup> Under all Chinese arbitration commission rules, if parties want to have their disputes arbitrated in a Chinese arbitration commission, the arbitration should only be performed in accordance with the rules of such arbitration commission. Partly or fully changing or excluding the rules of such arbitration commission or choosing the rules of another arbitration commission can only be done with the permission from the arbitration commission,<sup>201</sup> which rarely happens in Chinese international arbitration activities. This makes the agreement of self-selecting arbitration rules just a piece of paper.<sup>202</sup> Since all arbitration rules of the Chinese Arbitration Commissions are adopted in accordance with the 1995 Arbitration Law, practically this provision does not result in the dilemma that the

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<sup>196</sup> The New York Convention, supra note 35, at art. V.

<sup>197</sup> Civil Procedure Law, supra note 176, at art. 260 (1).

<sup>198</sup> Li, supra note 47, at 134.

<sup>199</sup> Civil Procedure Law, supra note 176, at art. 260 (1).

<sup>200</sup> The New York Convention V (1) (d) show that one of the reasons leading to the non-enforcement is that the composition of the arbitration division or the procedure of arbitration “was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” The New York Convention, supra note 35, at art. V.

<sup>201</sup> Li, supra note 47, at 135. See also Arbitration Rules of CIETAC, supra note 150, art. 7.

composition or the procedure is consistent with arbitration rules but conflict with the 1995 Arbitration Law or visa verse.<sup>203</sup> However, compared with the New York Convention, this provision is not flexible and certainly should be revised to make the choice of arbitration procedure rules possible in Chinese foreign-related arbitration, thus providing parties in disputes more rights of self-determination.<sup>204</sup>

Third, under the New York Convention, the invalidity of an award can be grounds for a court to refuse to enforce an award,<sup>205</sup> unlike the Civil Procedure Law where this ground is not explicitly stated as a reason for non-enforcement.<sup>206</sup> However, the Arbitration Law provides that if one party appeal to a court to withdraw an award during its enforcement, the court should cease to enforce the award until the petition for withdrawing the award is refused.<sup>207</sup> This provision implies that if an award is nullified, the award cannot be enforced. So in China, the invalidity of an award is also a ground for non-enforcement of an award.

Fourth, under the New York Convention, a court of a contracting state may refuse to enforce an award if the dispute of the award is inarbitrable under the laws of that country.<sup>208</sup> In the Civil Procedure Law, this is a ground if the dispute of an award goes beyond the authority of the arbitration commission where the award was rendered, thus the enforcement should be refused.<sup>209</sup> In China, the subject matters that can be arbitrated by every arbitration commission are always within the scope of what can be arbitrated under the Arbitration Law. In the past, various arbitration commissions used to be permitted to solve disputes,<sup>210</sup> so in China a matter

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<sup>202</sup> Li, *supra* note, at 135.

<sup>203</sup> *Id.* at 135-36.

<sup>204</sup> *Id.* at 136.

<sup>205</sup> The New York Convention, *supra* note 35, at art. V (1)(e).

<sup>206</sup> Civil Procedure Law, *supra* note 176, at art 260.

<sup>207</sup> 1995 Arbitration Law, *supra* note 90, at art. 64.

<sup>208</sup> The New York Convention, *supra* note 35, at art. V (2) (a).

<sup>209</sup> Civil Procedure Law, *supra* note 176, at art. 260 (4).

<sup>210</sup> As mentioned before, in the past, Domestic arbitration commission could only deal with domestic disputes, while

which was arbitrable under Chinese laws could be refused enforcement because it was inarbitrable under the rules of the arbitration commission, a practice contrary to the spirit of the New York Convention. Although currently both domestic and international arbitration commissions are now permitted to deal with all the subject matters that can be arbitrated under the Arbitration Law, this provision should be changed to be parallel to the provision in the New York Convention to avoid unnecessary conflicts.

Fifth, under the Civil Procedure Law, if a losing party can prove that an arbitral award falls one or more grounds provided by Article 260, the court where the enforcement is sought *shall* refuse to enforce the award.<sup>211</sup> However, under the New York Convention, the court *may* have the freedom to decide whether to enforce the award under the same circumstance.<sup>212</sup> The difference between “shall” and “may” shows that in China, the freedom of a court to decide whether to enforce an award under minor procedural irregularity is forbidden by law. The provisions of the Civil Procedure Law are relatively stable while the extent to which the court can oversee foreign-related arbitration is still extensive.<sup>213</sup> This difference also shows that China is not as willing as other states parties to the New York Convention to encourage the recognition and enforcement of arbitral awards. With China becoming more open to the external world, China should take a more positive attitude toward foreign-related arbitration and should change its provisions to be more consistent with international standards.

Since the Arbitration Law does not directly provide the grounds on which the enforcement of a foreign-related arbitral award should be refused, it only relies on the literal

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Chinese international arbitration commission could only deal with international or foreign-related disputes.

<sup>211</sup> Civil Procedure Law, *supra* note 176, at art. 260.

<sup>212</sup> The New York Convention, *supra* note 35, at art. V.

<sup>213</sup> Li, *supra* note 47, at. 137.

provisions of the Civil Procedure Law.<sup>214</sup> However, the Arbitration Law does not refer to Part II of Article 260 of the Civil Procedure Law that provides social or public interest as a ground to refuse enforcement.<sup>215</sup> This creates an inconsistency between the Arbitration Law and the Civil Procedure Law, which will result in a misunderstanding based on the interpretation of Article 260 of the Civil Procedure Law. This is critical and should be corrected as soon as possible.

### **III. Defects in the Recognition and Enforcement of Chinese Foreign-Related Arbitral Awards and Suggestions**

For parties seeking to protect their legal rights through arbitration in China, obtaining a reasonable arbitration award is only the first step in a long and precarious process. Statistics from the Secretariat of CIETAC indicate that among all the awards rendered by CIETAC, fewer than five percent went to the courts for enforcement, and among them less than eight percent were denied enforcement.<sup>216</sup> However, recent information shows an increasing number of applications for enforcement of CIETAC awards in the Chinese courts while the courts enforce only about two-thirds of the awards brought before them.<sup>217</sup> Some foreign writers criticized the defects in the enforcement of arbitration awards as “legendary for victorious parties seeking to enforce awards in China.”<sup>218</sup> Others claim that “China’s spotty record in honoring international arbitration awards even constitute one of the reasons cited for the delay in China’s admittance to the World Trade Organization.”<sup>219</sup> This paper will examine these defects, introduce the efforts

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<sup>214</sup> 1995 Arbitration Law, *supra* note 90, at art. 71.

<sup>215</sup> *Id.*

<sup>216</sup> Wang, *supra* note 4, at 180.

<sup>217</sup> China: No Redress, *Bus. China*, Sept. 28, 1998, available in 1998 WL 16823923. Applications for enforcement of CIETAC awards in the Chinese courts increased from eight pre year in 1991 to 1993, to twelve in 1994, 34 in 1995, and 64 cases in 1996. Of the 1996 cases, 21 were not enforced by the Chinese courts.

<sup>218</sup> Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 *Va. J. Int’l L.* 615, 639(1994).

<sup>219</sup> Brown & Rogers, *supra* note 143, at 348.

made by Chinese legal authorities, discuss the regulations and practices in other countries such as the US, and try to find ways to minimize these defects.

### **i. Defects Caused by the Exclusive Right of Courts to Order Interim Measures**

During the lengthy arbitration process, the disputants still run a risk that property available to fulfill an award will disappear, leaving nothing for the winning party to claim.<sup>220</sup> While the 1991 Civil Procedure Law clearly provides for emergency protection of property,<sup>221</sup> the 1995 Arbitration Law says that only court has the right to order interim measures to protect property<sup>222</sup> or evidence<sup>223</sup>. However, in practice, a court may delay to order any party to take such interim measure. Furthermore, the Civil Procedure Law requires that arbitration commence prior to the request of interim measures, so the other party may be aware of the pending arbitration and have a chance to dispose of property that could otherwise satisfy an award or to destroy the evidence.<sup>224</sup> Besides, courts will deny such requests absent appropriate security provided by the claimant.<sup>225</sup> So the party must put additional assets at risk to protect the assets already in dispute. According to statistics by the CIETAC, in about thirty percent of CIETAC's arbitration cases, parties seek property preservation. Thus this provision heavily influences the ability of Chinese arbitration to function effectively.

On the other hand, in the U.S., interim measures involve not only emergency property and evidence protection, but also continue performance under the contract during the arbitration,

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<sup>220</sup> The time limit for international arbitration in CIETAC is 9 months after the formation of the tribunal, but that time may be extended if CIETAC considers it necessary. Furthermore, the winning party usually must wait for the expiration of time limits given for the losing party to comply before seeking court enforcement.

<sup>221</sup> Civil Procedure Law, *supra* note 176, at Chapter IX.

<sup>222</sup> 1995 Arbitration Law, *supra* note 90, at art. 28.

<sup>223</sup> *Id.* at art. 46.

<sup>224</sup> Liu & Lourie, *supra* note 89, at 562.

<sup>225</sup> *Id.* Emergency requests for property protection can be granted by the courts in as little as 48 hours, but only after the arbitration commission has determined it is necessary.

the inspection of goods, etc.<sup>226</sup> Although there is no clear provision stating who has the right to order interim measures under the FAA, in practice this order can be issued by a court upon the application by a party or by the arbitration tribunal while being enforced by a court.<sup>227</sup> Furthermore, according to the Revised Uniform Arbitration Act (RUAA), a court has the right to order interim measures before the arbitrators are appointed by the parties, and after the arbitrators are appointed, both the arbitrators and the court have the right to order interim measures.<sup>228</sup> The order of interim measures can be issued prior to or during the arbitration by either the arbitrator or the court. By giving such support for the availability of interim measures, arbitration awards in the U.S. can be effectively enforced.

Furthermore, this practice in the U.S. has also been provided by the UNCITRAL Model Law.<sup>229</sup> Interim measures are essential to the enforceability of final arbitration awards and since they are only temporary, they will not influence the final result of arbitration.<sup>230</sup> Also, if necessary, the arbitration tribunal may require the petition party to provide appropriate security of the asset. So it is strongly suggested that Chinese arbitration tribunals should also have this right to order interim measures.<sup>231</sup>

## **ii. Problems Caused by the Vague Definition of “Social or Public Interest.”**

The Civil Procedure Law uses *social or public interest* as a ground for non-enforcement instead of *public policy* under the New York Convention.<sup>232</sup> The Civil Procedure Law provides that when a court holds that enforcement is contrary to Chinese social or public interest, it should

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<sup>226</sup> Carbonneau, *supra* note 8, at 601.

<sup>227</sup> *Id.*

<sup>228</sup> The Revised Uniform Arbitration Act, at [Http://www.law.upenn.edu/library/ulc/ulc/htm](http://www.law.upenn.edu/library/ulc/ulc/htm).

<sup>229</sup> UNCITRAL Model Law, *supra* note 34, at art. 17.

<sup>230</sup> Qianquan Xu, *Several Problems about the 1995 Arbitration Law*, *Arb & L.*, 15 (August, 1997).

<sup>231</sup> *Id.*

<sup>232</sup> The New York Convention, *supra* note 35, at art. V (2) (b).

not enforce the award. However, there is no clear definition of *social or public interest*.<sup>233</sup> In the early stage of the enforcement of the Civil Procedure Law and the 1995 Arbitration Law some courts interpreted local economic interest as a social interest thus refused to enforce the award.<sup>234</sup> For example, in *Dongfeng Garments Factory of Kai Feng City & Tai Chun International Trade (Hong Kong) Co. Ltd. V. Henan Garments Import & Export (Group) Co.*,<sup>235</sup> the dispute arose from a joint venture establishment contract among three parties for the manufacture and export of fashion garments. The plaintiffs alleged that the defendant breached the joint venture contract and applied to CIETAC to solve the dispute pursuant to the arbitration clause in the contract. The arbitration tribunal rendered the award for the plaintiff. While the defendant refused to enforce the award, the plaintiffs applied to a local Intermediate People's Court for enforcement. However, a few months later, the local Intermediate People's Court refused to enforce the arbitration award only because "according to current State policies and regulations, enforcement ... would seriously harm the economic influence of the State and public interest of the society, and adversely affect the foreign trade order of the State."<sup>236</sup> Thus, social or public interest may be used as an excuse to refuse enforcing an award in order to protect local economic interest. Fortunately, the Supreme Court found this incorrect interpretation of social or public policy and ordered the enforcement later.<sup>237</sup>

Since this case, no such record on the mistaken use of social or public interest has been found in China, because Chinese courts now give a much narrow interpretation of social or public interest.<sup>238</sup> Still since there is no official legal and appropriate interpretation of social or

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<sup>233</sup> 1995 Arbitration Law, *supra* note 90, at art. 71.

<sup>234</sup> Lubman, *supra* note 177.

<sup>235</sup> For full context of the case, see Cheng et al, *supra* note 165, at 78. In current China, disputes involve the Hong Kong SAR, the Macao SAR and the Tai Wan region are deemed as foreign-related disputes.

<sup>236</sup> Cheng et al, *supra* note 165, at 78.

<sup>237</sup> *Id.*

<sup>238</sup> Li, *supra* note 47, at 149.

public interest in China, courts may encounter problems when interpreting this term. For example, a company whose place of business is in the mainland of China once imported some goods from a company in Hong Kong.<sup>239</sup> Later they had a dispute about the quality of the goods and solved the dispute by arbitration. Since the arbitral award favored the Mainland company and the Hong Kong company refused to honor the award, the Mainland company sought enforcement of the award by an intermediate court in an area where the Hong Kong company had property. The Hong Kong company requested the court to refuse the enforcement because of the Mainland company's misconduct when it reported the tariff tax. It argued that enforcement of this award meant that the Chinese court agreed with the misconduct which would conflict with the social or public interest of China. The intermediate court decided not to enforce the award; it then reported it to the local high court which affirmed the decision and reported it to the Supreme Court. Finally, the Supreme Court held that although the Mainland company committed misconduct, the enforcement of the award did not conflict with the social or public interest and the award was enforced.<sup>240</sup>

Due to this ambiguity a precise interpretation of social or public interest is urgently needed in China. Some scholars suggest that such interests should "certainly include those embodied in the Constitution, which defines the basic system and basic tasks of the state,"<sup>241</sup> but the short-term political policy should not be interpreted as social or public interests.<sup>242</sup> Under the arrangement on the enforcement of arbitral awards between the Mainland and Hong Kong, social or public interest is explicitly regarded as having the same meaning as *public policy*.<sup>243</sup>

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<sup>239</sup> A Hong Kong company is looked as a foreign company in current China.

<sup>240</sup> For full context of the case, see Houzhi Tang, *The Rules and Practice of International Commercial Arbitration*, Arb. & L., 82, 88 (2001(5)).

<sup>241</sup> Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards*, J. Chinese L. 117, 143 (1989).

<sup>242</sup> Id. at 143.

<sup>243</sup> Jian Li, *Legal Interpretation on International Commercial Arbitration*, Arb. & L 18, 20 (2001(3)).

Furthermore, this arrangement requires Chinese courts to apply this ground very narrowly and cautiously.<sup>244</sup>

The New York Convention does not have a clear definition of “public policy” either. But the practice in the U.S. and other countries may give us some clues that will be discussed later.<sup>245</sup>

### **iii. Difficulty of Enforcement Because of the Bifurcated System of Arbitration in China**

In China, domestic arbitration, i.e., arbitration proceeded by a Chinese arbitration tribunal, is actually divided into domestic and foreign-related arbitration, as different provisions govern.<sup>246</sup> Unlike foreign-related arbitration, domestic arbitration remains intimately dependent on domestic courts and the national legal system.<sup>247</sup> For example, parties of domestic arbitration can appeal to higher-courts to nullify an arbitration award within six months after the receipt of the award.<sup>248</sup> The court shall nullify the award if: (1) there is no arbitration agreement between the parties; (2) the dispute is inarbitrable, or the award is beyond the scope of the arbitration agreement; (3) the procedure of arbitration does not follow the provisions of the Arbitration Law; (4) the evidence that the arbitration award rely on is forged; (5) one party suppresses evidence that is sufficient to influence the arbitration award; or (6) the arbitrator is corrupt. Besides, if the enforcement of an arbitration award is contrary to social or public interest, courts can set aside the award without appeal.<sup>249</sup> It’s clear that Chinese courts will oversee both the procedural and the substantive merits of domestic arbitration awards in an effort to annul awards. When a court nullifies an award, it will ask the arbitration tribunal to re-hear the case.<sup>250</sup> Overseeing by the

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<sup>244</sup> Id.

<sup>245</sup> Part IV.C.2 of this paper.

<sup>246</sup> 1995 Arbitration Law, supra note 90, Chapter 7 provides special regulation on foreign-related arbitration.

<sup>247</sup> Brown & Rogers, supra note 143, at 331.

<sup>248</sup> 1995 Arbitration Law, supra note 90, at art. 59.

<sup>249</sup> Id. at art. 58.

<sup>250</sup> Id. at art. 58, 61. The court may not modify an award, only set it aside. The court can ask the arbitration tribunal to re-hear the arbitration and will stay all its proceeding during that process.

courts can also be made during the enforcement of arbitration awards.<sup>251</sup> While the enforcement of foreign-related arbitral awards will only rely on an examination on procedural irregularities during the arbitration process.<sup>252</sup> Consequently, the enforcement of domestic arbitral awards is more difficult than the enforcement of foreign-related ones.

However, there is no clear definition of “foreign-related arbitration,” so it can only be inferred from the interpretation of what constitutes “foreign-related” civil cases. An arbitration is foreign-related if the arbitration involves a dispute in which (1) one or both of the parties is/are non-citizen of China, foreign companies or organizations; (2) the legal facts that lead to the establishment, modification or termination of the legal relationship between the parties occur in a foreign country; or (3) the subject of the action lies beyond China.<sup>253</sup> In practice, this ambiguity causes certain arbitral awards to be enforced in a more complex process. For example, Joint ventures, one kind of foreign-investment enterprises, are defined as Chinese legal persons under the Chinese Joint Venture Law,<sup>254</sup> thus disputes related to joint ventures are deemed “domestic” disputes so enforcement of such awards will be more difficult than foreign-related ones. For example, China Int’l Construction and Consultant Corp. (Construction Corp.) sued Beijing Li Du Hotel Co. (Li Du)<sup>255</sup> under their designing contract, because the plaintiff fulfilled its obligations with respect to the design which was the part of the contract but the defendant refused to pay. The plaintiff applied to CIETAC and obtained an award in its favor. Later, the plaintiff applied to Beijing Intermediate People’s Court to enforce the award as the defendant refused to pay. The defendant claimed that the award should be nullified because both parties were Chinese legal

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<sup>251</sup> Li, *supra* note 47, at 123.

<sup>252</sup> Sally A. Harpole, *Following Through on Arbitration*, China Bus. Rev., Sept. 1, 1998, available in 1998 WL 10921747. Also see 1995 Arbitration Law, *supra* note 90, at art. 71 and this article part III (II)B.

<sup>253</sup> Decisions on Several Questions on the Enforcement of Civil Procedure Law of 1991, the Supreme People’s Court, 1992, art. 304.

<sup>254</sup> Brown & Rogers, *supra* note 143, at 344-45.

<sup>255</sup> For full context of this case, see Song, *supra* note 46, at 233.

persons, thus CIETAC had no power to arbitrate domestic dispute between two Chinese legal persons according to its 1988 Arbitration Rules. The Court agreed with the defendant's argument and held that since the two parties of the dispute were Chinese legal persons, the dispute between them contained no foreign elements and should not be arbitrated by CIETAC. The court then denied enforcement of the award because CIETAC had no jurisdiction on domestic disputes at that time.<sup>256</sup>

In 1998, the Chinese Congress authorized CIETAC to enlarge its jurisdiction scope to include disputes between foreign investment enterprises or between a foreign investment enterprise and a Chinese legal person, physical person and/or economic organization as well as domestic disputes under the 1998 Arbitration Rules of CIETAC.<sup>257</sup> This meant that now disputes involving joint ventures could be arbitrated by CIETAC. However, there is still no clear decision on whether arbitration awards involving joint ventures are foreign-related or domestic. Furthermore, under the Supreme People's Court's Decisions on Several Questions on the Enforcement of Civil Procedure Law of 1991, an arbitral award involving joint ventures is qualified as a domestic award,<sup>258</sup> while under the Arbitration Rules of CIETAC, such award is foreign-related.<sup>259</sup> According to legal principle, the Arbitration Rules of CIETAC is only a private rule, so the Supreme Court's Decisions prevails.

In China, joint ventures are common. Such an interpretation of "foreign-related" makes the enforcement of arbitral awards involving joint ventures even more difficult than the

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<sup>256</sup> Id.

<sup>257</sup> Arbitration Rules of CIETAC, supra note 150, at art. 2.

<sup>258</sup> The Supreme People's Court, supra note 249, at art. 304.

<sup>259</sup> Arbitration Rules of CIETAC, supra note 150, at art. 2.

enforcement of foreign-related arbitral awards involving other kinds of foreign investments,<sup>260</sup> leading to different treatment to similar foreign investors.

Under the current arbitration law, Chinese courts can oversee both the procedural and substantive merits of domestic arbitration awards in deciding whether to annul or enforce the awards.<sup>261</sup> Such regulations in effect bring arbitration under the control of Chinese judicial system, a practice that greatly weakens the independence of domestic arbitration in China. Besides, the term “foreign-related” is probably only used in China. Most other countries divide arbitration into domestic and international categories.<sup>262</sup> For example, an arbitral award rendered by a domestic arbitration commission involving at least one foreign party is considered to be a foreign-related arbitration award in China. While in the U.S. such an award is an international arbitral award enforced under international conventions.<sup>263</sup> The arbitration law in Germany applies the same rules to both domestic and international arbitration as the “two-track” approach is seen as “outdated, and, in effect, allowed jurisdictions to endorse arbitration less than wholeheartedly.”<sup>264</sup> Parties seek to settle their disputes by arbitration because they want to be treated evenly and arbitration is supposed to provide this equality. If domestic and foreign-related arbitration continues to be treated differently, this means that China will follow the same path, thus arbitration in China not being as attractive as in other countries.

To facilitate the healthy development of arbitration in China, there should be no difference between domestic and foreign-related arbitration. Since arbitration, in nature, is a

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<sup>260</sup> As mentioned before, Chinese courts shall oversee both the procedural and substantive content of domestic arbitration, while only overseeing the procedural context of foreign-related arbitration during the recognition and enforcement of arbitration award.

<sup>261</sup> 1995 Arbitration Law, *supra* note 90, at art. 63.

<sup>262</sup> Such as France, Japan, India, Sweden.

<sup>263</sup> 9 U.S.C. §202 (Supp.1985).

<sup>264</sup> Carbonneau, *supra* note 8, at 1036.

method to independently resolving disputes,<sup>265</sup> courts in China should only oversee the procedural merits of domestic arbitration awards, thus giving more independence to domestic arbitration.<sup>266</sup>

#### **iv. Other Defects in the Practice of Law in China Lead to the Problems**

Although Chinese courts cannot legally interfere with the substantive content of foreign-related arbitration awards, valid arbitration awards may not be enforced due to other reasons. First, the requirement that a foreign party apply for the enforcement of arbitral awards to the Intermediate People's Court where the losing party is domiciled or has property may cause local protectionism.<sup>267</sup> Since the concept of supremacy of law has not been fully applied in China, unlike other developed countries, the Chinese legal system appears to be not fully independent.<sup>268</sup> Consequently, local Communist Party and government are unwilling to let local money transfer to foreigners because the tax is a source of local income, thus they may interfere with litigation and prevent the enforcement of awards.<sup>269</sup>

Many foreign investors and lawyers have criticized the prevalence of local protectionism in China.<sup>270</sup> In 1992, China's central authorities first openly acknowledged the problem of local protectionism,<sup>271</sup> which mainly refers to the influence of the Communist Party and local government over judges<sup>272</sup> Although the systemic protections in local courts have been slow to

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<sup>265</sup> Craig, *supra* note 17, at 2.

<sup>266</sup> Lianbin Song & Jian Zhao, *How to Modify 1995 Arbitration Law*, *Arb. & L.* 3, 5-6 (2000 (4)),

<sup>267</sup> Alastair Crawford, *Plotting Your Dispute Resolution Strategy: From Negotiating the Dispute Resolution Clause to Enforcement Against Assets*, in *Dispute Resolution in the PRC* 42 (Chris Hunter ed., 1995).

<sup>268</sup> Richard H. Holton & Xiayuan Lin, *China and the World Trade Organization: Can the Assimilation Problems Be Overcome?*, *Asian Surv.*, Aug. 1, 1998, available in 1998 WL 13064625.

<sup>269</sup> Lubman, *supra* note 177.

<sup>270</sup> Matthew D. Bersani, *Enforcement of Arbitration Awards in China: Foreigners Find the System Sorely Lacking*, *China Bus. Rev.*, May 1992, at 6. See also Harer, *supra* note 5, at 399.

<sup>271</sup> Harer, *supra* note 5, at 417.

<sup>272</sup> Crawford, *supra* note 263, at 42.

emerge,<sup>273</sup> arbitration awards sometimes are denied enforcement because local courts come under significant pressure from local government authorities.<sup>274</sup> In other cases, even if enforcement is not expressly denied, the practical effect is the same because the courts fail to fully or actively enforce the award.<sup>275</sup> Even when courts issue orders requiring enforcement of arbitration awards, such orders are only pieces of paper that encounter the non-cooperation of other organization or government institutes that is necessary to enforce arbitration awards.<sup>276</sup>

Second, the enforcement of arbitration awards is prevented because enforcement divisions within courts are inefficient due to a lack of resources, staff,<sup>277</sup> and to under-funding.<sup>278</sup> Additionally, Chinese judicial staffs in some undeveloped areas are not familiar with special regulations on foreign-related arbitration or they may choose to ignore provisions related to enforcement of foreign-related arbitral awards.<sup>279</sup> Finally, corruption is another reason why there are many problems in the practical enforcement of arbitral awards.<sup>280</sup>

Fortunately, government authorities have noticed these defects. In the Work Report delivered at the National Conference on Politics and Law held in 1992, the Supreme People's Court Justice Ren Jianxin advocated "five prohibitions" to counter local protectionism which include: " (1) prohibiting local party cadres from interfering with the judicial process in an attempt to protect local interests; (2) prohibiting government officials and other parties from making threats or launching campaigns against judicial officers carrying out the execution of court orders; (3) prohibiting judicial organs from practicing favoritism towards local parties by

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<sup>273</sup> Brown & Rogers, *supra* note 143, at 333.

<sup>274</sup> Lubman, *supra* note 133, at 38.

<sup>275</sup> Cheng et al., *supra* note 30, at 3-4.

<sup>276</sup> *Id.*

<sup>277</sup> Daniel Behrendt, *Computer Software Copyright Law in the PRC*, 2 U. C. Davis J. Int'l L. & Pol. 1, 21 (1996).

<sup>278</sup> Bersani, *supra* note 266, at 7.

<sup>279</sup> Sun & Zeng, *supra* note 130.

<sup>280</sup> Jack Stratton, *Despite the Opaque Legal Environment, Foreign Companies Continue to Brave the Risks of Doing Business in China*, China Bus. Rev., Jan. 1, 1998, available in 1998 WL10921705. In a 1997 survey, China ranked

making unfair rulings or avoiding their proper responsibilities; (4) prohibiting officials of the public security and procuratorial organs from interfering with the adjudication of economic cases by treating contract and debt disputes as offences; and (5) prohibiting any organ or individual from obstructing the execution orders of the People's Courts in any other way.”<sup>281</sup>

Furthermore, being aware that the problems of enforcing arbitration awards partly result from a lack of guidance from the Chinese government, the Supreme People's Court has tried to provide this needed guidance.<sup>282</sup> In the Notice of August 28, 1995, the Supreme Court ordered lower courts not to deal with disputes involving an arbitration agreement without the approval of a higher-level court and the Supreme Court as well as lower courts not to overturn independent arbitration awards without the approval of a higher-level court.<sup>283</sup> Although this Notice will not solve all problems concerning the enforcement of foreign-related arbitration award, it may provide prevailing parties a chance at success by partially insulating enforcement decisions against extreme local pressures within the lower courts. Furthermore, the Notice indicates that national oversight is necessary in the enforcement of foreign-related arbitration awards. Before a people's court issues an order not to enforce a foreign-related arbitration award, it must report to a local high people's court and if this high court agrees with the non-enforcement, it should report to the Supreme Court.<sup>284</sup> Only after the Supreme Court agrees to deny enforcement can such order be issued. This Notice shows the willingness of the Chinese judicial system to guarantee the enforcement of foreign-related arbitration awards, but still China should make no distinction between foreign-related and domestic arbitration awards.

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twelfth out of 52 countries for perceived level of corruption.

<sup>281</sup> Song, *supra* note 46, at 231.

<sup>282</sup> Song & Zhao, *supra* note 262, at 5.

<sup>283</sup> Notice about the way to deal with foreign-related arbitration and foreign arbitration, the Supreme People's Court, August 28, 1995.[1995] No. 18.

<sup>284</sup> *Id.*

**CHAPTER 4**

**RECOGNITION AND ENFORCEMENT OF FOREIGN COMMERCIAL ARBITRAL**

**AWARDS IN CHINA**

A foreign arbitration award means an arbitral award rendered by an arbitration commission located outside the territory of China.<sup>285</sup> Unlike the enforcement of Chinese arbitral awards that is regulated by Chinese domestic law, the enforcement of foreign arbitral awards should follow the 1991 Civil Procedure Law and any valid international treaties between China and the country where the arbitral award is sought to be enforced.<sup>286</sup>

The New York Convention is currently the most important convention addressing the recognition and enforcement of foreign arbitral awards.<sup>287</sup> China signed the New York Convention on December 2, 1986 and acceded to it on April 22, 1987.<sup>288</sup> Even though foreign arbitral awards can be recognized and enforced in China, Chinese arbitral awards can also be enforced in foreign countries under the New York Convention.<sup>289</sup> China has also acceded to the ISCID Convention on February 6, 1993, which has its own system for enforcing foreign arbitral awards.<sup>290</sup>

According to Arbitration Research Institute of Chinese Chamber of Commerce, from 1990 through August 1997, only fifteen foreign arbitration awards sought enforcement by Chinese people's courts,<sup>291</sup> ten of which were ordered to be enforced and four were denied enforcement.

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<sup>285</sup> Li, *supra* note 47, at 155.

<sup>286</sup> Civil Procedure Law, *supra* note 176, at art. 269.

<sup>287</sup> Li, *supra* note 47, at 57.

<sup>288</sup> *Id.*, at 156.

<sup>289</sup> The New York Convention, *supra* note 35, at art. I (1) (3).

<sup>290</sup> Li, *supra* note 47, at 156.

<sup>291</sup> Shengchang Wang, *Experience with National Laws on Enforcement of Arbitral Awards—Enforcement of Awards*

Among these four awards, two were denied enforcement without reasons while the other two were denied enforcement because of the non-existence of the other party or the property.<sup>292</sup> The rate of non-enforcement of foreign arbitral awards is 13.33%. Only two out of fifteen foreign awards were denied enforcement.<sup>293</sup>

#### **A. Enforcement under Domestic Law**

The party seeking enforcement of a foreign arbitration award should file an application for enforcement to the Intermediate Court of the place where the losing party resides or has property that is the subject of the award.<sup>294</sup> The competent Chinese court will deal with the application for enforcement of a foreign arbitral award according to the New York Convention or any other international conventions.<sup>295</sup> Under the Supreme People's Court's regulation on fees and time limit for the recognition and enforcement of foreign arbitral awards,<sup>296</sup> a competent court should decide whether to recognize and enforce an award within two months from the date of receiving the application and normally should finish the enforcement within six months from the date of deciding to enforce the award.<sup>297</sup> Fees for enforcement are determined after fees schedule of courts.<sup>298</sup> If the competent Intermediate Court decides not to recognize and enforce the foreign award, it should report to the Supreme People's Court within two months from the date of receiving the application, and the Supreme People's Court has final right to decide whether to enforce the award.<sup>299</sup>

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*in the P.R.C 27* (1999).

<sup>292</sup> Id.

<sup>293</sup> Id, at 28.

<sup>294</sup> Civil Procedure Law, *supra* note 176, at art. 269.

<sup>295</sup> Id.

<sup>296</sup> Regulation on the fees and time limit for recognition and enforcement of foreign arbitral awards, the Supreme People's Court, issued on November 14, 1998, [1998] No. 28.

<sup>297</sup> Id, at art. 4.

<sup>298</sup> Id, at art. 3.

## **B. Enforcement under the New York Convention**

The New York Convention became part of Chinese law in 1987 and a number of foreign arbitral awards made in other member states have been granted recognition and enforcement in China under the Convention.<sup>300</sup>

### **I. Sphere of Application of the New York Convention**

Under Article I of the New York Convention, arbitration awards involving both commercial and noncommercial disputes are enforceable in a contracting or a non-contracting country.<sup>301</sup> Consequently, the New York Convention “confers legitimacy upon awards granted in any state, whether or not a contracting state, and whether or not the parties are subject to the jurisdiction of different contracting states.”<sup>302</sup> However, Article I (3) of the New York Convention permits member states to declare the reciprocity reservation<sup>303</sup> and the commercial reservation.<sup>304</sup> China made these two reservations to its membership.<sup>305</sup> For countries who make two reservations such as China, the requirements for the application of the New York

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<sup>299</sup> Notice about the way to deal with foreign-related arbitration and foreign arbitration, supra note 279.

<sup>300</sup> Li, supra note 47, at 155-156.

<sup>301</sup> The New York Convention, supra note 35, at art. I (1). “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

<sup>302</sup> Cindy Silverstein, *Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?*, 20 Brook. J. Int’l. 443, 454 (1994).

<sup>303</sup> The New York Convention, supra note 35, at art. I (3). The reciprocity reservation refers to that “when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”

<sup>304</sup> Id. at art. I (3). The commercial reservation means that “it may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”

<sup>305</sup> The New York Convention: Contracting States and Reservations [4 New York Convention] Int’l Com. Arb. (Oceana Publications) pt.VI.3, VI.5 (July 1996). China acceded to the New York Convention on April 22, 1987. Now over half of the contracting parties of the New York Convention including the United States declared the reciprocity clause reservation, and nearly one-third of the contracting parties included the commercial reservation. However, most counties will interpret them narrowly. So “neither reservation is extremely important.” See John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U.J. Int’l L. & Pol. 361, 388 (1986).

Convention include: (1) a written arbitration agreement between the two parties;<sup>306</sup> (2) the arbitration award is rendered in a contracting state, or the award is not domestic;<sup>307</sup> and (3) the award involves a legal and commercial relationship between the parties.<sup>308</sup>

The New York Convention applies to foreign awards and non-domestic ones. In other words, the New York Convention applies to awards made in the territory of a state other than the state in which the recognition and enforcement of the award is sought, as well as to “arbitral awards not considered as domestic awards in the state where the recognition and enforcement are sought.”<sup>309</sup> However, the New York Convention does not provide the definition of the key term “domestic awards.” This weakness has led to nonconformity between the contracting states in their application of the New York Convention.<sup>310</sup>

The United States considers a relationship “international” to be treated under the New York Convention if the relationship is not entirely between citizens of the United State and even so, or if there is some “reasonable relation with one or more foreign states.”<sup>311</sup> For example, in *Signal Bergesen v. Joseph Muller Corp.*,<sup>312</sup> the United States court interpreted “not considered as domestic” under the New York Convention as arbitration awards that were rendered “within the legal framework of another country,”<sup>313</sup> and the U.S. court enforced a domestically rendered arbitral award between two foreign entities under the New York Convention.<sup>314</sup> The U.S. court also held that the New York Convention can be applied to a domestically promulgated arbitration

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<sup>306</sup> The New York Convention, *supra* note 35, at art. II.

<sup>307</sup> *Id.* at art. I (1).

<sup>308</sup> *Id.* at art. I (3).

<sup>309</sup> *Id.* at art. I, section 1.

<sup>310</sup> Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U.J. Int'l L. & Pol. 175, 196 (1996).

<sup>311</sup> 9 U.S.C. §202 (Supp. 1985). For example, if the commercial relationship “involves property located abroad, or envisages performance or enforcement abroad.”

<sup>312</sup> 710 F. 2d 928.

<sup>313</sup> *Id.* at 928.

<sup>314</sup> *Id.* at 934.

award between two United States citizens if the dispute arose out of an agreement or contract involving performance in another country.<sup>315</sup> For example, in *Lander Co., Inc. v. MMP Investments, Inc.*,<sup>316</sup> both parties were domestic while the plaintiff sought enforcement of a domestically rendered arbitral award with respect to a contract for distribution in Poland of the plaintiff's products.<sup>317</sup> The Seventh Circuit of the U.S. Court of Appeals held that provisions of the New York Convention do not exclude its application within a contracting state.<sup>318</sup> Furthermore, this dispute also involved performance of a contract abroad.<sup>319</sup> The Seventh Circuit court decided the applicability of the New York Convention to this domestically rendered arbitral award.<sup>320</sup> Therefore, a U.S. court will decide whether an arbitral award should be enforced under the New York Convention on the basis of the nationality of the award, the nationality of the parties to the disputes, or the substantive factors of the dispute.

However, the rules in England on the application of the New York Convention are different from those in the U.S.. In England, an arbitral award can be enforced under the New York Convention if: (1) the award is arbitrated outside England, i.e., foreign arbitration award; or (2) the award is arbitrated in England but at least one party of the dispute is not an English person.<sup>321</sup> The English courts will decide the application of the New York Convention on the basis of the nationality of the arbitral award or the parties to the disputes.

However, in China, the Civil Procedure Law regulates that the New York Convention can only be applied to arbitral awards rendered by foreign arbitration commissions, i.e., foreign

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<sup>315</sup> 107 F. 3d 476 (7<sup>th</sup> Cir. 1997), 483.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*, at 481.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*, at 482.

<sup>320</sup> *Id.*, at 483.

<sup>321</sup> Jia Fei, *New York Convention: its Future—Suggestion on the Rectification of New York Convention*, *Arb. & L.*, 10, 18 (2000 (5)).

arbitral awards.<sup>322</sup> Furthermore, a Supreme People’s Notice on the Enforcement of the New York Convention<sup>323</sup> explicitly provides that the New York Convention can only be applied to international commercial arbitral awards rendered by a foreign arbitration commission in another contracting state, called “foreign commercial arbitral awards.”<sup>324</sup> Therefore, a Chinese court will disregard the provision on “not considered as domestic awards” in the New York Convention<sup>325</sup>, and consider such award as a Chinese foreign-related arbitral award or even a Chinese domestic award to be enforced under Chinese domestic law. For example, if *Lander Co., Inc. v. MMP Investments, Inc.* happened in China, the court would consider it a domestic arbitral award and enforce it under Chinese domestic law.<sup>326</sup> In China, a court will decide whether to enforce an arbitral award under the New York Convention only on the basis of the nationality of the award, thus greatly limiting the scope of the application of the New York Convention. Since in China enforcement of an arbitral award under the New York Convention is relatively easier than that under Chinese domestic law, some parties will complain about the limited scope of the application of the New York Convention in China.

Furthermore, although the New York Convention does not clearly define “non-domestic” arbitration awards, the UNCITRAL Model Law states that arbitration is international and should be enforced under international conventions if: (1) the parties, at the time of conclusion of the arbitration agreement, had their places of business in different states; (2) the place of arbitration is situated outside the state where both parties have their place of business; (3) any place where a substantial part of the obligations is to be performed, or the place with which the subject-matter

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<sup>322</sup> Civil Procedure Law, *supra* note 176, at art. 269.

<sup>323</sup> Notice on the Enforcement of the New York Convention, the Supreme People’s Court, April 10, 1984. Available at Li, *supra* note 47, at 226.

<sup>324</sup> *Id.*

<sup>325</sup> The New York Convention, *supra* note 35, at art I (1).

<sup>326</sup> Currently Chinese courts will only recognize and enforce foreign arbitral awards under the New York Convention or other international conventions. See also *supra* note 316.

of dispute is closely connected, is situated outside the state where the parties have their place of business; or (4) both parties expressly agree that the subject matter of the arbitration agreement involves more than one country.<sup>327</sup> According to this interpretation, most Chinese foreign-related arbitral awards, and even some domestic arbitral awards, should be treated as “international” and enforced under the New York Convention or another international convention.<sup>328</sup>

Therefore, to make China more attractive for foreign investors, aside from giving domestic arbitration more independence by simply overseeing the procedural merits of domestic arbitral awards, China should broaden the sphere of application of the New York Convention. If China follows the lead of many other countries and divides arbitration into domestic and international categories while requiring all international arbitration to be regulated by international conventions, Chinese arbitration will develop more quickly and more in line with recognized international standards.

## **II. Prerequisite on Enforcement of Foreign Arbitration Awards in China**

Under the New York Convention, when a losing party refuses to enforce the international arbitral award, the successful party may apply to a contracting state where the losing party resides or has property.<sup>329</sup> The successful party only needs to present an original or certified copy of the arbitral award and agreement to a court of that contracting state.<sup>330</sup> In China, a petitioning party should also submit its identification certificate and a written application form in Chinese.<sup>331</sup>

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<sup>327</sup> UNCITRAL Model Law, *supra* note 34, at art. 1.

<sup>328</sup> Notice on the Enforcement of the New York Convention, *supra* note 319.

<sup>329</sup> The New York Convention, *supra* note 35, at art. IV.

<sup>330</sup> *Id.*

<sup>331</sup> Dong & Sun, *supra* note 183, at 17.

### III. Enforcement Procedure of International Arbitral Awards under the New York Convention

Under Article III of the New York Convention, a contracting state court will enforce an arbitral award according to the rules of its domestic procedure laws.<sup>332</sup> Although a few countries favor international arbitral awards and allow enforcement without the official justification of a domestic court, most countries enforce an award only after a local court has given permission to execute the award by public force.<sup>333</sup> However, the procedures and the extent of examination exercised by domestic courts over international awards in enforcement proceedings vary among countries.<sup>334</sup> For example, in England, courts will follow the same procedure for the enforcement of both domestic and international arbitral awards, either “by a cause of action on the award or by an application under section 26 of the 1950 Act.”<sup>335</sup> To provide a competitive environment for foreign investment, the United States has been a strong supporter of international arbitration. The U.S. acceded to the New York Convention on December 29, 1970<sup>336</sup> and consistently upholds the enforcement of international awards under this Convention, demonstrating a “pro-enforcement bias”<sup>337</sup> by taking an “increasingly internationalist approach.”<sup>338</sup> Chapter 2 of the Federal Arbitration Act (FAA) implements the New York Convention and makes international arbitral awards involving commercial matters enforceable in the United States.<sup>339</sup> Chapter 2 of

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<sup>332</sup> The New York Convention, *supra* note 35, at art. III.

<sup>333</sup> Robert H. Davis, *NAFTA: Resolving International Payments Conflicts*, Disp. Resol. J. 74, 79 (1994). Generally, however, most courts will enforce foreign arbitral awards without significant scrutiny into the substantive content of an award.

<sup>334</sup> Volz & Haydock, *supra* note 64, at 871.

<sup>335</sup> Zhang, *supra* note 46, at 179. See also John Parris, *Arbitration Principles and Practice* 159 (1983).

<sup>336</sup> Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures under the New York Convention*, 80 A. J. I. L. 24, 25 (1986).

<sup>337</sup> Bouzari, *supra* note 37, at 211.

<sup>338</sup> David P. Stewart, National Enforcement of Arbitral Awards Under Treaties and Conventions, in *International Arbitration in the 21<sup>st</sup> Century: Towards “Judicialization” and Uniformity?* 163, 166 (Richard B. Lillich & Charles N. Brower ed., 1994).

<sup>339</sup> James H. Carter, *Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues*, Presentation Before the American Bar Association Center for Continuing Legal Education, National Institute, Doing Business

the FAA limits federal district courts to recognize and enforce only commercial arbitral agreements or awards.<sup>340</sup> Under the United States Arbitration Act (USAA), any party to an arbitration award can apply to a specified court for an order confirming the award, and once the award is confirmed, that party can enforce it as it is just like a judgment of the court.<sup>341</sup>

The same procedure happens in China. After receiving the written application for enforcement, the competent intermediate court will determine whether to confirm the validity of the final award.<sup>342</sup> If there is no ground to refuse the enforcement, the court will issue the enforcement order.<sup>343</sup> For example, in *Food Industries' Planning & Servicing Ltd. (Switzerland) (hereinafter Food Industries) v. China Hua Yang Technology and Trade Corporation (China) (hereinafter Hua Yang)*,<sup>344</sup> a dispute arose between the two parties regarding a turkey contract for a lack current berries juice processing plant. The case was arbitrated at the Arbitration Institute of the Stockholm Chamber of Commerce according to the arbitration clause in the contract. On April 10, 1995, an award was issued in favor of Food Industries that required Hua Yang to pay a certain amount of Swiss Francs and Hong Kong Dollars.<sup>345</sup> However, Hua Yang did not perform the award, so Food Industry applied for enforcement to the Beijing First Intermediate People's Court under the 1995 China Arbitration Law.<sup>346</sup> Hua Yang argued that the court should refuse to enforce the award because it violated Article V of the New York Convention.<sup>347</sup> After carefully examining Hua Yang's arguments and evidence, the court held that the award did not "fall under the situations where recognition and enforcement may be refused as described in Art. V (1) and

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Worldwide (Feb. 8-10 1998), at 7.

<sup>340</sup> Thomas Oehmke, *Commercial Arbitration*, § 5:2 (1987).

<sup>341</sup> The United States Arbitration Act, 9 U.S.C sections 9 (1994).

<sup>342</sup> Song, *supra* note 46, at 244.

<sup>343</sup> *Id.*

<sup>344</sup> *Food Industries' Planning & Servicing Ltd. v. China Hua Yang Technology and Trade Corporation*, Yearbook Comm. 641 Arb'n XXIII (1998)

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

(2) of the New York Convention nor does it violate the reservations declared by China at the time of its accession to the Convention.”<sup>348</sup> The court finally ordered that “the validity of the final award made ... by the Arbitration Institute of the Stockholm Chamber of Commerce ... is confirmed” and shall be enforced.<sup>349</sup> From this case, we can see that as in the United States, foreign arbitral awards that seek enforcement in China also must be confirmed first.

### **C. Refusal to Recognize and Enforce Foreign Arbitration Awards under the New York Convention and Common Puzzles**

A court in China will refuse to enforce a foreign arbitral award only on the limited seven grounds noted in Article V of the New York Convention and two other Chinese reservations.<sup>350</sup> All seven grounds can be divided into two groups: one “related to the parties and the arbitration agreement” and the other “related to the matter under arbitration.”<sup>351</sup> The losing party who objects to the enforcement has the burden of proving that the award should not be enforced.<sup>352</sup> However, among these seven grounds, two grounds are quite complex and are discussed in detail in this paper.

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<sup>347</sup> Id, at 24.

<sup>348</sup> Id.

<sup>349</sup> Id.

<sup>350</sup> The New York Convention, *supra* note 35, at art. V. The seven grounds are: (1) the incapacity of the parties or the invalidity of the arbitration agreement. (2) The improper notice to the losing party of the appointment of the arbitrator or of the arbitration proceedings, or the losing party was otherwise unable to present his case. (3) The matters that the award deals with are beyond the scope of the submission to arbitration. (4) The composition of the arbitral authority or the procedure conflicts with the arbitration agreement or the arbitration law of the country where the award is rendered. (5) The award has been unbinding or set aside by a competent authority in the country where the award is rendered. (6) The dispute that the award deals with is inarbitrable under the law of that state. (7) The enforcement of the award is against the public policy of that state.

<sup>351</sup> Andrej Bolfek, *Arbitration and Public Policy: Application of European Community Competition Law in Arbitration Proceedings from the Aspect of Public Policy*, 7 *Croat. Arbit. Yearb.* 141, 143 (2000).

<sup>352</sup> Choi, *supra* note 306, at 189.

## **I. Refusal to Enforce Because the Award was not Binding or Was Set Aside in the Country Rendered.<sup>353</sup>**

Under this ground, the country where the enforcement is sought must look into the laws of the country where the arbitration award was rendered to determine whether the arbitration award is binding, thus enforceable under the New York Convention.<sup>354</sup> However, to decide when an award is binding can be complex under different circumstances. For example, in *Europcar Italia, S.p. A. v. Maiellano Tours, Inc.*,<sup>355</sup> the parties agreed to have their dispute arbitrated in Italy under an informal arbitration procedure known as “*arbitrato irrituale in equita*” (*arbitrato irrituale*).<sup>356</sup> Germany’s Supreme Court held that awards rendered under *arbitrato irrituale* are not enforceable under the New York Convention, while the Italian Supreme Court held that because such award is binding on the parties, an award rendered under *arbitrato irrituale* can be enforced under the New York Convention.<sup>357</sup> The Second Circuit of U.S. District Court disregarded the enforceability of an award under *arbitrato irrituale* under the New York Convention, but looked into parties’ free will.<sup>358</sup> The U.S. Court held that because the parties had explicitly agreed to resolve their dispute by arbitration and to be bound by the arbitration award,<sup>359</sup> the award should be binding and enforceable under the New York Convention.<sup>360</sup>

Another issue arising in this context is even if the award is set aside or not binding in the country where the award is rendered, should the contracting state refuse to enforce the award?

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<sup>353</sup> The New York Convention, *supra* note 35, at art. V (5).

<sup>354</sup> Karamanian, *supra* note 26, at 94. The U.S. courts have to look into foreign laws to determining the enforceability of awards under the Convention, but the extent to which U.S. courts will rely on the foreign law is not clear.

<sup>355</sup> 156 F. 3d 310 (2d Cir. 1998).

<sup>356</sup> *Id.*, at 311.

<sup>357</sup> *Id.*, at 314.

<sup>358</sup> *Id.*, at 315.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* However, the court still “remanded the case to the district court for a re-determination as to whether the enforcement proceedings should not be stayed” under article VI of the Convention because of the tendency of the

The answer is probably “no” in some contracting states. The rationale of this answer is based on Article V (1) (e) which provides that a court “may” refuse to enforce an award under the ground, giving the contracting state court where enforcement is sought the right to choose whether or not to enforce the award.<sup>361</sup> A U.S. court may make such a decision on the basis of whether the arbitration agreement provides that the arbitration decision will be subject to any appeal or other recourse, as well as other factors.<sup>362</sup>

For example, in the famous case of *Chromalloy Aeroservices v. Arab Republic of Egypt* case,<sup>363</sup> the U.S. court found that an arbitration award, rendered in Egypt in favor of an American corporation (against the Egyptian Air Force), was nullified by the Egyptian Court under Egyptian law, a situation falling within Article V (1)(e) of the New York Convention.<sup>364</sup> Since Article V of the New York Convention provides that a court “may” refuse to enforce under certain circumstances, the term “may” means that the courts have a certain right of self-determination on the issue of enforcement.<sup>365</sup> The U.S. court left Article V (1)(e) aside and looked into Article VII (1) which provides that any winning party of an arbitration award may protect his interest afforded by the award to the extent “allowed by the law or the treaties of the country where such award is sought to be relied upon.”<sup>366</sup> The U.S. court held that it should give the American corporation all rights afforded under domestic arbitration law and looked into FAA.<sup>367</sup> Under § 10 of FAA, an arbitration award can be set aside or nullified only in limited circumstances.<sup>368</sup>

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proceedings in Italy. *Id.*, at 317-18.

<sup>361</sup> Karamanian, *supra* note 26, at 96.

<sup>362</sup> *Baker Marine (Nig.) Ltd. v. Chevron (Nig) Ltd.*, 191 F. 3d 194, 197 (2d Cir. 1998).

<sup>363</sup> 939 F. Supp. 907 (D.D.C. 1996).

<sup>364</sup> *Id.*, at 909.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* (Quoting The New York Convention, *supra* note, at art. VII (1)).

<sup>367</sup> *Id.*, at 910.

<sup>368</sup> FAA, *supra* note 26, at 9 U.S.C. §10. The district court in the district where the award was rendered may vacate an award if the award was made through “corruption, fraud, or undue means” or based on an arbitrator’s (a) “evident partiality or corruption”; (b) misconduct in refusing to postpone the hearing, upon sufficient cause shown, or as to

After analyzing the Egyptian arbitration proceedings under § 10 of Domestic FAA, the U.S. court concluded that the award should not be nullified.<sup>369</sup>

Furthermore, the U.S. court relied on a principle in *Scherk v. Alberto-Culver Co.*<sup>370</sup> that parochial views should not be allowed to undermine the enforcement of an arbitration agreement.<sup>371</sup> It also relied on the clause that the parties of this dispute had explicitly agreed that the arbitration would be final and binding and not subject to appeal.<sup>372</sup> The U.S. court did not apply Egyptian law, the law chosen by the parties, to judge the validity of this clause,<sup>373</sup> nor did it apply the principle that such clauses do not influence the grounds for vacating arbitral awards.<sup>374</sup> In effect, this court disregarded Article V (1)(e) of the New York Convention, which suggests the court where the enforcement is sought to take into account the decision of the local court where the award is rendered when deciding whether to enforce the award.<sup>375</sup> In the end, the arbitral award was confirmed while the local Egyptian court's ruling was disregarded<sup>376</sup>

Contrary to *Chromalloy* case, in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*,<sup>377</sup> the Nigerian Federal High Court nullified two arbitration awards rendered in Nigeria under Nigerian law on several grounds.<sup>378</sup> The Nigerian plaintiffs applied to a U.S. court for the enforcement of the invalid awards.<sup>379</sup> Both the Second Circuit and the District Court refused to confirm the

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certain evidentiary issues; (c) misbehavior that prejudiced a party's rights; or (d) use of excessive power or imperfect execution of power that resulted in the failure to enter a mutual, final, and definite award on the subject matter submitted.

<sup>369</sup> *Chromalloy*, supra note 359, at 910-12.

<sup>370</sup> 417 U.S. 506 (1974).

<sup>371</sup> *Chromalloy*, supra note 359, at 911-12 (quoting *Scherk*, 417 U.S. at 519).

<sup>372</sup> *Id.*, at 912.

<sup>373</sup> *Id.*

<sup>374</sup> *Iran Aircraft Indus. V. Avoc Corp.*, 980 F. 2d 141, 145 (2d Cir. 1992).

<sup>375</sup> *Chromalloy*, supra note 359, at 911-12.

<sup>376</sup> *Id.*

<sup>377</sup> 191 F 3d. 194 (2d Cir. 1998).

<sup>378</sup> *Id.*, at 196. The court nullified the awards because the arbitration tribunal improperly awarded punitive damages, went beyond the scope of arbitration agreement, incorrectly admitted evidence, made inconsistent awards and so on.

<sup>379</sup> *Id.*

arbitral awards because U.S. law should not be applied to judge the merits of the awards.<sup>380</sup> The parties had agreed to arbitrate in Nigeria under Nigerian law, a situation different from Chromalloy that specifically provided that the arbitration decision would not be subject to any appeal or other recourse.<sup>381</sup> Furthermore, unlike the court in Chromalloy case, the court in the Baker case found no reasons to refuse to follow the judgment of the Nigerian court.<sup>382</sup> So in the U.S. a nullified arbitral award does not always mean an “unenforceable” award. A U.S. court where the enforcement is sought will decide whether to enforce the award after examining related factors such as the parties’ explicit express agreement, and the grounds on which the award is nullified.

Similarly, in France, a court would not refuse to enforce a foreign arbitral award just because it was set aside by a local court in the country where it was rendered. The 1981 French decree provides that the recognition and enforcement of foreign awards is the same as that of French international arbitral awards.<sup>383</sup> This French statute does not allow its court to refuse to enforce an award only on the ground that it was set aside by the local court in the country where the award was rendered.<sup>384</sup> A French court will make its own decision after examining the reasons for non-enforcement under its own laws.<sup>385</sup>

At this time, there is no record in China that a Chinese court will enforce a foreign commercial arbitral award that has been set aside or nullified by the country where the award was rendered.<sup>386</sup> Theoretically, as a contracting state of the New York Convention, a Chinese

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<sup>380</sup> Id.

<sup>381</sup> Id., at 197.

<sup>382</sup> Id.

<sup>383</sup> N.C.P.C articles 1502 and 1504 provide five grounds on which a French court may set aside a French international award or refuse to enforce a foreign award.

<sup>384</sup> Craig, *supra* note 17, at 32

<sup>385</sup> Id.

<sup>386</sup> Jing Li, *the Recognition and Enforcement of Nullified Foreign Arbitral Awards*, *Arb. & L.*, 65, 70 (2001 Volume. 3)

court also has the right of free judgment provided by Article V of the New York Convention that says a court “may” refuse to recognize and enforce an arbitral award if the award falls under one or more of the seven grounds.<sup>387</sup> However, the Supreme People’s Court’s Notice on the Enforcement of the New York Convention in China in 1987 provided that if a Chinese court finds that a foreign award falls under one or more of the seven grounds provided in the New York Convention, it *should* refuse to enforce the award.<sup>388</sup> The use of “should” instead of “may” excludes the judge’s right to exercise free judgment, a practice that is not in line with the purpose of the New York Convention.<sup>389</sup>

The New York Convention’s aim is to facilitate the enforcement of international arbitral awards in contracting states. Article VII of the New York Convention further provides that the Convention shall not “affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting State nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”<sup>390</sup> This provision permits a contracting state to enforce a nullified arbitral award if under either international treaties other than the New York Convention or that state’s domestic law, the enforcement of such awards is permitted. As in the U.S., a nullified foreign arbitral award does not always mean “unenforceability”.<sup>391</sup> Furthermore, a court will look into the parties’ explicit express agreement, the grounds on which the award is nullified, and other related factors to decide the enforceability of a foreign arbitral award. It is such practice that meets the

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<sup>387</sup> The New York Convention, *supra* note 35, at art. V.

<sup>388</sup> Jing Li, *supra* note 382, at 70.

<sup>389</sup> *Id.*

<sup>390</sup> The New York Convention, *supra* note 35, at art. VII.

<sup>391</sup> Jing Li, *supra* note 382, at 69.

spirit of arbitration: neutrality.<sup>392</sup> Parties prefer arbitration because it helps to free them from the control of local courts. Depending on a court's decision while regardless of parties' explicit will and other reasonable factors, we actually force arbitration still under local courts' control, a practice that conflict with the good will of the New York Convention and the spirit of arbitration thus discourage the development of Chinese arbitration. With the development of Chinese international transactions, there will be more and more foreign arbitral awards sought to be enforced in China. To facilitate the enforcement of arbitral awards, thus to encourage foreign investments in China, the regulations in China should no longer be so rigid, but should provide judges with the right of free judgment to encourage the purpose behind the New York Convention to be a viable reality in China.

## **II. Refusal to Enforce Because of Public Policy of Enforcing State.<sup>393</sup>**

When the New York Convention was initially promulgated, many countries were reluctant to become contracting states<sup>394</sup> because they believed that the rules of the New York Convention were in conflict with the countries' own domestic laws.<sup>395</sup> However, the provision on public policy and the greater reliance by foreign investors on international arbitration have led many states to adopt the New York Convention.<sup>396</sup>

However, "public policy" is not clearly defined in the New York Convention, yet it is most often cited by the losing party in an enforcement proceeding.<sup>397</sup> Among the seven grounds,

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<sup>392</sup> Id.

<sup>393</sup> The New York Convention, *supra* note 35, at art. V (2) (b).

<sup>394</sup> Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards under Article V (1)(E) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 Tex. L. Rev. 1031,1038-39 (1990).

<sup>395</sup> House Comm. On Judiciary, Foreign Arbitral Awards, H.R. Rep. No. 1181, 91<sup>st</sup> Cong., 2d Sess. 1-2 (1970) (that showed the United States resisted the New York Convention because Convention provisions were in conflict with U.S. law)

<sup>396</sup> Carolyn B. Lamm, *Recent Developments in International Arbitration*, 36 Fed. B. News & J. 276, 276 (1989).

<sup>397</sup> Bouzari, *supra* note 37, at 211.

this broad public policy ground gained the most attention<sup>398</sup> In practice, the contracting parties are supposed to interpret this ground narrowly to give the New York Convention greater effect.<sup>399</sup> For example, the United States used to be hostile to arbitration,<sup>400</sup> but once it became a contracting state of the Convention, the U.S. federal courts strongly favored arbitration as a method to settle disputes involving international commerce.<sup>401</sup> The United States courts “have been careful to take into account the strong public policy favoring arbitration and to adopt standards and define defenses in a manner that can be uniformly applied on an international scale. They have therefore construed narrowly any defenses to the enforcement or recognition of an award.”<sup>402</sup> In fact, the U.S. courts have rarely refused to enforce a foreign arbitration award on a public policy ground.<sup>403</sup> For example, federal courts will not refuse to enforce a foreign arbitral award even if the award conflicts with the foreign policy of the United States, the agreement or award is contrary to federal or state law, or the award is barred by laches.<sup>404</sup> In *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’ Industrie Du Papier*,<sup>405</sup> the U.S. court held that the “enforcement of foreign arbitral awards may be denied on [the public policy] basis only where enforcement would violate the forum state’s most basic notion of morality and justice.”<sup>406</sup> Furthermore, in *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*,<sup>407</sup> the court followed

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<sup>398</sup> *Id.*

<sup>399</sup> Some contracting states such as the United States, Kuwait, and Syria have given the convention’s public policy exception a narrow construction. See Kristin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 *Fordham Int’l L.J.* 920, 924 (1995).

<sup>400</sup> Oehmke, *supra* note 336, at 49.

<sup>401</sup> Karamanian, *supra* note 26, at 17.

<sup>402</sup> David W. Rivkin, *International Arbitration*, in *COM. ARB. FOR THE 1990S* 123, 135 (Richard J. Medalie ed., 1991).

<sup>403</sup> Bouzari, *supra* note 37, at 208.

<sup>404</sup> For a thorough discussion on “public policy,” see Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 *A.L.R. Fed.* 481 (2001).

<sup>405</sup> 508 F. 2d 969 (2d Cir. 1974)

<sup>406</sup> Bouzari, *supra* note 37, at 211. (Quoting *Parsons* case, 508 F. 2d at 974).

<sup>407</sup> 656 F. Supp. 160 (S.D.N.Y. 1987).

a narrow interpretation of “public policy” and held that a court could refuse to enforce a foreign arbitral award when the enforcement would violate the most fundamental notions of justice.<sup>408</sup>

Although the New York Convention regulates “public policy” to make it more flexible to attract more contracting states, currently when courts interpret “public policy,” most of them will disregard the formal test of whether the enforcement will violate domestic law or domestic principles.<sup>409</sup> Instead, they will come to the opposite conclusion and apply the test of whether the enforcement would violate “international order.”<sup>410</sup> After years of practice, China interprets “public policy” as “fundamental principles,” an interpretation that is much narrower than before, thus a Chinese court can’t refuse to enforce a foreign arbitral award unless it violates “the most fundamental morals and principles of the Chinese system,”<sup>411</sup> however, such interpretation still falls behind the just mentioned interpretation -- “international order.”

### **III. Other Problems in the Enforcement of Foreign Arbitration Awards**

The New York Convention was intended to facilitate enforcement of international arbitral awards throughout the world. However, as with many legal issues in the early stages in China, consistent application of existing legal principles was a problem, including enforcement of arbitral awards.<sup>412</sup> Although Chinese courts are permitted to refuse to enforce a foreign arbitral award only in accordance with Article V of the New York Convention, Chinese courts may do so without justification.<sup>413</sup> When one looks at published and unpublished record on the enforcement

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<sup>408</sup> Id. at 163-65.

<sup>409</sup> Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Law 269, 270 (1979).

<sup>410</sup> Id.

<sup>411</sup> Klitgaard, *People's Republic of China Joint Venture Dispute Resolution Procedures*, 1 UCLA PAC. BASIN L.J. 1, 33 (1982).

<sup>412</sup> Fishburne & Lian, *supra* note 139, at 334.

<sup>413</sup> *China's Rocky Road to Dispute Resolution: Rough Justice*, Bus. China, Feb. 2, 1998, available in 1998 WL 16823697.

of foreign arbitral awards, China's early performance was not consistent and not satisfactory.<sup>414</sup> One famous example of poor enforcement in China is Revpower case.<sup>415</sup> Revpower, a U.S. manufacturer of industrial batteries, and its Chinese joint venture partner had their dispute arbitrated in Stockholm.<sup>416</sup> The arbitral award issued in 1993 favored Revpower in the sum of approximately \$5 million U.S. dollars. In the same year, Revpower applied to enforce the award with the Shanghai Intermediate People's Court, but it took two years for Revpower to successfully register the award with this court.<sup>417</sup> Despite registration and subsequent diplomatic pressures, the Shanghai People's Court refused to enforce the award without giving any reasonable grounds for its refusal.<sup>418</sup> This court finally dismissed Revpower's application on the ground that the losing party had filed for bankruptcy and therefore there were no assets against which the award could be enforced.<sup>419</sup>

Chinese legal authorities became aware of their bad reputation on the enforcement of foreign arbitration awards. So in 1995 the Supreme People's Court issued a Notice on how to deal with foreign arbitral awards which regulates that a final decision to refuse to enforce a foreign arbitral award can only be made by the Supreme Court.<sup>420</sup> Furthermore, to guarantee effective enforcement of foreign arbitral awards, in 1998 the Supreme People's Court issued a regulation imposing a time limit on the enforcement of foreign arbitral awards, giving a competent court two months from the date of receiving the application to decide whether to recognize and enforce an award and six months from the date of their previous decision to finish

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<sup>414</sup> Harer, *supra* note 5, at 393.

<sup>415</sup> For full context of this case, see Jessica L. Su, *Enforcement of Arbitral Awards: A Survey of Selected Asian Jurisdictions*, Int. A.L.R., 179 (20003(6)).

<sup>416</sup> *Id.*, at 179.

<sup>417</sup> *Id.*, at 180.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*, at 181.

<sup>420</sup> Notice about the way to deal with foreign-related arbitration and foreign arbitration, *supra* note 279, at art. 2.

the enforcement.<sup>421</sup> And although there have been some problems in non-major cities, such as a general lack of resources, expertise, and knowledge of the New York Convention among Chinese judicial officials and remnants of local protectionism,<sup>422</sup> with the development of the economy, China has made great strides in disseminating an elementary knowledge of law including international law to all officials. The Chinese government has realized that a good reputation on following international law will attract more foreign investors to invest in China.<sup>423</sup> And after China became a member of the World Trade Organization, with the development of even more transparent market, the legal circumstance will become even better.

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<sup>421</sup> Supreme People's Court's Regulation on the fees and time limit for recognition and enforcement of foreign arbitral awards, *supra* note 292, at art. 4..

<sup>422</sup> Sun & Zeng, *supra* note 130, at 50.

<sup>423</sup> Li, *supra* note 47, at 165.

## CHAPTER 5

### ENFORCEMENT OF CHINESE ARBITRAL AWARDS IN FOREIGN COUNTRIES

According to the 1995 Arbitration Law, if one party of a domestic foreign-related arbitral award is a Chinese legal person, while the other party or its property is located outside the territory of China, the Chinese party should apply for the enforcement of the award to a competent foreign court.<sup>424</sup> Since China acceded to the New York Convention in 1987, the recognition and enforcement of Chinese arbitration awards is mainly achieved under the New York Convention.<sup>425</sup> Now, Chinese arbitral awards can be recognized and enforced in more than 90 countries<sup>426</sup> and over seventy cases have been successfully recognized and enforced in over 20 countries around the world, including the United States, England, Canada, Japan, German and Australia.<sup>427</sup> The winning party who applies for the enforcement of the arbitral award in another country must provide a duly authenticated original award or its duly certified copy, as well the original arbitration agreement or its duly certified copy.<sup>428</sup> The foreign court should enforce the arbitral award unless the losing party or the court can prove the existence of at least one of the five grounds on which enforcement may be denied under Article V of the New York Convention.<sup>429</sup>

Most Chinese arbitration awards that are enforced in foreign countries are CIETAC awards.<sup>430</sup> However, different countries may interpret the New York Convention and decide

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<sup>424</sup> 1995 Arbitration Law, *supra* note 90, at art. 71.

<sup>425</sup> Li, *supra* note 47, at 155.

<sup>426</sup> Richard Singleton et al., *U.S. Court Recognizes Chinese Arbitral Award*, *China L. & Prac.* 48, 48-51 (1996 (9)).

<sup>427</sup> Li, *supra* note 47, at 155. The figure is provided by the Secretariat of CIETAC.

<sup>428</sup> The New York Convention, *supra* note 35, at art. IV.

<sup>429</sup> *Id.* art. V.

<sup>430</sup> Song, *supra* note 46, at 228.

whether to enforce CIETAC awards in different ways. I will first look at the enforcement of two CIETAC awards in the United States. First, in *Polytek Engineering Co.(a Hong Kong Co.) v. Jacobson Co.(a U.S. Co.)*,<sup>431</sup> the plaintiff first signed a contract with a Chinese corporation agreeing to sell certain equipment to that Chinese corporation.<sup>432</sup> Since the plaintiff did not produce the equipment, it sent a purchase order to the defendant, a Minnesota corporation pursuant to the original contract.<sup>433</sup> The plaintiff attached to the purchase order the contract with the Chinese corporation, which included an arbitration clause stating that any disputes arising from the contract should be solved by arbitration in CIETAC.<sup>434</sup> The plaintiff also included on the purchase order a clause saying “all the terms and conditions should conform to the main contract attached.”<sup>435</sup> Following the provisions of the purchase order and the attached contract, the defendant delivered the equipment to the plaintiff, and then the plaintiff transferred it to the Chinese corporation.<sup>436</sup> However, the Chinese corporation claimed that the equipment could not perform as stated under the contract. The Chinese corporation and the Hong Kong corporation sought to solve the dispute by CIETAC.<sup>437</sup> The arbitration award favored the Chinese corporation for damages of \$ 1.2 million and ordered the plaintiff to collect the equipment at the plaintiff’s cost.<sup>438</sup>

The plaintiff then sued the U.S. corp. in CIETAC and received an award favoring the plaintiff for damages of \$ 1.7 million and ordered the defendant to collect the equipment at the defendant’s cost.<sup>439</sup> Upon the defendant’s refusal to enforce the CIETAC award, the plaintiff

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<sup>431</sup> 984 F. Supp. 1238 (D. Minn. 1997).

<sup>432</sup> Id. at 1239.

<sup>433</sup> Id.

<sup>434</sup> Id.

<sup>435</sup> Id.

<sup>436</sup> Id.

<sup>437</sup> Id.

<sup>438</sup> Id..

<sup>439</sup> Id, at 1240.

applied to the U.S. District Court of Minnesota to enforce the CIETAC award. The defendant argued that it had no arbitration agreement with the plaintiff, so it should not be bound to the CIETAC award.<sup>440</sup> The court found that the key issue was whether an arbitration clause of a contract attached to a purchase order could meet the requirement of a written arbitration agreement between the parties.<sup>441</sup> After examining the legal facts of the dispute, the court concluded that because the purchase order was formed after the initial contract and the transaction between the parties actually heavily relied on that contract, and during the transaction the defendant never objected to the arbitration clause, it could be deemed that there was a written arbitration agreement between the parties.<sup>442</sup> Since the defendant made no further challenges pursuant to Article V of the New York Convention, the court ordered the enforcement of this CIETAC award.<sup>443</sup>

A second case is *Anhui Provincial Import & Export Corp. (Anhui) v. Hart Enterprises International, Inc. (Hart)*,<sup>444</sup> where Anhui applied to CIETAC for Hart's breach of a series of purchase contracts between them.<sup>445</sup> CIETAC received the case and notified Hart to appoint an arbitrator and forward its statement of the case, but Hart failed to do so.<sup>446</sup> CIETAC then notified Hart of the impending arbitration proceedings in Beijing, but Hart still did not respond to the notification nor did it attend the arbitration hearing.<sup>447</sup> Instead, Hart brought suit in an American court that ordered Hart to solve the dispute by arbitration. However, several days before the order was issued, the arbitration tribunal in China had already conducted its hearing on the issue and the CIETAC filed an award favoring Anhui who subsequently applied to a U.S. district court

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<sup>440</sup> Id.

<sup>441</sup> Id.

<sup>442</sup> Id. at 1241.

<sup>443</sup> Id. at 1242.

<sup>444</sup> 1996 WL 229872 (S.D.N.Y 1996).

<sup>445</sup> Id, at 1.

<sup>446</sup> Id.

to enforce the award.<sup>448</sup> Hart appealed, claiming the court must not enforce the award on the ground that it had lack of notice.<sup>449</sup> The court looked into whether the enforcement of the award would be against public policy or whether the award rendered did lack necessary notice to Hart.<sup>450</sup> The court finally held that neither the enforcement of the award would be against US public policy nor Hart was without notice. The court even thought that Hart had “essentially ignored CIETAC during every step of the arbitration process.”<sup>451</sup> Consequently, the court ordered the recognition and enforcement of the award.<sup>452</sup>

From these two cases, we can see that normally U.S. courts decide whether to recognize and enforce a foreign arbitral award by strictly following the rules of the New York Convention. Furthermore, in *Polytek*, although the defendant never showed a positive intent to have the dispute solved by arbitration, the court confirmed the existence of a written arbitration agreement between the parties. It is easy to conclude that U.S. courts are more likely to confirm the validity of arbitration awards and enforce such awards. Since the enforcement of international arbitral awards falls under the New York Convention, it is an even easier process to enforce such awards than for domestic arbitral awards.

Chinese arbitral awards are also enforced in Japan under the New York Convention. For example, on August 25, 1999, a Japanese district court issued an order to recognize and enforce a CIETAC award involving a purchase contract between a Japanese company and a Chinese company.<sup>453</sup> The two parties had their dispute solved by CIETAC according to the contract.<sup>454</sup>

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<sup>447</sup> Id.

<sup>448</sup> Id.

<sup>449</sup> Id.

<sup>450</sup> Id, at 2.

<sup>451</sup> Id. at 2-3.

<sup>452</sup> Id. at 4.

<sup>453</sup> For the full context of this case, See *Honda Cai, a CIETAC arbitral award enforced in Japan*, *Arb. & L.*, 105, 105 (2001 (6)).

<sup>454</sup> Id.

On December 6, 1997, CIETAC rendered an award favoring the Chinese party who, after the losing Japanese party failed to fulfill the award within the required time, applied to a Japanese district court to enforce the award.<sup>455</sup> Besides the petition of the invalidity of the arbitration agreement and the irregularity of the arbitration process, the Japanese party argued that the plaintiff provided false evidence to the arbitration tribunal. The court held that the termination of the contract could not deny the validity of the arbitration agreement between the parties, therefore the dispute should be decided by arbitration.<sup>456</sup> Although the Japanese party used the fact that the arbitration tribunal notified him in Chinese instead of Japanese and did not provide a Chinese lawyer for him as reasons to nullify the arbitration award.<sup>457</sup> The court found that under Article 75 (1) of the Arbitration Rules of CIETAC, arbitration would proceed in Chinese unless the parties agreed to use another language. Since the parties did not agree on the use of a language other than Chinese before the arbitration commenced, the fact that arbitration proceeded in Chinese should not be deemed as an irregularity of the arbitration process.<sup>458</sup> Lastly, the court looked into the petition of “false evidence” on the ground of “public policy,” and held that this misconduct could not be seen as a violation of “public policy” that should be interpreted as basic Japanese legal principles.<sup>459</sup> This meant that the CIETAC award gained full enforcement in Japan.<sup>460</sup>

The attitude of courts in Singapore regarding the enforcement of Chinese arbitral awards under the New York Convention is also relevant. In *Hainan Machinery Import and Export Corporation (Hainan Co.) v. Donald & McCarthy Pte Ltd. (Donald Ltd.)*,<sup>461</sup> CIETAC issued an

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<sup>455</sup> Id.

<sup>456</sup> Id.

<sup>457</sup> Id.

<sup>458</sup> Id.

<sup>459</sup> Id, at 105-06.

<sup>460</sup> Id, at 106.

<sup>461</sup> 1996-1 S.L.R. 34. See also Michael Hwang & Rajesh C. Muttath, *Enforcement of Arbitral Awards in Singapore*,

arbitration award favoring Hainan Co., who applied to a Singapore court to enforce the award. Donald Ltd. argued to refuse to enforce the award on the basis of section 31 (2) (e) of the International Arbitration Act (IAA) (similar to article V (1) (d) of the New York Convention).<sup>462</sup> The court denied the petition because the defendant did not provide sufficient evidence to prove that the composition of the arbitration tribunal or the arbitration proceeding breached the Arbitration Rules of CIETAC.<sup>463</sup> Instead, the court held that the defendant had sufficient opportunity to attend the hearing but it chose to avoid the proceeding.<sup>464</sup> The defendant also argued that since the plaintiff claimed it would seek legal recourse, the plaintiff had waived its right to arbitrate. The court held that such claim could not legally waive the plaintiff's right to arbitrate.<sup>465</sup> The evidence provided by the defendant only showed that the defendant sincerely believed that by seeking legal recourse, the plaintiff meant to commence a lawsuit. The court denied the defendant's petition based on this evidence.<sup>466</sup> The defendant also argued that the dispute should be determined under its applicable law. However, the parties did not agree on any applicable law and neither did the arbitration tribunal.<sup>467</sup> The court held that the principle of applicable law is that if the parties did not have an agreement on applicable law, the law in the country where the arbitration commission is located would be regarded as the implied choice of law between the parties.<sup>468</sup> Here, CIETAC is located in China and the tribunal rendered the award based on Chinese law. Thus, this too was denied by the court.<sup>469</sup> Lastly, the defendant

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Int'l Arb. L. Rev. 207, 211 (2000).

<sup>462</sup> In Singapore, there are two arbitration acts. One is the 1980 Arbitration Act (Chapter 10 of Singapore) that regulates non-international arbitrations, the other is the 1994 International Arbitration Act (IAA) (Chapter 143 A of Singapore) that regulates international arbitrations. See Hwang & Muttath, *supra* note 457, at 211.

<sup>463</sup> *Id.*, at 211.

<sup>464</sup> *Id.*, at 211.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.* at 211-12.

argued that because the award did not “decide the real matter in dispute between the parties,” the enforcement of the award would be against public policy.<sup>470</sup> The court discussed on what constituted “public policy” and held that “public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good.”<sup>471</sup> Therefore, the award was enforced.

From the above cases, it is evident that Chinese arbitral awards have gained satisfactory enforcement since China became a contracting state of the New York Convention. Almost all the contracting states strictly follow the rules of the New York Convention when deciding whether to enforce a Chinese arbitral award. As the Singapore court said in *Hainan Machinery*, “as a nation which itself aspires to be an international arbitration center, Singapore must recognize foreign awards if it expects its own awards to be recognized abroad.”<sup>472</sup> This idea should also be treasured by Chinese courts.

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<sup>470</sup> Id, at 212.

<sup>471</sup> Id.

<sup>472</sup> Id.

## **CHAPTER 6**

### **CONCLUSION**

For foreign investors, a better investment environment is very important to guarantee success in international business. Deference to arbitration can provide part of this guarantee even though foreign investors may have to resolve their disputes in other country using a foreign law in the arbitration process. While the Chinese government has taken significant steps towards meeting internationally accepted norms for conducting business and for resolving international commercial disputes, further changes including changes on arbitration are needed. China must support the recognition and enforcement of domestic and international arbitral awards if it wants to remain an attractive forum to foreign investors in the long term. To achieve this target, China's legal authorities should rectify the outdated provisions on arbitration, continue disseminating legal knowledge on domestic and international arbitration, but start with forming a more positive attitude towards arbitration. Being a new member of the WTO, China's heartily deference to arbitration will help it gain a good reputation on international trade and give foreign investors more confidence in Chinese free market, which will be a great contributing factor in the development of a healthy Chinese economy.

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