RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CHINA AND GROUNDS FOR REFUSAL IN THE CONTEXT OF THE NEW YORK CONVENTION

LLM Paper
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INTRODUCTION

Arbitration, as a form of alternative dispute resolution, is now serving an indispensable instrument for modern merchants to solve their disputes in the commercial transaction. Especially, in the cross-border transaction, arbitration is frequently used as a neutral mechanism to defeat the potential local protectionism by the national court. However, a favorable award is not the end of the story; the winning party may encounter unexpected difficulties in the country where the recognition and enforcement of the award is sought due to the discrepant implementations in different contracting member states of the New York Convention.

With the inexorable rise of Chinese economy, more active participations from Chinese companies have been witnessed in the global trade, attracting the westerners’ attention on the situation of Chinese attitude towards the New York Convention.

Given the special legal regime in China, this paper is to explore the recognition and enforcement of foreign arbitral awards in China and grounds for refusal in the context of the New York Convention, through comparative study and empirical study. Apart from the conclusion part, this paper is divided into 3 main parts:

Chapter I provides an overview of the recognition and enforcement of the foreign arbitral award, in which the scope of the application of the New York Convention is to be illustrated, along with certain definitions which need to be distinguished.

Chapter II is the heart of this paper, which is the Chinese practice of the recognition and enforcement of foreign arbitral awards under the New York Convention, in which a very unique interpretation of the non-domestic award in China will be stressed, followed by the procedural requirement and the Report Mechanism, most importantly, the grounds for refusal of the recognition and enforcement of foreign arbitral awards in China is to be illustrated in detail through the analysis of ample cases.

Chapter III discusses some specific suggestion aiming to the problems that have been revealed during the process of China’s implementation of the New York Convention.
I. AN OVERVIEW OF THE RECOGNITION AND ENFORCEMENT OF THE FOREIGN ARBITRAL AWARD

1. The Scope of Application of New York Convention

   1.1 Foreign Arbitral Award

With the State of Palestine joined in on 2 January 2015, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)\(^1\) now has 154 contracting parties. Undoubtedly, as the most successful international instrument with regard to international commercial arbitration, the New York Convention provides the winning party with a more straightforward and uniform way to recognize and enforce foreign arbitral awards in other countries by imposing the burden of proof on the party against whom recognition and enforcement was invoked\(^2\), instead of conforming with national laws of the country where is to be relied upon in the past.\(^3\)

The scope of application of the Convention was one area in which there was compromise.\(^4\) Although the New York Convention adopted the territorial criterion for the application of the Convention purposed in the 1955 UN draft, Article I also inserted a ‘non-domestic’ award due to the legislation divergence in some civil law countries, such as France and Germany, where under French and Germany law, an


\(^2\) See Article V of New York Convention.


arbitration rendered in accordance with a foreign law would be deemed as a foreign award.  

‘Foreign arbitral award’ is ‘foreign’ in two scenarios which were defined in Article I of the New York Convention:

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.

Apart from the traditional territorial criterion and non-domestic award, the ambit of application is limited by two reservations stipulated in Article I (3) of New York Convention.

1.2 Two Reservations

One of the main tools for the New York Convention’s undeniable success is the fact that it allows Contracting State to ‘mould’, at least to a certain extent, the Convention’s provisions to avoid any clash with the core principles of each Contracting State’s domestic law.

There are two reservations available to the Signatory States under the New York Convention: ‘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. It may also declare that it will apply

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the Convention State. 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* (emphasis added).7

The First reservation is also called the ‘reciprocity reservation’, which allows the
Contracting States to recognize and enforce foreign arbitral awards only in the
territory of another Signatory State to the New York Convention. As stated in
*Weizmann Institute of Science v. Neschis*8, the US court did not apply the Convention
to a Liechtenstein award because Liechtenstein was not a Contracting State in 2002.

With the increasing number of Contracting States to the New York Convention, the
impact of the reciprocity reservation has become weaker and weaker nowadays.
However, it would never be pointless for the parties to make sure the place where the
arbitral award will be made would not lead to any unnecessary difficulties when the
recognition and enforcement is sought.

It should be noted that by making the reciprocity reservation a country does not refuse
to enforce awards made in non-Contracting States. Rather, it refuses to apply the
Convention to those awards.9 In this context, the arbitral awards usually may be
recognized and enforced through other approaches. For instance, a German court
applied the 1927 Geneva Convention to enforce a UK award since UK was not a
Contracting State at that time.10

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7 Article I (3) of New York Convention.
9 Michael Pryles, Reservation Available to Member States: The Reciprocal and Commercial
Reservations, Cameron May 2008, P163
The second reservation is called the ‘commercial reservation’, which allows the Contracting States to apply the New York Convention to issues which are only related to commercial relationship in their national law. This reservation was inserted because it was believed that, otherwise, it would be impossible for certain Civil Law Countries, which distinguished between commercial and non-commercial transactions, to adhere to the Convention.\(^{11}\) In one US case, *B.V Bureau Wijsmuller v. United States*\(^{12}\), the court held that the activity of salvaging of a US warship could not fall into the ambit of ‘commercial’ relationship. In practice, the commercial reservation is not new to the most of Contracting States in that the 1923 Geneva Protocol had already provided such a backdoor to impair the uniform application of the Convention. However, the restrictive interpretation of ‘commercial’ adopted by some national courts had been criticized as a hurdle to the New York Convention since no uniform interpretation was found in the articles. One example is the case *Taie Haddad and Hans Barrett v. Société d’Investissement Kal*\(^{13}\), ICC arbitral tribunal rendered an award related to architectural design where the architects were entitled to get paid from their work. But when they sought the enforcement of such award in Tunisia, the court found that Tunisia had made the commercial reservation in the New York Convention and architectural works are not considered as commercial under Tunisian Law. Hence, the enforcement was denied.

It is noteworthy that more and more cases have indicated the growing trend of applying the commercial reservation by the national courts in a more liberal way which somehow echoed the explanation of ‘commercial’ in the Modal Law\(^{14}\), and thus


\(^{14}\) The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial
little impact would affect the effectiveness of the New York Convention with regard to the recognition and enforcement of foreign arbitral awards.

1.3 Non-domestic Award

Apart from the territorial criterion, the second criterion—‘non-domestic award’ is provided in the second paragraph of Article I (1): ‘[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought’. The Convention did not provide a specific definition of the non-domestic award. If looking back to the historical background of this Article, it will not be difficult to find that the non-domestic award was inserted because some civil law countries intended to widen the application of the New York Convention. For example, suppose an arbitral award was made in France under the arbitration law of China, and you want to enforce this award in the country where the award was made which is France. However, under the French law, this award would be considered as a foreign award, and in the meantime such an award would not recognized as the ‘foreign arbitral award’ in the context of the New York Convention because this award was not made in the territory of another State. If the ‘non-domestic’ award was not included, then the New York Convention was not able to be invoked under this circumstance. Hence in this sense, the non-domestic criterion somehow enlarges the application of the Convention.

Albert Jan van den Berg considers the non-domestic award may cover three categories:

(a) An award made in the enforcement State under the arbitration law of another State

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representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

15 Supra note 5.
(b) An award made in the enforcement State under the arbitration law of that State involving a foreign (or international) element;

(c) An award that is regarded as ‘a-national’ in that it is not governed by any arbitration law.\(^{16}\)

With respect to category (a), the above example has illustrated this scenario which is the narrow interpretation of the non-domestic award under the Convention. As for category (b), this was brought to the public view by the US leading decision in \textit{Bergesen v. Muller}\(^ {17}\). The US court of Appeals for the Second Circuit enforced an arbitral award made in New York under the New York Law between a Norwegian shipowner and a Swiss company, by relying on the non-domestic award criterion in Article I (3) of the New York Convention. The Court held that since the Convention did not define the non-domestic awards, then the Enforcement State was permitted to define its own understanding of the non-domestic award in accordance with its national law. Most importantly, the court adopted the view that awards ‘not considered as domestic’ denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.\(^ {18}\)

As regards category (c), it is still controversial that whether ‘Non-domestic’ award criterion could offer the possibility to embrace the recognition and enforcement of arbitral awards made without any reference to the application of any national arbitration law.


\(^{17}\) Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir:1983)

\(^{18}\) \textit{Ibid}, P932
It is apparent that from the wording of Article I (1) of the Convention, the non-domestic award criterion leaves the Enforcement State discretion to decide which awards are domestic and which are not. This can be implied from the word ‘considered’ in the second sentence of Article I (1). Indeed, this may lead to various interpretations which somehow are far beyond the legislative intent, but it is uncontested, more awards would be included into the sphere of the New York Convention from a pro-arbitration perspective.

2. ‘Recognition’ and ‘Enforcement’ in New York Convention

The Term ‘Recognition’ and ‘Enforcement’ do run together and connect with each other as well. Compared to a more precise expression ‘Recognition or Enforcement’ was used in the Geneva Convention, ‘Recognition and Enforcement’ is frequently used in the New York Convention. Nonetheless there are no definitions of these two terms in the Convention; it is obvious that there is a distinction between ‘Recognition’ and ‘Enforcement’.

Recognition usually refers to the court where the recognition is sought to give a binding legal force to an already made arbitral award. By contrast, enforcement refers to the process of effectuating the decision of the arbitral tribunal. Recognition on its own is generally a defensive process, acting as a shield, and enforcement however, acting its function more like a sword. Recognition is intend to block any attempt to raise in fresh proceeding issues that have already been decided in the arbitration that gave rise to the award whose recognition is sought. For instance, a legal proceeding was raised by a motor company against an auto parts manufacturer for its defective performance of the parts in the contract. Suppose the motor company and the auto parts manufacturer had a contract and one of the parts manufactured by the auto parts manufacturer was defective. The motor company took the auto parts manufacturer to court and won the case. Now, the motor company seeks to enforce the arbitral award in a New York Convention country. The auto parts manufacturer argues that the issue of the defective parts has already been decided in the arbitration that gave rise to the award whose recognition is sought. Therefore, the court must recognize the arbitral award and enforce it. In this case, the court would recognize and enforce the arbitral award.

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19 See Chapter II.1.1.2., ‘Non-domestic’ award in China.
22 Ibid, P628.
parts manufacturer had already went through an arbitration proceeding to solve the same claim before launching this legal proceeding; and a final award was made, where the claim of defective performance was dismissed by the tribunal. Here, in this context, the auto parts manufacturer could seek to the court to recognize the rendered arbitral award, and the recognition if made afterwards could be served as an effective legal defense against the new claim brought in the following legal proceedings. Therefore, a shield would be built up at the time a determined claim was invoked in the future.

Conversely, enforcement goes a step further than recognition. As a sword, ‘Enforcement’ means that the court would compel the losing party to execute the final and binding award made by the tribunal under by means of certain legal sanctions. In practice, recognition is considered as the necessary prerequisite to enforce an arbitral award, that is to say, only the binding effect of an award is recognized by the court, and then the court would activate the enforcement procedure. As the abovementioned example, suppose the tribunal made the award in favor of the motor company and the auto parts manufacturer was under the obligation to deliver the non-defective parts and to compensate the loss suffered by the motor company due to the defective performance. The motor company could resort to the court to enforce the award if the auto parts manufacturer only delivered the goods but refused to pay the damages. In this scenario, the court was able to apply legal sanctions directly against the banks accounts or trading accounts of the auto parts manufacturer.

Recognition and enforcement, as the most direct measures to guarantee the effectiveness of arbitration awards, *inter alia* international arbitration awards, not only represents supervisory powers of a national court, but also reflects the attitude of national courts in a sovereign state towards arbitration.
II. CHINESE PRACTICE OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

1. The Application of the New York Convention in China

1.1 China’s Accession to the New York Convention

In the past time, foreign investors had many obstacles when seeking the recognition and enforcement of foreign arbitral awards against Chinese companies in China. Before acceding to the New York Convention, there was no specific provision regarding to the recognition and enforcement of foreign arbitral awards in China. The only seemingly possible approach was set out through the judicial assistance, which was provided in Article 204 of Civil Procedure Law (Trial Implementation):

When a people's court of the People's Republic of China is entrusted by a foreign court with the execution of a final judgment or order, the people's court shall examine it in accordance with any international treaty concluded or acceded to by the People's Republic of China or on the principle of reciprocity. If the court deems that the judgment or order does not violate the fundamental principles of the law of the People's Republic of China or her national and social interests, it shall order to recognize the validity of the judgment or order and execute it according to the procedure specified in this Law; otherwise, the people’s court shall return the judgment or order to the foreign court.  

Article 204 only set out the rule of the recognition and enforcement of foreign judgment or order, and which need to satisfy three requirements, including: the judgment or order is final in the jurisdiction where it is rendered; application of

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23 Civil Procedure Law of the People's Republic of China (For Trial Implementation), Adopted at the 22nd Meeting of the Standing Committee of the Fifth National People's Congress and promulgated by Order No.8 of the Standing Committee of the National People's Congress on March 8, 1982, and implemented on a trial basis as of October 1, 1982.
recognition and enforcement of such judgment or order has to be applied by a foreign court; such judgment or order cannot violate the fundamental principles of China or the national and social interest. Besides, reciprocity principle had to be respected when recognition and enforcement is activated. Hence, the recognition and enforcement of foreign arbitral awards in China will be executed in the same way as did to the foreign judgment or order, and the application can only be entrusted by relevant foreign court not by the parties, which leads to numerous difficulties and inconveniences.

On 2 December 1986, the National People’s Congress Standing Committee adopted the decision on joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards along with the declaration of two reservations (reciprocity and commercial reservations), and would take into effect on 22 April 1987 in China.\(^\text{24}\) The adoption of New York Convention played an important role in the legislative amendments regarding to the recognition and enforcement of foreign arbitral awards in China, for example, Article 204 of Civil Procedure Law (Trail Implementation) was later repealed and replaced by new provisions in the Civil Procedure Law.\(^\text{25}\)

Twelve days before the New York Convention took effective in China, on 12 April 1987, the Supreme People’s Court issued a *Supreme People’s Court’s Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention Implementation Notice)*.\(^\text{26}\)

\(^{24}\) The Standing Committee of the NPC issued a decision on China's access to the New York Convention on 2 December 1986, and the ratification became effective on 22 April 1987.

\(^{25}\) Article 269 of Civil Procedure Law 1991: 'Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, a party shall apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity.' Now, this provision is still unrevised, see Article 283 of Civil Procedure Law (2012 Amendments).

\(^{26}\) Supreme People’s Court’s Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, issued by the Supreme People’s Court on 10 April 1987.
Convention Implementation Notice was intended to safeguard the smooth implementation of the New York Convention, and form the basis for the recognition and enforcement of foreign arbitral awards in China. Two reservations, namely the reciprocity reservation and commercial reservation, were made by China when ratifying the New York Convention, and which were clarified in the Convention Implementation Notice as follows:

I. In accordance with the reciprocity reservation declaration made by China upon its accession to this Convention, China will only apply this Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting state. In case of any discrepancy between the provisions of this Convention and the provisions of China’s Civil Procedure Law (Trial Implementation), this Convention prevails. Where an arbitral award made within the territory of a non-contracting state needs to be recognized and enforced by a Chinese court, Article 204 of Civil Procedure Law (Trial Implementation) shall apply.

II. In accordance with the commercial reservation declaration made by China upon its accession to this Convention, China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the People’s Republic of China. ‘Legal relationships, whether contractual or not, which are considered commercial’ means the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as purchase and sale of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labor service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine

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accident, and ownership disputes, except disputes between foreign investors and the host government. (emphasis added)

The meaning of the term ‘commercial’ was exhaustively illustrated in Article II of the Convention Implementation Notice, and however, disputes between foreign investors and the host government are excluded in this context. It is note that the abovementioned dispute was covered by Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, and which was later signed by China in February 1990.

1.2 Non-Domestic Award in China

As stated above, the non-domestic award originated from the intention of boarder application of the New York Convention purposed by some civil law countries. Despite that Albert Jan van den Berg contended the expansive interpretation adopted by the US court in Bergesen was contrary to the historical background of non-domestic award (Conventional interpretation), in his latter thesis, he recognized the discretionary power of the court in a enforcing country to interpret the non-domestic award freely due to the word ‘consider’ expressed in Article I of the New York Convention. However, the interpretation of the non-domestic award in China is particularly unique, which somehow links to the issue ‘Foreign Arbitration Institution conducting arbitration with the seat in China’ in that the concept of ‘seat of arbitration’ is not incorporated into Chinese law, instead, the designation of an

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28 Art I, II of the Supreme People’s Court’s Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

29 Decision of the Standing Committee of the National People’s Congress to Ratify the Convention on the Settlement of Investment Disputes between States and Nationals of other States, was signed by China on 9 Feb. 1990; passed per decision of the Standing Committee of the NPC issued on 1 Jul. 1992; ratification deposited on 7 Jan. 1993; the Convention is effective in China from 6 Feb. 1993.

30 Supra note 5.

31 Albert Jan Van Den Berg, When is An Arbitral Award Nondomestic under the New York Convention of 1958, Pace Law Review, Volume 6, issue 1, Fall 1985, P39.

32 Supra note 16.
arbitration institution is used as the standard to determine the nationality of a foreign arbitral award and the validity of an arbitration agreement in China. In this circumstance, the arbitral award rendered by a foreign arbitration institution, especially, the Arbitration of International Chamber of Commerce in China is in a blurred status.

A. Is the Arbitral Award Rendered by ICC with the Seat in China in accordance with Chinese Law?

The strict requirement of arbitration institution in Chinese Arbitration Law directly influences the validity of the arbitral award issued by ICC in China. Article 16 of Chinese Arbitration Law stipulates that an arbitration agreement shall contain the following particulars: an expression of intention to apply for arbitration; matters for arbitration; and a designated arbitration commission. Hence, inevitable difficulties would emerge by applying the standard arbitration clause of ICC without referring to the arbitration institution. In Züblin International GmbH v. Wuxi Work General Engineering Rubber Co., Ltd., the Supreme People’s Court found that the parties inserted an arbitration clause in the contract, providing that ‘Arbitration: ICC Rules, Shanghai shall apply’. And then ruled that in the circumstances where the parties failed to stipulate the governing law of the validity of the arbitration clause, according to the general principle of the governing law of the validity of the arbitration clause, the law of the place where the arbitration took place will apply. In other words, Chinese law shall be applied to determine the validity of the arbitration clause between the parties. Accordingly, the court finally decided the arbitration clause null and void because the parties did not designate an arbitration institution in pursuance to Chinese Arbitration Law.

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33 The Standard Arbitration Clause of ICC”All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

To this situation, in 2005, ICC made an adjustment for the arbitration clause used in Mainland China:

It is prudent for parties wishing to have an ICC arbitration in Mainland China to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration. The following language is suggested for this purpose:

“All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Nonetheless the standard ICC arbitration clause was amended by incorporating the designation of ICC expressly, the arbitration academic circles in China still had doubts on the issue whether the Arbitration of the International Chamber of Commerce could constitute to the ‘arbitration institution’ under Chinese Arbitration Law, as Article 10 provides that:

Arbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people's governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. Arbitration commissions shall not be established at each level of the administrative divisions.

**B. What Type of Award can the Arbitral Award Rendered by ICC with the Seat in China be Categorized as?**

The case *Duferco S.A. v. Ningbo Arts and Craft Import and Export Co, Ltd.*\(^{36}\) was the first case that people's court considered arbitral award made by ICC in China as the non-domestic award under the New York Convention. On 23 January 2003, Duferco and Ningbo concluded a contract containing an arbitration clause ‘*All disputes arising out of or in connection with the present contract or the execution thereof shall be settled by friendly negotiation. If no solution can be reached, the parties shall then submit to The Arbitration of the International Chamber of Commerce in China under the United Nations Convention on the International Sale of Goods*’. On 12 September 2005, Duferco submitted the case to ICC to arbitration after the disputes occurred. Subsequently, on 21 September 2007, the arbitral award No.14006/MS/JB/JEM was issued in favor of Duferco by a sole arbitrator nominated by ICC in Beijing. Upon the application of the recognition and enforcement of this award, Ningbo Intermediate People’s Court held that the arbitral award in the present case was the non-domestic award in accordance with Article I (1) of the New York Convention. And without any ground of refusals was found under Article V of the New York Convention, the court decided to recognize and enforcement the concerned arbitral award.

In fact, the heart of the problem regarding to ‘ICC arbitration in China’ is the nonexistence of ‘the seat of arbitration’ in Chinese law. Under this situation, the different types of arbitral award was classified on the base of different types of arbitration institution, instead of referring to the international standard—‘the seat of arbitration’. There are three types of arbitral award in China: domestic award, made by legally established arbitration institutions under Chinese law\(^{37}\), foreign-related award, made by foreign-related arbitration institutions of the PRC\(^{38}\); foreign award, made by foreign arbitration institutions.\(^{39}\) In contrast to the territorial criterion of

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\(^{37}\) Article 237 of Civil Procedure Law (2012 Amendments)

\(^{38}\) Article 274 of Civil Procedure Law (2012 Amendments)

\(^{39}\) Article 283 of Civil Procedure Law (2012 Amendments)
determining the nationality of arbitral award in the New York Convention, Article 283 of Civil Procedure Law (2012 Amendments) adopted the arbitration institution criterion in which the nationality of an arbitral award depends on where the arbitration institution is located:

Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, a party shall apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity.

This was well illustrated in the case *TH&T International Corp. v. Chengdu Hualong Automobile Parts Co., Ltd.*[^40] TH&T signed the contract with Chengdu Hualong containing an arbitration clause ‘*Any dispute regarding marketing and sales, payment of the goods arising out of or in connection with the present agreement shall be submitted to arbitration under the Rules of Arbitration of the International Chamber of Commerce in Los Angeles*’. Later, ICC issued the award in Los Angeles in favor of TH&T and TH&T issued the application of the recognition and enforcement of such award to Chengdu Intermediate People’s Court due to the Chengdu Hualong’s non-performance of the duties under the award. The court held that the award is a French award based on the fact that the head office of Arbitration of the International Chamber of Commerce is Paris, rather the place where the award is made which is the United States. Therefore the court found that both France and China are the contracting member state to the New York Convention, and in accordance with Article I and the reciprocity reservation made by China, the New York Convention shall apply to the present case. Finally, without any valid ground of refusal was found, the

[^40]: *TH&T International Corp. v. Chengdu Hualong Automobile Parts Co., Ltd.*, 12 December 2003, Higher People’s Court of Sichuan Province
application for the recognition and enforcement of the arbitral award was granted by the court.

Notably, in most cases, if both the arbitration institution and seat of arbitration are foreign, the recognition and enforcement of the arbitral award in this sense will not have conflicts either in accordance with the New York Convention or Chinese Civil Procedure Law. However, as for the issue ‘ICC arbitration in China’ in Duferco case, the award would be a foreign arbitral award if the arbitration institution criterion in the Civil Procedure Law is applied; the award would be domestic arbitral award if the territorial criterion in the New York Convention is applied. On the one hand, considering this as a foreign arbitral award would contrary to the New York Convention; on the other hand, considering this as a domestic arbitral award would contrary to the definition of domestic award where a domestic award is made in China by Chinese legally established arbitration institution. Therefore, the non-domestic award decided by Ningbo Intermediate People’s Court is reasonable as pursuant to both Chinese law and the New York Convention.

However, it cannot be ignored that this judgment was only a lower court’s decision, and did not represent the official opinion compared to the Supreme People’s Court. According to the Report Mechanism, only the recognition and enforcement of foreign arbitral award was refused by the lower court, then the case would be sent to the Supreme People’s Court for examination. In the current case, Ningbo Intermediate People’s Court had already supported the application from the applicant; therefore the Report Mechanism was not activated. Though the Supreme People’s Court did not make any comment on this issue yet, this judgment was widely upheld by the mainstream scholars in China.

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42 See Chapter II.3. Report Mechanism for Foreign Arbitral Awards
43 See Zhao Xiuwen, On the recognition and enforcement of the arbitral award in the New York Convention—and the revision and improvement of the legislation of foreign arbitration award in
C. Recent progress of ICC Arbitration in China

The recent case Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L. in 2013 was considered as a milestone for foreign arbitration institution conducting arbitration in Mainland China. In Letter of Reply of the Supreme People's Court to the Request for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L., the Supreme People’s Court officially confirmed the validity of arbitration clause referring to ICC conducting arbitration in China for the first time:

This is a case of confirming the validity of a foreign-related arbitration agreement. The contract between the parties stipulated that disputes arising from the contract shall be brought to the ICC International Court of Arbitration for arbitration, and also stipulated that “PLACE OF JURISDICTION SHALL BE SHANGHAI, CHINA.” From the context of the arbitration agreement, the expression of “PLACE OF JURISDICTION SHALL BE SHANGHAI, CHINA” shall be understood that the seat of arbitration is in Shanghai. In this case, the parties failed to agree upon the law governing the confirmation of the validity of the arbitration agreement. Therefore, in accordance with Article 16 of the Interpretation of the Supreme People's Court on Several Issues concerning Application of the Arbitration Law of the People's Republic of China, the laws at the locality of the court, i.e., the laws of the People's Republic of China, shall apply to the examination on the validity of the arbitration agreement.

In accordance with Article 16 of the Arbitration Law of the People's Republic of China, an arbitration agreement shall contain the following elements: (a)

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the intention of requesting for arbitration; (b) subject matter of arbitration; and (c) the choice of the arbitration commission. The arbitration agreement involved in this case, which had the intention of requesting for arbitration, stipulated subject matter of arbitration and specified the choice of arbitration body, shall be deemed valid. This Court concurs with your majority opinion that the arbitration agreement is valid.45

It seemed that the Supreme People’s Court erased the doubts on whether selecting of a foreign arbitration institution conform to the requirement in Article 10 of Chinese Arbitration Law as mentioned above by adopting the expansive interpretation to decide such selection can be deemed as selecting an arbitration institution under Chinese law.

Even though this judgment opened the door for foreign arbitration institution proceeding arbitration in China, there are still some issues that Supreme People’s Court did not clarify to the public, for instance, how will the award rendered by foreign arbitration institution in China be characterized? And what will be the procedure rule to enforce such award?

Some commentator argued that even though arbitral award rendered by foreign arbitration institution can be considered as the non-domestic award in Duferco case, there is no possibility to enforce the non-domestic award given the reciprocity reservation made by China.46 Considering the wording “[a]ny 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”, the reciprocity reservation precludes the application of non-domestic award.

45 Ibid.

However, another pro-arbitration interpretation is more acceptable in which the reciprocity reservation is regarded as the counter measure aiming at the arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought\(^{47}\). That is to say, non-contracting state is the real target under the reciprocity reservation, not the non-domestic award. Furthermore, from an empirical perspective, as a country made the reciprocity reservation, the United States have recognized and enforced several non-domestic awards under the New York Convention.\(^{48}\)

2 Procedural Requirement of the Recognition and Enforcement of Foreign Arbitral Awards in China

2.1 The Competent Court

China specified the competent court to which the party could apply for the recognition and enforcement of foreign arbitral awards in *Supreme People’s Court’s Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention Implementation Notice)*\(^{49}\):

III. In accordance with Article IV of the 1958 New York Convention, an application to a people’s court in China for recognition and enforcement of an arbitral award made in the territory of another contracting state is filed by a party to the arbitral award. The application shall be under the jurisdiction of the intermediate people’s court at the following place:

(1) If the party against whom the award is invoked is a natural person, the place of his or her household registration or the place of his or her residence.

\(^{47}\) Li Xun, Developmental Prospects of the Recognition and Enforcement of Foreign Arbitral Awards in China—Staring From the First Successful Case concerning the Recognition and Enforcement of the Arbitral Award rendered by Foreign Arbitration Institution, Arbitration Study, Volume 2, 2010, P100.


\(^{49}\) *Supra* note 26.
(2) If the party against whom the award is invoked is a legal entity, the place of its principal business office.

(3) If the party against whom the award is invoked does not have any household registration, residence or principal business office in China but has any property in the territory of China, the place where the property is located.

The competent court is depends on whether the executee is a natural person or a legal entity. Later, this provision was reflected in Article 283 of the Civil Procedure Law (2012 Amendments) ‘An arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, a party shall apply directly to the Intermediate People’s Court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity’. Hence, the standard remains the domicile of the party against whom enforcement is sought or the place of the property, and distinct wordings did not change the fact that Intermediate People’s Court has the jurisdiction over the issue of the recognition and enforcement of foreign arbitral awards.

2.2 Documentation Required

As pursuant to Article IV of the New York Convention, the party applies for recognition and enforcement shall supply the duly authenticated original award or a duly certified copy; and the original agreement or a duly certified copy. Besides, Article IV(2) provides that if the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.
Particularly in China, the documents required for the recognition and enforcement of foreign arbitral awards were listed in Article 20 and 21 of *Supreme People’s Court Provisions on Certain Issues Relating to the People’s Courts Enforcement Work Regulation (Trial Implementation)* 50 *(Enforcement Work Regulation)*. In general, the applicant shall present the following documents to the competent court to file the application for enforcement:

(1) Enforcement Application. The Application shall include the reasons for enforcement, subject matter of the enforcement, and status of proprietary assets of the party against whom enforcement is sought which is known to the applicant. When it is truly difficult for the applicant to write the Enforcement Application, the applicant may apply the enforcement orally. People’s court shall record in writing when accepting the oral application, and which shall be signed or sealed by the applicant. When a foreign party applies for enforcement, the Enforcement Application shall be in Chinese, unless otherwise provided in the judicial assistance treaty or other international treaty acceded to by China and the state of nationality of the foreign applicant.

(2) The original or a notarized and certified copy of the arbitral award, and the original or a notarized copy of the arbitration agreement or of the contract containing relevant arbitration clause. Besides, applicant shall submit a Chinese version of the abovementioned award and arbitration agreement, which duly authenticated by Chinese consulates or notarized by Chinese notary organ.

(3) Identify certification of the applicant. If the applicant is a natural person, he shall submit the identity card; if the applicant is a legal person, he shall

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submit the copy of business license of the corporation or legal representative certificate.

Previous case law has indicated Chinese’s pro-arbitration attitude in considering the documentation requirement when considering of application for the recognition and enforcement of foreign arbitral awards. In *Macor Neptun GmbH v. Shanghai Machinery and Equipment Import and Export Co., Ltd. (SMEIC)*, Macor Neptun GmbH applied for the recognition and enforcement of the arbitral award made in Zurich to the Shanghai Intermediate People’s Court. And SMEIC challenged the application before the court, arguing that the applicant failed to submit a Chinese version of the duly authenticated arbitral award and arbitration agreement by Chinese consulates or notarized by Chinese notary organ, which did not meet the requirement of filing an application and therefore court shall not accept the case. Pursuant to the Report Mechanism, the case was reported to the Supreme People’s Court and in the meanwhile applicant was asked to supplement the relevant materials. In the *Letter of Reply of the Supreme People’s Court’s on the Request for Instructions on the Application of Macor Neptun GmbH’s for Recognition and Enforcement of Arbitral Award*\(^5\), the Supreme People’s Court stated that even though the applicant failed to entirely comply with relevant provisions of application, the people’s court shall accept the case and place on file if the applicant supplemented those materials after the court’s notice. And therefore people’s court shall not refuse to recognize and enforce the arbitral award in this case based on the reason ‘Applicant failed to file a valid application within the statutory period’.

2.3 Time Limit

After 2007, the time limit of initiating enforcement proceedings had changed to a unified regulation, compared to previous provisions where the time limit depended on

whether the applicant is natural persons or not in the past. In the present, under Article 239 of Civil Procedure Law (2012 Amendments), the period for applying for enforcement is two years. In addition, the suspension or interruption of the time limitation for applying for enforcement shall be governed by legal provisions regarding the suspension or interruption of the time limitations for instituting an action. And the period in the preceding paragraph shall begin from the last day of the performance period specified in a legal instrument; begin from the last day of each specified performance period if a legal instrument requires performance in installments; or begin from the effective date of a legal instrument if the legal instrument does not specify a period of performance.

The Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China (Enforcement Procedures Interpretation) further clarified the stipulation regarding the situation where suspension or interruption may occur during the two years period. Article 27 provided that: ‘Where, in the last 6 months of the time limitation for the submission of an application for enforcement, the right of claim cannot be exercised for any force majeure or other obstacle, the time limitation for the submission of an application for enforcement shall be suspended. It shall continue being counted from the day when the cause of suspension of the time limitation disappears.’ And Article 28 examined the interruption of limitation period.

52 Civil Procedure Law Of The People's Republic Of China (Adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991, promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991, and effective as of the date of promulgation)

Article 219 'The time limit for the submission of an application for execution shall be one year; if both or one of the parties are citizens; it shall be six months if both parties are legal persons or other organizations. The above-mentioned time limit shall be calculated from the last day of the period of performance specified by the legal document. If the legal document specifies performance in stages, the time limit shall be calculated from the last day of the period specified for each stage of performance.' (Revised by 2007 Amendments)

53 Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China (No. 13 [2008] of the Supreme People’s Court, adopted at the 1452nd meeting of the Judicial Committee of the Supreme People’s Court on September 8, 2008)
where the time limitation for the submission of an application for enforcement shall be interrupted when an application for enforcement is made, the parties reach a settlement agreement, or one of the parties requires performance or agrees to perform obligations. The time limitation for the submission of an application for enforcement shall be recounted from the time of interruption.

### 2.4 Grounds for Refusal

The grounds for refusal of the recognition and enforcement of foreign arbitral awards were explicitly provided in Article IV of the *Convention Implementation Notice* after China acceding to the New York Convention:

> After receiving a party's application for recognition and enforcement of an arbitral award, the people's court of China having jurisdiction shall examine the arbitral award. If the court deems that the arbitral award does not fall under the circumstances set out in paragraphs 1 and 2 of Article V of the 1958 New York Convention, it shall rule to recognize the award as binding and enforced the award according to the rules of procedure in the Civil Procedure Law (Trial Implementation). If the court deems that the arbitral award falls under any of the circumstances set out in paragraph 2 of Article V or the evidence provided by the party against whom the award is invoked proves that the award falls under any of the circumstances set out in paragraph 1 of Article V, it shall rule to dismiss the application and refuse recognition and enforcement of the arbitral award.

Apart from that, China is a monism country in which the New York Convention does not have to be incorporated into domestic legal regime and such international law can be applied directly by citizens just as if it were national law. Article 260 of Civil Procedure Law (2012 Amendments) clarifies that where there is any discrepancy between an international treaty concluded or acceded to by the People's Republic of China and this Law, the provisions of the international treaty shall prevail, except

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54 *Supra* note 26.
clauses to which the People's Republic of China has declared reservations. As a consequence, Article V of the New York Convention will serve as the refusal grounds for recognition and enforcement of foreign arbitral awards in China beyond doubt.

3 Report Mechanism for Foreign Arbitral Awards

Early in 1992, Ren Jianxin, the president of the Supreme People’s Court, proposed ‘Five Prohibitions’ to avoid local protectionism:\(^55\):

1. Prohibiting local party cadres from interfering with judicial process in an attempt to protect local interests;
2. Prohibiting government officials and other parties from making threats or launching campaigns against judicial personnel carrying out the execution of court orders;
3. Prohibiting judicial organs from practicing favoritism towards local parties by 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.\(^56\)

Apparently, this ‘Five Prohibitions’ was just political declaration with merely instructive function, and thus didn’t have any legal effect at all. However, to certain extent, the ‘Five Prohibitions’ indeed paved the way to the declaration of the report mechanism afterwards. On 28 August 1995, the Supreme People’s Court adopted the


Notice of the Supreme People’s Court concerning Handling by People’s Court of Issues in Relation to Matters of Foreign-related Arbitration and Foreign Arbitration (1995 Notice) 57, which officially announced the Report Mechanism was set up.

Under the Report Mechanism, if the intermediate People’s Court considers that the arbitration agreement between the parties in a foreign arbitral award is not valid or is not able to be enforced, it must report it to the competent Higher People’s Court for examination before accepting and hearing the case from the party. If the Higher People’s Court approved the acceptance of the case, this opinion of approval should be sent up the Supreme People’s Court. Before the reply from the Supreme People’s Court, the case cannot be accepted. Furthermore, such Report Mechanism applies to the situation where the Intermediate People’s Court considers that a foreign arbitral award ought to be denied enforcement. Before making the decision to refuse the enforcement of a foreign award, the Intermediate People’s Court must send up a report to the competent Higher People’s Court. If the Higher People’s Court agrees the refusal of such award, then Higher People’s Court shall report to Supreme People’s Court for further examination. Only when the Supreme People’s Court approves the denial of enforcement can the Intermediate People’s Court make the decision of refusing the recognition and enforcement of such foreign arbitral award. Obviously, the Report Mechanism attempted to avoid the local protectionism and to make sure the implementation of the New York Convention in China will be carried out in a democratic way.

A number of drawbacks could not be concealed notwithstanding the merits of the Report Mechanism were highly appreciated by foreign investors. First, the 1995 Notice was not stipulated by law, however, existed as a ‘Notice’, and was only effective in the inner system of the courts in China, lacking a great of legal certainties

57 Notice of the Supreme People’s Court concerning Handling by People’s Court of Issues in Relation to Matters of Foreign-related Arbitration and Foreign Arbitration, issued by Supreme People’s Court and took effect on 28 August 1995.
for the public at large. Second, the 1995 Notice lacks transparency, which did not provide the parties a right to participate in the hearing by Higher People’s Court or the Supreme People’s Court, and it did not even provide the parties the right to be notified about the hearing or to submit written documents in support of their position. Third, in fact, the Report Mechanism leads to that the Supreme People’s Court always has the final say on the issue of whether the decision of declaring the arbitration agreement in a foreign arbitral award void and refusing the enforcement of a foreign arbitral award from a lower court can be granted. The monopoly of such decision-making power deprives the possibility for the Intermediate People’s Court to improve the case-handling capacity from the experience of dealing with issues related to foreign arbitral awards. Besides, the Intermediate People’s Court will throw the case to the upper court when the cases are too complicated or they don’t want to bear the responsibility of some influential cases.

Most importantly, the 1995 Notice didn’t provide a time limit for such mechanism, which gave rise to significant delays in the proceedings. This problem was highlighted in the case Revpower Ltd v. Shanghai Far East Aerial Technology Import and Export Company (SFATC)\(^{59}\), Revpower, a US manufacture of industrial batteries, contracted a purchasing agreement with SFATC, and an arbitration clause was inserted in the contract between them, providing that: ‘If the disputes between the parties could not be solved through the friendly consultation within 60 days, either of the parties has the right to arbitration in Stockholm, Sweden, under the Statue of the Arbitration Institute of the Stockholm Chamber of Commerce.’ In 1991, Revpower filed to arbitration to Arbitration Institute of the Stockholm Chamber of Commerce. SFATC raised the objection to the jurisdiction of the arbitral tribunal and later in 1993, brought a lawsuit before Shanghai No.2 Intermediate People’s Court for challenging


\(^{59}\) Revpower Ltd (Hong Kong) v Shanghai Far East Aerial Technology Import and Export Company (SFAIC) (Shanghai No 2 IPC, 1 March 1996)
the jurisdiction of SCC. When Revpower initiated an application for enforcement of the arbitral award where the SCC tribunal made in favor of Revpower in December 1993, however, the case was not accepted by the court due to the reason that the jurisdiction issue of SFATC’s lawsuit was still pending. In order to enforce the award, high level officials between the US and China involved in many diplomatic negotiations, and lots of US congressmen and US Trade Representatives also concerned about this issue. Under the tremendous pressure, two years later in 1995, Shanghai No.2 Intermediate People’s Court gave the judgment to dismiss the SFATC’s claim of jurisdiction objection, and rendered the ruling on recognition and enforcement of the award made by SCC in 1996. Ironically, SFATC successfully filed for bankruptcy whilst Revpower was waiting for the enforcement, and which finally led to the decision of dismissal of enforcement of Revpower’s award.

Maybe it is farfetched to make the assertion that this case resulted in the progress of legislative amendments, however, the Supreme People’s Court issued two regulations regarding to matters of enforcement to correct the issue of lacking time limits of recognition and enforcement of foreign arbitral awards in 1998. The first was the Enforcement Work Regulation 60. Under the Enforcement Work Regulation, People’s Court shall make the decision whether or not accept the case within 7 days after the enforcing party filed the application to the court. The second was the Supreme People’s Court Provision on Fee Collection and Time Limits for Review of Recognition and Enforcement of Foreign Arbitral Awards 61 (Fee Collection Regulation), as pursuant to Article IV of the Fee Collection Regulation, if the People’s Court considers the foreign arbitral award ought to be recognized and enforced, the court shall make the decision within 2 months after the acceptance of the case, and the enforcement of such foreign arbitral award shall be completed within 6 months after

60 Supra note 50.

the decision is made without any special circumstances occurred; If the People’s court considers the foreign arbitral award ought not to be recognized and enforced, relevant court shall report to the Supreme People’s Court within 2 months\(^\text{62}\) after the acceptance of the case in accordance with the 1995 Notice. Nonetheless these two regulations set out a time framework, it is regrettable that the time limit for the examination by Higher People’s Court and Supreme People’s Court was not provided.

After all, the Report Mechanism is a transitional mechanism to provide a limited protection for the foreign investors under the current legal system. With the rapid growth of Chinese economy and China’s increasing involvement in the cross-broader transactions, the recognition and enforcement of foreign arbitral awards has become much more important than ever before. In the recent Chinese Arbitration Law 2014 Annual Meeting, *China Academy of Arbitration Law* has proposed the expert proposal for amendments plans of China Arbitration Law, which included suggested amendments about the Report Mechanism for foreign arbitral awards.\(^\text{63}\)

4 Grounds for Refusal of the Recognition and Enforcement of Foreign Arbitral Awards

4.1 Grounds which must be Raised by the Party Resisting the Recognition and Enforcement

A. Incapacity or Invalid Arbitration Agreement

(a) Incapacity

Contracting parties with full legal capacity for civil conduct is the basic precondition of a valid commercial transaction. Incapacity defense is not a new instrument as a ground for the opposing party in the civil proceedings. Usually, incapacity somehow

\(^{62}\) Here, the period of 2 months shall refers to the time limit of the whole process of report mechanism, including the time that Intermediate People’s Court send up to the Higher People’s Court for examination.

\(^{63}\) Available at [http://www.arbitration.org.cn/jeecmsen/hotnews/713.shtml](http://www.arbitration.org.cn/jeecmsen/hotnews/713.shtml), Access time :19 April 2015
connects with invalidity, because as a rule, the contract conclude by an incompetent person shall be considered as null and void under the national law. For instance, under Article 17 of Chinese Arbitration Law\textsuperscript{64}, an arbitration agreement shall be null and void if ‘one party that concluded the arbitration agreement has no capacity for civil conducts or has limited capacity for civil conducts’. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. \textsuperscript{65} However, it is note that the governing law of incapacity is not clearly indicated in the New York Convention.

In \textit{Chongqing Machinery Equipment Import and Export Corp. Ltd (CMEC) v. Glencore Ltd (U.K.)}, Sun Jian, the salesman of CMEC concluded a contract with Glencore Ltd on 4 June 1996, inserting an arbitration clause which stated that ‘\textit{All disputes arising out of or in connection with the present contract, including the shall be submitted to arbitration under London Metal Exchange Rules and Regulations, the applicable rules of law are the laws of England.}’ Two days later, Sun Jian reported this to his assistant manager, and the assistant manager required Sun Jian to cancel the contract because Sun Jian was not authorized to conclude such a contract. On 19 June 1996, Glencore Ltd urged CMEC to perform the contract, however, CMEC refused to recognize the contract signed by Sun Jian. Later in September, Glencore Ltd referred to London Metal Exchange for arbitration to claim the compensation caused due to CMEC’s breach of contract. On 17 February 1997, London Metal Exchange issued a default award in favor of Glencore Ltd and ruled that CMEC shall compensate Glencore Ltd $US495,000. And subsequently, Glencore Ltd applied for the recognition and enforcement of the made award in Chongqing No.1 Intermediate People’s Court and the case was reported to the Supreme People’s Court.

\textsuperscript{64} Arbitration Law of the People's Republic of China (2009 Amendment) (Adopted at the 9th Session of the Standing Committee of the Eighth National People's Congress on August 31, 1994; amended according to the Decision on Amending Certain Laws adopted at the 10th session of the Standing Committee of the Eleventh National People's Congress on August 27, 2009)

In *Letter of Reply of the Supreme People’s Court on Request for Instruction on the Application of Glencore Ltd’s for Recognition and Enforcement of Arbitral Award*\(^66\), the Supreme People’s Court stated that:

According to Article V (1) (a) of the New York Convention, contracting parties’ capability shall be determined by Chinese law under the principle of *Lex Personalis*. Sun Jian, as the staff of the Chongqing Machinery Equipment Import and Export Corp.Ltd., was not authorized by the company when signing the contract with Glencore Ltd and company’s seal was not affixed on the contract. In addition, CMEC expressly denied Sun Jian’s conduct of signing the contract afterwards. Given the abovementioned context, Sun Jian’s conduct failed to meet the formality requirement of an agency relationship. Furthermore, Sun Jian’s conduct did not conform to the trading usages between the two companies, which thus shall not be regarded as Agency by Estoppel. Therefore, the contract signed with Glencore Ltd was null and void. Similarly, the arbitration clause agreed between the parties was null and void either. Consequently, the recognition and enforcement of arbitral awards in this case shall be refused.

The law governing the incapacity of parties is quite blurred by leaving a vague expression in Article V (1) (a) of the New York Convention, which is ‘under the law applicable to them’. The term ‘to them’ gave rise to the subtle possibility to apply *Lex Personalis* rather than applying the law of the forum to determine capacity of the parties as a uniform approach. Apparently, China adopted *Lex Personalis* approach to determine that parties lack incapacity.\(^67\) Despite that the law of the Forum Approach was considered less complicated and more workable in avoiding the peculiar


\(^{67}\) See *Letter of Reply of the Supreme People's Court on the Application of Hong Kong Xiangjin Cereals, Oil and Foodstuffs Ltd's for recognition and enforcement of the HIKAC award*, 14 November 2003, Min Fa Ta Zi [2003] No.9. The same as Glencore Ltd case, Supreme People's Court adopted 'Personal law' approach to determine the incapacity defense of the parties.
situations that may arise in jurisdictions that do not have a personal law or where capacity is not governed by a norm of this nature, the Personal Law approach was supported by professor Sanders who introduced the proposal that became the final text of the Convention, and he indicated that the capacity was ‘determined only according to the law governing personal status and not the law applicable to the award’.

(b) Invalidity of Arbitration Agreement

Invalidity defense is probably the most frequently invoked ground for refusing the recognition and enforcement of foreign arbitral awards in China. As stated in Züblin case, if Chinese law is applied, designation of arbitration institution as a core element of a valid arbitration agreement will become the major barrier in the way of recognition and enforcement of foreign arbitral awards in China. Apart from that, the Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China (Chinese Arbitration Law Interpretation) provided several provisions regarding to the designation of arbitration institution. For instance, the issue concerning the name of a selected arbitration institution is inaccurate; the issue concerning two arbitration institutions are selected by the parties; the issue concerning that the disputes shall be arbitrated by the

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70 Supra note 34.

71 Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Adopted at the 1375th meeting of the Judicial Committee of the Supreme People's Court on December 26, 2005, Interpretation No. 7 [2006] of the Supreme People's Court.

72 Article 3 of the Chinese Arbitration Law Interpretation 'Where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.'

73 Article 5 of the Chinese Arbitration Law Interpretation 'Where an agreement for arbitration stipulates two or more arbitration institutions, the parties concerned may choose either arbitration institution upon agreement when applying for arbitration; if the parties concerned cannot agree upon the choice of the arbitration institution, the agreement for arbitration shall be ineffective.'
arbitration institution in an agreed place without specifying the exact arbitration institution\textsuperscript{74}. However, it will not be burdensome if the recognition and enforcement of the arbitral award sought by the party is not governed by Chinese law.

In \textit{Yideman Asia Private Co., Ltd. (Singapore) v. Wuxi Huaxin Cocoa Food Co., Ltd}\textsuperscript{75}, the court looked into the intention to arbitration from the parties to determine whether there was a valid arbitration agreement. On 12 January 1999, Yideman faxed Huaxin a ‘Business Consultation’ containing the basic contract information. On 13 January, Yideman faxed a ‘Letter of further clarification’ to the ‘Business Consultation’ sent yesterday, and indicated that the complete contract would be provided afterwards. On 14 January, Huaxin signed both ‘Business Consultation’ and ‘Letter of further clarification’, but revised the offer in the ‘Letter of further clarification’. After this, both parties held several negotiations to discuss the offer revised by Huaxin in the next 3 months period, and still there was no agreement reached between the parties. Finally, Yideman submitted the case to Cocoa Association of London (C.A.L) for arbitration, claiming that Huaxin violated its duty of performance under the contract signed on 1 January. On 13 July, C.A.L rendered the final award in favor of Yideman, and Yideman sought the recognition and enforcement of the award in China. The Supreme People’s Court stressed that the prerequisite of the validity of an arbitration clause or an arbitration agreement is the mutual intention to arbitration between the parties. And the court held that given the exchanges of faxes between the parties, no agreement to arbitration was reached concerning the purchase of cocoa between Yideman and Huaxin, hence the arbitral award rendered by C.A.L on the base of the

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\textsuperscript{74} Article 6 of the Chinese Arbitration Law Interpretation ‘Where an agreement for arbitration stipulates that the disputes shall be arbitrated by the arbitration institution at a certain locality and there is only one arbitration institution in this locality, the arbitration institution shall be deemed as the stipulated arbitration institution. If there are two or more arbitration institutions, the parties concerned may choose one arbitration institution for arbitration upon agreement; if the parties concerned fail to agree upon the choice of the arbitration institution, the agreement for arbitration shall be ineffective.’

\textsuperscript{75} Letter of Reply of the Supreme People’s Court on Request for Instructions on the Application of Yideman Asia Private (Singapore) Co., Ltd. for Recognition and Enforcement of Foreign Arbitral Award, 12 June 2003, Min Si Ta Zi [2001] No.43.
\end{flushright}
arbitration clause unilaterally drafted by Yideman lacked factual and legal basis. Therefore, the court refused the recognition and enforcement of the arbitral award in accordance with Article V (a) of the New York Convention.

**B. No proper notice of appointment of arbitrators or of the arbitration proceedings; unable to present the case**

Article V (1) (b) of the New York Convention is often referred to ‘due process defense’ in the common law jurisdictions, upon which the enforcing member state is entitled to refuse the recognition and enforcement of a foreign arbitral award, given that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings or was otherwise unable to present his case. In a nutshell, due process requires that parties shall be treated equally, and all arbitrators must respect this general principle in all proceedings, regardless of the place of arbitration and the procedural rules applicable to them.76

In *Cosmos Marine Managements (U.K.) (CMM) v. Tianjin Kaiqiang commerce Co., Ltd (KQCL)* 77, the court supported due process defense raised by respondent. On 2 February 2005, CMM informed KQCL to select the arbitrator as pursuant to the arbitration clause they agreed to within 14 days through the third party via email. On 9 March 2005, CMM informed KQCL to select the arbitrator within 7 days through the third party via email. On 17 March 2005, CMM emailed to KQCL to notify them that N.S. Sevastoponlos was nominated as the sole arbitrator given that KQCL failed to select the arbitrator after CMM sending two notices to them. KQCL did not respond to any of the abovementioned emails till CMM filed the application for recognition and enforcement of the award made by the sole arbitrator N.S. Sevastoponlos to the Tianjin Maritime Court, and KQCL alleged that they never

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77 Letter of Reply of the Supreme People's Court on Request for Instructions on the Application of Recognition and Enforcement of 'ABRA Ship Lease of December 28, 2004’ Arbitration Award of London, UK, 10 January 2007, Min Si Ta Zi [2006] No.34.
received any notice related to nomination of arbitrator or arbitration proceedings. The Supreme People's Court upheld the opinion from the lower court, ruling that despite the fact that delivering the notice through email did not violate the applicable law of arbitration proceedings (Arbitration Act 1996 of England) nor Chinese law, the respondent shall not be deemed to have been received the delivery of notice if the applicant failed to provide the confirmation emails from the respondent or any evidence that could prove that respondent have received the emails. Therefore, according to Article V (1) (b) of the New York Convention, Tianjin Maritime Court shall refuse the recognition and enforcement of the arbitral award in this case.

In the case of a Japanese company Shinetsu applying for recognition and enforcement of arbitral award No.04-05 made by Japan Commercial Arbitration Association, Shinetsu Chemical Industry Co., Ltd. signed the contract with a Chinese company—Jiangsu Zhongtian Technology Co., Ltd. containing an arbitration clause which indicated that the applicable law to the arbitration proceedings were Arbitration Rules of the Japan Commercial Arbitration Association and Japanese Arbitration Law. Under the Arbitration Rules of JCAA, the tribunal shall notify the opposing party if respondent altered the arbitration claim to the tribunal. On 7 July 2005, the tribunal accepted the request for alternation of arbitration claim from Shinetsu. However, till the award was made on 23 February 2006, Zhongtian Technology was still not notified by the tribunal. The Supreme People’s Court stated that the absent of such notice actually deprived the Chinese Party of its right to submit a defense and present the case corresponding to the amendments of the arbitration claims, and hence refused the recognition and enforcement of the arbitral award based on Article V (1) (b) of the New York Convention.

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C. Ultra Vires

Article V (1) (c) of the New York Convention provides that recognition and enforcement of arbitral award may be refused if ‘[t]he award deals with a difference 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’.

Article V (1) (c) origins from the reading of the essence of arbitration, namely arbitration tribunal’s authority is rooted in the contractual agreement concluded between the parties, which means arbitrators are restricted to the sphere that only the parties allow when exercising their powers. Furthermore, the New York Convention leaves the floor to the courts in the country where recognition and enforcement is sought to consider whether the decisions on matters submitted to arbitration can be separated from those not so submitted, if so, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

In Gerald Metals Inc. (U.S.) v. Wuhu Smeltery, the arbitral tribunal accepted the case on the base of the arbitration clause stipulated in Article 13 of the contract agreed between the parties, where ‘All disputes arising out of or in connection with the present contract shall be finally settled by arbitration in London under the Rules of London Metal Exchange’. However, the tribunal, upon GMI’s request, named Wuhu Hengxin Copper Inc as the co-respondent, which had no arbitration agreement or arbitration clause with GMI, and finally issued an award concerning three parties—GMI, Wuhu Smeltery and Wuhu Hengxin Copper Inc. When GMI sought to recognize and enforce the award in Anhui Intermediate People’s Court, Wuhu Hengxin Copper Inc. raised the defense of ultra vires of arbitral tribunal under Article V (1) (c) of the New York Convention. The Supreme People’s Court affirmed the opinion from Anhui Higher People’s Court in the Letter of Reply of the Supreme People’s Court on the Application of Gerald Metals Inc for recognition and enforcement of arbitral award.
issued by London Metal Exchange\textsuperscript{79}, and held that ‘the arbitral award made by arbitral tribunal apparently went beyond the scope of the arbitration clause given that Wuhu Hengxin Copper Inc. was not a party to the arbitration clause in this case. As pursuant to Article V (1) (c) of the New York Convention, if the part of award made within the scope of the arbitration clause can be separated from the part of award made beyond the scope of the arbitration clause, then the former part shall be recognize. Therefore, the part of award containing liabilities that should be undertaken by Wuhu Smeltery alone shall be recognized. As the part of award made related to ‘the respondent’ (including Wuhu Smeltery and Wuhu Hengxin Copper Inc) could not be separated by the court, thus the court refused the recognition and enforcement of the arbitral award with respect to this part.’

D. Composition of Tribunal not in accordance with Arbitration Agreement or Law

Article V (1) (d) of the New York Convention offered the possibility for the opposing party to hinder the recognition and enforcement of a foreign arbitral award through procedural defense, such as 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.

In \textit{Bunge Agribusiness Singapore Pte. Ltd. (Singapore) v. Guangdong Fengyuan Grain and Oil Industry co. Ltd.}, a sale contract of soybean was concluded between the parties with an arbitration clause inserted ‘\textit{Any disputes between the parties shall refer to arbitration in London under Rules of Arbitration and Appeal of FOSFA (Federation of Oils, Seeds, and Fats Associations) and Arbitration Act 1996 of England.’} On 10 August 2004, Bunge Agribusiness resorted to arbitration to FOSFA, selected Mr. R.W.

\footnotesize{\textsuperscript{79} Letter of Reply of the Supreme People's Court on the Application of Gerald Metals Inc for recognition and enforcement of arbitral award issued by London Metal Exchange, 12 November 2003, Min Si Ta Zi [2003] No.12.}
ROOKES as the arbitrator, and notified the respondent to nominate his arbitrator via fax. On 15 September 2004, due to claimant’s application, FOSFA sent letters to the respondent to nominate the arbitrator within the set time. On 1 October 2004, FOSFA informed respondent that Mr. S. Bigwood was selected as the arbitrator. On 8 October and 11 October 2004, respondent raised the objection of Mr. S. Bigwood as the arbitrator selected by FOSFA. On 25 October 2005, Mr. S. Bigwood voluntarily applied for his withdrawal, and FOSFA nominated Mr. W.PLUG as the arbitrator for the respondent. Later on 19 July 2005, the arbitral tribunal consisting of Mr. R.W.ROOKES and Mr. W. PLUG made the final award. The Supreme People’s Court checked applicable law to the arbitration proceeding and found that Article 1 (f) of the Rules of Arbitration and Appeal of FOSFA provided as follows:

[T]he Federation will notify the party who has failed to make an appointment or a substitution of its arbitrator, as the case may be, that the Federation intends to make such an appointment unless that party makes its own appointment within 14 consecutive days of notice being dispatched to it by the Federation. In the absence of an appointment being notified to the Federation within the stipulated period the Federation shall make such an appointment.

After Mr. S. Bigwood voluntarily applied for his disqualification, FOSFA directly appointed another arbitrator Mr. W. PLUG rather than notified the respondent to nominate the arbitrator. Therefore, the court held that the composition of the arbitral authority was not in accordance with the agreement of the parties, conforming to Article V (1) (d) of the New York Convention. Ultimately, the court refused to recognize and enforce the arbitral award issued by FOSFA.  

In the case concerning application of First Investment Corp of Marshall Island (FIC) for recognition and enforcement of ad hoc arbitral award in London\(^{81}\), the Supreme People’s Court refused to recognize and enforce the arbitral award made by truncated tribunal. In this case, the arbitration clause between parties indicated that three arbitrators shall be appointed to solve the disputes between them. Wang Shengchang, a co-arbitrator, only participated in the deliberation of the first draft of the award and was out of reach afterwards without attending the deliberation of the second and third draft of the award. Therefore, the court held that the composition of the arbitral tribunal was not in accordance with the arbitration clause between the parties. Besides, the court held that the composition of the arbitral tribunal was not in accordance with the law of seat of arbitration (English law). The Arbitration Act 1996 provided three possible statutory options to cope with the situation where an arbitrator is incapable of conducting the proceedings: (a) Revoke arbitrator’s authority\(^{82}\), (b) Apply to the court to remove the arbitrator\(^{83}\); (c) Filling the vacancy by nominating another arbitrator.\(^{84}\)

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\(^{81}\) Letter of Reply of the Supreme People's Court on the Application of First Investment Corp. of the Marshall Islands for Recognition and Enforcement of Arbitration Award of an Ad Hoc Arbitration Tribunal in London, 27 February 2008, Min Si Ta Zi [2007] No.35.

\(^{82}\) Article 23 of the Arbitration Act 1996—Revocation of arbitrator’s authority

23(1) The parties are free to agree in what circumstances the authority of an arbitrator may be revoked.

\(^{83}\) Article 24 of the Arbitration Act 1996—Power of court to remove arbitrator

24(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds— (a) that circumstances exist that give rise to justifiable doubts as to his impartiality; (b) that he does not possess the qualifications required by the arbitration agreement; (c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; (d) that he has refused or failed— (i) properly to conduct the proceedings, or (ii) to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.

\(^{84}\) Article 27 of the Arbitration Act 1996—Filling of vacancy, &c.

27(1) Where an arbitrator ceases to hold office, the parties are free to agree— (a) whether and if so how the vacancy is to be filled, (b) whether and if so to what extent the previous proceedings should stand, and (c) what effect (if any) his ceasing to hold office has on any appointment made by him (alone or jointly).

27(2) If or to the extent that there is no such agreement, the following provisions apply.

27(3) The provisions of sections 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment.
Hence, when Wang Shengchang was not able to perform his duty as arbitrator, the remaining two arbitrators could not constitute a valid arbitral tribunal to proceed with the case before any statutory measures were adopted by the parties. Consequently, the court ruled that the composition of arbitral authority was not in accordance with the arbitration clause and the law of the seat of arbitration, and refused the recognition and enforcement of the arbitral award as pursuant to Article V (1) (d) of the New York Convention.

At unusual occasion, Article V (1) (d) was invoked by Chinese courts when the pre-arbitral condition was not fulfilled by the parties. In both case PepsiCo Inc. (U.S.) v. Sichuan Pepsi-Cola Beverage Co., Ltd. 85, and PepsiCo Investment Ltd. (U.S.) v. Sichuan Province Yun Lu Industrial Co., Ltd. 86, a multi-tier arbitration clause was inserted in the contract, where a friendly consultation shall be conducted between the parties after the arouse of disputes, and a 90 days and 45 days consultation period was set in these two cases respectively, if no solution was reached after the period, then parties could refer to arbitration. However, the applicants in both cases directly submitted to arbitration without going through the friendly consultation with respondents. The Arbitration Institute of the Stockholm Chamber of Commerce received both cases and finally issued No.111/2003 award and No.076/2002 award. The Court held that no evidences have shown to the court that the parties have carried out the pre-arbitral condition, namely the friendly consultation for the set period of time in the arbitration clause. Hence the awards must be refused recognition and enforcement because the arbitral procedure was not in accordance with the agreement of the parties under Article V (1) (d) of the New York Convention. It is noteworthy that the pre-arbitral condition in these two cases shall be distinct from those conditions that cannot be enforced, such as the prerequisite is too vague to carry out or there is no time limit at all.

86 PepsiCo Investment Ltd v Sichuan Province Yun Lu Industrial Co., Ltd, Cheng Min Chu Zi [2008] No.36.
E. Award not binding, suspended, or set aside

Article V (1) (e) of the New York Convention enables the enforcing country to refuse the recognition and enforcement of arbitral award if the award has not yet become building 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. However, up to this day, among all the Letter of Reply of the Supreme People’s Court, none of the grounds for refusal was invoked under Article V (1) (e).

4.2 Grounds which can be raised by the Courts

F. Arbitrability

One of few defenses that can be invoked by the enforcing country not the parties is arbitrability. The recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds the subject matter of the difference is not capable of settlement by arbitration under the law of that country under Article V (2) (a) of the New York Convention. However, it is precisely because arbitration is a private proceeding with public consequences that some types of dispute are reserved for national courts, whose proceedings are generally in the public domain, and it is in this sense that they are not ‘capable of settlement by arbitration’. 87

In China, Article 2 of Chinese Arbitration Law provides that ‘contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated. And Article 3 specified the disputes may not be arbitrated:

(a) Marital, adoption, guardianship, support and succession disputes;
(b) Administrative disputes that shall be handled by administrative organs as prescribed by law

87 Supra note 47, P123.
In a case concerning recognition and enforcement of an arbitral award of Mongolia, two Chinese citizens signed a contract regarding the establishment of a limited liability company in Mongolia. During the operation of the company, one of the contracting parties dead. His wife referred to arbitration in Mongolia in accordance with the arbitration clause in the concluded contract, requesting the tribunal to terminate the contract and confirm her right of possession of 50% registered capital of the company. The tribunal made the award in favor of the applicant and the applicant sought recognition and enforcement of such award in China. Chinese court held that the award concerned about succession disputes, and unsurprisingly refused the application as pursuant to Article V (2) (a) of the New York Convention and Article 3 of the Chinese Arbitration Law.

G. Public Policy

Public policy ‘is never argued at all but when other points fail’. When one looks at the available case law on Article V, it is striking how often defendants invoke the public policy defense to resist enforcement of an arbitration award. However, it is also a defense which, in the majority of cases, fails. Article V (2) (b) provides that the recognition or enforcement of the award would not be contrary to the public policy of the country where recognition and enforcement is sought. But, the New York Convention did not clarify the definition of public policy which leaves the national court to interpret the notion. Majority of judges and scholars viewed the public policy under Article V (2) (b) as the ‘international public policy’ which is narrower than the scope of domestic public policy, to some extent, limiting the chances to invoke public policy defense when resisting the recognition or enforcement of an arbitral award.

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88 Richardson v. Melish, (1824) 2 Bing. 228 (252) (Court of Common Pleas, England).

Despite that the expression ‘public interest’ rather ‘public policy’ was used to identify such fundamental principles in China, the narrow reading of the public policy adopted by China conforms to the general pro-enforcement orientation of the New York Convention like many other countries in the world. In other words:

[n]ot every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.90

(a) **Violation of Mandatory Provisions or Department Regulations Does Not Constitute to the Violation of Public Policy in China**

In *ED&F Man (Hong Kong) v. China Sugar & Wine Group Corporation*91, the Supreme People’s Court declined to broaden the scope of public policy in China. When the court was reviewing the application of recognition and enforcement of arbitral award made by London Sugar Association in accordance with the arbitration clause of the parties, the court found that China Sugar engaged in overseas futures business without any permission from relevant authority, which should have been held invalid for breaching the relevant provisions of Chinese law. However, the court ruled that breach of the mandatory provisions of Chinese law did not completely equal to the breach of public policy, therefore public policy cannot be invoked under Article V (2) (b) of the New York Convention, and shall decide to recognize and enforce the award in this case.

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91 Letter of Reply of the Supreme People’s Court on Request for Instructions on the Application of ED&F (Hong Kong) Co., Ltd. for Recognition and Enforcement of the Arbitral Award of London Sugar Association, 1 July 2003, Min Si Ta Zi [2003] No.3.
The same attitude adopted by Supreme People’s Court was reflected in *Mitsui (Japan) & Co v. Hainan Textile Industry Corporation*[^92]. The court held that Hainan Textile Industry Corporation as State-owned Corporation, directly bear the debts for Mitsui & Co, without acquiring the registration and approval of State Administration of Foreign Exchange, violating the provisions regarding to examination and approval of foreign debts and foreign exchange control policy. However, the breach of department regulation and administrative laws and regulations did not necessarily constitute the breach of public policy in China, hence the Award No. 060/1999 issued by the Arbitration Institute of the Stockholm Chamber of Commerce shall not be refused by invoking public policy under Article V (2) (b) of the New York Convention.

(b) Unfair and Unjustifiable Outcome of the Arbitral Award Does Not Constitute to the Violation of Public Policy in China

In *GRD Minproc Co., Ltd. (Australia) v. Shanghai Feilun Industrial Corporation*[^93], Shanghai Higher People’s Court held that:

The disputes between the parties derived from the manufacturing equipment which did not meet the industrial safe manufacturing standards, thereby causing serious pollution to the manufacturing environment and great threat to the health of employees of respondent, leading to numerous economic losses suffered the respondent and the closing of respondent’s factory for a long period of time on the base of the violation of social public interest. However, the tribunal did not pay much attention to this, and decided the claimant did not breach the contract simply based upon the clauses agreed in parties’ contract, which went against the spirit of fairness and justice.


underlined in arbitration, resulting in the objective unfavorable consequences of public interest in our country. All the forgoing factors conformed to the condition provided in Article V (2) (b) of the New York Convention, and therefore the award shall not be recognized and enforced.

The Supreme People’s Court rejected the opinion of Shanghai Higher People’s Court in *Letter of Reply of the Supreme People’s Court on Request for Instructions Re Application of GRD Minproc Limited for Recognition and Enforcement of the Arbitration Award of Arbitration Institute of the Stockholm Chamber of Commerce*, and stated that:

The Purchase of the manufacturing equipment by Feilun Industrial Corporation was under the permission of the competent authority, and the equipment was not prohibited importing to China under Chinese law. There were multiply reasons leading to the environment pollution during the installment, adjustment and operation of the equipment. The arbitral tribunal had the power to make the decision on the issue of the quality of the equipment in this case on the base of Feilun’s application to arbitration as pursuant to the valid arbitration clause in the contract between the parties. The fairness and justifiableness of the outcome of the arbitral award cannot be regarded as the standard of determining whether the recognition and enforcement of such an award would contrary to public policy in our country. Recognition and enforcement of the arbitral award in the present case would not contrary to fundamental interests of the society, fundamental principles of Chinese law, and good and honest custom in China. Therefore, Article V (2) (b) of the New York Convention could not applied to this case.

(c) Low-price Dumping by Foreign Enterprises to Chinese Market, and Violation of Fairness and Justice Principle in Chinese Law Does Not Constitute to the Violation of Public Policy in China
In the case *Shinetsu Chemical Industry Co., Ltd. (Japan) v. Tianda Tiancai Co., Ltd.*\(^9\)\(^4\), Tianjin Higher People’s Court held that:

The supply price provided by the applicant (Shinetsu Chemical Industry Co., Ltd.) to domestic fiber enterprises in Japan was far lower than the price offered to Tianda Tiancai Co., Ltd. and other Chinese enterprises, and the misconduct of applicant resulted in the much lower costs of production in Japanese enterprises than those in China, which contributed to Japanese enterprises’ dumping to Chinese market at a lower price. The respondent (Tianda Tiancai Co., Ltd.) suffered huge economic losses and was hardly enable to continue the manufacturing owing to the ‘double squeeze’ with mass low-price dumping by Japanese enterprises and forced purchase at high price from the upstream suppliers. In the context, the award made by the arbitral tribunal, which upheld Shinetsu’s claim for numerous amount of compensation from Tianda Tiancai, shall be considered as a violation of public policy in our country. Furthermore, a five years sales and purchase agreement guaranteed by irrevocable letter of credit (ILC) concluded by the parties was unfair, and on that basis held that ‘the made award was in breach of the fundamental principles of Chinese law— the principles of fairness and justice’.

However, the Supreme People’s Court declined to react to the issue of public policy defense invoked by the Tianjin Higher People’s Court, ultimately instructed the lower court to refuse the recognition and enforcement on the grounds of Article V (1) (b) and V (1) (d) of the New York Convention. From this perspective, Supreme People’s Court did not support the lower court to refer to public policy even if the Chinese contracting party was at a disadvantage and unfair position.

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(d) Violation of Chinese Judicial Sovereignty and Jurisdiction of Chinese Court Constitutes to the Violation of Public Policy in China

The first case that Supreme People’s Court refused the recognition and enforcement of foreign arbitral award by invoking public policy defense based on Article V (2) (b) of the New York Convention was Hemofarm DD and others v. Jinan Yongning Pharmaceutical Co., Ltd. On 22 December 1995, Hemofarm DD, MAG International Trading Corporation signed the contract with Jinan Yongning to set up a Joint Venture Company (Jinan-Hemofarm Pharmaceutical Co., Ltd.), and Article 58 of the contract provided that ‘Any disputes arising out of or in connection with the present contract or the execution of the present contract shall be solved by friendly negotiation between the parties; if no solution can be reached, the parties can refer to arbitration to International Chamber of Commerce in Paris under their procedure rules.’ In April 2000, Suramo Media Co., Ltd joined JV Company and became the shareholder of the company.

On 6 August 2002, Jinan Yongning brought a law suit against the JV Company to Jinan Intermediate People’s Court, claiming the payment of rent and the restitution of part of leasing assets. JV Company challenged the jurisdiction of the court on the base of the arbitration clause in the JV contract. Jinan Intermediate People’s Court found that the arbitration clause shall only be applied to the disputes between the parties of JV contract (Namely Hemofarm DD, MAG International Trading Corporation, Suramo Media Co., Ltd and Jinan Yongning Pharmaceutical Co., Ltd.). However, the current case concerned about the disputes between JV Company and Jinan Yongning, therefore arbitration clause in JV contract could not be applied and the objection of jurisdiction shall be rejected. Ultimately, upon the application and guarantee provided

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95 Letter of Reply of the Supreme People’s Court to a Request for Instructions on the Non-Recognition and Non-Enforcement of an Arbitration Award of the ICC International Court of Arbitration, 2 June 2008, Min Si Ta Zi [2008] No.11.
from Jinan Yongning, the court adopted property preservation, sealing up part of JV Company’s assets and savings.

On 3 September 2004, Hemofarm, MAG and Suramo as the co-claimant submitted to arbitration to ICC Paris, claiming that the litigation proceedings brought by Jinan Yongning was contrary to the agreed arbitration clause, and Jinan Yongning should compensate the losses suffered by JV Company due to the interim measures issued by Jinan Intermediate People’s Court. The tribunal made the final award in favor of Hemofarm, holding that the interim measures caused direct, substantial, and adverse impact to claimants and lead to the closure of the JV Company eventually, thus claimants were entitled to the compensation for the damages caused by the preservation of property granted by Chinese court. And the tribunal further held that Jinan Yongning breached the JV contract for bringing the case to Chinese court, rather than referring to arbitration to ICC Paris in accordance with the arbitration clause.

When the recognition and enforcement of such award was reported to the Supreme People’s Court, the court pointed out in its reply letter that the arbitral tribunal of ICC Paris’ decision regarding to the disputes between the claimant and respondent went beyond the scope of the agreed arbitration clause. Besides, the court stressed that, under the circumstances where Chinese relevant court had made the judgment and executed the interim measures with regard to the disputes between JV Company and Jinan Yongning, the re-adjudication by the tribunal of ICC Paris constituted a violation of the judicial sovereignty of China and the judicial jurisdiction of Chinese courts. Therefore, the court refused to recognize and enforce the No. 13464/MS/JB/JEM award rendered by the International Court of Arbitration of International Chamber of Commerce in accordance with Article V (1) (c) and Article V (2) (b) of the New York Convention.
It is noted that, nonetheless, Model Law had the specific provision of interim measures issued by arbitral tribunal\(^96\) and the arbitral tribunal was indeed vested with such power in many jurisdictions, the power to decide and execute interim measure exclusively belongs to the courts in China\(^97\), which means the arbitral tribunal in China had no power to adopt interim measures aiming to the assets within the territory of China. Thus, the adverse comments from the arbitral tribunal concerning the interim measures issued by Jinan Intermediate’s People’s Court was a challenge to China’s exclusive jurisdiction, and could be considered as part of the reason for violating the public policy in China, besides the reason that the tribunal reheard the case that had already settled by Chinese court.

In conclusion, from the perspective of empirical study of the judicial practice in China, Chinese court took a prudent and cautious view on the application of public policy defense in the New York Convention.

III. SUGGESTIONS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CHINA

1. Perfect the Report Mechanism

As mentioned above in Chapter II.3., the Report Mechanism is a temporary mechanism created by the Supreme People’s Court to deal with the difficulties encountered by the lower people’s court when facing the recognition and enforcement of foreign arbitral awards under the New York Convention. It is uncontested that the Report Mechanism played a significant role in China’s duty of implementation of the New York Convention, serving as a protective umbrella not only for the parties but also for the lower people’s court. However, 22 years have passed since the Report


Mechanism was formed, some drawbacks have becoming increasingly obvious, and which need to be examined and improved.

First and foremost, the Report Mechanism was not stipulated by law, but in the form of ‘notice’, which only could be considered as an internal regulation among Chinese people’s courts. It is advisable to stipulate the Report Mechanism in the form of the judicial interpretation of Supreme People’s Court. Compared to the long preparation period of law-making process, judicial interpretation will better cater for the urgent need of recognition and enforcement of foreign arbitral awards in China. Besides, as one of the sources of law in China, judicial interpretation has the direct effect on the lower people’s court.

Secondly, even though the Enforcement Work Regulation\textsuperscript{98} and Fee Collection Regulation\textsuperscript{99} provided the time limit for the lower court to accept the case and make the decision, the time limit for the Higher People’s Court and Supreme People’s Court to review the case upon the report from lower people’s court was not touched upon. That is to say, it is unpredictable for the parties to foresee the whether the award is still possible to be enforced even if the Supreme People’s Court made the decision in favor of the applicant.\textsuperscript{100} It is suggested that the Higher People’s Court shall not exceed 1 month to make the decision after the lower court sends up the case, given that the lower court would have had a preliminary review of the facts and evidences. And it would be efficient that the Supreme People’s Court could make the final decision within 2 months upon the submission from the Higher People’s Court.

Thirdly, the review process should be more transparent and accessible to the parties. Parties should be permitted to participate in the review process in Higher People’s Court.

\textsuperscript{98} Supra note 50.
\textsuperscript{99} Supra note 61.
\textsuperscript{100} Supra note 59, Revpower case
Court and Supreme People’s Court through presenting their position and, *inter alia*, supplementing the evidences when it is necessary.

Besides, in case of the circumstances where the lower court is reluctant to deal with the case by abusing of the power in the Report Mechanism, some counter measures and punitive measures should be provided by the Supreme People’s Court in the judicial interpretation.

2. **Tackle the Issue of ‘Foreign Arbitration Institution Conducting Arbitration in China’**

Although the *Long Li De* case recognized the validity of foreign arbitration institution conducting arbitration in China, it did not put an end to this problem. Without the clarification of the nature of such award rendered in this context and the procedure rules of its recognition and enforcement, *Long Li De* case was just a small step. To thoroughly solve this problem, two options are suggested which both call for the legislation amendments.

One approach is to completely abandon the arbitration institution criterion to determine the nationality of an arbitral award, and adopt the territorial criterion following the international common practice. After all, it is absurd to consider all ICC arbitral awards, regardless of where the arbitral awards are rendered, as French arbitral award. By this approach, all relevant provisions in the Civil Procedure Law and Chinese Arbitration Law need to be amended accordingly, and particularly, the wording ‘an arbitration award of a foreign arbitral institution’ in Article 283 of the Civil Procedure Law (2012 Amendments) should be replaced into ‘a foreign arbitral award’\(^{101}\). In this circumstance, the arbitral award rendered by a foreign arbitration institution in China would be deemed as a Chinese award, and then there would not be

an issue of recognition by Chinese court and such award can be enforced under Chinese law.

The other approach is not as costly as the first one, in which Chinese court need to form the standard of non-domestic award in China under the New York Convention. As a matter of fact, the arbitral award rendered by foreign arbitration institution in China was deducted to the non-domestic award under the New York Convention, instead of in accordance with any legislation or regulation. It is more like a reluctant interpretation because there are no alternatives in the context in that the arbitral award is neither a foreign award under the New York Convention nor a domestic award under the Chinese law. Therefore, the Supreme People’s Court needs to clarify the standard of non-domestic award concerning the arbitral award rendered by foreign arbitration institution in China, and then such award can be recognized and enforced under the New York Convention, or the court can characterize it as other types of award provided that there is a relative mature rule for its enforcement afterwards.

3. Narrow the Scope of Public Policy

Nonetheless only a few exceptional arbitral awards were refused recognized and enforced on the ground of public policy, there is still a room to consider a better approach to deal with public policy defense and better adhere to the pro-enforcement bias of the New York Convention. Apparently, as the first case that Chinese court invoked public policy to refuse the recognition and enforcement of foreign arbitral award, Hemofarm DD case was placed in the spotlight.

In this case, the re-adjudication by the tribunal of the same dispute which had been decided by Chinese court was considered as an invasion of Chinese judicial sovereignty and judicial jurisdiction of Chinese court, thereby violating public policy in China. Positive conflicts of jurisdiction is the essence of this case, and usually a national court tends to refuse to judgment made by foreign court when facing with jurisdiction conflicts, and would never touch upon public policy. For example, Article
533 of Interpretation of the Supreme People’s Court on Application of the Civil Procedure Law of the People’s Republic of China102 stated that:

Where both people’s courts and foreign courts have the jurisdiction over the case, one of the parties institute an action in a foreign court, and the party institute an action in a people’s court, the people’s court may accept the case. After the people’s court enters the judgment, the application of either a foreign court or the party to recognize and enforce the judgment made by a foreign court of the same dispute shall be rejected, unless otherwise provided in the international treaty that concluded or acceded to by People’s Republic of China and the country where the judgment was made. Where the judgment or the ruling made by a foreign court has been recognized by people’s court, a people’s court shall refuse to accept an action instituted by the party concerning the same dispute.

Even though Hemofarm DD concerns about the jurisdictional conflicts between the arbitral tribunal and a national court, not ‘parallel proceedings’ between two courts in different states, the common nature is alike in which the same dispute is solved by two parallel dispute resolutions. It would be far beyond the necessary to touch upon issue of public policy in this scenario where even ‘parallel proceedings’ is not deemed as a violation of Chinese judicial sovereignty and public policy.103

Besides, Hemofarm DD also involved ultra vires of the arbitral tribunal. In fact, it is uncontested that Supreme People’s Court could refuse the recognition and enforcement on the base of Article V (1) (b) alone, despite whether it is appropriate to refer to public policy in the conflicts of jurisdiction. Was it still necessary to invoke public policy when other defense was found applicable? Not really. The scope of public policy is intrinsically blurred which largely depends on the interpretation of

102 Interpretation of the Supreme People’s Court on Application of the Civil Procedure Law of the People’s Republic of China, 30 January 2015, Fa Shi [2015] No.5.

national courts. Once the court opens the door for public policy, the issued judgment will become the standard of application of public policy.\textsuperscript{104}

IV. CONCLUSION

Looking back at the past 30 years since China acceded to the New York Convention, significant progress has been made by Chinese courts on the recognition and enforcement of foreign arbitral awards in China. The Supreme People’s Court has upheld only 24 out of 64 refusals reported to them by the intermediate courts.\textsuperscript{105} The implementation of the spirit of the New York Convention directly influenced the legislation amendments of Chinese Arbitration Law and Chinese Civil Procedure Law, in a large extent, bringing the legislative advancements of Chinese legal regime.

In general, with much respect to the parties’ autonomy, due process and the pro-arbitration bias, Chinese courts properly applied the relevant provisions in the New York Convention while dealing with the recognition and enforcement of foreign arbitral awards in China. Especially, in the aspect of public policy, Chinese courts reassured the foreign investors who are always full of worries by adopting the narrow reading of Chinese public policy.

However, there are still some shortcomings, for example, some judges in lower courts are not equipped with adequate knowledge of the New York Convention; insufficient review under the Report Mechanism usually results in significant delays; and the rigid interpretation of Chinese law generally gives rise to unnecessary obstacles. In addition, when it comes to the governing law which is Chinese law, the difficulties for the party to recognize and enforce the arbitral awards in China would become prominent in that there are still some rules in Chinese law that do not conform to the international

\textsuperscript{104} Ibid, P19.

common practice, such as the arbitration institution criterion to determine the nationality of an arbitral award.

It is undeniable that, with the dramatic development of Chinese economy, the New York Convention will play an increasingly important role in guaranteeing the effectiveness of foreign arbitral awards in China. And with more judicial practice in this regard, the more efficient recognition and enforcement of foreign arbitral awards by Chinese courts will be witnessed.
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