

**Enforceability: Foreign Arbitral Awards
in Chinese Courts**

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arbitral awards in China is still considered as problematic.² A recent study reveals that among foreign businesses, the “opinion of China’s treatment of foreign arbitral awards” is low and the skeptic views of China’s system of enforcing foreign arbitral awards remain.³ The question raised time and again is whether an arbitral award obtained outside China could be effectively enforced in Chinese courts.

Arbitration in China is divided into two categories: domestic arbitration and foreign arbitration. Foreign arbitration includes the arbitration by Chinese arbitration institutions, which contain foreign elements (foreign-related arbitration), and the arbitration by foreign arbitration bodies where the enforcement of their arbitral awards is sought in China (foreign-country arbitration). Foreign parties and practitioners in general have a complicated feeling about arbitration in China. In one aspect, they are reluctant to engage a Chinese arbitration entity due to a lack of confidence in the entity or in the Chinese legal system as a whole.⁴ Also, when choosing foreign country arbitration, they are worried about getting the arbitral award enforced if the enforcement has to take place in China.⁵

China did not have a formal arbitration system until 1994 when the Arbitration Law of China was adopted,⁶ although a scholarly study suggests that the arbitration legislation in the country actually started as early as in

Woguo Jiaru de “Chengren Ji Zhixing Waiguo Zhongcai Caijue Gongyue” de Tongzhi (最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知) [Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 2, 1986, effective Apr. 22, 1987), CLI.3.3255(EN) (Lawinfochina) [hereinafter SPC Foreign Arbitral Award Notice (1987)]. Pursuant to article 12, paragraph 2 of the New York Convention, the New York Convention became effective in China on April 22, 1987 (90 days after the accession). *See id.*; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 12(2), June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

2. *See* Roger P. Alford et al., *Perceptions and Reality: The Enforcement of Foreign Arbitral Awards in China*, 33 PAC. BASIN L.J. 1, 2 (2016).

3. *See id.* at 4.

4. *See* Eleanor Taylor, *Arbitration in China – The Common Misperceptions*, KLUWER ARB. BLOG (Nov. 7, 2013), <http://kluwerarbitrationblog.com/2013/11/07/arbitration-in-china-the-common-misperceptions> [<https://perma.cc/U9FM-5DWA>]; *see also* Alyssa S. King, *Procedural Perils: China’s Supreme People’s Court on the Enforcement of Awards in International Arbitration*, 17 ASIAN-PAC. L. & POL’Y J. 1, 12 (2016).

5. *See* Alford et al., *supra* note 2, at 4.

6. Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995) CLI.1.9590(EN) (Lawinfochina).

1913, when the Republic government adopted the Rules of Commercial Arbitration Bureau.⁷ Before 1994, arbitrations did take place in the country. However, unlike the current legislation, the arbitrations at that time had two distinctions: first, the arbitrations primarily focused on contractual disputes between enterprises, mostly state-owned;⁸ and second, the arbitrations had a strong administrative nature because they were all conducted by government agencies.⁹

Prior to 1987 — when China became a member of the New York Convention — the enforcement of foreign arbitral awards was provided in the 1982 Civil Procedure Law (Provisional) (CPLP). Under Article 204 of the CPLP, enforcement of foreign arbitral awards must satisfy two conditions: (a) the enforcement should be examined in accordance with the international treaty China concluded or acceded to or on the principle of reciprocity, and (b) the enforcement should not violate the fundamental principles of the law or national and social interests of China.¹⁰

When joining the New York Convention, China made two reservations. The first is called a “reciprocity reservation,” which requires that the Convention apply only to recognition and enforcement of awards made in the territory of another contracting State.¹¹ The second reservation is known as a “commercial matters reservation,” under which the application of the Convention is to be made only to the differences arising out of legal relationships, whether contractual or not, that are considered “commercial” under the national law.¹² The two reservations impose constraints on the extent to which the New York Convention may be applied in the country.

In order to implement the New York Convention, the Supreme People’s Court of China (SPC) issued the Notice of Application of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1987 Notice).¹³ The 1987 Notice, which remains effective, specifies how the Convention

7. See JIANG WEI (江伟) & XIAO JIAN GUO ZHU (萧建郭竹), *ZHONG CAI FA (仲裁法 /) [THE ARBITRATION LAW]* 40 (Renmin Univ. Press ed., 3rd ed. 2016); see also DR. JOHN SHIJIAN MO, *ARBITRATION LAW IN CHINA* 1 (Sweet & Maxwell Asia, 2001).

8. Before the Contract Law of China was adopted in 1999, the Economic Contract Law generally precluded individuals from making contracts in the law. Chen Xuebin, *China Enacts a New Contract Law for the New Millennium*, INT’L REL. (2000), <http://www.international-relations.com/cm4-1/WbChineseLaw.htm> [<http://perma.cc/5HK5-B5LH>].

9. See JIANG WEI & XIAO JIAN GUO ZHU, *supra* note 7, at 41.

10. See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 8, 1982, effective Oct. 1, 1982), 1982 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 204 (China) [hereinafter Civil Procedure Law (1982)].

11. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 1.

12. See *id.* art. 2.

13. The notice was issued to all local courts except the trial courts on April 10, 1987. *Id.*

is to be applied in Chinese courts.¹⁴ It also provided a definition of “contractual and non-contractual relationship of commercial nature” under the commercial reservation China made to the Convention. In addition, the 1987 Notice designated the Intermediate People’s Courts to handle the requests for recognition and enforcement of foreign arbitral awards.¹⁵

In 1991, China enacted the Civil Procedure Law (1991 CPL) to replace the CPLP of 1987.¹⁶ Under the 1991 CPL, the interested party was able to directly apply to the People’s Court for the recognition and enforcement of the foreign arbitral award obtained.¹⁷ In 1995, the SPC issued the Notice on Several Matters Concerning the Handling of Foreign Arbitration and Foreign Arbitral Awards in the People’s Courts (1995 Notice).¹⁸ An important feature of the 1995 Notice was the establishment of an internal reporting system in Chinese courts. Pursuant to the 1995 Notice, the reporting system equally applies to the filing of a case seeking to invalidate the arbitration clause or agreement.¹⁹

In 2012, the 1991 CPL was revised.²⁰ In the revised CPL (2012 CPL), there are six articles (Articles 271-75, 283) that govern foreign arbitration, which are basically taken from the 1991 CPL.²¹ In its Interpretation Concerning Application of the Civil Procedural Law issued on January 30, 2015 (2015 CPL Interpretation), the SPC took an extraordinary step and explicitly addressed several issues that were quite controversial and also caused

14. *Id.* art. 1.

15. *See id.* art. 3. In China, the People’s Courts have four levels: at the top is the SPC, then the Provincial High People’s Court, followed by Intermediate People’s Courts. The trial or county courts are at the basic level and have preliminary jurisdiction of most cases.

16. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991), 1991 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ., art. 270 (China).

17. *See id.* art. 269.

18. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Chuli Yu Shewai Zhongcai Ji Waiguo Zhongcai Shixiang Youguan Wentí de Tongzhi (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知) [Notice of the Supreme People’s Court on the Relevant Issues of the People’s Court Dealing with Foreign Arbitration] (promulgated by the Sup. People’s Ct., Aug. 28, 1995, effective Aug. 28, 1995), CLI3.102557(EN) (Lawinfochina).

19. *See id.* art. 1.

20. *See generally* Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Jan. 1, 2013) 2012 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. [hereinafter Civil Procedure Law (2012)].

21. *See id.* arts. 271–75, 283.

confusion with regard to foreign arbitration.²² The 2015 CPL Interpretation is considered an important judicial interpretation on foreign arbitration not only because it incorporates opinions of the Court stated in prior cases, but also because it restates common practices accepted by the Court.²³

On December 26, 2017, the SPC adopted two sets of rules pertaining to judicial review of arbitration: Provisions on Several Issues Concerning Adjudication of Requests for Judicial Review of Arbitration (2017 Rules of Arbitration Review)²⁴ and Provisions on the Issue of Reporting for Examination and Approval of the Cases Requesting Judicial Review of Arbitration (2017 Rules on Reporting).²⁵ Those rules further addressed issues pertaining to the review of the validity of an arbitration agreement, review of foreign arbitral awards, application of law, and the internal reporting process.

In general, the foreign country arbitration cases filed with Chinese courts can be divided into three categories. The first category concerns the requests for confirmation of the effect of foreign arbitration agreements (confirmation). The second category includes requests for the cancellation of arbitral awards issued by foreign arbitration institutes of China (cancellation). The third category involves applications for recognition and enforcement of foreign arbitral awards (enforcement). According to an official report by the China International Trade and Economic Arbitration Commission (CIETAC) on international commercial arbitrations in China, in 2015 Chinese courts concluded eighteen cases involving application for

22. Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Minshi Susong Fa” de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China] (promulgated by the Jud. Comm. Sup. People’s Ct., Jan. 30, 2015, effective Feb. 4, 2015) LEXIS CHINA ONLINE [hereinafter CPL Interpretation 2015]. The CPL Interpretation 2015 is the longest ever judicial interpretation made by the SPC with a total of 552 articles, of which about seventeen are related to arbitration. See CHINA ACAD. OF ARBITRATION LAW, ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2015) 11–14 (2015), <http://www.cietac.org.cn/Uploads/201612/58678e45783ae.pdf> [<https://perma.cc/V5U7-AWRQ>].

23. See Yan Yang (阎阳) & Hua Zhang (张华), *Annual Review on Commercial Mediation in China (2016)*, in COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW (2016) 53, 55–56 (China Legal Publ’g House, 2016).

24. See Zuigao Renmin Fayuan Guanyu Shenli Zhongcai Sifa Shenchu Anjian Ruogan Wenti de Guiding (最高人民法院关于审理仲裁司法审查案件若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases] (promulgated by the Jud. Comm. Sup. People’s Ct., Dec. 26, 2017, effective Jan. 1, 2018), CLI.3.307539(EN) (Lawinfochina).

25. See Zuigao Renmin Fayuan Guanyu Zhongcai Sifa Shenchu Anjian Bao He Wenti de Youguan Guiding (最高人民法院关于仲裁司法审查案件报核问题的有关规定) [Relevant Provisions of the Supreme People’s Court on the Review of Judicial Review Cases] (promulgated by the Jud. Comm. Sup. People’s Ct., Dec. 26, 2017, effective Jan. 1, 2018) CLI.3.307538(EN) (Lawinfochina).

confirmation of the validity of foreign-related arbitration clauses, fifty-nine cases involving application for setting aside foreign-related arbitral awards, and forty cases involving application for enforcing foreign-related arbitral awards.²⁶

In 2016, King & Wood Mallesons (KWM), a leading Chinese law firm, conducted an extensive survey of the enforcement of foreign arbitral awards in China between 1994 and 2015 (KWM Survey).²⁷ Of the ninety-eight applications to enforce foreign arbitral awards in China K&W reviewed, sixty-seven were successful, resulting in an overall average enforcement rate of sixty-eight percent.²⁸ This finding was consistent with Professor Randall Peerenboom's empirical study in 2001, where he concluded that fifty-two percent of foreign arbitral awards were enforced in China in the 1990's, slightly higher than the forty-seven percent success rate for the CIETAC awards.²⁹ Nonetheless, about one-third of foreign arbitral awards went unenforced in China according to the KWM survey. Note, however, that the KWM survey included foreign arbitral awards seeking enforcement in China rendered by the arbitration bodies in Hong Kong, Macau and Taiwan, three territories which are considered "foreign" for the purposes of civil and commercial dispute settlement.³⁰

Individual cases in which the enforcement of foreign arbitral awards is sought in Chinese courts may differ from each other in many ways. But every case involves the common issue of whether the foreign arbitral award should be enforced, or the issue of enforceability. In many cases, the enforceability is dependent on the validity of the arbitration agreement. Quite often, before deciding on the enforcement, the court is asked to determine whether an effective arbitration agreement exists between the parties or whether an arbitration agreement should be set aside under certain circumstances.

26. See ANNUAL REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA (2015), *supra* note 22, at 24. In addition, courts concluded sixty-four cases related to Hong Kong, Macau and Taiwan, including thirty-six confirmation cases, twenty-four cancellation cases, and four enforcement cases. *See id.*

27. See Meg Utterback, Li Ronghui & Holly Blackwell, *Enforcing Foreign Arbitral Awards in China – A Review of the Past Twenty Years*, LEXOLOGY (Sept. 15, 2016), <http://www.lexology.com/library/detail.aspx?g=139d16ff-02d4-46fd-863e-6e08a9d6027a> [<https://perma.cc/ZUX7-YL72>] [hereinafter KMW Survey].

28. *Id.*

29. Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 254 (2001).

30. See KMW Survey, *supra* note 27.

The enforceability involves the legal effect of an arbitral award, while the validity of an arbitration agreement affects the legitimacy of arbitration.

This Article intends to address the enforceability matter and examines how the enforcement of a foreign arbitral award is handled in China under Chinese law and judicial practice. The purpose of this article is to provide an in-depth analysis of common issues encountered by foreign arbitral awards seeking enforcement in China. The analysis is largely based on the cases in which recognition and enforcement of foreign arbitral awards were denied during the period of 2000 to 2015. It also looks at the recent cases in light of the 2012 CPL and 2015 CPL interpretations, and discusses the new development under the SPC's 2017 rules pertaining to the enforcement of foreign arbitral awards. The analysis and discussion are made with a focus on implementation of the New York Convention in China and related matters.

Part II of the article begins with a review of the legal framework of China governing enforcement of foreign arbitral awards. It analyzes the enforcement mechanism and the role of the judiciary. Part III of the article discusses the concept of “foreign element” and its determination, which involves preliminary issues concerning the enforcement. The discussion also involves Chinese understanding of the delocalization doctrine that allows the parties to choose the non-national law of the place of arbitration to govern the arbitral proceeding, and a recent case that sparked controversy in China on the recognition of the non-domestic arbitral awards. Part IV concentrates on the arbitration agreement itself — the essential factor to the determination of enforceability. It examines the major issues involving the validity of arbitration agreements under Chinese law and explores strategies to overcome the legal impediments. Part V turns to other conditions affecting recognition and enforcement. It focuses on the cases where the enforcement was denied, and analyzes the grounds on which the denials were made.

Part VI concludes that enforcement of foreign arbitral awards remains a challenging issue in China. On one hand, China needs to further improve its legal scheme. On the other hand, there is a necessity to narrow the gap between foreign perception and Chinese reality. It is probably true that having arbitration outside China is ideal to the foreign party. But in doing so, enforcement of the foreign arbitral award in the country will necessarily become an issue. Thus, if the enforcement of the arbitral award must take place in China, a strategic alternative worthy of consideration is to have the arbitration conducted in the country by a Chinese arbitration body or a foreign arbitration institute. In either case, there is a possibility that the parties may still choose a foreign law to govern their disputes.

II. LEGAL SCHEME OF FOREIGN ARBITRATION AND ENFORCEMENT MECHANISM

Foreign arbitration in China is governed by a legal framework consisting of three components. The first component is legislation, referring to the laws passed by the National People's Congress (NPC) and its Standing Committee. The second component contains treaties, including the New York Convention and various bilateral judicial assistance agreements. The third component is the opinion of the SPC in the form of interpretation, notice, reply, or decision. It is important to note that under the Chinese legal structure, the first two components represent the primary source of law, while the third component concerns only the application of the law. In other words, the Chinese judiciary does not have a function of making a law, although the SPC's opinions are considered to have binding effect to all people's courts.³¹

A. Foreign Arbitration Legislation

As noted, before the Arbitration Law was adopted in 1994, China did not have independent arbitration legislation, and the provisions that governed arbitration were scattered in the CPL and other regulations.³² After the Arbitration Law was enacted, arbitration legislation in China began a two-track format: the CPL (in general), and the Arbitration Law (in particular). The former is the general law while the latter is the special law. As an established principle in China, if there is any discrepancy between the general law and special law, the special law takes the priority unless otherwise indicated in the law.

Domestic and foreign cases are traditionally handled differently under Chinese law. A general pattern is that there are special provisions in the law intended to apply specifically to cases classified as "foreign." Following this standard, both the Arbitration Law and the CPL contain special provisions that regulate the foreign arbitration. Chapter Seven of the Arbitration Law has nine articles, collectively called "Special Provisions on Foreign Related Arbitration."³³ The 2012 CPL, as previously noted, contains six articles

31. For more information about sources of law in China and the function of Chinese courts, see Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 WASH. INT'L L.J. 269, 282–88 (2017).

32. See, e.g., Civil Procedure Law (1982), *supra* note 10, arts. 192–95, 203.

33. See Arbitration Law, *supra* note 6, arts. 65–73.

under the title of Special Provisions on Foreign Related Civil Litigation, which are applied explicitly to foreign arbitration.³⁴

However, the provisions in the 2012 CPL and Arbitration Law mainly deal with foreign arbitration in China, namely the foreign related arbitration made by Chinese arbitration bodies. There is only one article in the 2012 CPL that is related to foreign arbitral awards. Under Article 283 of the 2012 CPL, if a foreign arbitral award needs to be recognized and enforced in China, the People's Court would handle the matter pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity.³⁵ Thus, from a legislative viewpoint, enforcement of foreign arbitral awards in China is mainly governed by treaties, or subject to the principle of reciprocity absent the treaties. The most influential treaty in this regard is the New York Convention.

B. New York Convention and Its Application

Since China became a member of the New York Convention in 1987, the New York Convention has been the primary source of legal rules that govern the enforcement of foreign arbitral award in the country. Two major issues are often raised with respect to the application of the New York Convention. The first issue is the relationship between treaties and Chinese domestic law. More specifically, this issue is whether domestic law or the New York Convention prevails if there is a conflict between the two. The second issue is whether the New York Convention can be applied directly in Chinese courts.

The Chinese Constitution does not contain any provision specifying the status of treaties in the domestic law. Instead, the application of treaties is provided in the law of particular areas. Insofar as civil matters are concerned, there are two articles that are generally cited as authoritative sources concerning a treaty's application: Article 142 of the General Principles of Civil Law (1986)³⁶ and Article 260 of the 2012 CPL.³⁷ Under these two articles, if the provision of a treaty to which China is a member is inconsistent with the domestic law, the treaty provision prevails, except for the treaty provisions to which China has made reservation.

What is unclear, however, is whether the provision of a treaty still prevails if it appears to be in conflict with the law that is adopted at a later time.

34. See CPL Interpretation 2015, *supra* note 22 and accompanying text.

35. Civil Procedure Law (2012), *supra* note 20, art. 283.

36. Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by Order No. 37 President P.R.C., Apr. 12, 1986, effective Jan. 1, 1987), 1987 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 142.

37. Civil Procedure Law (2012), *supra* note 20, art. 260.

Put differently, it remains as a question whether the doctrine of “last in time” applies when the provision of a treaty is at odds with a newly promulgated law. There is a general assumption in China that a latter legislation would not contradict the treaty obligations that the country has assumed.³⁸ The SPC has also made it clear that when there is a treaty to which China has joined or acceded, its application shall take priority in People’s Courts except for the reserved provisions.³⁹

The issue concerning application of the New York Convention in the People’s Courts involves the judicial authority to apply the treaty. In international law theory, there are two approaches to the application of treaties in a domestic court. One approach is known as direct application or “monism” in a legal jargon. Under this approach, the domestic and international legal systems are considered to form a unity, and international law has effect automatically in domestic laws. Thus, a treaty is directly applicable in a domestic court.⁴⁰ The other approach is called indirect application or “dualism.” In contrast to the monism, dualism views domestic and international law as two separate legal systems.⁴¹ Thus, without legislative action to transform the treaty, treaties and international law confer no

38. See generally Wan Xiang, *Part IV: Application of International Law in China, in RESEARCH IN THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW* (Peking Univ. Press 2011); see also Zuigao Renmin Fayuan Guanyu Shenli Guoji Maoyi Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理国际贸易行政案件若干问题的规定) [Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of International Trade Administration] (promulgated by Jud. Comm. Sup. People’s Ct., Aug. 27, 2002, effective Oct. 1, 2002), art. 9, CLI.3.41780(EN) (Lawinfochina) (stating that if there are two or more reasonable interpretations of the specific provisions of law or administrative regulations applicable in the people’s court adjudication and one of the interpretation is in line with the relevant provision of an international treaty to which China has concluded or joined, such interpretation shall be chosen except for those provisions that China has made reservation).

39. See Zuigao Renmin Fayuan Guanyu Shenli He Zhixing Shewai Min Shangshi Anjian Yingdang Zhuyi de Ji Ge Wenti de Tongzhi (最高人民法院关于审理和执行涉外民商事案件应当注意的几个问题的通知) [Notice of the Supreme People’s Court on Several Issues That Should Be Paid Attention to in the Trial and Implementation of Foreign-related Civil and Commercial Cases] (promulgated by Sup. People’s Ct., Apr. 17, 2000, effective Apr. 17, 2000), art. 2, CLI.3.233828(EN) (Lawinfochina).

40. See generally J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT’L L. 66, 74–81 (1936).

41. PETER MALANCZUK, *AKHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 63 (Routledge 7th ed. 1997).

rights cognizable in the municipal courts.⁴² Simply put, a domestic court may not apply international law directly under a “dualism” approach.

China does not follow either of these approaches, but rather seems to stand in between. There are several reasons for this interpretation of the Chinese approach. First, there is no provision in any legislation in the country clearly stating how the treaty is to be applied in the People’s Courts. Second, a majority of Chinese international law scholars favor a mixed doctrine that combines both monism and dualism.⁴³ Third, the SPC takes a pragmatic position and applies the treaties on the basis of substance.⁴⁴ Under the SPC’s interpretation, if a treaty involves substantial or specific rights and obligations of the civil parties, the People’s Courts may apply it directly.⁴⁵ On the other hand, if a treaty is mainly concerned about policies or principles, its application requires an action from the NPC or its Standing Committee.⁴⁶

With regard to the New York Convention, its application in the People’s Courts is governed by the rules specified in the SPC’s 1987 Notice. Under the 1987 Notice, the People’s Courts are required to follow the New York Convention and apply the Convention provisions.⁴⁷ But, according to the SPC, application of the New York Convention shall occur under two conditions pursuant to the reservations China has made to the Convention. First, the provisions of the New York Convention apply only to those arbitral awards made in the territory of another contracting State.⁴⁸ Second, the application

42. See Starke, *supra* note 40, at 77; see also MALANCZUK, *supra* note 41, at 64.

43. See generally, WANG TIEYA, INTERNATIONAL LAW ch. 13 (Law Press 1995).

44. See CAO JIANMING, THE WTO AND CHINA’S JUDICIAL ADJUDICATION, 250–58 (Law Press 2001).

45. A typical example is the United Nations Convention on Contracts for the International Sales of Goods (CISG). According to the SPC and judicial practice, the provisions of the CISG have an effect of application in Chinese people’s courts, and absent the parties’ choice otherwise, the CISG shall directly be applied. See Zuigao Renmin Fayuan Guanyu Yinfa Quanguo Yanhai Diqu Shewai She Gang’ao Jingji Shenpan Gongzuo Zuotan Hui Jiyao de Tongzhi (最高人民法院关于印发《全国沿海地区涉外、涉港澳经济审判工作座谈会纪要》的通知) [Circular of the Supreme People’s Court on the Publication of the Symposium on the Economic Trials of Foreign Affairs Involving Hong Kong and Macau] (promulgated by Sup. People’s Ct., June 12, 1989, effective June 12, 1989). In many cases, the Supreme People’s Court repeatedly held that the People’s Courts could directly cite the CISG provisions except for those to which China has made reservation. See Liu Ying, *Direct Application of the CISG in Chinese Courts*, 5 WUHAN U. INT’L L. REV. 83 (2009).

46. According to the SPC, when adjudicating international trade administrative cases, People’s Courts shall apply Chinese laws and administrative regulations. See Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of International Trade Administration, *supra* note 38, arts. 7–8 (having the effect of excluding the direct application of the WTO).

47. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 1.

48. See *id.*

of the New York Convention may only be made to the controversies arising from the contractual or non-contractual commercial legal relationships under Chinese law.⁴⁹

In its 1987 Notice, the SPC explicitly stated that if the New York Convention is applicable and its provisions differ from those in the CPL, the People's Courts should apply the Convention.⁵⁰ From a general reading of the 1987 Notice, application of the New York Convention in Chinese courts does not require any transformative legislation; therefore, the New York Convention itself is an authoritative legal source in China.⁵¹ The 1987 Notice has a two-fold implication: on the one hand, a People's Court may directly apply the Convention or cite it as the legal ground on which the court's decision is based;⁵² alternatively, the parties may ask the People's Court to follow the Convention or may cite the Convention as a defense if there is discrepancy between the Convention and Chinese law.

C. Judicial Interpretation and the Role of Chinese Judiciary

As previously noted, the Chinese judiciary does not have the power to make law, or even to interpret the law.⁵³ Under the Chinese legal structure, the law-making authority rests exclusively with the legislative branch, namely the People's Congress.⁵⁴ The executive branch is empowered to adopt administrative regulations, provided that they are not inconsistent with the law enacted by the People's Congress.⁵⁵ The NPC and its Standing Committee are the national legislative bodies, and the local congresses are responsible for promulgating the laws that either implement the national law or regulate local matters.⁵⁶ Under the Chinese Constitution, the Chinese judiciary has only the power to implement and apply the law.⁵⁷

49. See *id.* art. 2.

50. See *id.* art. 1.

51. Wan E'xiang & Xia Xiaohong, *Reasons for the Denial of Recognition and Enforcement of Some Foreign Country Arbitral Awards by Chinese Courts: An Analysis of New York Convention Related Cases*, 13 WUHAN U. INT'L L. REV. 1, 11 (2010). Note that Wan E'xiang was the Vice President of the SPC at the time of this publication, and according to his opinion therein, the New York Convention need not be transformed into domestic law in order for it to be applied in the people's courts.

52. See *id.*

53. See Zhang, *supra* note 31, at 271, 278.

54. *Id.* at 274.

55. *Id.* at 275.

56. *Id.* at 274–75.

57. *Id.* at 277–78.

The implementation of law as a judicial function is mostly seen in the judicial interpretations.⁵⁸ In China, the legal interpretation is divided into two different categories: legislative interpretation and judicial interpretation.⁵⁹ Legislative interpretation is the interpretation of law by the legislature, while judicial interpretation only concerns application of the laws.⁶⁰ The former is purposed to tell what the law is and the latter is aimed at making sure how the law is to be applied as intended by the legislature. Since the line between legislative and judicial interpretations blurs in most cases, the judicial interpretation often operates to actually define the law itself.⁶¹

It is important to note that under the Chinese legal system, only the SPC has the power to make judicial interpretations.⁶² Therefore, the judicial interpretation in China is actually the SPC interpretation. According to the SPC, judicial interpretation could be made in four different forms: “interpretation,” “provision,” “reply,” and “decision.”⁶³ Another considered form of judicial interpretation is “notice” issued by the SPC.⁶⁴ Although it remains debatable in China whether the judicial interpretation is a source of law, it has the effect of binding all People’s Courts.⁶⁵ In practice, the People’s Courts often rely on the judicial interpretation, especially where the law is unclear.⁶⁶

It is without doubt that the 1987 Notice serves as a primary guide for Chinese People’s Courts in implementing the New York Convention. As a matter of fact, in every case involving recognition and enforcement of foreign arbitral awards since the issuance of the 1987 Notice, the People’s

58. *See id.*

59. *Id.* at 278.

60. *Id.*

61. *See id.* at 279.

62. *See* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 10, 1981, effective June 10, 1981), CLI.1.1006(EN) (Lawinfochina).

63. *See* Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People’s Court on the Judicial Interpretation Work] (promulgated by the Sup. People’s Ct., Mar. 9, 2007, effective Apr. 1, 2007), CLI.3.89508(EN) (Lawinfochina) (according to the SPC, “interpretation” means to handle the issue concerning how to specifically apply a certain piece of law or how to apply the law to a specific type of case or matter in judicial practices; the “provisions” refer to the judicial interpretation made in lieu of regulations or opinions adopted on the basis of need for judicial work pursuant to the legislative spirit; the “reply” is an interpretation in response to the request from the higher People’s Courts or the military courts for direction on the specific application of laws in the trial and; the “decision” is the form employed by the Supreme People’s Court to amend or repeal a judicial interpretation).

64. *See* ZHANG WEIPING, CIVIL PROCEDURE LAW 16 (Law Press 3rd ed. 2013).

65. *See* Zhang, *supra* note 31, at 284.

66. *See id.*

Courts have been required to follow the framework set forth therein. As discussed, under the 1995 Notice, an internal report is mandated for the denial of enforcement.⁶⁷ The 2017 Rules on Reporting further strengthen the internal review process by emphasizing that all decisions as to invalidation of arbitral agreements or denial of enforcement of foreign arbitral awards must be made after the SPC's review.⁶⁸

D. Enforcement Mechanism

To enforce a foreign arbitral award in Chinese courts, it is required to follow the procedure established by the SPC. Under the 1987 Notice, enforcement requires three steps: (1) filing with the court that has the jurisdiction, (2) ascertaining the applicable law, and (3) obtaining the court's review and examination.⁶⁹ The 1995 Notice and 2017 Rules on Reporting added a fourth step: (4) reporting internally in case of denial.⁷⁰ Now, all foreign arbitral awards seeking recognition and enforcement in China are handled in Chinese People's Courts under this four-step framework.

1. Jurisdiction

As noted, under the 1987 Notice of the SPC, the petition for enforcement of a foreign arbitral award should be filed with an Intermediate People's Court.⁷¹ But not every Intermediate People's Court has jurisdiction. Pursuant to the 1987 Notice, only the Intermediate People's Court in the particular place is competent to deal with the enforcement petition.⁷² This provision is incorporated in Article 283 of the 2012 CPL.⁷³ For jurisdiction purposes, there are three places that are relevant, all depending on the status of the person against whom the petition is filed or, in short, the status of respondent.

67. See Notice of the Supreme People's Court on the Relevant Issues of the People's Court Dealing with Foreign Arbitration and Foreign Arbitration, *supra* note 18.

68. See Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases, *supra* note 24, art. 2.

69. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 4.

70. See Notice of the Supreme People's Court on the Relevant Issues of the People's Court Dealing with Foreign Arbitration, *supra* note 18, para. 2.

71. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 3.

72. See *id.*

73. See Civil Procedure Law (2012), *supra* note 20, art. 283.

First, if the respondent is a natural person, the party seeking enforcement (the petitioner) shall file the petition with the Intermediate People's Court of the place where the respondent has its household registration or the place of the respondent's residence.⁷⁴ Second, when the respondent is a legal person, the enforcement petition shall be filed with the Intermediate People's Court in the location where the principal place of business of such legal person is situated.⁷⁵ Third, where the respondent has no domicile or residence or principal place of business, but has property within the territory of China, the Intermediate People's Court of the place in which the property is located has jurisdiction.⁷⁶

In China, the place of household registration is an important connecting factor of jurisdiction over a natural person. Under the newly adopted General Provisions of Civil Law of China, the domicile of a natural person shall be the place of residence as shown on the household registration or the valid personal identification card.⁷⁷ But if the habitual residence of a person differs from his or her domicile, the habitual residence shall be deemed as the domicile of the person.⁷⁸ The principal place of business of a legal person is the domicile of such person.⁷⁹ It is required that a legal person shall register its principal place of business as its domicile at the time of registration.⁸⁰

Under the 2017 Rules of Arbitration Review, however, if the arbitration award sought for enforcement is related to a case pending in a People's Court, and neither domicile nor location of the property of the respondent are within China, the request for enforcement shall be filed with the People's Court handling the case.⁸¹ If the court involved is a trial court, the enforcement request shall be taken by the People's Court in the next level (namely the Intermediate People's Court).⁸² If the court involved is a High People's Court or the Supreme People's Court, the High People's Court or the Supreme People's Court may review the request itself or designate an Intermediate People's Court to deal with the request instead.⁸³

74. *See id*

75. *See id*

76. *See id.*

77. *See* Zhonghua Renmin Gongheguo Min Fa Zong Ze (中华人民共和国民法总则) [General Principles of Civil Law of the People's Republic] (promulgated by the Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017), art. 25, 2017 P.R.C. LAWS.

78. *See id.*

79. *Id.* art. 63.

80. *See id.*

81. *See* Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases, *supra* note 24, art. 3.

82. *Id.*

83. *Id.*

When compared to the SPC's previous opinions, the 2017 Rules of Arbitration Review also provides a broader jurisdiction base for cases involving the validity of an arbitration agreement. Under Article 2, a request for confirming the validity of an arbitration agreement may be filed with the Intermediate People's Court of the place where the arbitration agreement is made, the petitioner is domiciled, or the respondent is domiciled.⁸⁴ Note that under Article 3, if the arbitration is conducted by a Chinese arbitration body (foreign related arbitration), the Intermediate People's Court of the place where the arbitration body is located also has jurisdiction over the case.⁸⁵ If the petitioner files the request with two or more competent People's Courts, the People's Court with which the request is first docketed shall have jurisdiction.⁸⁶

2. Application of Law

The application of law concerns two issues: where the arbitration is made and what the arbitration is about. The first issue determines whether the New York Convention shall be applied, and the second issue involves application of Chinese law. As to the first issue, given the reservations China made in acceding to the New York Convention, Chinese courts will only recognize and enforce arbitral awards made by the arbitration body within the territory of another contracting state.⁸⁷ Therefore, if an arbitral award is made in a non-contracting state, the New York Convention does not apply, and instead Chinese law will govern.

According to the 1987 Notice, when a People's Court is asked to recognize and enforce an arbitral award obtained from an arbitration body of a non-contracting state, the People's Court shall review and examine the request in accordance with the provisions of the CPL.⁸⁸ It is now mandated under Article 283 of the 2012 CPL that the People's Court handle the enforcement petition according to the principle of reciprocity absent treaties.⁸⁹ Once granted after review and examination by a People's Court, the enforcement shall be made under the procedure provided in the

84. *See id.* art. 2.

85. *See id.*

86. *See id.* art. 4.

87. SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 1.

88. *Id.*

89. *See* Civil Procedure Law (2012), *supra* note 20, art. 283.

Civil Procedure Law.⁹⁰ The enforcement procedure equally applies to the arbitral awards that fall within the realm of the New York Convention.

With regard to the second issue, for a foreign arbitral award to be enforced in China under the New York Convention, the dispute must arise from a contractual or non-contractual commercial legal relationship.⁹¹ In other words, for purposes of the New York Convention, only arbitral awards that settle contractual or non-contractual disputes of commercial legal relationship nature are entitled to recognition and enforcement in China. Also, pursuant to the New York Convention, what would constitute the commercial legal relationship is a matter of domestic law of the enforcing state, and thus is to be determined under the Chinese law.⁹²

In its 1987 Notice, the SPC defined the “contractual and non-contractual commercial legal relationship” as the economic rights and obligations resulting from contract, torts, or other relevant provisions of law, such as, *inter alia*, the sale of goods, lease of property, project contracting, processing, technology assignment, joint adventure, joint business operation, exploration and development of natural resources, insurance, credit, labor service, surrogate, consultation service, marine/civil aviation/railway/road passenger and cargo transportation, product liability, environment pollution, marine accident, dispute over ownership.⁹³ Under the SPC definition, disputes between foreign investors and the host government are excluded from contractual and non-contractual commercial legal relationships.⁹⁴

3. Review and Examination

Once the petition for the enforcement is filed, whether the enforcement will be granted under the New York Convention depends on the result of the court’s review and examination (R&E). The R&E is a bi-faceted process: procedure and substance. Procedurally, the arbitral award to be enforced in China shall not violate the two reservations China made to the New York Convention, namely “commercial nature” and “made within the territory of a contracting state.” Substantially, the enforcement sought shall meet the conditions set forth in Article V of the New York Convention as judged by the people’s courts.⁹⁵

90. See CPL Interpretation 2015, *supra* note 22, art. 546.

91. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 2.

92. See New York Convention, *supra* note 1, art. 1.

93. SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 2.

94. *Id.*

95. See New York Convention, *supra* note 1, art. V, providing that:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the

According to the 1987 Notice, if, upon review and examination, it is found that none of the situations for denial of enforcement as stated in Article V, paragraphs (1) and (2) of the New York Convention exists as to the foreign arbitral award, the People's Court shall recognize its effect and enforce it under the enforcement procedure provided in the law of China.⁹⁶ If, however, any of the Article V situations is found to have occurred, the enforcement petition will be rejected and as a result, the recognition and enforcement of the arbitral award in question will be denied.⁹⁷ It is imperative in the 1987 Notice that the People's Courts' review and examination of the foreign arbitral awards covered by the New York Convention be conducted in accordance with the provisions of the Convention.

competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

96. See SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art. 4.

97. *Id.*

4. Internal Reporting

Internal reporting refers to a reporting scheme under which the decision of an Intermediate People's Court to deny the enforcement of a foreign arbitral award is required to be submitted to a High People's Court, as well as to the SPC for approval before the notice of denial is issued.⁹⁸ As discussed, there was no such internal reporting requirement until the release of the 1995 Notice. Realizing that the standard by which the Intermediate People's Court examines the foreign arbitral award could vary from court to court, and in some instances create cause for abuse of the established process, the SPC—through its 1995 Notice—unified the criterion for review and examination via the reporting requirement. The purpose was said to ensure that the New York Convention would be implemented and strictly adhered to.⁹⁹

The 1995 Notice contains only two articles.¹⁰⁰ The first article deals with the invalidation of an arbitration agreement, and the second involves other conditions under which the recognition and enforcement of foreign arbitral awards would be denied. The invalidation provision describes the manner in which the People's Court is to determine whether or not to take and hear the enforcement petition. The condition provision describes the qualifications the People's Court must consider to determine the eligibility for enforcement. In both situations, the SPC explicitly reserves the power to have the final say through the system of reporting internally, because in either case the enforceability of the foreign arbitral award is at issue.

Under Article 1 of the 1995 Notice, when asked to render an arbitration agreement invalid, ineffective, or unenforceable on the merits, an Intermediate People's Court is required to report to the High People's Court in the same jurisdiction, and if necessary, the SPC for review.¹⁰¹ Prior to the review, the intermediate court may remove the case from the SPC's the docket. Article 2 of the 1995 Notice is aimed at establishing the process to deny recognition and enforcement of foreign arbitral awards. It provides that if a People's Court finds a foreign arbitral award ineligible for enforcement, before it decides to deny recognition and enforcement, the court must report the case to the High People's Court in the same jurisdiction for review. If

98. See Yves Hu & Clarisse von Wunschheim, *Reforms on the "Prior Reporting System"—A Praiseworthy Effort by the PRC Supreme People's Court, or Not?*, KLUWER ARB. BLOG (Jan. 8, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/> [http://perma.cc/6SZH-WARX].

99. See Notice of the Supreme People's Court on the Relevant Issues of the People's Court Dealing with Foreign Arbitration and Foreign Arbitration, *supra* note 18.

100. See *generally id.*

101. See *id.* art. 1.

the High People's Court agrees to the denial, it shall be submitted to the SPC for opinion. Only after obtaining the SPC's approval would formal denial be tendered to the parties.¹⁰²

The 2017 Rules on Reporting amends Article 1 of the 1995 Notice with regard to the invalidation of an arbitration agreement. It simply requires that the Intermediate People's Court decision to invalidate an arbitration agreement, like the decision to deny enforcement of a foreign arbitration award, be submitted to the High People's Court in the same jurisdiction for review, and to the Supreme People's Court for approval if the High People's Court agrees with the decision of the lower court. Thus, under the 2017 Notice on Reporting, the decision to invalidate an arbitration agreement may only be made after the SPC's review.¹⁰³

III. DEFINING FOREIGN ARBITRAL AWARDS: PRELIMINARY THRESHOLD

Enforcement of foreign arbitration in China, whether pursuant to the New York Convention or pursuant to Chinese law, must first meet the enforcement threshold. Three basic issues are involved in this regard: (a) whether the disputes arbitrated in a foreign country contain foreign elements; (b) whether the arbitration in question is made by a foreign arbitration institution; and (c) whether the arbitration is conducted in compliance with the rules of the place of arbitration. As discussed below, the first issue invites no debate, because China does not recognize foreign arbitrations litigated on domestic disputes. The other two issues are quite controversial because they appear, as many argue, either at odds with the New York Convention, or to be inconsistent with the general practices in many other countries.

A. Foreign Elements

It is vital that the disputes submitted for a foreign-country arbitration contain foreign elements in order for the arbitral award to be eligible for enforcement in a people's court. Therefore, even if the parties have agreed to subject their dispute to a foreign-country arbitration, their agreement may be deemed invalid and thus unenforceable by the People's Court if it

102. See *id.* art. 2.

103. See Notice of the Supreme People's Court on the Relevant Issues of the People's Court Dealing with Foreign Arbitration and Foreign Arbitration, *supra* note 18, art. 2.

is found that the disputes involve no foreign elements.¹⁰⁴ Under the current practice in China, if a dispute is not classified as “foreign,” the arbitration must be conducted by a Chinese domestic arbitration body. As noted, China does not allow any non-foreign civil dispute to be arbitrated by a foreign arbitration institution.

The term “foreign elements” refers to alien or non-domestic factors. Under the SPC’s interpretation, a civil case can be categorized as possessing foreign elements if any of the following factors is present: (a) one or both of the parties are foreign citizens, foreign legal persons or other organizations, or stateless persons; (b) the habitual residence of one or both of the parties is outside the territory of China; (c) the subject matter of the disputes is located outside the territory of China; (d) the legal facts that create, modify, or terminate the civil relation occur outside the territory of China; or (e) any other circumstance that can be regarded as a foreign related civil relation.¹⁰⁵

Note again, that for purposes of dispute settlement on civil and commercial matters, Hong Kong and Macau, the two special administrative regions (SARs), though part of China, are deemed “foreign” and the foreign-related law and regulations are equally applied. In many cases, however, there are certain special arrangements in terms of judicial assistance that are applicable only between the mainland and the SARs. Another special region is Taiwan. Although its status remains uncertain or undeclared, Taiwan is also considered as foreign in this regard. Thus, if a case involves any of these three regions, it will also be classified as a foreign-element case.

To illustrate the above, take a case involving a Korean arbitration award. In *Beijing Chaolai Xinsheng Sports and Leisure Co. Ltd. v. Beijing Suowang Zhixing Investment Consulting Co., Ltd.*,¹⁰⁶ the petitioner was a corporation wholly owned by a Chinese citizen, while the respondent was a company 100% owned by a Korean, and both of the parties’ companies were incorporated

104. See Sabrina Lee, *Arbitrating Chinese Disputes Abroad: A Changing Tide?*, KLUWER ARB. BLOG (Apr. 7, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/04/07/arbitrating-chinese-disputes-abroad-a-changing-tide/> [http://perma.cc/7DX2-CDZ7].

105. See Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falü Shiyong Fa” Ruogan Wenti de Jieshi (Yi) (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释 (一)) [Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of the Law of the People’s Republic of China on the Application of Foreign-related Civil Relations Law (1)] (promulgated by the Sup. People’s Ct., Apr. 23, 2013, effective Apr. 23, 2013), SUP. PEOPLE’S CT. [hereinafter 2013 Interpretation].

106. See generally *Beijing Chaolai Xinsheng Tiyu Xiuxian Youxian Gongsi Su Beijing Suowang Zhixing Touzi Zixun Youxian Gongsi* (北京超來新生體育休閒有限公司訴北京索旺知行投資諮詢有限公司) [*Beijing Chaolai Xinsheng Sports and Leisure Co. Ltd. v. Beijing Suowang Zhixing Investment Consulting Co., Ltd.*], BEIJING CT. WEB (Beijing Second Interm. People’s Ct., Jan. 20, 2014).

in Beijing. The case involved a joint venture contract entered into between the parties in 2007 to operate a golf course. The contract contained an arbitration clause, which provided that if a dispute were to occur and the parties failed to resolve it amicably, the dispute was to be submitted to the commercial arbitration chamber of South Korea for arbitration, and the arbitration award so obtained would be binding to both parties.

During the contract period, the parties fell into dispute over the distribution of the compensation fee paid by the local government for taking back certain land of the golf course. In 2012, the respondent initiated the arbitration in South Korea. The petitioner filed counterclaim and obtained an award of 10 million RMB plus interest. The petitioner then filed a petition with Beijing No. 2 Intermediate People's Court for enforcement of the award. Upon review and examination, Beijing No. 2 Intermediate People's Court, with an approval from the SPC, denied the petition.

In its denial decision, the court held that since both parties were considered Chinese legal persons; the contract was made for operating a golf course located in China; the legal facts creating, modifying and terminating the civil relation between the parties took place in China; and the subject matter of the dispute was located in China, the case did not contain a sufficient foreign element and therefore did not fall within the foreign element case. On this basis, the court invalidated the arbitration clause in the contract.¹⁰⁷

However, not every court has handled the issue of determining foreign elements the same way as the Beijing No. 2 Intermediate Court. For instance, in *Siemens International Trading (Shanghai) Co., Ltd v. Shanghai Golden Landmark Co. Ltd.*¹⁰⁸ Shanghai No. 1 Intermediate People's Court took a more

107. *See id.* There is no legal provision under current Chinese law that directly prohibits Chinese parties from submitting disputes to foreign country arbitration institutions. This case cites article 171 of the CPL and article 128 of the Contract law, which only provide that the parties to a foreign element contract may, per the contracted arbitration agreement, apply for arbitration to a Chinese arbitration institution or other arbitration institution. According to the court, under these articles, only foreign contract may be submitted to a foreign arbitration institution for arbitration. *See id.*

108. *See generally* Xi Men Zi Guoji Maoyi (Shanghai) Youxian Gongsi Su Shanghai Jindi Youxian Gongsi (西門子國際貿易（上海）有限公司訴上海金地有限公司) [Siemens Int'l Trade (Shanghai) Co., Ltd. v. Shanghai Gold Land Co., Ltd.] CHINA JUDGEMENTS ONLINE (Shanghai First Interim. People's Ct., Nov. 27, 2015); *Siemens International Trading (Shanghai) Co., Ltd. and Shanghai Golden Landmark Company Limited, A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award*, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, B&R Cases, Typical Case 12 (TC 12), Mar.

flexible approach in finding the foreign elements. The facts of the case were quite simple. Both the petitioner and the respondent were wholly foreign owned enterprises (WFOEs) incorporated in China.¹⁰⁹ In September 2005, the parties entered into a supply contract under which petitioner was to provide certain type of electricity equipment for the respondent.

In the contract, the parties agreed to appoint the Singapore International Arbitration Center (SIAC) as the dispute settlement body. During the course of the contract, a dispute between the parties arose surrounding the terms of performance. The respondent then brought the case to the SIAC for arbitration, and the petitioner filed a counterclaim. In 2011, the SIAC entered an award in favor of the petitioner. Since the respondent made only partial payment to the petitioner, the petitioner brought the suit to the Shanghai No. 1 Intermediate People's Court to enforce the SIAC's arbitral award. During the court hearing, the respondent argued that the arbitration agreement should be set aside because there was no foreign element in the case.

Shanghai No. 1 Intermediate People's Court disagreed with the respondent's contention, and instead held that although the case did not appear to have typical foreign elements, both the contractual parties and the performance of the contract clearly differed from a common domestic contract. According to the court, the parties' financial sources, ultimate interest attribution, and the decision-making for the operation were all closely related to foreign investors. Therefore, the WFOEs in this case, when compared to other domestic enterprises, apparently have some foreign elements. In addition, the court also pointed out that in this case, the contract required the importation of equipment from a foreign country, and thus the performance of the contract also involved a foreign element.¹¹⁰

Another important and unique factor the court considered in this case was that both of the parties were registered in the Shanghai Pilot Free Trade Zone, which, according to the court, should be treated differently. The court then established that the case had foreign elements under the SPC's criteria of "other circumstance[s] that can be regarded as foreign related

27, 2018 ed., <https://law.stanford.edu/wp-content/uploads/sites/2/2017/08/CGCP-BR-English-Typical-Case-12.pdf> [<https://perma.cc/YSL4-RNQH>].

109. A WFOE is a limited liability company incorporated under Chinese law. Unlike a joint venture, a WFOE is completely owned and managed by foreign investors without a Chinese partner. *See generally* Law on Wholly Foreign-Owned Enterprises (promulgated by the Nat'l People's Cong., Apr. 12, 1986, rev'd Oct. 31, 2000, effective Oct. 31, 2000), MINISTRY OF COM. CHINA, <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200301/20030100062858.html> [<https://perma.cc/Z6W2-3DYS>].

110. *See* Siemens Int'l Trade (Shanghai) Co., Ltd. v. Shanghai Gold Land Co., Ltd., CHINA JUDGEMENTS ONLINE (Shanghai First Interm. People's Ct., Nov. 27, 2015).

civil relation.” The *Siemens* case later was endorsed by the SPC and published on the “China Court” website under the auspices of the SPC.¹¹¹

In early 2017, the SPC issued an opinion on providing judicial safeguard to the development of pilot free trade zones.¹¹² In the opinion, the SPC made clear that when WFOEs within the pilot free trade zone submit by agreement their commercial disputes to arbitration outside the territory of China, the arbitration agreement shall not be regarded invalid solely for the reason that the dispute does not seem to contain any foreign element.¹¹³ The opinion further upheld the *Siemens* decision and opened the door for the People’s Courts to interpret foreign elements more broadly.

B. Foreign Arbitral Award

To trigger application of the New York Convention, there must be a foreign arbitral award. Under the New York Convention, a foreign arbitral award is an award “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”¹¹⁴ When acceding to the New York Convention, China, through its reservation, limited the award to one “made only in the territory of another Contracting State.”¹¹⁵ In either case, the definition of foreign arbitral award is based on the territory or location.

Chinese law, however, seems to rest with a different standard. It defines foreign arbitral award on the basis of the presence of a foreign arbitration institution or the nationality of the arbitration body other than the place of arbitration. Under Article 283 of the 2012 CPL, foreign arbitral award is described as “an award made by a foreign arbitration institution.”¹¹⁶ In its 1987 Notice, the SPC followed the New York Convention language and phrased foreign arbitral award as “an award made in the territory of another contracting state”.¹¹⁷ In 2015, when issuing the 2015 Notice, the SPC

111. See *Siemens International Trading (Shanghai) Co., Ltd. And Shanghai Golden Land Co., Ltd. Apply for Recognition and Enforcement of Foreign Arbitration Awards*, CHINA COURT (May 15, 2017, 11:44:18 PM), <http://www.chinacourt.org/article/detail/2017/05/id/2863098.shtml> [https://perma.cc/J6CY-NZQR].

112. Sup. People’s Ct., *Opinions of the Supreme People’s Court on Providing Judicial Protection for the Construction of Free Trade Zone*, SUP. PEOPLE’S CT. NETWORK (Jan. 9, 2017, 4:36:17 PM), <http://www.court.gov.cn/fabu-xiangqing-34502.html> [https://perma.cc/HD5S-DKL9].

113. See *id.*

114. See New York Convention, *supra* note 1, art. 1.

115. See *id.*

116. Civil Procedure Law (2012), *supra* note 20, art. 283.

117. SPC Foreign Arbitral Award Notice (1987), *supra* note 1, art.1.

dropped the term “territory of another contracting state,” and simply used “foreign country arbitral award” instead.¹¹⁸

The problem that occurs here is how to determine the “nationality” of the arbitral award. Under the standard of the New York Convention, it is the place where the arbitration is made. According to Chinese CPL standard, however, it depends on the arbitration institution that made the arbitral award. If a foreign arbitration body renders an arbitral award in its own country, there is no difference under either of the two standards. But when said arbitration body entered the arbitral award in another country, the “nationality” of the arbitral award would become an issue. Moreover, if the home country of the arbitration body is a member state of the New York Convention and the country where the arbitral award is made in a non-member state, a more complicated issue may arise.¹¹⁹

For example, in the 2003 case of *TH&T International Corp. v. Chengdu Hualong Auto Parts Co., Ltd.*,¹²⁰ the petitioner filed a petition with Chengdu Municipality Intermediate People’s Court to enforce an arbitral award made by the International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) in Los Angeles. When determining the enforceability of the ICA arbitral award, the court opined that for purposes of the New York Convention, the “territory of another contracting state” should be understood as the state where the arbitration body is situated rather than the state in which the arbitration is made. In that case, the court regarded France as the “other contracting state.” According to the court, the ICA is located in Paris and France is the member of the New York Convention. On that ground, the court granted the petitioner request for enforcement under the Convention.

Another case was *Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L.* (2013).¹²¹ The case involved a contract in which the parties agreed to submit their contractual disputes to the ICA for arbitration under the ICA arbitration rules. The arbitration agreement also designated Shanghai as the “place of jurisdiction”. When the parties disputed the

118. See CPL Interpretation 2015, *supra* note 22, arts. 546–48.

119. For example, application of the New York Convention may vary in different contracting states due to reservations each country made to the Convention.

120. See generally *TH&T Guoji Gongsi Su Chengdu Hualong Qiche Ling Bujian Yuuxian Gongsi* (TH & T 國際公司訴成都華龍汽車零部件有限公司) [TH&T Int’l Corp. v. Chengdu Hualong Auto Parts Co., Ltd.], FSHOU (Chengdu Interm. People’s Ct. of Sichuan Province, Dec. 12, 2003).

121. See *Supreme People’s Court on the Applicant Anhui Longlide Packaging and Printing Co., Ltd. and the Respondent BP Agnati S.R.L Reply to the Request for Confirmation of the Validity of the Arbitration Agreement*, SHANTOU ARB. COMMISSION (Feb. 22, 2016), <https://web.archive.org/web/20160325031054/http://stzc.shantou.gov.cn/html/law/460.html>. [https://perma.cc/BNL2-KZZ5].

contract during its performance, the ICA conducted arbitration in Shanghai. After the arbitral award was entered, Long Li De asked Hefei Intermediate People's Court to deny the enforcement of the arbitral award. One of the key arguments Long Li De made was that since the arbitral award was made by the ICA within the territory of China, it was therefore a "domestic award" under the Arbitration Law of China, and thus should not be enforced under the New York Convention.

Through the internal reporting process, the case was submitted to Anhui High People's Court for review. A highly divided Anhui High People's Court sent the case to the SPC for guidance. In its reply, the SPC took the position that for the purpose of the determination of the validity of the foreign arbitration agreement in the case, the "place of adjudication" in the agreement should be interpreted to mean "the place of arbitration." The SPC then held that because its contents met the requirements of the Arbitration Law of China, the arbitration agreement should be deemed valid and enforceable.¹²²

Although the SPC's reply did not respond directly to Long Li De's argument about the domestic nature of the ICA's arbitration in China, it implicated that since the ICA is a foreign arbitration body, its arbitral award, though made within the territory of China, was a foreign arbitral award to which the New York Convention was applicable. However, under the territory standard, this arbitral award may not be characterized as one made in "the territory of another contracting state." The SPC's holding in this case recognizes the foreign status of an in-country arbitration award by a foreign arbitration institution.

In its 2017 Rules of Arbitration Review, the SPC defines foreign arbitration and foreign arbitral award on the basis of "foreign element." Under Article 12 of the 2017 Rules of Arbitration Review, if an arbitration agreement or arbitral award contains any of the foreign elements as specified in the SPC's interpretation, the agreement or the award shall be classified as a foreign arbitration agreement or foreign arbitral award.¹²³ Article 12 appears to be a compromise between "an award made by a foreign arbitration institution" and "an award made in the territory of another contracting state" in identifying "foreign." However, confusion may arise, because "foreign

122. *See id.*

123. *See* Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases, *supra* note 24, art. 12.

element” as interpreted by the SPC carries no meaning of “another contracting state” for the purpose of the New York Convention.

A separate but relevant issue is *ad hoc* arbitration. Under Article 16 of the Arbitration Law of China, in order to be valid, an arbitration agreement must include a choice of an arbitration body.¹²⁴ Article 18 of the Arbitration Law further provides that if the arbitration agreement does not contain a choice of arbitration body, the parties may enter into a supplement agreement to make a choice.¹²⁵ If the parties fail to do so, the arbitration agreement shall become invalid. Because the choice of an arbitration body is an essential factor of the validity of an arbitration agreement under Chinese law, *ad hoc* arbitration is not legally recognized in China.¹²⁶

Thus, it is worth noting that whether the agreement is one which provides for *ad hoc* arbitration in China, or is one which provides for *ad hoc* arbitration choosing Chinese law as the governing law, the agreement as such is invalid in China.¹²⁷ Although there has been an increasing demand for the adoption of *ad hoc* arbitration in the nation, the current *status quo* would remain intact unless the law changes.¹²⁸ Nevertheless, an *ad hoc* arbitral award made in a foreign country under foreign law will be treated differently. According to the 2015 Interpretation of the SPC, if a party asks a People’s Court to recognize and enforce an arbitral award made outside the territory of China by an *ad hoc* arbitration tribunal, the people’s court shall handle it either under the provisions of the treaties, including the New York Convention, or on the basis of the principle of reciprocity.¹²⁹

C. Doctrine of Delocalization

In international commercial arbitration, an important issue is which law, both procedurally and substantively, governs the arbitration. In essence, it is a question whether the parties have the power or freedom to choose

124. See Arbitration Law, *supra* note 6, art. 16.

125. See *id.* art. 18.

126. See Jingzhou Tao & Clarisse Von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 ARB. INT’L 309, 312 (2007).

127. See *id.*

128. See generally Lin Xiaoya (林小雅), Woguo Shewai Shangshi Linshi Zhongcai Zhidu Goujian Yanjiu (我国涉外商事临时仲裁制度构建研究) [Research on the Construction of China’s Foreign-related Commercial Arbitration System] (2013) (unpublished Master’s thesis, Xinan Zhengfa Daxue (西南政法大学) [Southwest University of Political Science and Law]) (on file at <https://perma.cc/A5SW-5NMB>).

129. See CPL Interpretation 2015, *supra* note 22, art. 545.

procedural and substantive rules for an arbitral proceeding.¹³⁰ Under the classic approach of *locus regit actum* (meaning, an act is to be governed by the law of the place of the act), arbitration is subject to the law of the place where the arbitration occurs, or the *lex loci arbitri*.¹³¹ The doctrine of delocalization, however, holds that arbitration shall follow the rules and procedures chosen by the parties under the principle of party autonomy; these rules are those other than the rules of the place of arbitration.¹³²

The core of the doctrine of delocalization is to free the parties from the restriction of the national law of the place of arbitration,¹³³ allowing the arbitration tribunal to “be guided by the agreement of the parties, or failing such agreement, by its own judgment.”¹³⁴ With regard to the choice of law by parties, it has become an internationally accepted choice of law principle that the parties are permitted to select as they wish the substantive law of a particular country to govern their contractual and even non-contractual obligations.¹³⁵ The law of the forum always controls as far as procedural law is concerned, given its public nature.¹³⁶ The theory of delocalization breaks this tradition and provides the parties with the power to choose the procedural rules irrespective of where the arbitration takes place.¹³⁷

130. See Theodore C. Theofrastous, *International Commercial Arbitration in Europe: Subsidiary and Supremacy in Light of the De-Localization Debate*, 31 CASE W. RES. J. INT'L L. 455, 456–58 (1999).

131. See *id.* at 460–64.

132. See *id.* at 464–66.

133. See *id.* at 457.

134. See *id.* at 456.

135. See generally Mo Zhang, *Party Autonomy and Beyond: In International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511 (2006), and Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861 (2009) (discussing party autonomy and choice of law). Under Chinese law, the parties may select a law to govern their civil relations by agreement, but the law so chosen refers only to the substantive law of a particular country or region, excluding any conflict of law rule or procedural law. See Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi Huo Shangshi Hetong Jiufen Anjian Falu Shiyong Ruogan Wenti de Guiding (最高人民法院关于审理涉外民事或商事合同纠纷案件法律适用若干问题的规定) [Rules of the Sup. People's Ct. on Related Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases Related to Civil and Commercial Matters] (promulgated by the Jud. Comm. Sup. People's Ct., July 23, 2007, effective Aug. 8, 2007) CLI3.96117(EN) (Lawinfochina), at art. 1.

136. See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 1137–41 (5th ed. 2010).

137. See Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INT'L ARB. 177, 185 (1999).

For example, under the Model Law of International Arbitration published by the United Nations Commission on International Trade Law (known as UNCITRAL), the parties are generally free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.¹³⁸ It is further provided that failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.¹³⁹ Obviously, the Model Law does not intend to limit the parties' power to choose only the arbitration rules of the place of arbitration. According to the UNCITRAL'S status report, the Model Law has now been adopted in 75 states in a total of 106 jurisdictions.¹⁴⁰

In China, the doctrine of delocalization has not yet gained recognition, both in legislation and in judicial practice. From a legal perspective, there is no provision in Chinese law that allows the parties to choose the arbitration rules other than those of the place of arbitration. Under the SPC interpretation, the choice of law by the parties shall be regarded invalid if there is no legal provision that expressly authorizes such choice.¹⁴¹ In addition, pursuant to the Arbitration Law of China, an arbitration award may be cancelled if the arbitration procedures violate the legal proceedings.¹⁴² According to the SPC, "legal proceedings" are the arbitration procedures as provided in the Arbitration Law, and the arbitration rules chosen by the parties.¹⁴³

Additionally, the Chinese legal community appears to be quite skeptical about the adoption of delocalization due to the concern that it would make international commercial arbitration beyond the control of the legal system of the place where arbitration is conducted.¹⁴⁴ Some Chinese scholars describe the theory of delocalization as purposing to establish an arbitration system

138. See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 19(1) (U.N. COMM'N ON INT'L TRADE LAW 1985) (amended 2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [<https://perma.cc/U6RX-3LT3>].

139. See *id.* art. 19(2).

140. See *Status of UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL.ORG, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited Aug. 28, 2018) [<https://perma.cc/XE5T-ENU4>].

141. See Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Foreign-related Civil Relations Law (1), *supra* note 105, art. 6.

142. See Arbitration Law, *supra* note 6, art. 58.

143. See Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释) [Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China] (promulgated by the Sup. People's Ct., effective Dec. 26, 2005) Beijing Arb. Comm'n, Dec. 26, 2005, at art. 20, <http://www.bjac.org.cn/english/page/ckzl/htf3.html> [<https://perma.cc/SK2C-Y5R3>] (China) [hereinafter Arbitration Law Interpretation].

144. See LIU XIAOHONG, A MONOGRAPHIC STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION LAW 466 (2009).

not subject to the law of the place of arbitration nor the national law of any particular country.¹⁴⁵ There is also a belief in China that delocalization would lead to a situation where the legal effect of an arbitration award is not governed by the law of the place of arbitration.¹⁴⁶

The Chinese International Economic and Trade Arbitration Centre (CIETAC), however, seems to have taken a flexible approach towards delocalization. Under Article 3 of the CIETAC Arbitration Rules (2015), if the parties agree to refer their dispute to CIETAC for arbitration but have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of law applicable to the arbitral proceedings.¹⁴⁷ In addition, Article 3 of the CIETAC Arbitration Rules requires that the CIETAC perform the relevant administrative duties when the parties have agreed on the application of other arbitration rules.¹⁴⁸ Because Article 3 of the CIETAC Arbitration Rules permits the use of the non-Chinese arbitration rules, it is considered as a limited acceptance of delocalization.¹⁴⁹

The 2013 ICA arbitration of *Anhui Long Li De Packaging and Printing Co., Ltd. v. BP Agnati S. R. L.* in Shanghai raised an interesting question pertaining to the recognition of delocalization in China. As discussed, the case was arbitrated by ICA in Shanghai under the arbitration rules of the ICA, which were selected by the parties. When affirming the enforceability of the ICA's arbitral award in that case, the SPC made no inquiry into the appropriateness of the use of the ICA arbitration rules for an arbitration conducted within the territory of China or the place of arbitration. It is

145. See Dèng Jié (邓杰), *SHANGYÈ ZHONGCÁI Fǎ* (商业仲裁法) [LAW OF COMMERCIAL ARBITRATION], 259 (Tsinghua Univ. Press 2008).

146. See Zhào Xiùwén (赵秀文), *Fēi Guó nèi Zhòngcái* (非国内仲裁) [*Non-Domestic Arbitration*], in 6 Chén ān (陈安) [Chen An], *GUĀNYÚ GUÓJÌ JINGJÌ Fǎ DE SHÓUJÌ WÈNTÍ* (关于国际经济法的收集问题) [COLLECTED ESSAYS ON INTERNATIONAL ECONOMIC LAW], 541 L. PRESS (2002).

147. See Zhòngcái Guīzé, 仲裁规则 [Arbitration Rules] (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Nov. 4, 2014, effective Jan. 1, 2015), CHINA INT'L ECON. AND TRADE ARB. COMMISSION, art. 3, <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en> [https://perma.cc/N3YN-Z9NL].

148. See *id.* art. 3.

149. See Chen Yanhong (陈艳红), *Jiāochā Huà Lílùn Jí Qí Dui Guójì Zhòngcái de Zhènggé Xiàoyǐng* (非内国化”理论及其对国际商事仲裁一体化的影) [THE THEORY OF DELOCALIZATION AND ITS INTEGRATION EFFECTION ON INTERNATIONAL ARBITRATION] 104 (CHINA U. OF POL. SCI. & L. PRESS 2015).

therefore reasonable to wonder if the Supreme People's Court actually gave the "green light" to use of the doctrine of delocalization.¹⁵⁰

Another question that has generated debates in China pertaining to ICA arbitration in Shanghai is the non-domestic award. Under Article I, the Convention applies to the awards made in the territory of another contracting state (foreign awards) and the awards not considered as domestic awards in the State where their recognition are sought (non-domestic awards).¹⁵¹ Since China, by reservation, has limited the application of the New York Convention only to the arbitral awards of another contracting state, an argument is that the non-domestic awards are out of the coverage of the New York Convention as applied in the China.¹⁵²

Many in China believe that since arbitration made by the ICA took place in Shanghai, its award fell within the category of non-domestic awards, and therefore, the SPC's upholding of such award seems to have stepped over the line of the reservation China made to the New York Convention.¹⁵³ Others disagree by asserting that the reservation operates only in the sense that China does not have any obligation to recognize and enforce the non-domestic awards, but carries no meaning that China could not do it.¹⁵⁴ The middle ground is of the opinion that because the ICA is a foreign arbitration institution, it meets the standard of "foreign" as prescribed in Chinese law.¹⁵⁵

IV. ARBITRATION AGREEMENT: THE ISSUE OF VALIDITY AND DETERMINATION

As a practical matter, the enforceability of foreign arbitral awards often depends on the validity of the arbitration agreement. Among the 30 cases where the enforcement was denied in China during the years 2000 to 2015, about 11 cases involved defects in the arbitration agreement. The issues ranged from the lack of capacity of a party, to the failure to specify arbitration body, and from absence of mutual consent to the arbitration, to non-existence of arbitration agreement. For the parties and their counsels, special attention

150. See generally Zhāng Jiàn (张健), *Zhōngguó Shāngshì Zhòngcái Guójì Huà Miànlín de Tiǎozhàn* (中国商事仲裁国际化面临的挑战) [Challenges to the Internationalization of Commercial Arbitration in China], 1 SHANGHAI C. OF POL. SCI. & L. REV. 64 (2016).

151. See New York Convention, *supra* note 1, art. I. See generally Albert Jan Van Den Berger, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25 (1985).

152. See Lübinwù (吕斌武), *Zhōngguó Jìngnèi Wàiguó Zhòngcái Jīgòu Zhòngcái Wèntí* (中国境内外仲裁机构仲裁问题) [Issues on the Arbitration by Foreign Arbitration Institutions within China], 10 RES. ON THE RULE OF L. 71 (2010), <http://www.docin.com/p-945660114.html> [https://perma.cc/HVQ7-PSNG].

153. See *id.* at 73.

154. See *id.* at 74.

155. See *id.* at 73.

must be called to the validity issues at the time when the arbitration agreement was made. Any defect in the arbitration agreement may become an obstacle to the arbitral award's enforcement in China.

A. Basic Requirements

Under Chinese law, an arbitration agreement could be made in three different ways: as an arbitration clause in a contract, as a separate arbitration agreement reached between the parties either before or after a dispute occurs, or in other forms.¹⁵⁶ For an arbitration agreement to be valid and enforceable, it must meet the requirements in both formality and substance. In regards to formality, an arbitration agreement must be in writing.¹⁵⁷ As for the substance, a valid arbitration agreement shall contain the essential factors as required by the law.

1. Writing

In China, an arbitration agreement is generally described as “a manifestation of the consent of the parties to resolve their disputes through an arbitral body.”¹⁵⁸ The manifestation, as required under Chinese law, shall be made expressly and in a written form. “Expressly made” means that the manifestation may not be inferred or implied. “Written form” refers to a form that can show the described contents visibly, such as a written contract, letters, and data-telex (including telegram, telefax, fax, and/or electronic data exchange).¹⁵⁹ With the emergence of new communication methods, the written form may be subject to further interpretation in certain cases.

For example, in *GS Global Corporation v. Shanghai Zhenxu Petroleum Co. Ltd.* (2016), the petitioner, a Korean company, entered into a sales contract with the respondent via emails.¹⁶⁰ The contract contained an arbitration clause providing that all disputes concerning the contract shall be subject

156. See Arbitration Law, *supra* note 6, art. 16.

157. See *id.*

158. See JIANG WEI & XIAO JIAN GUO ZHU, *supra* note 7, at 55–56.

159. Zhōnghuá Rénmín Gònghé Guóhé Tóng Fǎ (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 11, CLI.1.21651(EN) (Lawinfochina); see also Arbitration Law Interpretation, *supra* note 143, art.1.

160. See *GS Global Corporation Bèi Gào, Shànghǎi Zhènróng Shí Yóu Yǒu Xiàn Gōng Sī* (GS Global Corporation 被告, 上海振荣石油有限公司) [GS Global Corporation v. Shanghai Zhenrong Petroleum Co., Ltd.] CHINESE CT. DECISION SUMMARIES ON ARB. (Shanghai No. 1 Interm. People's Ct., Feb. 22, 2017).

to arbitration in Seoul by the Korean Commercial Arbitration Court (KCAC).¹⁶¹ When the parties fell into dispute over the performance of the contract, the petitioner took the case to the KCAC for arbitration pursuant to the arbitration agreement.¹⁶² After obtaining an award from the KCAC in its favor, the petitioner requested the Shanghai No. 1 Intermediate People's Court to recognize and enforce the award against the respondent.¹⁶³

The respondent contended that the award should not be enforced because the arbitration agreement was invalid.¹⁶⁴ Among the respondent's arguments was that the sales contract bearing the arbitration clause was made via emails, and an email was not the form of writing as required under the New York Convention.¹⁶⁵ Shanghai No. 1 Intermediate People's Court rejected the respondent's arguments. In its decision to enforce the award, the Court held that since "writing" in the New York Convention is referred to as an exchange of letters or telegrams, the email, though not predicted at the time the New York Convention was adopted, should be regarded as a form of writing under the term "telegrams" for purposes of the Convention.¹⁶⁶ The court made it clear that an agreement made via emails was an agreement in writing.¹⁶⁷

In fact, the term "exchange of letters or telegrams" as provided in the New York Convention has generated controversies.¹⁶⁸ From a practical viewpoint, the issue is a matter of interpretation.¹⁶⁹ There are three questions frequently raised. The first question is what would constitute an "exchange."¹⁷⁰ In Chinese courts, a proof of acknowledgment of receipt of the letter or telegram bearing the arbitration agreement, or a reply expressly indicating acceptance of the agreement, is required.¹⁷¹ The second question is whether the signatures or seals of the parties are needed on the document. As a common practice in China, signatures and seals are essentials for a formal document.¹⁷² The third question is whether silence by the recipient counts

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *See id.*; *see also* Int'l Trade & Bus. Research Council, *Legal Practice Guide of Shanghai Lawyers Handling Recognition and Enforcement of Foreign Arbitral Awards*, at 11, <http://www.lawyers.org.cn/info/ccalac552671499a8f24ea8eec585c9c> [<https://perma.cc/9G2S-BCXK>].

172. *See* Huang Yaying, *On the Form of the New York Convention and Arbitration Agreement*, 2 JURIS. J. 13 (2004).

as an acceptance. Under Chinese law, acceptance must be made expressly as far as an arbitration agreement is concerned.¹⁷³

2. Essential Contents

As required under Article 16 of the Arbitration Law, for an arbitration agreement to be valid, it substantively must contain three items: (a) the parties' intent to arbitrate; (b) the matter subject to arbitration; and (c) a designated arbitration body.¹⁷⁴ As a matter of law, each of the three items is decisive in determining the validity of an arbitration agreement. The Article 16 requirement, however, is not received favorably among many commentators. Some argue that as compared with international common practice, Article 16 imposes "stricter requirements on the content of an arbitration agreement,"¹⁷⁵ and as a result, it may lead to unattainability of arbitration.¹⁷⁶ Also argued is that Article 16, along with Article 18 of the Arbitration Law, allows the parties to designate an arbitration body in a supplementary agreement,¹⁷⁷ which has at least a *de facto* effect of disqualifying "international arbitrations from operating in China."¹⁷⁸

a. Intent for Arbitration

Since arbitration is based on an agreement, the mutual assent of the parties to the arbitration must be present.¹⁷⁹ To determine assent, two questions must be answered. The first question is whether there is a contract by which the contractual relationship between the parties has been established.¹⁸⁰ The second question concerns whether the parties have intended to submit the disputes to arbitration.¹⁸¹ Therefore, if a contract has never been reached, the arbitration agreement would not exist. Additionally, even if there is a

173. See Wan E'xiang & Xia Xiaohong, *supra* note 51, at 12–13.

174. See *id.*

175. Tao & Von Wunschheim, *supra* note 126, at 324.

176. See *id.*

177. See Arbitration Law, *supra* note 6, art. 18 (referring to Article 18, whereas an agreement for arbitration fails to specify or specify clearly matters concerning arbitration or the choice of arbitration commission, parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the agreement for arbitration is invalid).

178. Tao & Von Wunschheim, *supra* note 126, at 309.

179. JIANG WEI & XIAO JIAN GUO ZHU, *supra* note 7, at 56.

180. See *id.*

181. See *id.*

contract, an expression of intention by the parties for arbitration must be found in case of dispute.

Under Chinese law, the expression of intent can be made either in an arbitration clause or via a separate arbitration agreement.¹⁸² Since writing is required, evidence of a writing that proves the parties' intention for arbitration becomes critical for the arbitration as well as the enforcement of the arbitral award. In addition, once a contract containing an arbitration clause is made, even if the contract later is found invalid, the arbitration clause survives under the rule of independence.¹⁸³ Therefore, if a party challenges the validity of a contract as a whole, the validity of the arbitration clause would not be affected. More explicitly, in order to effectively challenge the validity of the arbitration clause, the challenge must be made specifically to the arbitration clause.

In *Singapore Yimande Asia v. Wuxi Huaxin Cocoa Food*, the petitioner obtained an arbitration award from Cocoa Association of London Ltd and asked Wuxi Municipal Intermediate People's Court to enforce the award against the respondent.¹⁸⁴ Upon review, the court found that the petitioner relied on fax exchanges between the parties, but since the parties were bargaining over the price and quality of the cocoa via the exchange of offers and counter-offers, no purchase agreement was actually reached.¹⁸⁵ It was also found that the purchase contract that the petitioner claimed was the "final version" had no signature of the respondent.¹⁸⁶

On the basis of its finding, the court concluded that since there was a lack of mutual assent, no contract was ever concluded between the parties, and that the arbitral award made on the non-existing contract should not be recognized and enforced.¹⁸⁷ In its reply approving the denial, the SPC held that the prerequisite for a valid arbitration clause is mutual assent by the parties of their intent to arbitrate.¹⁸⁸ Since the parties in this case never reached consent to arbitration during their fax exchanges, the arbitral award lacked both factual support and legal basis, and therefore, its recognition and enforcement were denied.¹⁸⁹

182. *See id.*

183. *Id.* at 57–62.

184. Xīnjiā Pō Yìdémǎn Sī Rén Yǒu Xiàngōng Sī, Wúxī Huáxīn Kěkě Shípǐn Yǒu Xiàngōng Sī (新加坡益得满私人有限公司, 无锡华新可可食品有限公司) [Singapore Yideman Asia Pte Ltd. v. Wuxi Huaxin Cocoa Food Co., Ltd.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct. 2001) (China).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*; *see also* E'xiang & Xiaohong, *supra* note 51, at 6 n.4 (internal citations omitted) (Discussing another case where the parties made a series of contracts and arbitration was conducted under the arbitration clause contained in contract No. 623, and the enforcement

In *Voestalpine USA Corp v. Jiangsu Foreign Trade Co.*, the representatives of the parties, during the contract negotiation, discussed the contents of the contract but did not reach any agreement.¹⁹⁰ Later, the petitioner sent to the respondent a letter confirming the sales contract, but the respondent did not sign it.¹⁹¹ In the contract, there was an arbitration clause making Singapore the place of arbitration and using Singapore law as the governing law on the issue of validity of the arbitration clause.¹⁹² Before the arbitration took place, the local attorney retained by the petitioner sent a letter to inform the respondent of arbitration, and received no reply from the respondent.¹⁹³

During the arbitration, the SIAC was of opinion that the respondent's failure to respond and to object to the arbitration agreement within a reasonable period of time implicated the existence of such agreement.¹⁹⁴ The SIAC then entered an award at the request of the petitioner.¹⁹⁵ When the petitioner brought the award for enforcement in China, it was found that the respondent made a reply to the second letter from the petitioner's attorney rejecting the petitioner's claim of the arbitration agreement.¹⁹⁶ Based on the reply, the respondent argued that there was no express mutual assent to the arbitration.¹⁹⁷

In affirming the lower court's decision to deny the petitioner's request for enforcement of the award, the SPC regarded the SIAC's finding of the existence of an arbitration agreement as having no legal ground. The reasons stated were, among others: (a) there was no guarantee that the respondent would timely receive the petitioner attorney's letter; (b) respondent denied the arbitration agreement in its reply to the second letter from the petitioner's

of arbitral award was denied for lack of mutual assent. During the enforcement of the arbitral award, it was found that the disputes resolved by the arbitration body were actually arising out of the contract No. 624, and contract No. 623 was already replaced by contracts No. 622 and 624 that each had its own arbitration clause. The SPC affirmed the decision to deny recognition and enforcement of the arbitral award on the ground that absent the parties' agreement, the arbitration clause in contract No. 624 may not be used to resolve the dispute related to contract No. 624.).

190. Voest-Alpine Guójìnmào Yìgōng Sī, Jiāngsū Shěngwài Màogōng Sī (Voest-Alpine国际贸易公司, 江苏省外贸公司) [Voest-Alpine Int. Trade Co. v. Jiangsu Prov. Foreign Trade Corp.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct. 2008) (China).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

attorney; and (c) the petitioner attorney's letter did not specify a deadline for the reply and there was no provision in Singapore law imposing a "reasonable period of time."¹⁹⁸

b. Matters Subject to Arbitration

Under the Arbitration Law, it is required that the parties in their agreement unequivocally address the matters to be submitted for arbitration.¹⁹⁹ The matters could be stated in general terms, such as "all disputes arising out of this contract," or refer to particular issues that the parties would take to arbitration. Under the SPC's interpretation, if the parties' agreement provides a general term for arbitration based on all contract related disputes, the term shall be understood to include any contractual dispute involving such matters as formation, validity, modification, transfer, performance, liability for breach, interpretation, or dissolution of the contract.²⁰⁰

Note, however, that a defect in providing or addressing the matters for arbitration in the agreement between the parties is curable as a matter of law. Thus, if in an arbitration clause or agreement, the parties fail to state the matters for arbitration, or the statement is ambiguous, they may, under Article 18 of the Arbitration Law, enter into a supplementary agreement to clarify.²⁰¹ Pursuant to Article 18, only if a supplementary agreement could not be reached by the parties may the arbitration agreement be deemed invalid.²⁰²

But an issue that often arises is whether a non-contractual claim that is related to the performance of the contract could also be included if a general term is used in the arbitration clause or agreement. This issue is relevant because it may affect the option of a party to pursue litigation other than arbitration. Article 5 of the Arbitration Law mandates that the People's Court not take the case if the parties involved had a valid arbitration agreement.²⁰³ Thus, no party may seek litigation if the non-contractual claim is excluded from the general term of arbitration. Therefore, it is important that the matters for arbitration are clearly stated in the arbitration agreement and include or exclude certain issues that might arise.

Also important is the scope of the matters for arbitration as this would affect the enforcement of the arbitral award. Under Article 58 of the Arbitration Law, a party may apply to the People's Court for cancellation of the arbitral

198. *Id.*

199. *See* Arbitration Law, *supra* note 6, art. 16.

200. Arbitration Law Interpretation, *supra* note 143, art. 2.

201. Arbitration Law, *supra* note 6, art. 18.

202. *Id.*

203. *Id.* art. 5.

award if the matters arbitrated are beyond the scope of arbitration agreement.²⁰⁴ In accordance with the SPC, upon request of a party, if it is clearly found that an arbitral award contains certain matters exceeding what the parties have agreed for arbitration, the excessive part will be removed and become unenforceable.²⁰⁵ If however, the exceeded part is indispensable from the rest of the arbitral award, the whole award will be set aside by the People's Court.²⁰⁶ In actual cases, the People's Courts often look at the "exceeding" issue quite broadly.

An example of this is illustrated in the case of *Gerald Metals Inc. (GMI) v. Wuhu Smelter & Refinery Plant*. In this case, the parties entered into a sales contract.²⁰⁷ It was provided in the contract that any dispute arising out of, or related to, this contract should be subject to arbitration in London in accordance with London Metal Exchange Rules.²⁰⁸ In December 2001, the petitioner filed a request for arbitration with the arbitration panel of London Metal Exchange on the grounds of breach of contract.²⁰⁹ In its request, the petitioner listed both the respondent and *Wuhu Metallurgical Plant (WMP)* as co-parties.²¹⁰ The respondent and WMP neither answered the petitioner's claim nor attended the arbitration.²¹¹

A default arbitration award was entered in May 2002.²¹² Petitioner then took the award to China for enforcement.²¹³ The respondent asked the People's Court to deny the enforcement of the award on the grounds that the petitioner and respondent (1) never had any business contacts or sales disputes; (2) the respondent never participated in any part of the arbitration; and (3) the respondent was not related to WMP in terms of property or equity ownership.²¹⁴ Upon its review, the High People's Court of Anhui Province found that the respondent was not a party to the arbitration agreement in question, and thus held that the arbitral award exceeded the

204. *Id.* art. 58.

205. Arbitration Law Interpretation, *supra* note 143, art. 19.

206. *Id.*

207. Jiélā dé Gāng Tiě Gōng Sī, Wúhú Yěliàn Chǎng (杰拉德钢铁公司, 芜湖冶炼厂) [*Gerald Metals Inc. v. Wuhu Smelter & Refinery Plant*], CHINESE CT. DECISION SUMMARIES ON ARB. (Anhui People's Ct. May 23, 2002) (China).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

scope of the arbitration agreement.²¹⁵ The Court then reported the case to the SPC for approval of the denial.²¹⁶

In its reply, the SPC opined that since the respondent was not involved in the sales contract between the petitioner and WMP, the arbitral award based on the alleged dispute between the petitioner and the respondent obviously exceeded the underlying arbitration agreement, and therefore, the exceeded part shall be invalid.²¹⁷ The SPC also concluded that because the arbitral award did not separate the respondent from WMP in light of the liabilities claimed, and that since there was no meaningful way to differentiate the non-exceeded part from the award, the award as a whole should not be recognized and enforced.²¹⁸

c. Designated Arbitration Body

It is required under Chinese law that an arbitration agreement shall contain a designated arbitration institution.²¹⁹ Absent such designation, the agreement would be regarded invalid. Again, the Arbitration Law allows the parties to cure this issue retroactively. As noted, under Article 18 of the Arbitration Law, when the designation of an arbitration institution is unclear in the arbitration agreement, the parties may enter into a supplementary agreement to specify the institution. Otherwise, the arbitration agreement will become invalid.²²⁰

The SPC has also shown certain flexibility in determining whether an arbitration body is being designated in an arbitration agreement. There are a number of situations in which the arbitration agreement will be deemed to have designated the arbitration body despite certain flaws in the agreement. The first situation is that the arbitration agreement does not accurately state the name of the arbitration body. Under this circumstance, according to the SPC, if the arbitration body could be ascertained, the designation should be considered as having been made.²²¹

The second situation refers to the case where the parties have only agreed on the arbitration rules that will be applied if arbitration is sought, but have failed to mention the arbitration body. Although in general, such an agreement would be deemed as containing no designated arbitration

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*; see also Jiélā dé Gāng Tiě Gōng Sī, Wúhú Yěliàn Chǎng (杰拉德钢铁公司, 芜湖冶炼厂) [Gerald Metals Inc. v. Wuhu Smelter & Refinery Plant] Peking U. L. (Sup. People's Ct. Nov. 12, 2003) (China).

219. Arbitration Law, *supra* note 6, art. 16.

220. *Id.* art. 18.

221. Arbitration Law Interpretation, *supra* note 143, art. 3.

body, the agreement will nevertheless be considered valid if, (a) the parties reach a supplementary agreement for this purpose, or (b) if the arbitration body could be ascertained via the agreed arbitration rules.²²² The SPC's 2017 Rules of Arbitration Review contains a broader provision in this regard. Under Article 15 of the 2017 Rules of Arbitration Review, if the arbitration agreement does not specify an arbitration institution or the place of arbitration, but the institution or place could be ascertained through the arbitration rules agreed upon by the parties, such arbitration body or place of arbitration shall be deemed as the one that the parties have chosen for the purpose of determining the governing law for the arbitration.²²³

The third situation is the case in which two or more arbitration bodies were provided in the arbitration agreement. If this happens, under the SPC's interpretation, the parties may agree to choose any one of them.²²⁴ However, if the parties fail to reach consent to the choice, the arbitration agreement will be nulled for lack of designated arbitration body.²²⁵ In this situation, none of the arbitration bodies will be regarded as having jurisdiction over the dispute between the parties.²²⁶

The fourth situation involves selection of the arbitration body in a particular place without specifying the name of the arbitration body. It occurs when the arbitration agreement states only something like, for example, "subject to arbitration in London." Because of the ambiguity in the agreement with regard to the arbitration body, its validity is dependent on whether the arbitration body may be identified. Two possibilities may be present in this scenario: (a) there is one and only one arbitration institution in the specified place, or (b) the place has two or more such institutions. In the former case, the arbitration body can readily be ascertained.²²⁷ In the latter case, however, the parties would have to make a choice by mutual

222. *Id.* art. 4.

223. See Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Arbitration Judicial Review Cases, *supra* note 24 (the cross reference of Article 15 is to Article 18 of the *Law on the Application of Law Concerning Foreign-Related Civil Relations of the People's Republic of China* that provides: "The parties may by agreement choose the law applicable to their arbitration agreement. If the parties make no such choice, the law of the place of the arbitration institution or the place of arbitration shall apply." *Law on the Application of Law Concerning Foreign-Related Civil Relations of the People's Republic of China* (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 18, CLI.1.2XU21AR4(EN) (Lawinfochina)).

224. Arbitration Law Interpretation, *supra* note 143, art. 5.

225. *Id.*

226. *See id.*

227. *Id.* art. 6

consent.²²⁸ If no consent can be reached, the arbitration agreement will be held invalid.²²⁹

In *Changzhou Donghong Packing Materials Co. v. France DMT*, the contract entered into by the parties had the following provision: “Any dispute arising from the contract shall be resolved through amicable consultation. If however, no agreement can be reached by the consultation, the dispute shall be submitted to arbitration. The place of arbitration is Beijing, China. The arbitration shall be conducted under the related rules of the ICC....”²³⁰ When dispute occurred and consultation failed, the plaintiff brought the case to He Bei High People’s Court for litigation, claiming that the arbitration agreement in the contract was invalid.²³¹

In their arguments, the parties disputed the arbitration body. Defendant contended that since the arbitration agreement pointed to the ICC rules, the ICA should have the power to arbitrate the dispute.²³² Plaintiff challenged the ICA’s jurisdiction, arguing that the arbitration agreement had designated Beijing as the place of arbitration. Since Beijing has multiple arbitration institutions, the court held that due to its lack of specified arbitration body, the arbitration agreement in question would be deemed invalid under Article 18 of the Arbitration Law unless the parties had reached a supplementary agreement.²³³ In its decision to annul the arbitration agreement, the court took the position that because there was no supplementary agreement ever reached by the parties, the arbitration agreement had to be held invalid.²³⁴ The SPC approved the decision of invalidation on the same ground.²³⁵

B. Governing Law

When parties negotiate a contract in cross-border transactions in the highly mobilized business environment, the contract could be concluded in anyplace, depending on where the parties are. In respect to the arbitration agreement, when its validity becomes an issue, a question necessarily raised is under which law the validity of the arbitration agreement should be determined. In conflict of laws, a general approach is to follow the principle of party autonomy, under which the parties may select the governing law

228. *Id.*

229. *Id.*

230. Cāngzhōu Dōnghóng Bāo Zhuāng Cǎi Liào Yǒu Xiàngōng Sī, Fǎ Guó DMT (沧州东宏包装材料有限公司, 法国 DMT) [Cangzhou Donghong Packing Material Co. v. France DMT], PEKING U. L. (Sup. People’s Ct., Apr. 26, 2006) (China).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

to their contract subject to certain restrictions.²³⁶ Absent the parties' choice, the governing law shall be determined under the prevalent choice of law rules of the forum.²³⁷

In China, when reviewing the validity of an arbitration agreement, the People's Court will first determine the law that should be applied. Under Chinese choice of law rules, the contractual parties have the freedom to choose the law applicable to the arbitration.²³⁸ If, however, the parties have failed to choose the governing law but have specified the place of arbitration in their agreement, the people's court will apply the law of the place of arbitration or the law of the place where the arbitration body is located to determine the validity of the arbitration agreement.²³⁹ When the parties make no agreement on either the applicable law or the place of arbitration, Chinese law (forum law) will then be applied.²⁴⁰

For example, in *Changzhou Donghong Packing Materials Co. v. France DMT*, He Bei High People's Court held the arbitration agreement invalid in accordance with the Chinese law or the law of the forum.²⁴¹ In this case, the Chinese party and its French counterpart entered into a contract in which Beijing was selected as the place of arbitration, but there was no agreement on the choice of law.²⁴² Absent the choice of law by the parties, the court applied Chinese law – the law of the forum and the place of arbitration.²⁴³ As discussed, an arbitration agreement is invalid in China if it lacks a choice of arbitration body.²⁴⁴ Therefore, it is highly desirable that the parties to a contract make every effort to select an applicable law, because the law selected will not only govern the contract but also determine the validity of the arbitration agreement.

236. See PETER HAY ET. AL, *CONFLICT OF LAWS* 1085–86 (West Academic Publishing, 6th ed. 2018).

237. See *id.* at 1158–59.

238. *Law on the Application of Law Concerning Foreign-Related Civil Relations of the People's Republic of China*, *supra* note 223, art. 18.

239. *Id.*

240. Arbitration Law Interpretation, *supra* note 143, art. 16.

241. Cāngzhōu Dōnghóng Bāo Zhuāng Cǎi Liào Yǒu Xiàngōng Sī, Fǎ Guó DMT (沧州东宏包装材料有限公司, 法国 DMT) [Cangzhou Donghong Packing Material Co. v. France DMT], PEKING U. L. (Sup. People's Ct., Apr. 26, 2006) (China).

242. *Id.*

243. *Id.*

244. Arbitration Law, *supra* note 6, art. 18.

To select the governing law, the freedom of the parties is subject to two major restrictions under the Chinese Choice of Law Statute.²⁴⁵ First, the selection must be made expressly.²⁴⁶ China does not recognize any tacit choice or choice by inference.²⁴⁷ Second, the application of the law selected shall not violate the public policy of China or mandatory rules of Chinese law.²⁴⁸ However, under Chinese law, it is not required that the choice of law by the parties bear a certain relationship with the parties, transactions or disputes.²⁴⁹ Therefore, the parties may choose the law of any place regardless of their connection to the place.²⁵⁰

But note that with respect to the governing law, the contract and arbitration agreement are treated separately in Chinese courts. In other words, the independence principle that shelters the arbitration agreement also applies to the governing law of the arbitration agreement in China. This practice is important especially when the dispute involves a Sino-foreign joint venture. In accordance with Chinese law, Sino-foreign joint venture contracts are exclusively governed by the law of China, excluding the parties' choice of any foreign law.²⁵¹ But for arbitration on the disputes concerning a joint venture contract, application of Chinese law is not exclusive.

In *Zhang Jia Gang Electronics Co. Ltd v. Brose Int'l GmbH*, the parties signed a joint venture contract in 1995 to produce auto parts.²⁵² Under the contract, the conclusion, effect, interpretation, and enforcement of the contract would be subject to Chinese Law.²⁵³ The contract also provided that all disputes arising from the contracts shall be resolved first through friendly consultation, but if within sixty days after the consultation, the parties could not reach an agreement, the disputes should be submitted for arbitration in Zurich, Switzerland.²⁵⁴ The joint venture contract did not contain a choice of law clause for arbitration.²⁵⁵

245. See Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83, 118 (2011).

246. *Id.*

247. *Id.*

248. *Id.* at 119.

249. *Id.* at 118.

250. *Id.*

251. Contract Law of the People's Republic of China, *supra* note 159, art. 12.

252. Zhāngjiāgǎng Xīnggǎng Diàn Zǐ Yǒu Xiàngōng Sī, Bózéguó Jìgōng Sī (张家港兴港电子有限公司, 博泽国际公司) [*Zhangjiagang Xinggang Electronics Co. v. Brose International Co.*], SHANGHAI B. ASS'N (Su Zhou Intern. People's Ct. 2005) (China), <http://www.lawyers.org.cn/info/cca1ac552671499a8f24ea8ecc585c9c> [<https://perma.cc/NX2A-F4MB>].

253. *Id.*

254. *Id.*

255. *Id.*

After the dispute occurred, the plaintiff brought a suit against the defendant in Su Zhou Intermediate People's Court.²⁵⁶ Defendant used the arbitration clause in the joint venture agreement as a defense, and asked the court to dismiss the case.²⁵⁷ The plaintiff argued that since the arbitration clause did not specify the arbitration body, it should be held invalid under Chinese law.²⁵⁸ Su Zhou Intermediate People's Court rejected the plaintiff's argument, upholding the validity of the arbitration clause.²⁵⁹ On appeal, Jiangsu High People's Court, however, opined that the arbitration clause was unenforceable because: (a) the validity of the arbitration clause in the joint venture contract should be governed by Chinese law and (b) the arbitration clause was invalid under Chinese law for its failure to contain an arbitration body.²⁶⁰

The SPC disagreed. In its reply to Jiangsu High People's Court's request for opinion, the SPC held that under the well-accepted practice, the law chosen by the parties to govern their contractual disputes shall not be used to determine the validity of the arbitration clause in the contract, and when the parties did not choose the law governing the arbitration but specified the place of arbitration, the law of such place shall be applied to the validity of the arbitration clause.²⁶¹ Thus, in this case, according to the SPC, Swiss law should be the governing law with regard to the arbitration agreement, and under Swiss law, the arbitration agreement was valid.²⁶² The SPC then affirmed the Su Zhou Intermediate People's Court's decision to dismiss.²⁶³

The SPC's holding in this case implicates that the law chosen by the parties to govern their contract does not have the effect of governing the arbitration unless the parties state otherwise in the contract. What could be reasonably inferred from the SPC's holding is that, when choosing the law applicable to the arbitration, the parties may select the same law that governs the contract itself or pick a different law to be applied to the arbitration only. Thus, it is important that the parties make a specific selection in the

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. Zhāngjiāgǎng Xīnggǎng Diàn Zǐ Yǒu Xiàngōng Sī, Bózéguó Jīgōng Sī (张家港兴港电子有限公司, 博泽国际公司) [Zhangjiagang Xinggang Electronics Co. v. Brose International Co.], SHANGHAI B. ASS'N (Sup. People's Ct. 2006) (China), <http://www.lawyers.org.cn/info/ccalac552671499a8f24ea8cec585c9c> [https://perma.cc/NX2A-F4MB].

262. *Id.*

263. *Id.*

arbitration clause or agreement if they wish to have the agreed arbitration to be subject to a particular law.

The SPC's 2017 Rules of Arbitration Review restates the rule of choice of law for arbitration: Article 13 emphasizes that, when choosing the law via contract to govern the validity of the arbitration agreement, the parties shall unequivocally manifest their intent in this regard.²⁶⁴ Article 13 also makes it clear that if the parties only agree on the choice of law for the contract, the law so chosen shall not apply to the determination of the validity of the arbitration agreement.²⁶⁵ Further, under Article 14, absent the parties' choice, if the law of the place of arbitration and the law of the place where the arbitration body is located differ in respect to the validity of the arbitration agreement, the law that would render the arbitration agreement valid shall be applied.²⁶⁶

C. Defenses

In Chinese courts, only a party to an arbitration agreement may challenge the validity of that agreement.²⁶⁷ Therefore, unless a party raises an argument, the court never questions the validity of an arbitration agreement. Because an arbitration agreement is a contract, the defenses available to the formation of a contract may also be asserted against the arbitration agreement. Thus, under Chinese law and the practice of Chinese courts, if any of the following occurs, the arbitration agreement may be set aside by the People's Court upon the request of a party: (a) the arbitration agreement is reached by a party who has no or limited civil capacity; (b) the arbitration agreement is made by fraud or coercion; (c) the subject matter agreed for arbitration exceeds the scope prescribed by the law; (d) the agreement allows the parties to either apply for arbitration or pursue litigation; (e) the agreement provides only one party with the right to apply for arbitration; (f) the arbitration body specified in the arbitration agreement does not exist and the parties fail to reach a supplementary agreement; (g) the domestic parties agree to submit non-foreign related matter to a foreign arbitral body for arbitration;

264. Relevant Provisions of the Supreme People's Court on the Review of Judicial Review Cases, *supra* note 25, art. 13.

265. *Id.*

266. *Id.* art. 14.

267. Zuìgāo Rénmín Fǎyuàn Guānyú Rénmín Fǎyuàn Chǔlǐ Shè Wài Zhòngcái Jí Wài Guózhòngcái àn Jiàn Dì Ruò Gān Guī Dìng (Zhēng Qiú Yì Jiàngǎo) (最高人民法院关于人民法院处理涉外仲裁及外国仲裁案件的若干规定 (征求意见稿)) [Several Provisions of the Supreme People's Court on the Handling of Foreign-related Arbitration and Foreign Arbitration Cases by the People's Court (proposal)] (promulgated by the Sup. People's Ct., Dec. 31, 2003) art. 3, CHINACOURT.ORG, <https://www.chinacourt.org/article/detail/2003/12/id/98431.shtml> [<https://perma.cc/8BPC-VZAA>].

or (h) there is another situation in which the agreement would be annulled by the law.²⁶⁸

The issue of capacity involves two questions. The first question is whether a party is capable of making a contract. The second question, which is closely related to the first one, involves which law should be used to determine the capacity of the party. In China, a person's capacity includes capacity for civil rights and capacity for civil conduct. Under Articles 11 and 12 of the Choice of Law Statute of China, the law of the place of the person's habitual residence determines both the capacity of the person's civil rights and their civil conduct.²⁶⁹ However, if a natural person is deemed to lack civil capacity for civil conduct under the law of his habitual residence, but has such capacity according to the law of the place of conduct, the law of the place of conduct controls.²⁷⁰

In Chinese contract law, the capacity of a party may become an issue in three different settings: (a) where an agreement was made by a person having limited civil capacity; (b) where an agreement was entered into by an agent on behalf of a principal without due authorization; and (c) where a person with no right to dispose of property entered into an agreement involving a transfer of that property.²⁷¹ In most cases of international commercial transactions, the capacity issue concerns the authority of an agent, specifically, issues where an agent signed a contract claiming to have the authority to represent the principal.

Under Chinese law, an agent may not act on behalf of a principal unless the principal consents or retroactively endorses the action of the agent.²⁷² To duly establish an agency relationship, a written power of attorney between an agent and a principal is required and must contain the name of the agent, the matters entrusted, scope of authorization, and duration of authorization.²⁷³ More importantly, the power of attorney must be signed by or bear the seal of the principal.²⁷⁴ In certain circumstances, where another party reasonably

268. *Id.* art. 20.

269. *Law on the Application of Law Concerning Foreign-Related Civil Relations of the People's Republic of China*, *supra* note 223, arts. 11–12.

270. *Id.* art. 12.

271. MO ZHANG, CHINESE CONTRACT LAW: THEORY AND PRACTICE 156 (2006).

272. Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong. Mar. 15, 2017, effective Oct. 1, 2017), arts. 162, 168, http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018907.htm (China).

273. *Id.* art. 165.

274. *Id.*

believes that an agent possesses the relevant authorities, although the agent actually does not have them, a principal may be legally bound by the legal acts of the agent under the doctrine of apparent authority.²⁷⁵

The “official seal” is an important device in China and it appears in almost every major legal document. Because the seal is considered to be the official ID of an entity, in many cases an “official seal” of an entity carries more weight than a signature.²⁷⁶ Given the importance of the seal, an entity is required to obtain an approval for making a seal and must file a copy of its seal with the relevant government agency for record.²⁷⁷ With the promulgation of the Electronic Signature Law (ESL) in 2004, the electronic signature began to play a greater role in commercial transactions.²⁷⁸ However, under Article 3 of the ESL (as amended 2015), when making contracts or other documents, the parties may, by agreement, allow or disallow the electronic signature.²⁷⁹ Thus the use of the electronic signature in contracts is optional.

In the case where an agent is involved in international business transactions, the most common issue is whether the agent is duly authorized. What has happened frequently is that the agent made himself appear to have full authority from the principal (a Chinese domestic entity), but when the dispute arose, the principal denied any relationship with such agent. In this situation, without hard evidence to prove otherwise, it would be difficult for a foreign party to hold the Chinese principal liable. For an arbitration agreement, its validity can be directly affected by the capacity of the agent.

275. *Id.* art. 172.

276. A company normally has two types of seals: general and special. The general seal refers to Corp Seal while special seals include contract specific seals, accounting specific seals and receipt specific seals. Each seal shall be made with the permission of the local public security bureau. According to the Supreme People’s Court, in civil litigation, if a case involves an introduction letter of business, a contract specific seal, a sealed blank contract, and a borrowed bank account, the lender and the borrower shall be the joinders, which implicates the important features of the seals. Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by The Sup. People’s Ct., Dec. 18. 2004, effective Feb. 4, 2015), art. 65 (China).

277. A copy of official seal of an entity is generally filed with local bureau of industry and commerce. See *Establishing and Operating a Business in China 2018*, CHINA BRIEFING, 34 (2017), <https://ampia.org/wp/wp-content/uploads/Establishing-Operating-a-Business-in-China-2018.pdf> [<https://perma.cc/8QS3-33P6>].

278. The Standing Committee of the NPC adopted the ESL on August 28, 2004, effective April 1, 2005, and amended in 2015. See Zhonghua renmin gongheguo dianzi qianming fa (中华人民共和国电子签名法) [People’s Republic of China Electronic Signature Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2004, effective Apr. 1, 2005; amend. by the Standing Comm. Nat’l People’s Cong., Apr. 24, 2015), http://www.npc.gov.cn/wxzl/gongbao/2015-07/03/content_1942836.htm [<https://perma.cc/TFH9-UF83>].

279. *Id.* art. 3.

The case of *British Glencore Co., Ltd v. Chongqing Machinery and Equipment Import & Export Co. Ltd.* is quite exemplary. In 1996, a salesperson of the respondent contacted the Beijing representative office of the petitioner via a fax requesting to purchase from the petitioner one thousand tons of electrolytic copper priced at about \$2.5 million.²⁸⁰ The representative of the petitioner responded by fax confirming the purchase, and also informed the respondent's salesperson that a formal contract from the petitioner would be sent to the respondent.²⁸¹ A few days later, the petitioner sent the contract already signed by the petitioner to the respondent's salesperson for signature.²⁸² Upon receipt of the contract, the respondent's salesperson signed it back with his own signature.²⁸³

The contract provided, inter alia, that any dispute or remedy arising out of or relating to the contract, or any alleged breach of the contract should be subject to arbitration according to the rules of the London Metal Exchange (LME).²⁸⁴ It was also provided that the validity and interpretation of the contract should be governed by British law.²⁸⁵ Shortly after the contract was signed, the respondent asked to cancel the contract.²⁸⁶ According to the respondent's salesperson, he did not have the authorization from respondent company when he signed the contract, and therefore, the respondent company would not recognize any effect of the contract.²⁸⁷ The petitioner replied challenging the cancellation, and stated that if the respondent failed to perform the contract, the petitioner would suffer damages for which the petitioner may take legal action against the respondent.²⁸⁸

Facing the respondent's refusal to proceed with the contract, the petitioner applied to the LME for arbitration under the arbitration clause in the contract.²⁸⁹ A notice of arbitration was sent to the respondent, but the respondent did not respond or attend the arbitration.²⁹⁰ In the respondent's

280. Yīngguó Jiānéng Kěyǒu Xiàngōng Sī, Zhòngqīng Jīxiè Shè Bèi Jīnchū Kǒugōng Sī (英国嘉能可有限公司, 重庆机械设备进出口公司) [Glencore International v. Chongqing Machinery and Equipment Imp. & Exp. Co.], CHINESE CT. DECISION SUMMARIES ON ARB. (Chongqing High People's Ct., Dec. 29, 2000) (China).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

absence, the LME entered a default arbitral award in favor of the petitioner in February 1997.²⁹¹ The Petitioner then took the LME's arbitral award to Chongqing No. 1 Intermediate People's Court for recognition and enforcement.²⁹²

In 2000, after its review of the petitioner's request, Chongqing No. 1 Intermediate People's Court held that the arbitration agreement was invalid due to the incapability of the respondent's salesperson.²⁹³ The incapability was found on the grounds that (a) the contract in question did not have the respondent's official seal on it, which should put the petitioner on alert because as a general practice in China the official seal is legally required on the commercial transaction documents; (b) the respondent promptly notified the petitioner that the contract would not be recognized two days after the contract was signed by its salesperson, which implicated that the respondent's representative did not have the authority to make such a contract nor did the respondent ratify its salesperson's action on the matter; and (c) the respondent's salesperson did not have actual or apparent authority, therefore he had no power to enter into the contract, including the arbitration agreement by which the respondent was alleged to be bound.²⁹⁴

The Chongqing No. 1 Intermediate People's Court's decision of denial was endorsed by both the Chongqing High People's Court and the SPC.²⁹⁵ In its approval, the SPC held that the arbitration agreement was invalid because the salesperson and the respondent lacked a formal agency relationship on the basis of the facts that: (a) the salesperson was not authorized by the respondent, (b) the contract did not bear the official seal of the respondent, and (c) the respondent disapproved the salesperson's act on its behalf.²⁹⁶ It was also held by the SPC that pursuant to Article V, paragraph (1), subparagraph (a) of the New York Convention, the capacity of the respondent's salesperson should be determined by the law to which he is subject; in this case, the law of China.²⁹⁷

In addition to capacity, another issue affecting the validity of the arbitration agreement is whether the existing arbitration agreement applies to the party in question. This issue may arise in two different situations: delegation of contract and merger of documents.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Yīngguó Jiānéng Kěyǒu Xiàngōng Sī, Zhòngqīng Jīxiè Shè Bèi Jīnchū Kòugōng Sī (英国嘉能可有限公司, 重庆机械设备进出口公司) [Glencore International v. Chongqing Machinery and Equipment Imp. & Exp. Co.], CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., Apr. 19, 2001) (China).

296. *Id.*

297. *Id.*

Under Chinese Contract Law, the parties may transfer by agreement (wholly or in part) the rights and obligations of a contract to a third party.²⁹⁸ In delegation, the question is whether the delegatee has the ability to utilize this defense against an arbitration clause not mentioned when the delegation to the delegatee of the contractual obligation is made. One argument is that since the arbitration clause is independent to the contract, a delegatee shall not be bound by the clause unless the delegatee has specifically assented to it.²⁹⁹

The SPC, however, takes the contrary view that the arbitration clause remains binding when contract is transferred, unless the parties have agreed otherwise. According to the SPC, when a party transfers, either wholly or in part, its contractual rights or obligations to a third party, the arbitration clause in the contract shall not be adversely affected except when each of the transferor, transferee and the other contractual party have reached an agreement to the contrary.³⁰⁰ It is now commonly held in Chinese courts, at least in practice, that the delegation of a contract does not by itself adversely affect the arbitration clause.

The merger of documents is more complicated. Cases in this regard typically involve maritime situations, where the provisions of the charter party and the bill of lading are merged for the purpose of shipping. The provisions of the charter party create a contract between the owner of a vessel and the shipper of goods for the use of the vessel, while a bill of lading is a document necessary for most imports and exports throughout the world. The question is whether the arbitration clause in the provisions of the charter party would control any disputes arising from the bill of lading. As a general practice, it is required that the arbitration clause in the charter party would not have an effect in the bill of lading unless it is clearly stated that all clauses including arbitration clause in the charter party shall be merged or incorporated into the bill of lading.³⁰¹

298. Contract Law of the People's Republic of China, *supra* note 159, arts. 79, 84.

299. See Qu Guāngqīng et al., *Hé Tóng Zhuǎn Ràng Duì Zhòngcái Tiáo Kuǎn Xiàoli Yīng Xiǎngdí Kǎo Liáng Yǔ Fǎn Sī* [*Examining and Rethinking the Impact of Contract Assignment on the Validity of Arbitration Clause*], 1 CHINA ARB. CONSULTING 28, 29 (2005) (China), <http://www.docin.com/p-101702663.html> [<https://perma.cc/R6E7-44XC>].

300. Several Provisions of the Supreme People's Court on the Handling of Foreign-related Arbitration and Foreign Arbitration Cases by the People's Court (proposal), *supra* note 267, art. 29.

301. E'xiang & Xiaohong, *supra* note 51, at 29. Additionally, according to the SPC, only under the following conditions should the arbitration clause in the charter party be considered to have merged into the bill of lading: (a) there is a note in the front of the bill

In *Hanjin Shipping Co. Ltd. v. Guangdong Fuhong Oil Products Co. Ltd.*, the SPC approved the lower court's decision to deny recognition and enforcement of a British arbitral award.³⁰² The SPC denied recognition since the petitioner failed to prove that the charter party's arbitration clause was effectively incorporated into the bill of lading.³⁰³ In 2004, the petitioner obtained a British arbitral award and asked Guangzhou Maritime Court to enforce it.³⁰⁴ During the court's review, it was found that in front of the bill of lading there was a note stating the bill of lading was to be used together with the charter party provisions. Also, the back of the bill of lading contained a provision requiring all terms and conditions, including application of law and arbitration articles in the charter party provisions to be merged into the bill of lading.³⁰⁵

However, when submitting as evidence to the court the shipping contract, the petitioner was unable to prove that this shipping contract was the same as the charter party provisions specified in the bill of lading.³⁰⁶ In response, the respondent argued that the shipping contract actually covered the shipping arrangement between other parties and thus had nothing to do with the charter party provisions mentioned in the bill of lading.³⁰⁷ Based on these findings, the Guangzhou Maritime Court denied the petitioner's request for enforcement of the British arbitral award.³⁰⁸ In its approval of that ruling, the SPC held that since the petitioner failed to prove that the shipping contract is identical to the one referenced in the bill of lading, the shipping contract was not incorporated into the bill of lading. Thus, the arbitration clause contained in the shipping contract was invalid.³⁰⁹

D. Rule of Competence-Competence

The validity of an arbitration agreement determines the jurisdiction of the arbitration body, because no arbitral authority may be established on an arbitration agreement that is invalid. A remaining question then is who has the authority to determine the validity of an arbitration agreement. At

of lading specifying that the arbitration clause is incorporated into the bill of lading; and (b) the arbitration clause so incorporated is valid. Proposed Rules on Foreign Arbitration Cases art. 30.

302. Hǎnjìn Chuán Wù Yǒu Xiàngōng Sī, Guǎngdōng Fùhóng Yóupǐn Yǒu Xiàngōng Sī (韩进船务有限公司, 广东富虹油品有限公司) [*Hanjin Shipping Co., Ltd. v. Guangdong Fuhong Oil Co., Ltd.*], PEKING U. L. (Sup. People's Ct., June 2, 2006) (China).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

the center of the question is whether the arbitration body itself may determine the validity issue. Put differently, it is a question of whether an arbitration body may have the competence to determine its own jurisdiction.

In the modern law of arbitration, the rule of competence-competence has developed. Under this rule, an arbitral tribunal is considered to be competent to decide its own jurisdiction,³¹⁰ and to have the power to adjudicate disputes regarding its own jurisdiction.³¹¹ As provided in the Model Law of UNCITRAL, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.³¹² In the United States, the Supreme Court recognizes the competence-competence rule, but limits its application to matters of procedure, such as waiver, delay, time limits, notice, and other conditions precedent to an obligation to arbitrate.³¹³

In China, the competence-competence rule is accepted, but the parties have the right to decide whether the arbitration body may exercise the rule. Under Article 20 of the Arbitration Law, when the validity of an arbitration agreement is disputed, the parties may request the arbitration commission or a People's Court to make a decision.³¹⁴ If one party makes a request to the arbitration commission, while the other party refers the matter to a People's Court, the decision shall be made by the People's Court.³¹⁵ In addition, pursuant to Article 6, paragraph (1) of the Arbitration Rules of the CIETAC (as amended 2015), the CIETAC has the power to determine the existence and validity of an arbitration agreement and, subsequently, whether it has jurisdiction over an arbitration case. The CIETAC may also, where necessary, delegate such power to the arbitral tribunal.³¹⁶

Note, however, when applying the competence-competence rule, Chinese law gives the arbitration commission, rather than the arbitral tribunal, the competence to decide the arbitral jurisdiction. This practice, which involves two crucially different arbitration bodies of differing scales, has invited

310. Amokura Kawharu, *Arbitral Jurisdiction*, 23 N.Z. U. L. REV. 238 (2008).

311. See Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 853 (2d ed. 2001).

312. U.N. COMM'N ON INT'L TRADE LAW, *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*, art. 16, U.N. Doc. A/61/17, U.N. Sales No. E.08.V.4 (amended 2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [<https://perma.cc/U6RX-3LT3>].

313. *BG Group plc v. Republic of Arg.*, 572 U.S. 25, 26 (2014).

314. *THE ARBITRATION LAW*, *supra* note 6, art. 20.

315. *Id.*

316. *Arbitration Rules*, *supra* note 147, art. 6.

criticism. Many argue that allowing the arbitration commission (i.e., the SIAC or the CIETAC), rather than the arbitral tribunal (the “judges” who will actually hear the arbitration), decide the competence issue has several serious drawbacks. These drawbacks include: (a) it violates the parties’ free will in forming the arbitral tribunal, because when picking arbitrators the parties will give the arbitrator rather than the arbitration commission the authority to make decision; (b) it destroys the efficiency of arbitration, because the arbitration commission is not the body conducting the arbitration; and (c) it contradicts the function of the arbitration commission because the commission is not an arbitral tribunal but an administrative body.³¹⁷

V. GROUNDS OF DENIAL: OTHER CONDITIONS AFFECTING ENFORCEMENT

In addition to the validity of an arbitration agreement, there are several other grounds or conditions on which the recognition and enforcement of foreign arbitral awards could be rejected by the Chinese People’s Courts. A published summary of enforcement cases denied reveals that other than defects in the arbitration agreement, other reasons prompting denial include: violations of due process in arbitral proceedings; exceeding arbitral authority; improper composition of the arbitral tribunal; non-compliance with settled arbitration procedure; non-arbitrable subject matters; offense to public policy; and violation of the provisions of enforcement law.³¹⁸

Due process in arbitral proceedings is provided in Article V, paragraph (1), subparagraph (b) of the New York Convention; it requires proper notice and an opportunity to present a case.³¹⁹ When looking at the due process issue, Chinese courts often refer to the New York Convention requirements. In one case where the petitioner sent the respondent e-mails to notify the respondent to appoint an arbitrator, but failed to prove that the respondent actually received the e-mails, the request for enforcement of a British arbitral award so obtained was denied by the People’s Court for the lack of due process.³²⁰ In another case, the SPC rejected the enforcement of a Japanese arbitral award because it was found that the arbitral tribunal did not provide the parties with the notice of postponement of award decision,

317. JIANG WEI & XIAO JIAN GUO ZHU, *supra* note 7, at 133–34.

318. E’xiang & Xiaohong, *supra* note 51, at 8.

319. New York Convention, *supra* note 1, art. V(1)(b).

320. See Shi Jiè Hǎi Yùn Guǎnlǐ Gōng Sī, Tiānjīn Shì Kǎiqiáng Shāng Mào Yǒu Xiàngōng Sī (世界海运管理公司, 天津市凯强商贸有限公司) [Cosmos Marine Management S.A. v. Tianjin Kaiqiang Commerce & Trade Co., Ltd.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People’s Ct. 2007) (China).

which violated both the rules of arbitration and the law of the place of arbitration.³²¹

Other common issues are the improper composition of an arbitral tribunal and non-compliance with the arbitration procedure agreed to by the parties. These two issues deal with an arbitral award entered into in violation of the arbitration agreement. There are two cases in which the enforcement of Swedish arbitral awards were denied.³²² In both of the cases, the arbitration agreement provided a settled procedure, which included a buffer or grace period (45 days and 90 days respectively) for negotiation before the arbitration. However, in both cases the petitioner initiated arbitration without going through the negotiation period as required in the arbitration agreement.³²³ It was held in the two cases that the skipping of the negotiation grace period violated the arbitration procedure agreed by the parties.³²⁴

Exceeding arbitral authority, as discussed, is an issue pertaining to the scope of the arbitration agreement. In certain cases, however, the nature of the dispute may also become relevant to the issue of the authority of the arbitral body. In one case where the parties formed a joint venture, the joint venture contract provided for arbitration by the International Chamber of Commerce (ICC) and its subsidiary, the International Court of Arbitration (ICA), if any disputes arose out of the contract.³²⁵ The facts on record

321. See Xinyuè Huà Xuégōng Yè Zhūshì Huìshè, Jiāngsū Zhōngtiān Kē Jì Gǔ Fèn Yǒu Xiàngōng Sī (信越化学工业株式会社, 江苏中天科技股份有限公司) [Shin-Estu Chemical Co., Ltd. v. Jiangsu Zhongtian Technology JSCL] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct. 2008) (China).

322. Bǎishì Gōng Sī, Sìchuān Bǎishì Kě Lè Yīnlǎo Yǒu Xiàngōng Sī (百事公司, 四川百事可乐饮料有限公司) [PepsiCo Inc. v. Sichuan Pepsi-Cola Beverage Co. Limited] CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006) (China); Bǎishì (Zhōngguó) Tóu Zī Yǒu Xiàngōng Sī, Sìchuān Yùn Lǜ Shí Yè Yǒu Xiàngōng Sī (百事(中国)投资有限公司, 四川韵律实业有限公司) [PepsiCo Investment (China) Ltd. v. Sichuan Yunlv Co., Industry Development Co.] CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006) (China).

323. PepsiCo Inc. v. Sichuan Pepsi-Cola Beverage Co. Limited CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006); PepsiCo Investment (China) Ltd. v. Sichuan Yunlv Co., Industry Development Company CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006) (China).

324. PepsiCo Inc. v. Sichuan Pepsi-Cola Beverage Co. Limited CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006); PepsiCo Investment (China) Ltd. v. Sichuan Yunlv Co., Industry Development Company CHINESE CT. DECISION SUMMARIES ON ARB. (Chengdun Interm. People's Ct. 2006) (China).

325. Hemofarm DD, Jinán Yǒngníng Zhìyào Gǔ Fèn Yǒu Xiàngōng Sī (Hemofarm DD, 济南永宁制药股份有限公司) [Hemofarm DD v. Ji'nan Yongning Pharmaceutical Co., Ltd.] N.Y. CONVENTION GUIDE (Sup. People's Ct. 2008) (China).

involved the performance of a leasing agreement between a foreign investor in the joint venture and the joint venture itself.³²⁶ In denying recognition and enforcement of the arbitral award, the SPC made a rule that the arbitration clause in a joint venture contract may only bind the parties pertaining to disputes of matters involving the joint venture, and that the arbitration clause shall have no effect to disputes arising between one of the parties and the joint venture entity.³²⁷ Therefore, if an arbitral decision is made on the basis of the arbitration clause in a joint venture contract, and if the parties in disagreement are a joint venture and one of the individual parties in the joint venture, Chinese courts regard the decision as having exceeded the arbitral authority.

The issues of arbitrability, i.e., whether a claim may be submitted to and heard in arbitration; public policy; and compliance with Chinese law of enforcement, each deserve more discussion. These conditions are either provided explicitly in the law, or serve as the last resort to safeguard national interests. Each of the conditions have been employed in Chinese courts, though not often, to deny foreign arbitral awards that otherwise would be recognized and enforced. Unlike other conditions that may not be examined by the people's courts without the request of a party, both arbitrability and public policy are reviewable by the People's Court *ex officio* (by virtue of the office).³²⁸

A. Arbitrability

Although the parties have the freedom by agreement to subject their civil commercial disputes to arbitration, not every matter in a dispute is arbitrable. Under the New York Convention, recognition and enforcement of an arbitral award may be refused if the subject matter over which the two parties disagree is not capable of settlement by arbitration under the law of that country.³²⁹ In China, the Arbitration Law defines the scope of arbitration as disputes concerning contractual or other property rights between citizens, legal persons or other organizations.³³⁰ The matters expressly excluded from arbitration include two categories: (1) disputes arising from marriage, adoption, guardianship, support, and succession; and (2) disputes prescribed by the law to be resolved by administrative agencies.³³¹ It is unclear in the legal provisions, however, whether the disputes related

326. *Id.*

327. *Id.*

328. Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, *supra* note 22, art. 92.

329. New York Convention, *supra* note 1, art. V(2)(a).

330. Arbitration Law, *supra* note 6, art. 2.

331. *Id.* art. 3.

to such legal areas as antitrust, bankruptcy, and securities may be submitted to arbitration. However, the general holding in China is that those matters are not arbitrable.³³²

Contracts in the Chinese Contract Law are described as agreements creating, modifying, or terminating the relationship of civil rights and obligations between natural persons, legal persons, or other organizations of equal footing.³³³ Therefore, any dispute concerning such relationship is arbitrable. But the Contract Law does not cover labor contracts, because they are subject to a different legislation, particularly the Labor Contract Law. Article 77 of the Labor Contract Law allows a worker whose legitimate rights and interests are infringed upon to apply for arbitration.³³⁴ Thus, the contractual rights as provided in Article 2 of the Arbitration Law include the rights that arise under the labor contract.

In one case, a request for recognition and enforcement was rejected on the ground that the subject matter in dispute was non-arbitrable under Chinese law.³³⁵ The facts of the case were quite simple. Two Chinese nationals entered into an investment contract to establish and register a business corporation in Mongolia.³³⁶ The contract contained an arbitration clause under which the parties agreed to submit their disputes for arbitration to the Mongolian National Arbitration Court (MNAC).³³⁷ During the business operation, one party to the contract died.³³⁸ The widow of the deceased then filed a petition with the MNAC to persuade the commission to confirm, *inter alia*, her 50% ownership in the registered capital of the corporation.³³⁹

In its arbitral award, the MNAC held that the widow was the successor of the deceased, and thus was legally entitled to 50% of the invested capital contributed by the deceased.³⁴⁰ However, when the widow took the arbitral award to a Chinese people's court in the Shandong Province for enforcement, the court rejected her enforcement request.³⁴¹ In its approval of the denial

332. See JIANG WEI & XIAO JIAN GUO ZHU, *supra* note 7, at 140–44.

333. Contract Law of the People's Republic of China, *supra* note 159, art. 2.

334. Contract Law of the People's Republic of China, *supra* note 159, art. 77.

335. Wú Chūnyīng, Zhāng Guīwén (吴春英, 张贵文) [Wu Chunying v. Zhang Guiwen] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., Sept. 2, 2009) (China).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

made by the lower courts, the SPC concluded that the subject matter arbitrated, though related to a contract, actually concerned succession—inheriting property rights from the widow’s late husband.³⁴² Thus, ruled the SPC, under Article V, paragraph (2), subparagraph (a) of the New York Convention and Article 3 of the Arbitration Law of China, the MNAC’s arbitral award could not be recognized and enforced in China because the subject matter was non-arbitrable.³⁴³

B. Public Policy

Public policy is an “escape mechanism” that enables a court to refuse recognition and enforcement of a foreign arbitral award that otherwise would be recognized and enforced.³⁴⁴ The 2012 CPL makes Chinese public policy an affirmative defense to the enforcement of foreign arbitral awards sought in China.³⁴⁵ It is considered a judicial function of Chinese People’s Courts to review and examine, in light of public policy, foreign arbitral awards requested for enforcement in China. Although the phrase “public policy” is not defined in Chinese law, it is generally defined as social and public interests. Under Article 274, paragraph (4) of the 2012 CPL, a foreign arbitral award shall not be enforced if the People’s Court determines that enforcement of the award would be against social and public interest.³⁴⁶ In Article 282 of the 2012 CPL, public policy is referred to as basic principles of law, national sovereignty and security, or social and public interests.³⁴⁷

According to Chinese scholars, in addition to basic principles of law, public policy shall also include the core social values and morals, and basic obligations of treaties to which China is a member.³⁴⁸ The scholarly understanding in China is that public policy must involve something fundamental to the law and society. As required by Chinese law, the public policy exclusion applies to three areas: (1) application of foreign law; (2) recognition and enforcement of foreign judgment; and (3) recognition and enforcement of

342. *Id.*

343. *Id.*

344. New York Convention, *supra* note 1, art. V(2)(b) (providing that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country).

345. Civil Procedure Law (2012), *supra* note 20, art. 274.

346. *Id.*; see also *Law on the Application of Law Concerning Foreign-Related Civil Relations of the People’s Republic of China*, *supra* note 223, art. 5.

347. Civil Procedure Law (2012), *supra* note 20, art. 282.

348. See HUANG JIN, PRIVATE INTERNATIONAL LAW 295 (Beijing 1999).

foreign arbitral awards.³⁴⁹ In addition, for the purpose of public policy, the exclusion also applies to international customs,³⁵⁰ which is deemed a unique feature of Chinese law.³⁵¹

In practice, the SPC seems to have cautiously narrowed down the application of public policy as a defense to the third category, the recognition and enforcement of foreign arbitral awards. There has been one case in which the public policy exclusion was applied in Chinese courts pertaining to the recognition and enforcement of foreign arbitral awards. In *Hemofarm DD, MAG International Trading Co. & Sulamo Media Co. Ltd. v. Jinan Yongning Pharmaceuticals Co. Ltd.*, the Supreme People's Court allowed the lower court to deny recognition and enforcement of an International Court of Arbitration (ICA) arbitral award on the ground of public policy. The court made this decision because the award as it stood was considered to have encroached on the judicial sovereignty of China, and the adjudicative jurisdiction of Chinese courts.³⁵²

The case involved unpaid rent that incurred to a joint venture formed between a Chinese company and Liechtenstein firm in 1995.³⁵³ In addition to the joint venture contract, the parties had signed a rental agreement under which the respondent would lease its property to the joint venture, and the joint venture would pay rent to the respondent.³⁵⁴ In the joint venture contract, there was an arbitration clause providing for arbitration by the ICA in Paris under the ICC arbitration rules in case disputes arose between the parties pertaining to the joint venture contract.³⁵⁵ Later, a dispute arose over unpaid rent, and in 2002, the respondent sued the joint venture in Ji Nan Intermediate People's Court for the payment of the rent balance.³⁵⁶

349. Civil Procedure Law (2012), *supra* note 20, arts. 274, 282; *see also Law on the Application of Law Concerning Foreign-Related Civil Relations of the People's Republic of China*, *supra* note 223, art. 5.

350. Zhōnghuá Rénmín Gònghé Guómín Fǎ Tōngzé (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987), art. 150, CLI.1.2780(EN) (Lawinfochina).

351. *See* JIN, *supra* note 348, at 291.

352. Hemofarm DD, Jinan Yǒngníng Zhìyào Gǔfèn Yǒu Xiàngōng Sī (Hemofarm DD, 济南永宁制药股份有限公司) [Hemofarm DD v. Ji'nan Yongning Pharmaceutical Co., Ltd.] N.Y. CONVENTION GUIDE (Sup. People's Ct. 2008) (China).

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

The joint venture challenged the court's jurisdiction on the basis of the arbitration clause in the joint venture contract.³⁵⁷ The court rejected the jurisdictional argument.³⁵⁸ During trial, the respondent moved to take protective measures of property preservation to ensure the enforcement of the judgment.³⁵⁹ Upon the receipt of a money guarantee from the respondent, the court granted the respondent's motion and ordered to freeze part of the joint venture's assets, including bank accounts and certain products.³⁶⁰ In 2003, the court entered a judgment in favor of the respondent.³⁶¹ On appeal, Shandong High People's Court affirmed in 2004.³⁶²

In 2004, the petitioners filed an arbitration request with the ICA pursuant to the arbitration clause in the joint venture contract.³⁶³ The ICA issued an arbitral award in 2007 against the respondent.³⁶⁴ One of major reasons on which the award was made was that the Chinese court decision on the property preservation issue did not have any legal nor commercial appropriateness, and the freeze of the assets caused damage to, and ultimately the failure of, the business operation of the joint venture.³⁶⁵ The arbitral award held the respondent liable for breach of the joint venture contract.³⁶⁶

In September 2007, the petitioners made a petition to Ji Nan Intermediate People's Court for recognition and enforcement of the ICA arbitral award.³⁶⁷ The court, upon the SPC's approval, denied the petition.³⁶⁸ The grounds for the denial were mainly that (a) the rental agreement was not part of the joint venture contract, and thus was not subject to arbitration as agreed in the joint venture contract, and (b) the property preservation made by the lower People's Court was an exercise of judicial function *ex officio* under Chinese law, and therefore the appropriateness of such exercise was not arbitrable.³⁶⁹ The court then concluded that recognizing and enforcing the ICA arbitral award would violate the public policy of China.³⁷⁰

Hemofarm DD is the only case where the SPC allowed the public policy defense to stand in recent decades. In all other cases, the SPC rejected the lower courts' holding on the application of public policy. The issues raised

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

in those cases, and the SPC's rulings, have had considerable impact on how the public policy exception should be handled in People's Courts. The SPC's actions also suggest that the use of public policy to deny an award, though not well defined, may only be applied in a situation where the national (legal or judicial) interest is at stake.

There are three issues, each encompassing a different type of regulation, that involve the public policy exception. The first issue is the fairness of a foreign arbitral award, and the question is whether the recognition and enforcement of a foreign arbitral award should be denied on the finding that the arbitral award is unfair and unjust. In *GRD Minproc Ltd. v. Shanghai Flyingwheel Industry Co.*, Shanghai No. 1 Intermediate People's Court and the Shanghai High People's Court decided not to recognize and enforce an arbitral award made by the Arbitration Court of Stockholm Chamber of Commerce.³⁷¹ The denial relied on the argument that the arbitral award did not consider the potential harm to the health of the workers or to the working environment which was caused by the failure of the equipment purchased under the contract to meet the safety standard of the industry.³⁷² Therefore, it would violate the fairness principle of the Contract Law of China if the respondent was required to make the full payment for the equipment.³⁷³

The SPC rejected the denial.³⁷⁴ According to the SPC, there may have been various causes that contribute to the potential harm.³⁷⁵ The SPC further reasoned that since the arbitration was requested to resolve the quality issue disputes under the valid arbitration agreement, it was within the authority of the arbitral body to review that issue, and the parties should be expected to bear the result of the arbitration.³⁷⁶ The SPC then held that the public policy exception should not be made when considering whether the substantial result of the arbitral award is fair and reasonable.³⁷⁷ The SPC was also of the opinion that the arbitral award in this case contained no violation of fundamental social interests, basic principles of law, nor good morals of China.³⁷⁸

371. GRD Minproc Yǒu Xiàngōng Sī, Shànghǎi Fēilún Shíyè Yǒu Xiàngōng Sī (GRD Minproc 有限公司, 上海飞轮实业有限公司) [GRD Minproc Limited v. Shanghai Flyingwheel Industry Co., Ltd.] PEKING U. L. (Sup. People's Ct., Mar. 13, 2009) (China).

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

The second issue concerns mandatory provisions of law. The focal point is whether a violation of the mandatory provisions of law should be deemed a violation of public policy, for which the recognition and enforcement of a foreign arbitral award would be denied. In *ED&F Man (Hong Kong) Co., Ltd v. China Nat'l. Sugar Alcohol Group Co.*, the parties agreed to a contract for the purchase of sugar, under which the petitioner was to supply raw sugar to the respondent.³⁷⁹ The parties in the contract also agreed to subject the disputes arising from the contract to arbitration by the London Sugar Industry Association (LSIA).³⁸⁰ During the contract performance, the petitioner, with the knowledge of the respondent, opened an account with New York Futures Exchange (NYFE) to conduct future trading on part of the contracted sugar.³⁸¹

The performance of the contract did not go as the parties anticipated, so the petitioner requested arbitration, and won an award from the LSIA.³⁸² While attempting to enforce the arbitral award in Beijing No. 1 Intermediate People's Court, the petitioner was denied enforcement.³⁸³ The Intermediate People's Court and the Beijing High People's Court agreed that future trading (which was unauthorized by the respondent and was conducted for the purpose of illegal profit gains) is prohibited under Chinese law, and as such the arbitral award upholding the underlying contract of the future trading should not be recognized and enforced, because the non-observance of a mandatory provision of law constitutes a violation of public policy.³⁸⁴

In rejecting the denial, the SPC acknowledged that because future trading engaged by a Chinese domestic entity is barred under the law unless otherwise authorized, the conduct of such trading in this case should be regarded invalid.³⁸⁵ The SPC, however, held that a violation of a mandatory provision of law did not necessarily mean a violation of public policy for the purpose of recognition and enforcement of a foreign arbitral award.³⁸⁶ The SPC further opined that the dispute between the parties in this case, with regard to the performance of a future trading contract, by its nature fell within the dispute arising out of the contract-based commercial legal

379. ED & F Mǎnshì (Xiāng Gang) Yǒu Xiàngōng Sī, Zhōngguó Táng Yè Jiǔ Lèi Jítuángōng Sī (ED & F 曼氏 (香港) 有限公司, 中国糖业酒类集团公司) [ED & F Man (Hong Kong) Co., Ltd. v. China National Sugar Alcohol Group Co.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., July 1, 2003) (China).

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

relationship, and therefore could be subject to arbitration by the agreement of the parties.³⁸⁷

The third issue involves administrative regulations, and to a certain extent it is related to the second issue, because some regulations contain compulsory rules. The question is whether a failure to follow administrative regulations would amount to a violation of public policy. In *Japan Shanjin Property Co. v. Textile Industrial Company of Hainan Province*, the respondent, a state enterprise, entered into a contract with the petitioner, a Japanese company, for which the payment would be made in foreign currency.³⁸⁸ Under the foreign currency regulations at the time of the contract, a state enterprise was required to obtain an approval from the state foreign exchange administration, and to have the amount of foreign currency needed for international payment registered before the foreign contract could be released for its use.³⁸⁹

The respondent, however, failed to obtain approval when the contract was signed.³⁹⁰ Following a dispute over the contract, the petitioner won an arbitration award from the Arbitration Court of the Stockholm Chamber of Commerce, and sought to enforce it in Hainan.³⁹¹ The lower People's Courts in Hainan decided to reject the enforcement, because the arbitration award was made on an invalid agreement under Chinese law (because of its violation of foreign currency control).³⁹² The SPC, however, ruled to enforce the arbitral award.³⁹³ According to the SPC, a violation of administrative rules or regulations should not necessarily trigger the application of public policy to exclude the enforcement of a foreign arbitral award.³⁹⁴

387. *Id.*

388. Ribēn Sān Jǐng Wù Chǎn Zhūshì Huìshè, Hǎinán Shěng Fǎng Zhīgōng Yè Zǒnggōng Sī (日本三井物产株式会社, 海南省纺织工业总公司) [Mitsui & Co., Ltd. v. Hainan Textile Industry Co.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., July 13, 2005) (China).

389. *Id.*

390. *See id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*; see also Láì Bǎo Zī Yuán Yǒu Xiàngōng Sī, Zhōushān Zhōnghǎi Liáng Yóu Gōng Yè Yǒu Xiàngōng Sī (莱宝资源有限公司, 舟山中海粮油工业有限公司) [Noble Resources Pte. Ltd. v. Zhoushan Zhonghai Cereals and Oils Industry Co.] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., Mar. 18, 2009) (China) (holding that without evidence to prove that the imported beans at issue could cause serious food safety problem, the public policy should not become the reason to block recognition and enforcement of foreign arbitral award).

In short, all of the cases related to public policy seem to be evidence that when addressing public policy issues in the enforcement of foreign arbitral awards, the SPC has taken a restrictive approach to the application of public policy, and has limited it to very narrowly tailored cases. In addition, the SPC has taken the stringent position that if other grounds exist where a foreign arbitral award should not be recognized and enforced, the public policy exception should generally not be applied.³⁹⁵

C. Non-Compliance

It is a commonly accepted principle that the recognition and enforcement of foreign arbitral awards are subject to the law of the country where the recognition and enforcement is sought. The language in Article III of the New York Convention also suggests that the enforcement of a foreign arbitral award is subject to the procedures of the place where the enforcement is sought.³⁹⁶ Under this principle, a violation of, or non-compliance with, the procedure of the enforcing country would result in a denial of the recognition and enforcement of the arbitral award.

To enforce a foreign arbitral award in China, the requesting party is required to follow the procedures set forth in the CPL.³⁹⁷ There are several issues that are procedurally important to the recognition and enforcement of foreign arbitral awards. One of those issues is the statute of limitations. The SPC has specifically ruled on enforcement denials based on the party's failure to bring up the request for enforcement within the statutory time period.³⁹⁸ Before 2007, the time limit for the enforcement of an arbitral

395. See *Xin Yuè Huà Xué Gōng Yè Zhūshì Huìshè, Jiāngsū Zhōngtiān Kē Jì Gǔ Fèn Yǒu Xiàngōng Sī* (信越化学工业株式会社, 江苏中天科技股份有限公司) [Shin-Estu Chemical Co. Ltd v. Jiangsu Zhongtian Technology JSCL] CHINESE CT. DECISION SUMMARIES ON ARB. (Sup. People's Ct., June 29, 2010) (China).

396. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, at 77, U.N. Sales No. E.16.V.7 (amended 2016), http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=89 [<https://perma.cc/6999-R2KH>] ("Following lengthy discussions between the drafters, the final text of article III achieved a balanced solution that permits each Contracting State to apply its own national rules of procedure to the recognition and enforcement of arbitral awards, while guaranteeing that such recognition and enforcement will comply with a number of fundamental principles.").

397. Arbitration Law, *supra* note 6, arts. 15, 62.

398. See *Bǐ dé Shū dé, ài dé Huá Lái Mén ēn* (彼得舒德, 爱德华莱门恩) [Peter J. Scheuer v. Edward E. Lehman] PEKING U. L. (Sup. People's Ct., Jan. 22, 2007) (China) (rejecting petitioner's request for recognition and enforcement of an American arbitral award because the petitioner failed to meet the time limit set forth in art. 239 of the CPL).

award was one year for natural persons and 6 months for legal persons.³⁹⁹ After the CPL amendment in October of 2007, the time limit for submission was extended to two years, irrespective of natural or legal persons.⁴⁰⁰

Normally, the statute of limitations runs from the last day of performance if the arbitral award provides a performance date.⁴⁰¹ If, however, there is no fixed performance date, the time period will be calculated from the date when the arbitral award takes effect.⁴⁰² Under certain circumstances, the statutory time period may be suspended or discontinued as required by law.⁴⁰³ According to the SPC's interpretation of the CPL, the enforcement time period may be discontinued in the case where the parties have settled the dispute through an agreement during the enforcement period.⁴⁰⁴ In that case, the statute of limitations will restart and run from the last day of performance.⁴⁰⁵

But if a party is unable to meet the time limit, due to an event of *force majeure* or other legitimate reasons, the party may apply to the People's Court for an extension under Article 83 of the CPL.⁴⁰⁶ There are two preconditions for an extension made under Article 83 of the 2012 CPL. First, the application for extension must be made within 10 days after the resolution of the obstacle preventing the partying from complying with the statute of limitation.⁴⁰⁷ Second, the court must approve the application for extension.⁴⁰⁸ It follows that an extension is not automatic, but instead is subject to the court's discretion.

Another issue concerns the documents required. To apply for recognition and enforcement of a foreign arbitral award in China under the New York Convention, the applying party shall, at the time of the application, provide such documents as: (a) the duly authenticated original award or a duly certified copy thereof; and (b) the original agreement or a duly certified

399. Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Order No. 44 of the President of the People's Republic of China, Apr. 9, 1991), art. 219, P.R.C. LAWS.

400. Civil Procedure Law (2012), *supra* note 20, art. 239.

401. *See id.*

402. *See id.*

403. *See* CPL Interpretation 2015, *supra* note 22, art. 468.

404. *Id.*

405. *Id.*

406. Civil Procedure Law (2012), *supra* note 20, art. 83.

407. *Id.*

408. *Id.*

copy thereof.⁴⁰⁹ In addition, all of the documents would need to be translated into Chinese language.⁴¹⁰ It is also required that the translation be certified.⁴¹¹

What appears to be problematic is the certified translation of the documents. Under the New York Convention, the translation certification can be made by an official or sworn translator, or by a diplomatic or consular agent.⁴¹² However, in Chinese courts, the requesting party is required to provide an authenticated translation by the Chinese embassy or consular office in the relevant country;⁴¹³ or, as an alternative, a notarized translation by a Chinese notary public agency.⁴¹⁴ Failure to provide the translation as required may result in a rejection of enforcement.⁴¹⁵ In actual practice, however, the People's Court will ask the requesting party to amend the filing by submitting the acceptable translation before the rejection is made.

A final issue is identifying the parties. When making a request to the People's Court for recognition and enforcement of a foreign arbitral award, the requesting party must be a party to the arbitral award.⁴¹⁶ In addition, the person against whom the recognition and enforcement of the foreign arbitral award is sought must exist under Chinese law; otherwise, the request is denied. In *Subway International B.V. v. Beijing Sabowei Food & Beverage Co. Ltd.*, the U.S. petitioner obtained a default arbitral award made by the International Centre for Settlement of Investment Disputes against the Chinese respondent, and attempted to enforce it in China.⁴¹⁷ Its request was rejected because it was found that the respondent did not exist as an entity in China.⁴¹⁸

The disputes in the case arose from a franchising agreement between the petitioner and respondent.⁴¹⁹ The petitioner claimed that the respondent

409. New York Convention, *supra* note 1, art. IV(1).

410. *See id.* art. IV (2).

411. *Id.*

412. *Id.*

413. Zuigāo Rénmín Fǎyuàn Guānyú Rénmín Fǎyuàn Zhíxíng Gōngzuò Ruògān Wèn Tí dí Guǐdìng (Shíxíng) (最高人民法院关于人民法院执行工作若干问题的规定(试行)) [Provisions of the Supreme People's Court on Several Issues Concerning the Judicial Enforcement of People's Courts (for Trial Implementation)] (promulgated by Jud. Comm. Sup. People's Ct. on June 11, 1998, effective on July 8, 1998), art. 21, LEXIS CHINA.

414. *Id.*

415. *See id.* art. 20.

416. An arbitrator has no standing to request for enforcement of a foreign arbitral award to recover the arbitration fee decided in the award because he is not a party to the award. *See Provisions on Several Matters Concerning Adjudicative Jurisdiction in Foreign Related Civil and Commercial Cases* (promulgated by Sup. People's Ct., Feb. 25, 2002, effective Mar. 1, 2002), CLI.3.39353(EN) (Lawinfochina).

417. Sàibǎiwèi Guójì Yǒu Xiàngōng Sī, Běijīng Sàibówēi Cānyīn Yǒu Xiàngōng Sī (赛百味国际有限公司 北京萨伯威餐饮有限公司) [Subway International, B.V. v. Beijing Sabaiwei Catering Co., Ltd.] PEKING U. L. (Sup. People's Ct., Feb. 26, 2009) (China).

418. *Id.*

419. *Id.*

violated the agreement entered into by the parties in January 2005.⁴²⁰ In the arbitral award, the respondent was required to stop using the petitioner's name, trademarks, and business symbols.⁴²¹ The respondent also had to pay \$250 per day from the date of arbitral award to the date of enforcement plus other costs and fees.⁴²² When reviewing the petitioner's request, Beijing No. 2 Intermediate People's Court found that the respondent listed in the arbitral award was not registered as a business entity with the Beijing Bureau of Administration of Industries and Commerce.⁴²³ Since the identity of the respondent was unknown, the arbitral award went unrecognized and unenforced.⁴²⁴

VI. CONCLUSION

Recognition and enforcement of a foreign arbitral award in a country like China has been and will continue to be a focal point for dispute settlement in international business transactions. It is not only a matter of confidence in the legal and judicial system of the country, but also a test of the fairness and effectiveness of the system to protect foreign business interests. To the extent that China fulfills its obligations under the New York Convention, skepticism remains among Westerners due to the cultural and legal differences in the country, as well as the conflict between Chinese reality and foreign perception.⁴²⁵

Since its accession to the New York Convention, China has made progress to meet the international standard in handling foreign arbitral awards.⁴²⁶ But still, there are certain issues China has to deal with in order to make the country more appealing to foreign businesses in terms of dispute settlement. These issues, in one respect, reflect a level of legal and judicial deficiency of the country, and in the other respect create difficulties foreign parties would otherwise not have to face in the recognition and enforcement of foreign arbitral awards under the New York Convention.

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. See Fiona D' Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1318, 1359 (2006).

426. See generally Alford et al., *supra* note 2.

One of the issues involves transparency, especially in respect to procedure and availability of information.⁴²⁷ When applying for recognition and enforcement of foreign arbitral awards in Chinese courts, foreign parties often have limited access to the information needed about the decision making process, and in some cases were actually left in the dark.⁴²⁸ In addition, although the internal reporting system is purposed to ensure the proper treatment of foreign arbitral awards, the way it operates is completely behind closed doors.⁴²⁹ Moreover, as it happens frequently, foreign parties are stonewalled from getting any information about the identity and assets of their Chinese counterparty.

Another issue concerns the compatibility with the New York Convention. After joining the New York Convention, China has revised, amended, or adopted the laws to meet the Convention requirements. But there are still certain areas where provisions of the laws are considered incompatible with provisions of the Convention. One such area is the use of a foreign arbitral body other than the place of the other contracting state, as phrased in the New York Convention, to determine foreign made arbitral awards. Another area is about the requirement of document authentication.

The third issue is more general, referring to the lack of comprehensive or adequate legislation pertaining to recognition and enforcement of foreign arbitral awards. As can be seen from the practices of Chinese courts, most of the rules involving foreign arbitral awards are made by the SPC through its interpretations. Since the SPC's interpretations are often made on a case-by-case basis, confusion may arise in regards to the SPC's application. In addition, because the SPC has no power to make law, the practices of People's Courts are limited by legislation that is either lagging behind reality or outdated.⁴³⁰

On the other hand, however, it is important that a foreign party make as much effort as possible to follow the procedure under Chinese law, in order to avoid unwanted obstacles to the recognition and enforcement of the arbitral award the foreign party obtained outside China. As discussed, under the New York Convention, the procedure for recognition and enforcement of a foreign arbitral award is a matter of domestic law from the place where the enforcement is sought.⁴³¹ Therefore, as some have suggested, those

427. See *id.* at 2.

428. See *id.*

429. See Cai Yingwei, *The Procedural Issues in The Recognition and Enforcement of Foreign Arbitral Awards in China*, SINA BLOG (Aug. 31, 2013, 8:03 PM), http://blog.sina.com.cn/s/blog_69af4df20101fmpu.html [<https://perma.cc/7RP9-S4VS>].

430. See Xiaohong Xia, *Implementation of the New York Convention in China*, in 1 INTERNATIONAL COMMERCIAL ARBITRATION BRIEF 20, 24 (2011).

431. New York Convention, *supra* note 1, art. III.

who seek to win foreign arbitral award enforcement battles in China should worry more about procedure.⁴³²

As an alternative, if the enforcement of an arbitral award within the territory of China is the only option with regard to the dispute settlement between a foreign party and its Chinese counterpart, a choice of arbitration in China might be more practical in contrast to a foreign arbitration.⁴³³ For Chinese arbitration, enforcement will become a domestic concern, and all obstacles facing foreign arbitral awards will not exist. Additionally, through choosing arbitration in China, the parties may select a foreign law to govern their disputes. However, nothing here is to suggest that having arbitration with a Chinese arbitration body will result in the worry-free enforcement of an arbitral award.

In many cases, the business interests and relative bargaining power of the parties may require a choice of Chinese arbitration. But due to concerns about the Chinese legal system, reluctance, if not complete avoidance, to conduct arbitration in China often prevails. Nevertheless, considering the challenges discussed with regards to enforcement, arbitration in China does have strategic advantages that are worth considering.

432. See King, *supra* note 4, at 13.

433. See *id.* at 2 (“Choice of seat carries significant implications if the foreign party must rely on the PRC courts to enforce an award. . . .”).

