COMPARATIVE STUDY ON REFUSALS OF RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS: INCREASING IMPORTANCE OF DOMESTIC ARBITRATION-RELATED LAWS

By

Xingwei ZHANG

Committee Members: Professor Youichi NEMOTO
Professor Kayo NISHIKAWA
Professor Ichiro ARAKI

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Department of International and Business Law
International Graduate School of Social Sciences
Yokohama National University

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INTRODUCTION

As known that international commercial arbitration has been worldwide practiced today. It is commonly believed that the effectiveness of the final arbitral award, which ensures easier recognition and enforcement outside the place where it is rendered, contributes to its success. Due to jurisdictional protection as part of the sovereignty, confirming jurisdiction of cross border civil litigation cases is not easy by different national courts. And judgments ruled in one country cannot be smoothly recognized and enforced in another. It was not so urgent to solve this issue before the 20th century, when international commercial activities were not so active at that time. After commercial differences arose, national courts were the main institution for disputes resolving. Because most of those disputes happened domestically, there were also few problems on recognition and enforcement of courts’ judgments extraterritorially.

Arbitration is a historical dispute resolution. During the antiquity period, commercial activities were not as active as nowadays. As one of the alternative dispute resolutions, it was not so actively practiced for resolving commercial disputes, while was often used to solve disputes between states at that time. Nevertheless, some of the earliest reports on commercial arbitration were recorded in some countries. As one professor indicates, “Just as arbitration between states has an ancient, rich history, so arbitration of commercial disputes can be traced to the beginning of recorded human society.”

As an influential and widely practiced dispute resolution, international commercial arbitration has rapidly developed since the early 20th century. Especially after some international arbitration conventions were negotiated during the past decades, and with the fast development of the world-wide commercial activities, international commercial arbitration has been honored as the main mechanism for resolving cross border commercial disputes.

Someone may wonder how international commercial arbitration can be so popular and successful during the past century. When differences arose, disputed parties will firstly recall national court and resort to, which is the traditional effective institution for resolving disputes. Besides, there are other alternative dispute resolutions, such as mediation or conciliation, settlement or other methods. However, since a serious of multilateral conventions on arbitration agreement and execution of arbitral awards have been promulgated, arbitration system is most frequently chosen for resolving commercial disputes. During the past century, the most successful and influential convention for promoting arbitration was the United National Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was more intimately called as the New York Convention. Under the auspices of the New York Convention, international commercial arbitration has got great progress and received growing importance thereafter, even till nowadays.

As one professor states, “it becomes evident that the insertion of arbitration clauses into international contracts appears to be the best tool to resolve disputes between the parties to international contracts. This conclusion is confirmed by legal 

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practice. From 70% to 90% of all international contracts are reported to be equipped with arbitration clauses.”\(^2\) It is often commended that international commercial arbitration is so popular because of its less-time consuming, lower cost, effectiveness of recognition and enforcement and confidentiality. Although this argument has been challenged recently, for some of the argued merits of international commercial arbitration are not always existed as generally believed. For instances, the cost can be very high, even higher than suing in national courts, in some international commercial arbitral procedures. In addition, some complicated arbitration cases can be greatly time-consuming. Even so, the same professor continues indicating, “Arbitration turns out to be the most appropriate and most effective way to reach the primary goal of the parties in terms of costs, time and effectiveness.”\(^3\)

However, controversial issues on the refusals of recognition and enforcement of international commercial arbitral awards have never ending, even under the framework of the New York Convention, several outstanding regional multilateral arbitration conventions and different domestic arbitration laws. On one hand, the New York Convention has uniformly regulated the grounds for refusal of recognition and enforcement of international commercial arbitral awards, while on the other hand, in order to attract more member States, it has authorized several important issues to be determined by various domestic competent authorities, such as determining the validity of Arbitration Agreements; exercising judicial intervention on international commercial arbitration agreement and arbitral awards; invoking public policy exception to exempt execution of international commercial arbitral awards; interpreting the concept of non-domestic arbitral awards which could be recognized and enforced under the provisions of the New York Convention, etc.

According to the academic research and arbitration practice, many arguments are proposed for resolving those existed problems. In order to reduce those barriers to international commercial arbitral awards, systematical interpretation of the relevant provisions of the New York Convention, including Article II, V and VII(1), is critical for further growth of international commercial arbitration system. Some academic professors debate on the necessity of amendment of New York Convention. However, according to those international arbitration conventions, more authorizations have been granted to the domestic arbitration-related laws.

International commercial arbitration is still with speedy growth in recent years, such as a new phenomenon of online arbitration had been founded and practiced in some jurisdictions, including some developing countries like China. Nonetheless, the contemporary legal framework for recognition and enforcement of international commercial arbitration agreements and arbitral awards has not contained any regulation for such new kind of arbitration mechanism. In order to protect the efficiency of such new type of arbitral awards and eliminate those existed barriers to traditional cross border commercial arbitration system, it is urgent to amend and perfect the relevant domestic arbitration-related laws.

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\(^3\) *Id.*, p.16.
OVERVIEW

I Research Background

Prior to the legitimately established arbitration system, parties have to resolve their commercial differences in national courts, because court proceeding is the only compulsorily mechanism. However, considering the jurisdiction limitations in each domestic judicial system, the time-consuming proceedings, disclosure of commercial secrets and the most difficult stage confronted in execution of foreign judgments in other countries, civil litigation in national courts is not always perfect. Since the later medieval time, merchants preferred to resolve their disputes resulted from the transactions or trades by their guilds or autonomous organizations, instead of filing their cases into the national courts. This disputes resolution is the predecessor of contemporary commercial arbitration system. During the following centuries, Arbitration was gradually promoted and invoked for resolving commercial disputes among parties from different countries. Arbitration could be so popular because of its unique merits comparing to traditional courts’ proceedings. For instance, party-autonomy nature, confidentiality procedure, lowers cost and shorter time-consuming, effectiveness of execution of arbitral awards, etc.

Although arbitration was historically practiced within auspices of lex mercatoria, systematically legislation for international commercial arbitration began in the 20th century. A serious of international conventions was gradually drafted to promote internationally acceptation of arbitration, of which the New York Convention was the most successful one. It has 149 member States today, all of which have the obligation to mutually recognize and enforce international commercial arbitral awards pursuant to the principle of pacta sunt servanda.

According to article VII (2) of the New York Convention⁴, the former two Geneva Conventions on arbitration clause and execution of arbitral awards shall cease to have effect between contracting states on their becoming bound and to the extent that become bound by the New York Convention. Because almost all the Geneva Conventions’ contracting states have already acceded to or ratified the New York Convention, the two Conventions are not so actively invoked nowadays.

The New York Convention has been promulgated over 55 years, which has greatly improved the international commercial arbitration activities. It uniformly limits the conditions for refusing recognition and enforcement of arbitral awards. Nevertheless, there are still some provisions which refer to the application of regional arbitration conventions, bilateral conventions, or related domestic laws for recognition and enforcement of arbitral awards extraterritorially. Moreover, connecting with the historical background of the New York Convention, there are some controversial arguments on the interpretation of several critical provisions. And another relevant issue originates, indicating whether it is necessary or not to revise the New York

⁴ Article VII(2) of the New York Convention indicates, “The Geneva Protocol on Arbitration Clause of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.”

⁵ See infra note 25 &27.
Convention, to coincide with the fast growing of international commerce and greatly changed situations.

In fact, as international commercial arbitration system being widely practiced in different countries, various interpretations by national courts have caused many controversial problems. For instance, the definition of nationality of arbitral awards in Article I, especially for the concept of “non-domestic award”, strict written form requirement of arbitration agreements in Article II; the nature of Article V, which is the core provision of the New York Convention, enumerating the uniform conditions to decline the applications for recognition and enforcement of arbitral awards. The debates on Article V concentrate that if those limited reasons are exclusively or permissively. In legal practice, there are some cases in which arbitral awards have been set aside or annulled in their rendering countries, while the prevailing parties apply to other contracting states of the New York Convention, requesting recognition and execution of such kind of arbitral awards. Some of these annulled awards were recognized and enforced in those countries where the awards were relied upon.6

Further, Article V 2 (b) of the New York Convention provides the public policy exception which can be used as a rejection to enforce the foreign arbitral awards ex officio by competent authority of different countries. Besides, there are more issues concerning the relationship among the New York Convention and local arbitration conventions, and different national arbitration-related laws. Even under the influential New York Convention, controversial interpretations and arguments have caused potential obstacles to the recognition and enforcement of foreign arbitral awards in various jurisdictions.

Therefore, some scholars believe that it is urgent to revise the New York Convention. Otherwise the development and practice of international commercial arbitration will be obstructed or hindered. One of the most famous jurists is Professor Albert Jan van den Berg, who published a Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards in May 2008 (the Draft Convention).7 While some other jurists disagree with the necessity to revise the New York Convention, arguing that “even if the New York Convention were broke, which it isn’t, the likely ‘cure’ would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food.”8

Debates never end, however, reducing obstacles to recognition and enforcement of international commercial arbitral awards is urgently expected. For discussing refusal reasons to the execution of international commercial arbitration agreement and arbitral award, research work only concentrated on the international arbitration convention is not enough. Remembering the compromised character of the New York Convention, many elements on promoting recognition and enforcement of

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8 V.V. Veeder, Is There a Need to Revise the New York Convention, Key note speech, The Review of International Arbitral Awards.
international commercial arbitral awards are authorized to the local arbitration conventions or different national legislation. Therefore, it is necessary to review the regional arbitration conventions and domestic legislation, in order to find the real barriers to recognize and enforce the international arbitral awards. Without which, it is difficult to determine what have caused globally rejection of foreign arbitral awards, and it will not be able to conclude whether there is a need to revise the most important New York Convention or not.

The importance of multilateral conventions for international commercial arbitration deserves no doubt, even some arguments concerned in the a-national or de-national nature of international arbitration, it is still generally believed that international arbitration system bases deeply on domestic legal system. It shall not be ignored that the reported refusals of arbitral awards were all reviewed and decided by domestic courts, according to various domestic arbitration-related laws. One international commercial arbitral award may be rejected in one country, but be recognized and enforced in another. The importance of domestic arbitration laws for smoothly executing of international commercial arbitral awards should not be ignored.

Since the United National Commission on International Trade Law (UNCITRAL) had drafted the Model Law on International Commercial Arbitration (UNCITRAL Model Law) in 1985, legislation or amendment bills of domestic arbitration-related laws had become active and booming during the past three decades. Further, connecting with the “more-favorable-right” provision of Article VII(1) of the New York Convention, recognition and enforcement of international commercial arbitral awards nowadays is base on the synthesized legal system of both international arbitration conventions and domestic legislation. Especially, more attention should be paid to the different national arbitration-related laws. Harmonization of domestic arbitration-related laws by the UNCITRAL Model Law contributes to smoother recognition and enforcement of international commercial arbitral awards, which has made great promotion to contemporary international commercial arbitration system.

It is a new era when everything changes rapidly, including the developing pace of international commercial arbitration system. As one of the new online dispute resolutions, online arbitration procedure was born and practiced in some countries. For instance, the China International Economic and Trade Arbitration Commission (CIETAC) had passed the Online Arbitration Rules on January 8 2009. According to Article 1, “These rules are formulated in order to independently, impartially, efficiently and economically resolve, by means of online arbitration, disputes arising from economic and trade transactions of a contractual or non-contractual nature. These rules shall apply to the resolution of electronic commerce disputes and may also be applied to the resolution of other economic and trade disputes upon the agreement of the parties.”

This newly formed dispute resolution may face many challenges under the contemporary legal framework for international commercial arbitration, of which one critical question is that whether online arbitral awards being recognizable and

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enforceable or not. Not only the New York Convention but also the UNCITRAL Model Law and numerous domestic arbitration-related laws have not contained any regulations on the recognition and enforcement of such new type of arbitration awards. It is believed that the drafters of the New York Convention couldn’t imagine that the arbitration procedure can be organized and tried through internet. And of course that there wasn’t any provisions concerning the recognition and enforcement of online arbitral awards when drafting the New York Convention or some local conventions, even the arbitration-related domestic laws.

However, with fast development in technology together with the requirements of further lowering arbitration cost, online arbitration may be widely practiced in the nearly future. How to interpret or supplement the contemporary legal framework to permit this new phenomenon in arbitration practice is a meaningful topic, specifically in studying the obstacles to recognition and enforcement of online arbitral awards. We cannot imagine what will happen in the arbitration field with the closer and more complicate relationship of parties from different parts of the earth village in the nearly future.

It is worth acclaim that the UNCITRAL has begun to do more research on online dispute resolution (ODR) since 2010. A separate working group, Working Group III, has been established for research on online dispute resolution. It is widely accepted that making well preparation for the booming of this newly-founded mechanism is necessary and urgent, especially for promoting the enforceability of online international commercial arbitral awards among the contracting states of the New York Convention.

Therefore, it deserves to do more research on the efficiency of contemporary international arbitral mechanism and discuss specifically the obstacles to this efficient, confidential disputes resolution by comparative law study. Getting awareness of the controversial barriers to traditional arbitral awards, and making preparation to meet the latest needs, refusal of recognition and enforcement of international arbitral awards should be greatly reduced in different jurisdictions. Basing on the former research, this dissertation will concentrate on the refusal of recognition and enforcement international commercial arbitral awards in several contracting states of the New York Convention, where international commercial arbitration system had been actively practiced and recognized as an important alternative dispute resolution. Through this study, it will be honorable to make even a little promotion for smoother recognition and enforcement of international commercial arbitral awards in those selected territories, and even more countries in the nearly future.

II Main Issue of the Dissertation

Recognition and enforcement of international commercial arbitral awards is the most significant step in international commercial arbitration system. Contemporary legal framework for international commercial arbitration is composed with several successful multilateral conventions and different domestic laws, which have greatly improved the possibility of smoothly recognition and enforcement of cross border
commercial arbitral awards. Nevertheless, there are still some controversial barriers in various jurisdictions. A great number of researches had been carried out, in order to eliminate those obstacles. In this dissertation, the first step is to find the most controversial barriers to recognition and enforcement of international commercial arbitral awards. The second step is to compare those barriers blocking smooth execution of arbitral awards in selected jurisdictions, and analyze the reasons. Then for the third step, proposing practical and feasible suggestions on eliminating those most complicated barriers to international commercial arbitral awards in the nearly future will be discussed.

The main issue of this title is the argument on increasing importance of the Domestic arbitration-related laws, which are submitted as the critical element for reducing existed refusals of international commercial arbitral awards nowadays, and preventing future rejections. Paying more attention to those relevant domestic statute provisions and judicial explanations of them, together with the basic framework of important multilateral arbitration conventions, it is submitted that through such an approach, controversial refusals will be reduced or eliminated. Smoother recognition and enforcement of international commercial arbitral awards may be accomplished soon in different jurisdictions.

III Terminology

There are some basic terms for this dissertation should be defined and interpreted here:

**Commercial Arbitration**: Referring to the merits of arbitration, it is not only used for resolving commercial transaction differences, but also widely practiced for resolving investment disputes, labor disputes, etc. As indicated in the title, this dissertation will only concern the commercial arbitration, including some part of maritime-related disputes, which is mainly about the differences resulted from international transactions or trade amongst parties from different countries, whether natural persons or legal ones, concentrating on their legal relationships which are interpreted as commercial.

**International Commercial Arbitral Awards**: It is commonly accepted that commercial arbitration awards can be divided into two types, the domestic arbitral awards and the international arbitral awards. Pure domestic arbitral awards will be rendered under laws and/or arbitration rules of that country, which is confined to one specific country, and is easier to be enforced according to domestic legislation. Therefore, the real controversial problem is on the recognition and enforcement of international arbitral awards, which is also named as “foreign arbitral awards” in some international arbitration conventions. Emphasis will be made on international commercial arbitral awards here.

**Recognition and Enforcement Procedure**: Like civil procedure of national courts, there are many steps in arbitration proceeding, such as making an arbitration agreement or a clause, choosing the arbitrators and deciding the rules of arbitration procedure, organizing the arbitral tribunal, or the pre-trial proceeding, doing the trial,
rendering the awards and recognizing and/or enforcing the awards. Each part of these procedures is very important, lacking one of which will make the whole arbitration procedure and final arbitral award being illegal. Among those steps, the most one is the recognition and enforcement of arbitral awards. Nothing can be more frustrated than the arbitral awards being denied after a long period of struggling. This dissertation will concentrate on the procedure of recognition and enforcement of final arbitral awards.

**Domestic Arbitration-related Laws:** Although no accurate statistic on how many countries have already promulgated their domestic arbitration laws available, it is sure that countries with most active practicing of international commercial arbitration have already passed separate arbitration laws or some provisions of arbitration procedure inserted in the Civil Procedure Laws. For example, Japan, United Kingdom, United States of America, Singapore and People’s Republic of China, etc., have published domestic arbitration laws, while Germany, France, etc., legislated arbitration procedure as a part of their Civil Procedure Code. It is impossible to study all of the domestic arbitration laws in one dissertation. In order to make the main issue more arguable, it is necessary to choose some typical domestic arbitration-related laws, within the Common Law system and the Civil Law system, together with both statutes and case laws, including the most developed countries and some developing countries. Try to compare their common regulations and differences, particularly compare the influence of their domestic arbitration-related laws on recognition and enforcement of international commercial arbitral awards.

**METHODOLOGY**

Appropriate research methods are essential for comparative study on recognition and enforcement of international commercial arbitral awards. Considering both the theoretical and practical character, the following research methods will be used in writing this dissertation:

1. **Combination of Theoretical and Case Study**

   For comparative study on the recognition and enforcement of international arbitral awards in different jurisdictions, both theoretical and case study method seems equivalent important. It will simultaneously pay attention to the summaries of academic arguments and discussions of typical cases on the category of recognition and enforcement of international commercial arbitral awards, including both being recognized and enforced, and those being rejected in variously domestic jurisdictions. Therefore, combination analysis is critical for studying refusal grounds to international commercial arbitral awards, which will make the conclusion and the proposals for resolving such academic problem more persuasive.

2. **Comparative Jurisprudence Study**

   Besides the uniform rules of the New York Convention on refusals of recognition and enforcement of international arbitral awards, there are still some provisions of conflict law rules, which indicate to regulations or provisions of other bilateral or
multilateral arbitration conventions, and domestic arbitration-related laws. Therefore comparative jurisprudence method is necessary for studying the barriers to recognition and enforcement of international commercial arbitral awards. Basing on the different interpretations of the core provisions of the New York Convention and regulations of domestic arbitration laws by different national courts, useful proposal for reducing or eliminating such obstacles could be arguable on such compared theories and practices.

3. Value Analysis Study

This dissertation will compare the provisions of international commercial arbitration convention, regional conventions and national laws, and then try to analyze the functions of the contemporary legal framework for recognition and enforcement of the arbitral awards. It centralizes simultaneously on the successful functions of the New York Convention and its deficiencies, suggesting that in order to solve the controversial issues on recognition and enforcement of international commercial arbitral awards, more emphasis should be made on the importance of domestic arbitration-related laws, but not on the issue of whether the New York Convention should be revised or not.

**TABLE OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>U.S.</td>
<td>The United States of America</td>
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<tr>
<td>UK</td>
<td>The United Kingdom of Great Britain and Northern Ireland</td>
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<tr>
<td>P.R.C</td>
<td>The People’s Republic of China</td>
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<tr>
<td>ICDR</td>
<td>The International Centre for Dispute Resolution</td>
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<td>SCC</td>
<td>Stockholm Chamber of Commerce</td>
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<td>SIAC</td>
<td>Singapore International Arbitration Centre</td>
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<td>NAI</td>
<td>Netherlands Arbitration Institution</td>
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<td>BAC</td>
<td>Beijing Arbitration Commission (China)</td>
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<td>ODR</td>
<td>Online Dispute Resolution</td>
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<td>Art.</td>
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CHAPTER I MULTILATERAL INTERNATIONAL CONVENTIONS ON PROMOTING RECOGNITION AND ENFORCEMENT OF CROSS BORDER COMMERCIAL ARBITRAL AWARDS

1.1 Overview of the Development of International Arbitration Conventions

As an important alternative dispute resolution, arbitration was widely practiced all over the world for centuries. Even in antiquity time, when commercial disputes arose between private parties, they would like to choose a person or more than one, who they trust in or have authority in their tribes or communities, as amicable conciliator to solve their differences finally.\(^\text{10}\) However, during a long period of time when civilization was not highly developed, and no arbitration status had been perfectly legislated, arbitration was based greatly on moral restraint or other compulsory strengths. As lacking compulsory arbitration-related laws, the practices of arbitration were not being well regulated and protected, hindering its future growth.

Although arbitration system developed very slowly, it had been recognized as an effective dispute resolution for several kinds of differences.\(^\text{11}\) Particularly, when commercial transactions between parties from different States were gradually activated in the Middle Age, arbitration was simultaneously honored as a convenient method to solve controversial problems, especially for merchants who required their disputes being settled quickly, with lower cost and confidentially proceedings. Besides, keeping their transaction relationships and protecting commercial secrets were very important considerations of transactions parties. After national courts were gradually established, commercial disputes could also be resolved in those courts where final rulings would be rendered by virtue of judicial power of States. However, cross border parties still preferred arbitration mechanism which authorized full party-autonomy and several other merits. With those attractions, arbitration continued to be practiced and improved thereafter. As Professor Gary B. Born states as the follows,

“A wide variety of regional and local forms of arbitration were used to resolve private law disputes throughout the Middle Age in Europe. A recurrent theme of this development was the use of arbitration by merchants in connection with merchant guilds, trade fairs, or other forms of commercial or professional organizations.”\(^\text{12}\)

Nevertheless, even arbitration system was historically practiced, there were few

\(^{10}\) As in the state-to-state context, some of the earliest reports of commercial arbitration are from the Middle East.” See supra note 1, Gary B. Born, p.21; “The reasons for resorting to arbitration in Antiquity appear to be remarkably modern. Historical research indicates that ancient Greek courts- like today’s courts in many countries- suffered from congestion and back-logs, which lead to the use of arbitrators, retained from other city states(rather like foreign engineers or mercenaries), to resolve pending cases.” See D.Roebuck, Ancient Greek Arbitration 348-349, 2001; “Arbitration of commercial matters in ancient Roman times was more common than Roman state-to-state arbitrations, in part because there was no judicial system of litigation comparable to those in contemporary legal structures.” See D.Roebuck & B.de Fumichon, Roman Arbitration 94, 2004.

\(^{11}\) Arbitration had been widely practiced in state-to-state disputes in the ancient time, and gradually being used in commercial activities and other types of differences, such as labor-related disputes, administrative disputes, etc.

\(^{12}\) See supra note 1, Gary B. Born, p.27.
official arbitration laws being promulgated for centuries.\textsuperscript{13} Arbitration practices were absolutely sponsored by disputed parties, who established the critical character of arbitration. Even as one of the most important principles today, the party autonomy. Non arbitration legislation had caused some problems, of which the most controversial one was the lacking compulsory effect of arbitration agreement and arbitral awards. Thus final settlements given by the amicable arbitrators could only be effectively accomplished voluntarily, or relying on guild rules.\textsuperscript{14} As one professor indicates, “Enforcement was ideally not necessary (peer pressure or ‘reputation in the market’ causing compliance).”\textsuperscript{15}

Actually, there were not many international commercial arbitration cases reported at that time, because transnational commercial transactions were not as active as today. Just as the same professor continues, “It was after the first World War that commercial arbitration started internationalizing itself, but slowly, ever so slowly.”\textsuperscript{16} The contemporary international commercial arbitration has been rapidly improved since the early 20th century. According to Professor Gary B. Born, when discussing international commercial arbitration, it is occasionally suggested that:“As a technocratic mechanism of dispute settlement, with a particular set of rules and doctrines, international commercial arbitration is a product of this century [i.e., the 20\textsuperscript{th} century].”\textsuperscript{17}

Since then, international commercial arbitration had been extensively researched and practiced, together with the rapid growth of market economy and global commercial transactions. In order to meet the up-to-date needs of cross-border arbitration system, it is urgent to make sure of the validity and effectiveness of arbitration agreements. Under such situation, during the whole 20\textsuperscript{th} century\textsuperscript{18}, a serious of international and regional arbitration conventions had been negotiated, which firstly ensured the recognition of arbitration agreement as valid for resolving disputes among various contracting states\textsuperscript{19}, then the more important step was making

\begin{footnotesize}
\bibitem{13} It was said that “Parliament of England enacted one of the world’s first extant arbitration status, adopting what is sometimes called the 1698 Arbitration Act.” See Samuel, \textit{Arbitration Status in England and the USA}, 8 Arb. & Disp. Res.L.J.2, 4, 1999.
\bibitem{14} “The enforceability of arbitration agreements appears frequently to have been achieved, in historical commercial settings, largely through non-legal sanctions, such as commercial, religious and other sanctions effectuated via guilds or similar bodies.” See Benson, \textit{An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States}, 11 J.L.Econ. & Org. 479, 480 n.2, passim, 1995.
\bibitem{16} \textit{Id.} p.77.
\bibitem{17} See supra note 1, Gary B. Born, p.21.
\bibitem{18} Negotiation of those international or multilateral arbitration conventions in the whole 20\textsuperscript{th} century could be divided into three periods: the early 20\textsuperscript{th} century for the two influential Geneva Treaties for arbitral clauses and arbitral awards separately; in the middle 20\textsuperscript{th} century, the well known New York Convention was drafted and has become one of the most successful international conventions in arbitration field; the third period should be some regional arbitration conventions being negotiated and mainly be used to adjust the local arbitration issues, such as the 1961 European Convention on International Commercial Arbitration; the 1975 Inter-American Convention on International Commercial Arbitration; the 1987 Arab Convention on Commercial Arbitration and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, etc.
\bibitem{19} It was the direct object of the Geneva Protocol on Arbitration Clauses in 1923, see infra note 25.
\end{footnotesize}
international commercial arbitral awards recognizable and enforceable exterritorially.20

All those international and regional arbitration conventions had contributed to the easier recognition and enforcement of foreign arbitral awards, forming the critical merit of international commercial arbitration mechanism. As one jurist indicates, “Generally, the court applied to looks at foreign judgments as commands of a foreign sovereign and consequently treats them with reserve or distrust. These feelings are absent in the case of a foreign arbitral award which originates in an agreement of the parties.”21

Great efforts offered by scholars also contributed to the formation of several influential international arbitration conventions, realization of world-wide acceptance of international commercial arbitration system, and accomplishment of smoother practice of contemporary international commercial arbitration. These influential arbitration conventions could be divided into two categories, international arbitration conventions with a large number of contracting states, and regional or local arbitration conventions with fewer member states. All of these conventions were promulgated at three periods, the early, the middle and the late 20th century, and with a character that those latter multilateral conventions had listed less strict requirements for recognition and enforcement of foreign arbitral awards than their predecessors.

Previous to those international arbitration conventions, arbitration agreements or arbitral clauses for resolving international commercial disputes were not effectively recognized and protected in different countries during a long period of time. On the contrary, most countries treated arbitration agreement as invalid, and thus parties couldn’t solve their disputes outside the national courts.22 Including, but not limited to, courts and judges of those countries believed that validating arbitration agreement would cause loosing cases load of their own, and thus took hostile attitudes towards arbitration agreement and the whole arbitration system. As some jurists stated their arguments:

“Despite its deep historical roots, commercial arbitration also encountered recurrent challenges, often in the form of political and judicial mistrust or jealousy. These challenges have sometimes been overstated, and they have almost always (eventually) been overcome by the perceived benefits of the arbitral process in commercial settings and the (eventual) acceptance of these benefits by governmental bodies.”23

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20 The Geneva Convention on the Execution of Foreign Arbitral Awards had made this consideration realized since 1927, although there were some limitations and serious conditions under that Convention, see infra note 27.
22 For example, as some professors indicate, “Outside the statutory ‘safe heaven’ of the 1698 Arbitration Act, common law enforcement of arbitration agreements was made even more problematic by the decision in Kill v. Hollister. There, the court permitted an action on an insurance policy to proceed, notwithstanding an arbitration clause, on the grounds that ‘the agreement of the parties cannot oust this court.” “Many 19th century American courts developed a puritanical version of English common law hostility to agreements to arbitrate future disputes. Indeed, for some decades, U.S. courts held flatly that agreements to arbitrate future disputes were contrary to public policy and revocable at will; unlike England, U.S. courts appear to have developed no alternative legal mechanisms, whether through the use of penalty clauses or rules of court, to make such agreements enforceable.” See supra note 1, Gary B. Born, pp.34-35, 44.
23 See supra note 1, Gary B. Born, p.32.
“Over the course of the 19th century, significant judicial and legislative hostility to arbitration agreements developed, as American courts developed a peculiarly radical interpretation of historic English common law authority.”

Under such dilemma, the first international arbitration treaty in the early 20th century was negotiated, which was the Protocol on Arbitration Clauses drafted in 1923 at Geneva (hereinafter The Geneva Protocol). From a note of the Secretary-General of the League of Nations, it indicated that:

“Realizing the desirability and urgency of assuring by an international agreement a more general recognition of the validity of the arbitration agreement, whether referring to present or future differences, which is designed to regulate by means of arbitration differences that may arise in connection with contracts and especially with commercial contracts, concluded between persons subject to the jurisdiction of different States.”

Benefited from the Geneva Protocol, arbitration practice has gradually increased since then, because arbitration clauses are legitimately recognized and protected by the Contracting countries. Nonetheless, arbitration clause is only the basis of the whole arbitration proceeding, because the execution of final arbitral awards rendered by arbitrators is the objective of the whole arbitration system. Some parties would like to obey the decisions and perform them voluntarily, while in some other cases, respondents would not carry out such arbitral awards as soon as possible. Then applicants who have prevailed in the arbitral awards are not able to be immediately reimbursed. It is an obvious defect that recognition and enforcement of foreign arbitral awards is not permitted under the Geneva Protocol, which has just obligated the authority of the country where the arbitral award is made, to execute them domestically.

Considering the gradually increased arbitration practices and the necessity to execute arbitral awards extraterritorially, other convention for promoting execution of foreign arbitral awards was urgently needed. Four years after the Geneva Protocol, another international arbitration convention was signed in Geneva on 26 September 1927, called the Convention on the Execution of Foreign Arbitral Awards, entry into force on 25 July 1929 (hereinafter the Geneva Convention). This was the milestone in the history of recognition and enforcement of foreign arbitral awards. The Geneva Convention was a great progress in the international commercial arbitration field, which formed the crucial attraction of arbitration system, comparing to national court procedure and judgments. For the first time foreign arbitral award could be compulsory recognized and enforced in the contracting states pursuant to the principal of pacta sunt servanda. Nonetheless, the authorized conditions for recognition and enforcement of foreign arbitral awards were still strict and limited. Moreover, other problems were criticized by some commentators, such as the “double exequatur”

25 The Geneva Protocol on Arbitration Clauses was promulgated by the fourth assembly of the League of Nations on September 24, 1923. The depositary of this convention is at Secretary-General of the United Nations.
requirement under the relevant provision.28

On one hand, international commercial arbitration system gained rapid progress in the following decades, by virtue of the guidance of two Geneva international arbitration treaties. As the Professor Gary B. Born argues,

“The Geneva Protocol and Convention did not merely make international arbitration agreements and awards as enforceable as their domestic counterparts. Rather, these instruments made international arbitration agreements and awards more enforceable than domestic ones, establishing pro-arbitration standards that did not then exist in many domestic legal systems, for the specific purpose of promoting international trade and investment.”29

On the other hand, with fast development of global commercial activities, new mechanism was expected for promoting international commercial arbitration, as some of those limitations under the two Geneva Conventions no longer fitting the largely changed situations. Then a draft Convention on recognition and enforcement of foreign arbitral awards was firstly prepared by the International Chamber of Commerce in 1953, which was the basic script for discussion in June 1958 at New York, and formed the final version of the United National Convention on Recognition and Enforcement of Foreign Arbitral Awards on 10 June, 1958, abbreviated as the New York Convention.30 Fifty-five years later, the New York Convention had been widely accepted, which had 149 contracting states31 and formed the mechanism for contemporary recognition and enforcement of international commercial arbitral awards. It is obvious that the numerated reasons for refusal of recognition and enforcement of foreign arbitral awards had been decreased under the provisions of the New York Convention, comparing to its predecessors of the two Geneva treaties.

According to the guidance of unified provisions on rejecting foreign arbitral awards of the New York Convention, some regional commercial arbitration conventions had been promulgated since then. Two of those most influential and important regional conventions were the European Convention on International Commercial Arbitration, signed on 21 April 1961 at Geneva (the European Convention in the following)32, and the Inter-American Convention on International

28 For instance, one commentator indicates, “The Convention (Geneva Convention), open for ratification by states which had signed the Protocol, was ratified by even fewer states than the Protocol, and suffered from the disability that an award rendered in a Convention state was required to be recognized in another Convention state only if it had first been judicially recognized whether it had been rendered. This requirement of ‘double exequatur’ greatly limited its utility”, W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, Texas International Law Journal, Vol.30:1, 1995, p.9.
29 See supra note 1, Gary B. Born, P.92.
30 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed on 10 June 1958 at New York and entered into force on 7 June 1959 according to article XII of it.
32 European Convention on International Commercial Arbitration was prepared and open for signature on 21 April 1961 by the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration, which was convened in accordance with resolution 7 (XV) of the Economic Commission for Europe, adopted on 5 May 1960. The Special Meeting was held at the European Office of the United Nations in Geneva from 10 to 21 April 1961. Thus this convention was also called 1961 Geneva Convention.
Commercial Arbitration, signed on 30 January 1975 at Panama, which was referred as Panama Convention.  

The two outstanding regional arbitration conventions were generally based on the framework of the New York Convention, while introduced some small alternations, which had further decreased some barriers to recognition and enforcement of foreign arbitral awards. Both conventions concentrate on promoting smoothly practice of commercial arbitrations in those related countries and regions. A detailed comparison and discussion on the more-liberal provisions of the two influential regional conventions for reducing barriers to international commercial arbitral awards will be organized below.

1.2 Limited Possibility of Recognition and Enforcement of Cross Border Commercial Arbitral Awards under the Geneva Treaties

1.2.1 Non-Execution of Foreign Arbitral Award under the 1923 Geneva Protocol

Retrospect the history of arbitration system, cross border recognition and enforcement of commercial arbitral awards were not as easy as expected. Before the early 20th century, there wasn’t any international arbitration convention for recognition and enforcement of arbitration agreement and arbitral award. Simultaneously, there wasn’t any multilateral convention for enforcement of foreign judgment. Nonetheless, arbitration had been a very important dispute resolution for commercial disputes, because cross boarder arbitral award was easier to be enforced than court judgment, even lacking any conventions or legislation. For instance, arbitral awards could be voluntarily enforced, or recognized and enforced by moral compulsion or pressure of guild penalties, etc. Just as one professor analyzes, “Although there are other alternatives to litigation, such as negotiation and mediation, arbitration is the only alternative that can be binding on the parties. Therefore, it can achieve the same result as litigation—a binding award.”

“Regardless of what laws govern, the critical issue in an international arbitration is whether the award can be easily enforced. Without the guarantee of enforceability, the arbitration becomes meaningless, a mere prelude to frustrating litigation.”

It has already been widely accepted nowadays that arbitral award shall be final...
and binding, and be enforced among different nations. However, it had endured a long period when not being legally protected, until the two Geneva treaties were made in the early past century.

Attempting to achieve the worldwide acceptance of arbitration agreement as a legitimate dispute resolution among countries, the first step was to ensure the recognition of arbitration agreements or arbitral clauses. Under the auspice of the League of Nations, the Geneva Protocol was signed at Geneva on the fourth Assembly of the League of Nations in 1923, which was the first international arbitration treaty in international community. It attracted more than 40 contracting states, which was one of the most influential arbitration treaties in the early 20th century and recognized as the cornerstone of contemporary international arbitration system. It ensured the validity of arbitration clauses, and recognized arbitration as a legitimated dispute resolution among various contracting states.

According to Article 1 of the Geneva Protocol, contracting states shall obey the obligation to ensure the validity of arbitration agreement for resolving existed or future disputes between parties, who are subject to the jurisdiction of different contracting states of the Protocol. This article also contains the arbitrability issue, requiring that differences connecting to commercial matters or any other matters, which are resolvable by arbitration. Specific contents on what matters can be settled by arbitration has been left to the interpretation of different domestic competent authorities. Further, considering the promotion of internationally recognition of arbitration, the place of arbitration is not limited to those contracting states of the Protocol. Disputed parties may choose a third country to organize their arbitral proceeding, no matter whether such country has jurisdiction over one of them or not.

Since the very beginning of negotiating the Geneva Protocol, the predecessors had realized only ensuring the validity of arbitration agreements was not enough, even meaningless. As arbitration agreement is only the beginning of the whole arbitration procedure, like national courts, the arbitral tribunal will try the merits of the differences, and finally render the arbitral awards. Without any legal supports, it is difficult to ensure such arbitral awards being recognized and enforced simultaneously among other member States thereafter, because arbitration culture in those nations are different from each other. However, considering that smooth enforcement of foreign arbitral awards is the core value of arbitration system, the Geneva Protocol provides a

37 See supra note 26, Protocol on Arbitration Clauses, note by the Secretary-General, League of Nations, Official Journal, January 1924, pp.235-238.
39 See supra note 25, Article 1, “each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.”
40 Id. paragraph 2 of Article 1 allows each Contracting State to make “commercial reservation”, indicating that each Contracting State reserves the right to limit the obligation mentioned in paragraph 1 of the Protocol to contracts which are considered as commercial under its national law. No further interpretations had made for “matter capable of settlement by arbitration”, such interpretation should be done by each member States.
separate article on the execution of arbitral award, requiring that it should at least be executed by authorities of the country where the award is made.

Article 3 provides, “Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.” It is obvious that international arbitral clauses would be recognized as valid separately in each Contracting State, which formed the foundation of legitimate arbitration mechanism. This is a very important step for further research and practice of international commercial arbitration. Since then, the close relationship between arbitration clauses and the arbitral awards has been emphasized simultaneously. It has also affected subsequent international and regional arbitration conventions, which emphasize the importance of valid arbitration agreement and its impact on recognition and enforcement of arbitral awards.

In retrospect, contemporary arbitration regulations had not yet been established, and arbitration system had not been widely accepted as an efficient dispute resolution. Under the Protocol, some critical principles for contemporary arbitration system were formed, for instance, party-autonomy, arbitration excluding court proceeding and finality of arbitral awards. All of those basic principles have been reformed gradually during the following decades, and continue to be crucial for modern international commercial arbitration system.

On one hand, it is commendable that the Geneva Protocol has acted as the milestone in international commercial arbitration system in the 20th century; on the other hand, it still leaves many critical arguable issues. As one professor argues, “Most significantly, the Geneva Protocol did little to impose guarantees of enforcement once an award was decided.”

Another commentator states, “Ratifying nations needed only to enforce awards rendered in their own jurisdiction. This limitation defeated the fundamental purpose

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41 See supra note 25, Article 3.
42 For example, Article 1(a), paragraph 2 of the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 has regulated “That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto”. Article 2 (c) provides “That the award does not deal with the differences contemplated by or that is contains decisions on matters beyond the scope of the submission to arbitration.” Besides, Article V(1) (a) and (e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards also provide almost the same contents. Under Article IX 1 (a) and (c) of the European Convention on International Commercial Arbitration 1961, the analogy contents of Article V(1) (a) and (e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was provided. Also Article 5 of the Inter-American convention on International Commercial Arbitration 1975 contents similar provisions of the previous conventions.
43 See supra note 25, the first paragraph of Article 2 indicates, “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”
44 See supra note 25, the first paragraph of Article 4 states, “The tribunals of the Contracting Parties on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.”
45 See supra note 41, arbitral awards shall be recognized and enforced where they were rendered indicates that such arbitral awards should be final and resembled as court judgments.
of the international nature of the Geneva Protocol: to enforce arbitration awards across international borders.”

In order to promote recognizing and enforcing foreign arbitral awards among other territories, more efforts have been devoted to in the following few decades. Recognition and enforcement of foreign arbitral awards have been achieved when the previous strict and limited conditions for execution of foreign arbitral awards were gradually replaced thereafter.

1.2.2 Restricted Execution of Foreign Arbitral Award under the 1927 Geneva Convention

As discussed previously, the Geneva Protocol forms the first significant cornerstone of contemporary international commercial arbitration system, but still leaves some controversial problems which deserve further research and improvement. Particularly, achieving the mutual recognition and enforcement of foreign arbitral awards among different contracting states is necessary for forming true international commercial arbitration system. As one commentator argues, “Although the Protocol helped ensure respect of agreements to arbitrate, it did not ensure that resulting arbitral awards would be enforceable. Consequently, a complementary treaty was required: the Geneva Convention on the Execution of Foreign Arbitral Awards.”

Under such situation, the Geneva Convention was drafted and signed under the auspice of the League of Nations in 1927, with the purpose of supplementing the Geneva Protocol. If confirming that the Geneva Protocol is the first step for contemporary international commercial arbitration, then the Geneva Convention is the second, for the gradually establishment of international commercial arbitration system. Just as one commentary indicates, “The Convention (Geneva Convention) renders arbitral awards enforceable under certain conditions within the countries of the signatory powers.”

However, recognition and enforcement of foreign arbitral awards was still not easy even the Geneva Convention had been promulgated among the contracting states. There are numerous limitations under its provisions. Firstly, an arbitral award shall be made according to an arbitration agreement or arbitral clause which was covered by the Geneva Protocol, otherwise, such arbitral award shall not be recognized, let alone to be enforced. It thus limits the sphere of valid arbitration agreements and further affects the enforceability of foreign arbitral awards. Sometimes it is

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49 See supra note 27. On the assembly, delegates of various Contracting States had negotiated and recognized harmoniously that “Having resolved to conclude a convention with the object of supplementing the said protocol.” 27 Am. J. Int’l’L. Sup 1 1933.
51 See supra note 27, Article 1, paragraph 1.
understandable because the Geneva Convention was the first try on permitting recognition and enforcement of arbitration awards exterritorialy. Secondly, other limitations have caused obstacles to enforcement of foreign arbitral award, including, but not limited to, the jurisdiction requirements and the “double exequatur” condition.

Jurisdiction requirements of foreign arbitral awards are provided under the latter half of paragraph 1, Article 1 of the Geneva Convention. For final execution of an arbitral award, jurisdiction requirements shall be fulfilled in two aspects, the first one is that the place of arbitral award shall be located in one of the contracting states, providing “the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies.”

It is obvious indicated that the arbitration process shall be organized only in those countries where the Geneva Convention had been ratified.

Further, Article 1, paragraph 1 of the Geneva Convention has provided different conditions for recognition or execution of a foreign arbitral awards. For recognition conditions, any award which is made in pursuance of an arbitration agreement covered by the Geneva Protocol shall be recognized as binding. Comparing, Article 1, paragraph 1 of the Geneva Protocol takes an open and liberal attitude towards the place of arbitration, providing “whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.” As the Contracting Countries of the Geneva Protocol are limited and almost concentrated in Europe, it is probably that the place of arbitration may be stated in a country where the Geneva Protocol was not ratified. But such arbitral awards rendered there shall be treated as binding according to the above provision.

On the second aspect, even such arbitral awards can be recognized as binding, they might not be enforced, because the jurisdiction requirement for such kind of arbitral awards under paragraph 1, Article 1 of the Geneva Convention is clearly provided, demanding that such arbitral awards shall be made in a territory of one of its High contracting states. Thus, the stricter condition for enforcement of foreign arbitral awards adds more barriers to smoothly enforcement of them.

Further, one more jurisdiction limitation is provided for the disputed parties, indicating that “(the said award) between persons who are subject to the jurisdiction of one of the High Contracting Parties.” Referring to the contracting states list of the Geneva Convention, except Japan, India, Thailand, New Zealand and few other countries, most of the member States are European countries. Therefore, the sphere where such foreign arbitral awards can be enforced is restricted. Just as one commentator indicates, “No country of the Western Hemisphere was a party, the same as to the Geneva Convention of 1923 on Arbitration Clauses.”

52 Id.
53 See supra note 25, Article 1.
54 See supra note 27, Article 1, paragraph 1.
conditions under this Geneva Convention have relatively reduced the number of foreign arbitral awards which could be recognized and enforced outside their original country.

Another controversial barrier to enforcement of foreign arbitral award is the "double exequatur" requirement. Article 1 (d) of the Geneva Convention requires that arbitral awards firstly shall be recognized as final in the original country. This condition was said to be the first exequatur. Then another exequatur is authorized by the country where the said arbitral award is relied upon. Those requirements which derive from the execution country, include the arbitrability issue, public policy or principle of law issue, revocation of arbitral award, violation of due process, and arbitral awards not based on the submissions to arbitration, etc. As one commentator criticizes, “This requirement of ‘double exequatur’ greatly limited its (the Geneva Convention) utility”.

It deserves no doubt that the Geneva Convention has made further promotion on the development of contemporary international commercial arbitration system on the basis of the Geneva Protocol, especially ensures recognition and enforcement of foreign arbitral awards among certain Contracting Countries. Under the mechanism of both Geneva treaties, international commercial arbitration clauses and foreign arbitral awards have first time been legitimately protect by international conventions globally. Their contributions and influences for forming international commercial arbitration system shall not be denied in the following decades. Particularly, when negotiating the New York Convention three decades later, the two Geneva treaties were its predecessors, which have further improved contemporary international commercial arbitration system.

Notwithstanding, except those controversial problems discussed above, there are some other obstacles to recognition and enforcement of both international commercial arbitration agreement and arbitral award under the two Geneva Conventions. At that time, the international commercial arbitration culture was still not perfectly formed, and the possibility of executing cross border commercial arbitration clauses and arbitral awards was still not very high. Decreasing those barriers to foreign arbitration agreement and arbitral awards is necessary and critical to the further growth of international commercial arbitration culture and the system itself, in order to keep the

57 See supra note 27, Article 1 (d), “That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.”

58 For example, Article 1 (e) of the Geneva Convention indicates that recognition and enforcement of an arbitral award should not contrary to the public policy or the principles of the law of the country in which it is sought to be relied upon. Article 2 and Article 3 also listed numerous reasons for potentially refusal of recognition and enforcement of foreign arbitration under this Convention. Of which article 3 gave much freedom to parties against whom those arbitral awards should be enforced, providing “ If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.” See supra note 27, Article 1, 2 and 3.

59 See supra note 48, p.9.
vitality of such effective alternative dispute resolution for resolving transnational commercial disputes.

1.3 Maximal Common Grounds for Refusal of International Commercial Arbitral Awards under the New York Convention

Benefited from the two Geneva treaties, international commercial arbitration had gained further progress in the following decades. Nonetheless, as discussed previously, recognition and enforcement of foreign arbitration are still not as easy as expected, owing to numerous limitations and restrictions under the recognition and enforcement mechanism of both Geneva Protocol and Geneva Convention. In order to achieve further development of international commercial arbitration, all of those existed obstacles shall be eliminated. Under such background, the International Chamber of Commerce (ICC) took the initiative in 1953 to draft a Convention on the recognition and enforcement of truly international arbitral awards. After that, the conference for negotiating the New York Convention was carried out during three weeks from 20 May to 10 June 1958. During this conference, a draft version was provided by Professor Pieter Sanders, which was called as the “Dutch Proposal” being the basis for discussion.

The main intention of the “Dutch Proposal” are two, the first one is to eliminate the double exequatur condition; another one is to restrict the grounds for refusal of recognition and enforcement as much as possible, and switch the burden of proof to the party against whom the enforcement is sought. Both intentions are reflected in Article V, the heart of the Convention. At last, the New York Convention had been signed by the negotiators representing their country after impetuosity discussions on June 10 1958.

When recalling the contributions of the New York Convention, it is always appreciated as the most successful legislation for international commerce during the past 55 years in Private International Law, which was greatly promoted the

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60 “The (Geneva) Convention provides that in addition to conforming to national rules of procedure, the award to secure enforcement must also comply with six requirements… The Convention also provides that enforcement of an award shall be refused by the Court of any Contracting State if the Court is satisfied (a) the award has been annulled in the country in which it was made; (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present this case or was under some legal incapacity and was not properly represented or (c) the award does not deal with all the differences referred to arbitration or contains decisions on matters beyond the scope of the agreement for arbitration.” See Lynden Macassey, *International Commercial Arbitration—Its Origin, Development and Importance*, 24 A.B.A.J.518 1938.


64 See Michael Mustill, *Arbitration: History and Background*, 6 Journal of International Arbitration 43, 1989. (Indicating, it is often said that the United Nations Convention on the Recognition and Enforcement of Foreign
international trade, investment and other commercial activities. The most meaningful
coloration of the New York Convention is its core provision of Article V which
unifies conditions for rejecting recognition and enforcement of foreign arbitral awards.
Such restriction has effectively limited the rejections of valid foreign arbitral awards,
because more than three-quarter countries in our planet have adhered to the New York
Convention.65

1.3.1 Unified Common Refusal Grounds in Article V

The president of the United Nations Conference summarizes the advantages of
the New York Convention over prior arbitration treaties, arguing: “It was already
apparent that the document represented an improvement on the Geneva Convention of
1927. It gave a wider definition of the awards to which the Convention applied; it
reduced and simplified the requirements with which the party seeking recognition or
enforcement of an award would have to comply; it placed the burden of proof on the
party against whom recognition and enforcement was invoked.”66

For rejecting recognizing and enforcing of foreign arbitral award, Article V of
the New York Convention authorizes seven conditions to the competent authority of
the country where such arbitral award is relied upon. The seven refusal reasons have
been divided into two categories. The first five reasons listed in Article V(1) shall be
proved by the parties against whom the arbitral awards are invoked. The other
coloration of refusal reasons can be applied ex officio, by the competent authorities of
the country where the arbitral award was relied upon.67 As one jurist comments, “The
overall scheme of the Convention is to facilitate enforcement of arbitral awards.
Nonetheless, it is vitally important that parties, seeking enforcement and non-
enforcement alike, have a clear understanding of the grounds for denial of
recognition.”68

1.3.1.1 Invalid Arbitration Agreements

In Article V (1) (a) of the New York Convention, invalid arbitration agreement
can be an excuse to refuse executing of foreign arbitral awards. It is divided into three
colorations when determining the validity of arbitration agreement. The first one is the
formal validity of arbitration agreement, referring such requirement in Article II of the
New York Convention, requiring that arbitration agreement shall be in writing.69 The

Arbitral Awards is ‘the single most important pillar on which the edifice of international arbitration rests’ and is a
convention which ‘perhaps could lay claim to be the most effective instance of international legislation in the
entire history of commercial law.’

65 See supra note 31, Contracting States of the New York Convention had reached to 149 until July 15, 2013, when
the New York Convention entry into force in Myanmar.
67 See supra note 30, Article V.
68 Ramona Martinez, Recognition and Enforcement of International Arbitral Awards under the United Nations
69 See supra note 30, Article II.
second and third obstacles are concerned with the applicable law issue. Just as one professor argues, “The article V(1) (a) defense distinguishes between the law under which a court could examine the capacity of the parties (‘law applicable to them’) and the law under which a court should examine the validity of the agreement (‘the law to which the parties have subjected the agreement or, failing any indication…, under the law of the country where the award was made’).”

Thus, parties who lack capacity to negotiate the arbitration agreements will cause the denial of valid arbitration agreement. Further, the invalidity of the arbitration agreement will prevent recognition and enforcement of the arbitral award based on it. Finding the law applicable to determine capacity of arbitration parties is not as easy as expected. As one commentator states, “There is no mechanism which prescribes how the law applicable to the parties’ capacity is to be determined. In such a case, the law applicable to capacity then depends on the private international law rules of the enforcement forum.” Hence, the law applicable to determine the capacity of the parties is notoriously unsettled.

Another applicable law issue concerns the conflict of law rule to determine the validity of arbitration agreements. The determination of such applicable law issue has been authorized to the domestic courts of various members States. As the fundamental character of international arbitration, party autonomy is highly reflected. The interested parties are free to decide what laws shall be used to determine the validity of the said arbitration agreements. It is recognized that the validity of arbitration agreement contains two aspects, the formal and substantive validity. Some jurists argue that the laws decided through the conflict of law rule shall be only used to determine the substantive validity of arbitration agreements. Once arbitration agreement has been proved as invalid or void by the relevant party, the final arbitral awards based on the arbitration agreement will not be recognized and enforced according to the previous provision.

1.3.1.2 Violation of Due Process

Article V (1) (b) of the New York Convention is concerned on the violation of
due process, which provides “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.” As the outstanding jurist argues as follows:

“The cases in which enforcement has been refused on the basis of Article V (1) (b) can be divided into various categories. An initial category covers the failure to inform a party about the arbitration; a second category covers the failure to inform a party of what the other party has submitted; a third category covers what can be described as ‘insensitive arbitrators’; a fourth category is composed of cases where an arbitral tribunal puts a party on the wrong track.”

According to this provision, violation of fundamental procedural justice is not permitted. It contraries to the due process requirement of arbitration system, and thus affects the enforceability of arbitral awards. As argued by one professor, who believed that violation of due process could be interpreted as that “It concerns the fundamental principle of procedure, that of a fair hearing and adversary proceedings, also referred to as audi et alteram partem.”

International arbitration procedure, with its private and autonomous nature, is not controlled by general principle of civil procedure laws of sovereignties. Nevertheless, how to maintain the basic procedural justice in international commercial arbitration mechanism is critical for its wider practice and further development. Disputed party who has not got the opportunity to represent his case will argue the violation of the party-autonomy principal of arbitration. Thus arbitral tribunals and the parties shall pay attention to such violation of due process in international commercial arbitration procedures. Again as Professor Albert Jan van den Berg suggests, “It is clear that most of the refusal in the above cases could have been avoided if the arbitral tribunal or the administering arbitral institution had paid closer attention to the procedural conduct of the cases.” Reducing the violation of due process will effectively increase the possibility of recognition and enforcement of international commercial arbitral awards.

1.3.1.3 Exceed the Jurisdiction of the Arbitrators

In international commercial arbitration field, jurisdiction of the arbitrators is not directly authorized by national laws or other regulations, but the parties themselves. One Chinese professors says, “A Valid and, as far as this is feasible, perfect arbitration clause is a primary pre-condition and safeguard for parties to start lawful and effective arbitration proceedings.” Arbitration agreement drafted by the disputed parties shall clearly determine the sphere of their differences which could be tried by the arbitrators trusted and selected.

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75 See supra note 30, Article V(1) (b).
78 See supra note 76.
Otherwise, when an arbitral tribunal deals with differences which are not contemplated by or not fell within the terms of the submission to arbitration, or it renders decisions on matters beyond the scope of the submission to arbitration, the arbitral awards may be challenged recognition and enforcement by the party against whom such procedure is invoked.\(^{80}\) By virtue of the contractual nature of submissions to arbitration, including arbitral clauses or separate arbitration agreements, parties have absolute authority to decide the scope of arbitration. It also resembles the civil litigations in national court, where judges can try differences which are not sued by the parties.

Exceeding jurisdiction of the arbitrators issue is connected with another issue, which is called as the “who decides?” question\(^{81}\). When confused with the scope of arbitration agreements, who shall be authorized the right to decide the jurisdiction issue, the arbitrators or national courts? This is the argument on whether the judicial intervention by national courts is necessary or not, or, whether arbitrators could make a decision according to the doctrine of “competence-competence”. No matter who shall be authorized to decide, the final arbitral awards must comply with the scope of the arbitration agreements, otherwise it will be recognized as invalid.

Another issue contained in Article V (1) (c) of the New York Convention deserves research, which is the separability of arbitral awards. When an arbitral awards is rendered on differences both contained and not contained in the submission to arbitration, and such part of contained can be separated from the part not being submitted, then recognition and enforcement of partial arbitral award can be accomplished. \(^{82}\)

### 1.3.1.4 Invalid Composition of Arbitral Tribunal or Procedure

Basing on the party-autonomy character of arbitration procedure, disputed parties are also free to negotiate the composition of arbitral authority and arbitral procedure.\(^ {83}\) They may choose ad hoc arbitration or institution arbitration, and decide which laws or arbitration rules should be composed into their arbitral trial. As an attorney suggests, “In summary, parties to international contracts have many choices among many different types of arbitration clauses. Again, the issue of the legal culture will often play a decisive role.” \(^{84}\) Due to different legal culture in various States, requirements on composition of arbitral authority are different. \(^{85}\)

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\(^ {80}\) See supra note 30, Article V(1) (c).


\(^ {82}\) See supra note 80, the latter paragraph of this article contains “ 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 enforce.”

\(^ {83}\) See supra note 30, Article V(1) (d).


\(^ {85}\) For example, ad hoc arbitration is not permitted according to the current Arbitration Law of the People’s Republic of China. Even the parties are free to decide the composition of the arbitral authority or arbitral procedure themselves, various domestic arbitration legislations would also regulate arbitration procedure, thus affect the validity of final arbitral awards.
When disputed parties have not clearly agreed with the composition method of their arbitral tribunal or arbitral procedure, *lex loci arbitri* will be used to adjudicate the composition of arbitral authority or arbitral procedure. Article V(1) (d) of the New York Convention provides a conflict of law rule, indicating that except parties have otherwise agreed, arbitral awards will be rejected recognition and enforcement if the composed arbitral authority or selected procedure is not in accordance with the law of the country where the arbitration took place. 86 This requirement is friendlier to recognition and enforcement of foreign arbitral awards, which diminishes the strict conditions under the Geneva Convention. 87 As a professor indicates as follows:

“The International Chamber of Commerce (ICC), upon whose initiative the new convention was drawn up, considered the Geneva Convention’s main defect to be that it provided for the enforcement of only those awards that were strictly in accordance with the procedure law of the country where the arbitration took place. Hence, in 1953, ICC proposed a draft convention for the enforcement of truly international awards—i.e. arbitral awards not governed by a national arbitration law—containing the present text of ground (d). The truly international arbitration was subsequently rejected by the drafters of the New York Convention. ..The drafters nonetheless recognized that enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law. Various solutions to this problem were proposed, but in the end, after long discussions, the ICC text was retained.” 88

Thus, under this sub-provision, correct organizing arbitral authority or arbitral procedure will reduce the refusals of recognition and enforcement of international commercial arbitral awards. The unified and less strict requirement for composition of arbitration tribunals and arbitral procedure under the New York Convention is proper for promoting wider practice of commercial arbitration procedure globally.

1.3.1.5 Non-Finality of Arbitral Awards

The finality of international commercial arbitral awards has been frequently challenged, which has become one of the most controversial barriers to recognition and enforcement of international commercial arbitral awards. It reflects the “*double exequatur*” requirement under the Geneva Convention as discussed above. 89 After the Geneva Convention is signed, critics on the “double exequatur” issue are impetuous and intensive. In order to change such situation, the negotiators make great effort to draft such a provision of the New York Convention. 90 It does not require the “double

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86 See supra note 83.
87 See supra note 27, Article 1 (c) provides, “ That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.”
88 See supra note 76.
89 See supra note 57.
90 As delegate of Netherland of the Conference to draft the New York Convention, Pieter Sanders, who was the most famous arbitration professor, drafted the “Dutch Proposal” and had been recognized as the basis for further discussions. He said that “the main elements of the “Dutch Proposal” were, first of all, the elimination of the
exequatur” condition for smoothly recognition and enforcement of international commercial awards, because Article V (1) (e) of the New York Convention regulates that “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, the award was made.”

According to Article V (1) (e), the explicit binding requirement of arbitral award in the country where it is made has been deleted. It only requires the party against whom the enforcement is invoked to prove, making the competent court or other authority of the country where such award applied to be recognized and enforcement believes that such arbitral award is still pending between the disputed parties, including, but not limited to, being able to make some recourse to national courts. Another rejection reason is more important, for the arbitral award has been set aside or annulled by the competent authorities of the country where such award is made. This reason for refusal is understandable, because if an award has already been vacated in their original country, it means that such award is not legitimately existed. Thus, the competent authority of the country where the said award is relied upon can be authorized to refuse recognition and enforcement of it.

1.3.1.6 Disputes Lacking Arbitrability

Except the above five reasons to reject recognizing and enforcing of international commercial arbitral awards, which have turned the burden of proof to the parties against whom the arbitral awards being invoked, there are two other refusal grounds. They can be directly raised by competent authorities of those countries where recognition and enforcement is sought. The first one regulates that disputes lack arbitrability, providing “the subject matter of the difference is not capable of settlement by arbitration under the law of that country.” Specifically, even one arbitral award has been rendered by arbitrators abroad, if the subject matter of the

double exequatur, one in the country where the award was made and another one in the country of the enforcement of the award. Under the Geneva Convention we always requested both. It is logical to require an exequatur only in the country where enforcement of the award is sought and not in the country where the award is made but no enforcement is sought. I remember that the disappearance of the double exequatur was so warmly welcome during the Conference that the suggestion was made to create a new cocktail: the ‘double exequatur’”. See supra note 61.

91 See supra note 30, Article V(1) (e).
92 For example, “some guild arbitration allows the ‘two level or two-tier arbitration’ and divides the arbitration procedure to the first tier arbitration and the second tier arbitration (appeal). For example, the GAFTA (the Grain and Feed Trade Association) and FOSFA (the Federation of Oils, Seeds and Fats Associations) had taken the two-tier arbitration mechanism. If the parties were not satisfied by the first trial, then they could appeal to the second tier and got an appellate trial.” Xiangquan QI, Study on the Recognition and Enforcement of Foreign Arbitral Awards, Law Press, China 2010, p.387.

Other types of recourse to national courts includes permitting parties to appeal to national court if they were not satisfied by the trial of the arbitrator, for example, Article 1489 of Code of Civil Procedure of France indicates “an arbitral award shall not be subject to appeal, unless otherwise agreed by the parties.” So if the parties had agreed, they may made an appeal of the arbitral award; Article 69 of the England Arbitration Act 1996 regulates that “(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on an question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.”

93 See supra note 30, Article V(2) (a).
award cannot be settled by arbitration in the country where enforcement is applied, then even no application raised by the disputed parties, the national courts or other competent authorities can act *ex officio* to decide whether such an arbitral award is able to be recognized and enforced in their territory or not.

The arbitrability requirement under the New York Convention is almost the same as that of the Geneva Convention. However, defining the term of arbitrability is also difficult under the New York Convention. According to the conflict of law rule, it has authorized the explanation of this term through specific regulations of each country. So interpretations may be various among countries and changed from time to time. Regulations on arbitrability issue are different from each other, which have greatly affected the validity of arbitration agreement, further the effectiveness of arbitral award. On this point, this provision of the New York Convention is not so favorable than its predecessors of the two Geneva treaties.

### 1.3.1.7 Contradiction of Public Policy

Another refusal ground which can be invoked *ex officio* by domestic competent authorities is the violation of the public policy issue in international commercial arbitration system. It is appreciated that under the New York Convention, interpretations and practices on public policy theory have been greatly limited by some contracting states. As one professor provides, “The unifying effect to the New

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94 See supra note 27, Article (1) (b) of the Geneva Convention contents” that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon.” It was drafted from the positive way that such a condition should be met and then recognition and enforcement of the said arbitral award could be realized. While the language of the New York Convention had regulated form the negative perspective. *Id.*

95 For example, in the United States of America, “In MITSUBISHI case (the first Circuit Court of Appeal decided the cases on December 20, 1983), the First Circuit Court ruled that private antitrust issues were precluded from arbitration under both domestic law and the New York Convention. The Court noted that strong policy favoring arbitration but concluded that a judicially created rule excepting antitrust claims preempted it. This prevailing judicial policy had previously applied only to domestic contracts involving U.S. citizens. Its extension to international disputes seems to indicate a significant shift in the court’s position on the nonarbitrable subject matter defense and could be indicative of the priority the court will accord to their own national interests.” See Kristin L. Palmer, *Mitsubishi: The Erosion of the New York Convention and International Arbitration*, Wis. Int’l L.J. 151 1984.

96 For instance, as a professors note, under 1994 Arbitration Law of China, it stipulates in Article 3(1), the following disputes may not be arbitrated: (a) Marital, adoption, guardianship, support and succession disputes; (b) Administrative disputes that shall be handled by administrative organs as prescribed by law. Also in Article 17 (1), the above law provides that an arbitration agreement is void if the matter for arbitration exceeds the range of arbitral matters as specific by law. See Denghua Hou, *Arbitrability in China—Towards Modernization and Internationalization*, 3 US-China Law Review 45 2006. However, under the Arbitration Law of Japan, the listed specific categories of disputes non-arbitrable is different from that of China in Article 13(1) and Article 44 (1) (vii) give abstract interpretation of arbitrability. According to Article 13 (1), “Unless otherwise provided by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation). Article 44 (1) (vii) is about the reason for setting aside arbitral award, indicating “the claims in the arbitral proceedings relate to a dispute that cannot constitute the subject of an arbitration agreement under the laws of Japan. Under this situation, the judges have widely discretionary power to determine which case should be arbitrable while others are non-arbitrable. See Arbitration Law of Japan, Law No.138 of 2003.

97 See supra note 30, Article V(2) (b).
York Convention has led to a considerable approximation of domestic laws in the field of recognition and enforcement of arbitral awards. This is particularly true for the development of a restrictive notion of *ordre public international* which constitutes a cornerstone in the catalogues for both the setting aside of awards and the refusal of recognition and enforcement. The development of a uniform understanding of the notion of *ordre public* plays a major role in the evolution of arbitral case law that takes account of the specificity of international economic arbitration.98

Comparing to the Geneva Convention, the content of public policy under the New York Convention has been restricted. Under the former, violation of both public policy or the principles of the law of the enforcement country constitutes the refusal reason.99 In legal practice, interpretation of public policy is not as easy as expected National courts of different countries provide numerous explanations on this controversial issue. In recent years, limiting the exercise of public policy rejection as few as possible has been the generally accepted by those countries where arbitration is extensively practiced, including some developing countries, such as India, China and some Southeast Asian Countries.100

1.3.2 Controversial Interpretations of the Core Provisions

The New York Convention has made outstanding contributions to the uniformity of refusal reasons for cross border recognition and enforcement of arbitral awards. However, its provisions are abstract and concise, and its negotiation background has been largely changed since then. According to academic research and arbitration practices in various jurisdictions, there are some controversial interpretations on the core provisions of the Convention. Academic researchers and international commercial arbitration practitioners have discussed the contradiction between the out of date provisions of different international arbitration conventions and the practical needs in international commercial arbitration practices. The most critical issues are concentrated on the interpretation of Article II, V and VII(1) of the Convention, specifically referring to the unified formal validity condition of international commercial arbitration agreement, the general nature of Article V and the said “more-favorable-right” provision of Article VII(1). Further, how will those controversial interpretations affect the recognition and enforcement of the final arbitral awards should be more researched, trying to unify different interpretations on those critical regulations of the New York Convention.

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99 See supra note 27, Article 1 (e) requires “that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.
100 “According to the statistic from the Supreme People’s Court Judges, since 2000, there was only one foreign arbitral award which had been refused recognition and enforcement due to violation of public policy problem. In legal practice, the People’s courts are very cautious to use the public policy ground for refusal of international commercial arbitral awards in China.” LIU Guixiang, SHEN Hongyu, *Overview of the Judicial Practice on Recognition and Enforcement of Foreign Arbitral Awards in our Country*, Beijing Arbitration No.79, 2012; “The Supreme Court of India conclude that the public policy exception should be construed narrowly; it is only satisfied when the award violated (i) the fundamental policy of India law; (ii) the interest of India; (iii) the justice of morality.” See Moin Ghani, *Court Assistance, Interim Measures, and Public Policy: India’s Perspective on International Commercial Arbitration*, 2 Arb. Brief ii 2012.
1.3.2.1 Nationality of Arbitral Awards in Article I (1)

How to define the term of “non-domestic” arbitral awards under article I (1) of the New York convention is a difficult work. It is clearly required that the Convention shall also be applied to arbitral award which is not considered as domestic awards, by the State where its recognition and enforcement is sought.\textsuperscript{101} Actually this provision is a compromise between the Civil Law countries and the Common Law countries when the New York Convention is negotiated.\textsuperscript{102} In judicial practice, some court decisions on interpreting the New York Convention are reported in the Yearbook Commercial Arbitration, in which there are some few cases reported on the non-domestic arbitral awards issue.\textsuperscript{103} Because different legal traditions on interpreting the non-domestic awards exist, such an issue is still controversial nowadays.

The criterion of the New York Convention for identifying the foreign nature of an award is not connected with the nationality of the disputed parties, but only with the place where the arbitral awards are made. However, except the mainstream, the Convention also contains another type of arbitral award, which is rendered in the State requested to recognize and enforce, but not considered as domestic arbitral award there. Accordingly, such kind of arbitral awards shall also be recognized and enforced as foreign arbitral awards, because arbitration procedures are governed by different procedural laws, or satisfied other exception elements.\textsuperscript{104} Further, this criterion is also emphasized by Article V(e) of the New York Convention, which provides that “the award ..., or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made ”.\textsuperscript{105} Professor Albert Jan van den Berg stresses that a study of the awards rendered in the various contracting states on the application of the New York Convention shows that the second criterion is very rarely invoked\textsuperscript{106}. Nevertheless, it is submitted that from a systematic point of

\textsuperscript{101} See supra note 30, Article I (1).
\textsuperscript{102} As commentator indicates, “However, during the deliberations on the New York Convention, the delegates from certain countries opposed to such criterion, arguing that in order to ascertain whether the award is domestic or foreign, other factors should be taken into account as well—factors such as nationality of the parties, subject matters of the dispute and lex arbitri. These countries sought to exclude from the Convention’s enforcement regime award which, even if rendered abroad, were e.g., made pursuant to procedure law of a state where the award is sought to be relied upon. On the other hand, other countries considered that any criterion other than territorial would be too vague—for example, common law countries argued that such notions would not be understood.” See Edin Karakas, \textit{Origin of Arbitral Awards and Its Impact on Applicable Enforcement Regime}, 11Croat. Arbit. Yearb.15.
\textsuperscript{103} For example, in volume XXXVII 2012 of the Yearbook Commercial Arbitration, there are two cases reported related to the non-domestic issue, one is from India and the other is from US court. See Albert Jan van den Berg, \textit{Yearbook Commercial Arbitration}, Wolters Kluwer, p.147, 2012. There were also few cases concerned on the non-domestic issue under the Yearbook each year before 2012.
\textsuperscript{104} When talking about the arbitral award considered as “non-domestic”, the most famous professor had argued,” Concept: parties may agree on an arbitration law that is different from the arbitration law of the place of arbitration; why this concept? Only law professors can give you the answer as it is a purely academic invention; it is almost never used in practice; in the large majority of cases the arbitration law of the place of arbitration applies.” See Albert Jan van den Berg, \textit{The Application of the New York Convention by the Courts}, General editor Albert Jan van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, Kluwer Law International, 1999, p.20.
\textsuperscript{105} See supra note 30, Article V(1) (e).
\textsuperscript{106} See supra note 104.
view, its importance shall not be denied because of its non-active practice.

Another professor explains, “in such systems awards classified as international (merely based on the subjective or objective criterion) are treated as domestic, they belong to the subtype ‘domestic international awards’ and are regulated by domestic law, in some respects differently from wholly domestic awards. Aside from domestic and foreign awards, can there be a third separate category of international awards? and if there are some differences between the concepts of international awards and foreign awards? In addition, will these differences affect the recognition and enforcement in different countries? As discussed earlier it is suggested that the response is positive. However for the purposes of the Convention, international awards, in which internationality is based on non-application of domestic procedural law, are to be equated to foreign awards.”

Different interpretations by various competent authorities have caused many controversies in arbitration practices and already been one of the barriers to recognition and enforcement of international commercial arbitral awards. More practical arguments on “non-domestic” arbitral award will be discussed in other part below.

1.3.2.2 Formality Requirement of Arbitration Agreement in Article II

Arbitration agreement shall be in writing under Article II of the New York Convention. As one professor argues, “the reason for imposing this requirement is self-evident. A valid agreement to arbitrate excludes the jurisdiction of the national court and means that any dispute between the parties must be resolved by a private method of dispute resolution, namely arbitration. This is a serious step to take, albeit one that is becoming increasingly commonplace. There exist good reasons, therefore, for ensuring that the existence of such an agreement should be clearly established. This is best done by producing evidence in writing.” Article II (2) interprets the term of “agreement in writing” as including an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Great changes have taken place during the past fifty-five years’ practice under the New York Convention, together with the development of globalization and transnational commercial activities. Notwithstanding the uniform requirement listed in the New York Convention, some countries take more liberal explanations on written requirement of arbitration agreement, including, but not limited to, amplifying the sphere of the arbitration agreement in writing. However, whether various domestic arbitration laws are authorized to change the general provision of the New York Convention.
York Convention or not is becoming controversial. On the other hand, the New York Convention has passed more than 55 years, and the background of negotiating the Convention has been greatly changed since then. Thus the provision of the New York Convention on the written requirement may be out of date nowadays.

In order to avoid the refusal of recognition and enforcement of international commercial arbitral awards in those contracting states for various interpretations on the term of “agreement in writing”, the UNCITRAL has made a recommendation regarding the interpretation of article II paragraph 2 and article VII, paragraph 1 of the New York Convention, suggesting “1. Recommends that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive; 2. Recommends also that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, should be applied to allow any interested party to avail itself of right it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”

How does the formal validity condition of arbitration agreement cause barrier to recognition and enforcement of arbitral awards will be compared and discussed in details in the following chapter.

1.3.2.3 General Nature of Article V: Permissibility or Exclusivity

Just as its critical position in the whole Convention, interpretations of the general nature of Article V of the New York Convention become controversial, because of its vague expression in Article V (1), providing that “recognition and enforcement of the award may be refused, …only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that…”

How to explain the phrase “may be refused…only if” has been divided into two categories, which are closely connected with the general nature of article V of the Convention to be permissible or exclusive when recognition and enforcement of international commercial arbitral awards are required in national courts.

Professor Gary B. Born argues, “it is clear that the exceptions enumerated in Article V of the New York Convention are the exclusive grounds for denying recognition of a foreign arbitral award under the Convention. Article V provides that ‘recognition and enforcement of the award may be refused…only if’ one of specified exceptions applies. That language plainly treats the exceptions set forth in Article V of the Convention as the exclusive grounds for non-recognition. Thus, both national courts and commentary have uniformly arrived at this result.” Another professor summarizes that “United States courts recognize article V of the New York Convention as the exclusive source of their authority to deny enforcement of a foreign

112 See supra note 30, Article V (1).
113 See supra note 1, Gary B. Born, pp.2721-2722.
arbitral award. This recognition is consistent with the Convention’s implementing legislation, which states that “a court shall confirm the award unless it finds one of the grounds specified in the said Convention.”

However, there are different arguments and legal practices. For example, in legal practice, there are some cases concerned on the residual discretion on recognition and enforcement of international commercial awards. In Supreme Court in Queensland, Australia, believes that the grounds for refusal of enforcement listed in Article V left it with discretion to refuse enforcement on other grounds. One professor criticizes that “in reaching its decision, the Supreme Court failed to take into account the principle that the grounds for refusal of enforcement listed in the Convention are exhaustive. The court’s view seems to have deficient in this respect.”

Another question is whether an arbitral award which has already been set aside in a foreign country is able to be enforced by the national court where the said award is relied upon or not. As one professor summarizes the American legal practice, “A trilogy of cases decided in U.S. federal courts has addressed this issue. The rulings have unfortunately been inconsistent. In *in re Chromalloy Aeroservices*, the District Court for the District of Columbia enforced an arbitral award rendered in Egypt, although the Egyptian courts had annulled the award. The Chromalloy decision followed Article VII, emphasizing that Article V grounds for refusing recognition and enforcement are merely permissive. In *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, the Second Circuit reached a contrary result, refusing to enforce an arbitral award that the Nigerian courts had set aside. Following Baker Marine, the Southern District of New York in *Spier v. Calzaturificio Tecnica, S.P.A.* similarly declined to enforce an arbitral award overturned in the Italian courts. Because Chromalloy recognized the interrelationship between Articles V(1) (e) and VII in the New York Convention, it was the most nearly correct of the three decisions.”

Excepting discussion on the general nature of Article V, these cases are also connected with the question discussed in the next section, which explained the relationship between Article V and Article VII of the New York Convention.

1.3.2.4 More Favorable Right Provision of Article VII (1)

It has been widely researched on the relationship between Article VII (1) and other provisions of the New York Convention, which is a controversial problem under the Convention mechanism. According to Article VII (1), it provides that “it shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforceability of arbitral awards entered into by the contracting states; nor deprive

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116 See supra note 76.

any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”  

It means that the Convention does not automatically replace all the other multilateral and bilateral conventions. In case of conflicting with other conventions, Albert Jan van den Berg argues that the old principles “lex posterior derogate prior” and “lex specialis derogate generali”, as well as the more recent principle of “maximum efficacy” shall be applied. Accordingly, the New York Convention will not necessarily be prevailing, thus the validity of the arbitration agreement will be affirmed maximally.

On the latter part of this article, it intends to maximize the recognition and enforcement of arbitral awards, and get rid of the double exequatur under the Geneva Convention. However, different countries have taken various interpretations on this issue. For instance, domestic arbitration laws contain less strict requirements on the formal validity of arbitration agreements, or prefer to recognize and enforce foreign arbitral awards even which have already been set aside in their original country, etc. When discussing the international interplay between Article VII (1) and other articles, such as Article II (2) of the New York Convention, one professor compares and states, “although U.S. courts very seldom invoke article VII (1) of the New York Convention, that provision is central to many states’ approach to the form requirements under the New York Convention.”

Another professor analyzes one German case, indicating that “the court therefore concluded that international law suggests a broad interpretation of the national treatment principle, and that Article VII of the New York Convention permits reliance on more favorable national law. This decision affirms that a foreign arbitral award based on an arbitration agreement contained in a confirmation letter between merchants is enforceable in Germany, even where the form requirements of Article II of the New York Convention are not met. This decision underlines the general pro-enforcement stance of German courts vis-a-vis foreign arbitral awards.”

Through the different interpretations by contracting states of the New York Convention, how to maintain the uniform application of the Convention when recognition and enforcement of international commercial arbitral awards is sought in domestic courts becomes a critical concern. Of course, if applying the more-favorable right provision will promote arbitral awards to be enforced easily in such jurisdiction, it shall be welcomed. However, more attention needs to be paid to the obstacles to arbitration agreement and arbitral awards when interpreting this more-favorable provision.

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118 See supra note 30, Article VII (1).
122 Stephan Wilske, Claudia Karpfl, The Enforcement of a Foreign Award When the Underlying Arbitration Agreement Satisfies German Law, But not the New York Convention, 2011 IBA Arb. & ADR News. LEXIS 90.
1.3.3 Arguments on Revising the New York Convention

Considering the New York Convention has been drafted for decades, together with so many controversial issues existed under its provisions which have been discussed above, there are some arguments on whether the Convention should be revised or amended or not. The main arguments can be divided into two categories. One is provided by the advocators who insist that the New York Convention must be revised, while another provided by the objectors, who argue that the New York Convention cannot be easily changed.

1.3.3.1 Proposal to Revise the New York Convention

The sponsors who support the amending the New York Convention pretend to revise the provisions of the Convention directly. One of the most outstanding arbitration professors, Albert Jan van den Berg provided a Hypothetical Draft Convention on International Enforcement of Arbitration Agreements and Awards in May 2008 (herein after the Draft Convention). On the explanatory note of the Draft Convention, Professor Van den Berg introduces the general considerations on this modification of the New York Convention as follows:

“After 50 years of its existence, the New York Convention is in need of modernization: (a) A number of provisions need to be added, for example, a definition of the scope of application with respect to agreements that fall under the referral provisions of article II(3); a waiver of a party to rely on a ground for refusal of enforcement; a reference to the arbitration agreement in the more-favorable-right provision of article VII (1); (b) A number of provisions needs to be revised, for example, the written form as required by article II(2) for the arbitration agreement is stricter than almost any national law; the refusal of enforcement on the ground of a setting aside on any ground in the country of origin may import parochial annulment; (c) A number of provisions is unclear, for example, the notion of an award ‘not considered as domestic’ in article I (1); the expression ‘duly authenticated original award’ in article IV (1) (a); the word ‘may’ in the English text of article V(1); the words ‘terms of submission’ and ‘scope of submission’ to arbitration in article V(1) (c); the notion of a ‘suspended’ award in article V (1) (e); the reference to ‘any interested party’ in article VII (1); (d) A number of provisions is outdated, for example, the reference to ‘permanent arbitral bodies’ in article I (2); the reference to the law under which the award was made in article V (1) (e); and (e) A number of provisions needs to be aligned with prevailing judicial interpretation, for example, the public policy referred to in article V (2) means international public policy. The preliminary Draft Convention is intended to achieve the above modernization.”

Professor Van den Berg also indicates that “the above shortcomings in the New York Convention cannot be remedied by the UNCITRAL Model Law of 1985, as revised in 2006, because the provisions relating to enforcement of an arbitral award as

124 See supra note 7, Albert Jan van den Berg, Explanatory Note of the Hypothetical Draft Convention.
set forth in the Model Law are almost the same as those contained in articles III-VI of the New York Convention, because of the policy decision taken in 1985 to follow as closely as possible the New York Convention. Nor can the New York Convention’s shortcomings be remedied adequately and comprehensively by a “Recommendation regarding the interpretation issued by international bodies such as UNCITRAL in 2006 regarding articles II(2) and VII (1). It is expected that the time required for adherence by States to the Draft Convention is less than for the New York Convention since the Draft Convention builds on the structure and concepts of the New York Convention.”

Basing on the objective, the Draft Convention proposed by Professor Van den Berg has made great many changes to the New York Convention, in order to make the Convention to be modernized, while not to be deviated from its main focus on promoting the smooth recognition and enforcement of international commercial arbitral awards.

Some jurists support the proposal by Professor Van den Berg, for example, one lawyer analyzes the confusion issue of inconsistent court decisions among various jurisdictions, which have taken diametrical positions as to whether an arbitral award that has been set aside in its country of origin, shall be enforced elsewhere or not. He believes that this controversial ambiguity will be solved by the elegant simplicity and clarity language of Albert Jan van den Berg’s Draft Convention. He then concludes that “the Draft addresses many of the problems that we have encountered in interpreting the New York Convention over the past fifty years. An examination of the national court’s decisions and scholarly writing fully supports the need for the change and simplification reflected in the Draft Convention. Although the effort required to amend the New York Convention will be great, if the Draft Convention is adopted, fifty years from now we will look back to conclude that it was worth the effort.”

1.3.3.2 Objections to Revise the New York Convention

However, contrary to proposal of directly amending of the Convention, some other jurists argue that the New York Convention shall not be revised. They suggest that except amending the provisions of the Convention, it is better to take representative method to make the New York Convention modernized. For instance, one professor proposes the opinion, indicating, “I fully join the previous speakers who had expressed the opinion that the Convention should not be amended. It is still up-to-date and is applied world-wide. An amendment would do nothing more than create confusion. However, the world of international arbitration has changed since the creation of the Convention. I should think that it would be useful to envisage, therefore, an additional convention complementary to the Convention which would deal with issues which have arisen in the practice of international arbitration during the last 40 years.”

125 Id.
127 Id.
128 Werner Melis, Considering the advisability of preparing an additional Convention, complementary to the New
Another commentator indicates, “The current system of enforcement of arbitral awards is to some extent perceived to be costly, dilatory and arguably adversarial. These limitations eventually diminish the value of the award. Nevertheless, the perceived or actual limitations of the current enforcement system cannot be directly attributed to the New York Convention. The latter, as an international convention, has merely established the general framework for the enforcement of arbitral awards. The effective implementation of this framework has always been the responsibility of the signatory states. Thus, any actual or perceived inadequacies of the current enforcement system relate mainly to the failure of domestic legislation to establish an effective system of execution of arbitral awards in accordance with the general standards set out by the New York Convention.”

On objecting the amendment of the New York Convention, this commentator summarizes, “in conclusion, doing nothing is, under the circumstances, a much more effective and thus appealing prospect. Indeed, the best solution would be to retain the general enforcement framework of the current version of the New York Convention, and concurrently allow international business to continue to develop more progressive ‘private means of enforcement’ of arbitral awards.”

Another famous jurist, V. V. Veeder, criticizes that “for some, as encouraged by Dr van den Berg, the major criticism is that the New York Convention is far too short, incomplete and uncertain for a modern treaty. It comprises only sixteen articles, of which only three are critically important: Articles II, V and VII.” He indicates that revising the New York Convention could be analogy to make the Ten Commandments from the Bible’s Old Testament a potential reform. Through the analogy of revising the New York Convention to be as absurd as reforming the Ten Commandments, he continues giving the reasons, “there is a final and more local reason against reforming the New York Convention. Article VII(1) of the New York Convention permits a State court to recognise and enforce an arbitration award under the higher standards of its own laws. In conclusion, even if the New York Convention were broke, which it isn’t, the likely ‘cure’ would be far worse than any imagined malady. It would turn a healthy workhorse into a lame old nag, if not actual cat-food.”

There were also many advocators who support to the objection opinion of revising the New York Convention. For example, one french professor argues that “the reason why I strongly believe that the New York Convention should be left alone is threefold. It can be summarized by what I call the ‘three Nos’: there is no need, no hope an no danger. Specifically, (1) there is no need to revise the Convention, the sole

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130 Id.

131 See supra note 8, V. V. Veeder, Is There a Need to Revise the New York Convention, Key note speech, The Review of International Arbitral Awards, IAI Forum Dijon-12-14-September 2008.

132 Id.

133 Id.
fact that the language of the Convention is at times outdated and that some of its provisions could be fine-tuned does not warrant embarking upon a revision of an instrument binding on 144 States at the time of this writing; (2) there is no hope, in the current environment, that a significant number of the 144 States parties to the Convention (at the time of this writing) would agree to make the enforcement process more efficient; (3) on the other hand, there is no danger in leaving the New York Convention in its current state. The genius of the Convention is to have foreseen the evolution of arbitration law. As per its Art. VII, the Convention sets only a minimum standard. States can always be more liberal. By definition, the Convention cannot freeze the development of arbitration law. Thus, there is no danger in leaving it untouched.”

1.3.3.3 Remark on the Opposite Arguments

Until those controversial issues have been well settled, the previous debates on the necessity of revising the Convention may continue. Just as some commentators indicate that for the successful practice of the Convention, with 149 contracting states today, revising the New York Convention is not an easy work. Nevertheless, how to eliminate those obstacles to recognition and enforcement of international commercial arbitral awards under the New York Convention mechanism is a urgent work. It is obvious that the New York Convention has been so successful and influential, which has established the uniform framework for international arbitration practice. Considering the potential difficulties to amend a international treaty, the Convention shall not be hastily revised.

Instead, it seems better to research on the specific obstacles which hinder smooth recognition and enforcement of international commercial arbitral awards under the current framework, synthesized of both international arbitration conventions and various domestic arbitration laws. Especially, analyzing these barriers under domestic jurisdictions both academically and practically is better than directly amending the worldwide recognized New York Convention at the present time. Specifically, comparing these refusal reasons for international commercial arbitral awards under different domestic regulations and judicial practices is a practical method. Then it deserves paying more attention to the improvement of domestic arbitration-related laws, and restriction of the judicial interventions of national courts. All of these efforts will promote smoother recognition and enforcement of international commercial arbitral awards under the contemporary legal framework.

1.4 Increased Readiness to Recognize Cross Border Commercial Arbitral Awards by Two Important Regional Arbitration Conventions

It is obvious that international commercial arbitration system is benefited from

134 The number of Contracting States of the New York Convention has already increased to 149, see supra note 31.
the influential New York Convention, which has greatly increased the possibility of recognition and enforcement of international commercial arbitral awards during the past decades. New York Convention has limited the refusal reasons to foreign arbitral awards, although with abstract and concise provisions. Except the worldwide successful and effective New York Convention, some regional multilateral commercial arbitration conventions are gradually negotiated following the New York Convention, of which the most important two are the 1961 European Convention and the 1975 Panama Convention. Both conventions are so important because they are negotiated among the European countries and inter American countries. These high developed States have carried out active commercial transactions during the past decades. Comparing the contents of the two regional conventions will help finding how the mechanism of recognition and enforcement of cross border arbitral awards has been improved outside the framework of the New York Convention and various domestic laws.

1.4.1 European Convention on International Commercial Arbitration 1961

The preamble of the European Convention indicates the purpose of drafting this convention, providing, “Desirous of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European Countries.” According to Article VII(1) of the New York Convention, such regional multilateral or bilateral treaties or conventions will not be affected even the parties adhere to the former. It reflects the general jurisprudence of the legal maxim “lex specialis derogate lexi generali”. Further, Specific contents of the European Convention will be discussed in detail, to explain in what extent the European Convention has promoted the mechanism for recognition and enforcement of foreign arbitral awards under its provisions.

1.4.1.1 More Liberal Formal Requirement of Arbitration Agreement

Like the New York Convention, the negotiators of the European Convention intend to make arbitration agreement being maximally recognized as valid. Article I (2) (a) of the convention interprets the term of “arbitration agreement” the same as the previous arbitration conventions. Arbitration agreement under the European Convention is also divided into two categories: arbitral clause in a contract and separate arbitration agreement. Then there is a further question that how the European Convention liberalize the formal validity of such arbitral clause or submission to arbitration. The same article, where in the latter part, defines the term of arbitration

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136 See supra note 32.
137 See supra note 33.
139 See supra note 30, Article VII (1) indicates “the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States...”.

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agreement, indicating arbitration agreement “being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement conclude in the form authorized by these law.”

As one commentator interprets, “Article I (2) (a) establishes a requirement for the form of the arbitration agreement that takes precedence over the more stringent conditions of national laws. With a view to facilitating recognition of arbitration agreements, it does not, however, set a minimum requirement with respect to more liberal national laws; it yields to the more favorable provisions of domestic laws whenever any form other than the written one, such as an oral agreement, is admitted ‘in relations between States whose laws do not require that an arbitration agreement be made in writing.’ This language merits clarification. The draft convention referred to the laws applicable to the parties. During a Special Meeting of Plenipotentiaries, the text was amended to include not only the law of the States where parties come from but also the States in which the arbitration agreement or award is enforced, or the States in which the competent Chamber of Commerce is situated. As adopted, the text unduly limits the scope of Article I (2) (a) because acceptance of other forms is tied to the legal regime of States which may not be identified at the time of conclusion of the agreement, such as the State where the arbitration will take place or the State where enforcement may be requested. Similarity of forms is not required; the basic test for purposes of Article I (2) (a) turns on whether each legal system involved permits the conclusion of an arbitration agreement in the form in question.”

For this liberal formal validity requirement, arbitration agreement will be recognized as valid at the maximum level, no matter physical or legal persons, who had their habitual place of residence or their seat in different contracting states of the European Convention. This formal validity condition reflects the said more-favorable right provision of the New York Convention, where the more-favorable regulations of regional multilateral convention shall be applied. Additionally, this condition also amplifies the contents of the New York Convention, of which Article II requires arbitration agreement should be “in writing” as discussed above. Further, if more arbitration agreements could be recognized as valid, then the final cross border commercial arbitral awards will be treated as valid and enforced under such more-favorable domestic laws of the countries where the execution are relied upon.

1.4.1.2 Standardized Explanation of Set Aside Reasons

The vague expression of Article V(1) (e) of the New York Convention only provides that a vacated foreign arbitral award constitutes one of the refusal reasons in the following execution procedure. Differently, the European Convention has

143 See supra note 109, Article II (2) of the New York Convention.
specifically explained the reasons for setting aside an arbitral award covered by it. It requires that a nullified arbitral award in one Contracting State shall only constitute a ground for the refusal of recognition and enforcement in another when such award has been set aside in a State where it is rendered, or under whose laws it is made. 144 This was a great promotion, because it is the first time that setting aside conditions have been unified by multilateral arbitration convention, not still leaving to the various confusing interpretations of different national courts.145

According to Article IX (1) of the European Convention, the listed reasons for possible revocation are almost resembled Article V(1), of which sub-article (a) to (d) of the New York Convention.146 Considering the legislation background, the European Convention was passed only three years later. Therefore, it deserves no doubt that the regional arbitration convention had been largely influenced by the New York Convention.

1.4.1.3 Limited Application of Article V (1) (e) of the New York Convention

The critical promotion of the European Convention is that it has compulsorily contained the unified substantial reasons for setting aside of arbitral awards. Those compulsory conditions shall be applied to the contracting states which are also member States of the New York Convention. Benefiting from this uniform provision, interpretation of Article V (1) (e) will not be as complex or conflictive as before. Article IX (2) of the European Convention provides that “in relations between contracting states that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.”147

One commentator analyzes as follows, arguing that “according to paragraph 2, the scope of Article V (1) (e) is limited to those cases of setting aside enumerated in Article IX (1) (a)- (d). This language is self explanatory in the light of Article IX (1). The other parts of Article V (1) (e) relating to the binding force and to suspension of the award are not affected by Article IX. It is submitted that it would not in conformity with the spirit of Article IX to refuse enforcement of an award when suspension has been ordered on the basis of a ground for setting aside having no international effect within the meaning of Article IX (1).”148

Under such limitation, rejecting recognition and enforcement of cross border

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145 According to Article V (1) (e) of the New York Convention, no specific explanation had been made for reasons of setting aside awards, which had actually been authorized to different domestic competent authorities. Under what conditions should an arbitral award be annulled was unclear and so may generate potential obstacle to recognition and enforcement of foreign arbitral awards.
146 There is a little difference between the conflict of law rule under Article I (1) (d) of the 1961 European Convention and Article V (1) (d) of the New York Convention, where the former requires if parties haven’t made an agreement, then the composition of the arbitral authority or the arbitral procedure should be subject to Article IV of the it, while under the latter, when parties fails to agreed with each other, then the law of place of arbitration procedure would be applied to regulate the validity of such arbitral authority or arbitral procedure.
147 See supra note 32, Article IX (2) of the 1961 European Convention on International Commercial Arbitration.
148 See supra note 141. P.540.
commercial arbitral awards on the excuse that such arbitral awards have been set aside in their original country will be greatly restricted. Because contracting states which have joined into the European Convention and the New York Convention are no longer authorized with discretionary power to determine on which ground such awards can be set aside, other than those numerated in Article IX (1) of the European Convention. Accordingly, confusion and conflicts around the “set aside” issue under the New York Convention has been perfectly resolved when Contracting Countries ratify the European Convention. Since then, judicial interventions of various national courts on vacating arbitral awards have been largely restricted by virtue of this sub-article. If an arbitral award has not been nullified in their original country, then other contracting states of the New York Convention have no reason to refuse recognition and enforcement of it under the contemporary arbitration mechanism.

1.4.2 Inter-American Convention on International Commercial Arbitration

In order to promote international commercial arbitration among the American States, the Inter-American Convention on International Commercial Arbitration was negotiated and signed in Panama on January 30 1975. This Convention is also largely influenced by the New York Convention, of which the core articles directly taken from the latter. For example, Article 5 of the Panama Convention provides refusal grounds to deny executing of foreign arbitral decisions. According to the contents of this article, except slight difference of word expression, it is not substantial different from Article V of the New York Convention. As the comments of the Panama Convention states, “The Convention provides for a limited number of grounds for the refusal of recognition and execution of foreign arbitral awards, taken directly from Article V of the New York Convention.”149

Confirming that most of those contracting states of the Panama Convention are South American countries,150 during a long period of time, not all of those countries have joined into the New York Convention, impeding foreign arbitral awards to be smoothly executed in the South American continent. After the promulgation of the Panama Convention, such situation is greatly changed because contracting parties have gradually increased. Nowadays all of those member States have acceded to the New York Convention nowadays. However, the Panama Convention is still influential and effective among those American Countries. When recognition and enforcement of foreign commercial arbitral awards are applied upon those American parties, the Panama Convention is still preferentially invoked to regulate the recognition and execution of cross border arbitral awards among the related countries.

1.5 Brief Summary of Enumerated International Arbitration Conventions

According to the previous overview, contemporary mechanism for recognition and enforcement of international commercial arbitral awards is not so easy to be

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150 Contracting States of the Panama Convention, see website: http://www.oas.org/juridico/english/sigs/b-35.html last visit: 2013/10/12.
established. Arbitration is an important alternative dispute resolution, which has been historically practiced. As one professor states, “in short, arbitration offers parties the option of fashioning the forum to their particular needs. For this reason, arbitration is particularly suited to international commerce disputes, where any of the above factors may prove critical to the fairness of the process. Moreover, parties gain confidence in a procedure which has proven successful in resolving conflicts arising in some of the most common areas of international commerce - long term contracts, trade disputes, joint ventures, and construction and maritime disputes.” 151 However, arbitration mechanism has not been legitimately established until the series of international and regional arbitration conventions being promulgated, together with various domestic arbitration laws in the 20th century. 152

It is obvious that benefited from the synthesized contemporary legal framework for recognition and enforcement of international commercial arbitral awards in the past century, cross border commercial arbitral awards have been gradually recognized and enforced in those contracting states. At the very beginning of the past century, few multilateral treaties or perfect domestic arbitration laws could be found all over the world. Recognition and enforcement of contemporary arbitration agreement and arbitral award endured a long period of time before those important multilateral arbitration conventions were negotiated. As discussed before, arbitral award could only be executed in their home country under the Geneva Protocol. Then the sphere was expanded to those contracting states of the Geneva Convention four years later. Arbitral Awards were first time recognized and enforced extraterritorially under the auspice of multilateral arbitration convention. However, due to the limitations of those early international arbitration conventions, such as the strict jurisdiction requirements and “double exequatur” doctrine listed in the Geneva Convention, the possibility of executing foreign arbitral awards was still not very high.

After the two Geneva treaties being promulgated, arbitration system was developed faster among various countries, especially among the European Countries which were contracting states of the two Geneva treaties. With the fast growing of transnational trade and transactions, arbitration became more and more important for resolving commercial disputes between parties with different nationalities. Thus the outmoded provisions in the previous conventions should be changed as soon as possible. Under such situation, the New York Convention was negotiated, which has made great promotion of contemporary execution of foreign arbitral awards.

Even so successful as the New York Convention is, there are still many controversial issues on the correct interpretation of those core provisions of the Convention. Just as one professor indicates, “Even after we get the New York Convention and good legislation on the statute books, there is indeed a great deal of

152 Martin Domke, Report of the Committee on International Commercial Arbitration, “An important issue in foreign trade arbitration is the enforcement of an arbitral award in a country other than where it is rendered. Efforts for international convention to facilitate the enforcement of the arbitral awards have been made at various times in the past; to none of these multilateral agreements is the United States a party.” See 1954 Proceedings of the American Branch of the Law Association 35, 1954.
work to do country by country in educating the judiciary to really embrace the new arbitration culture’s view of their role in enforcing foreign arbitration awards.”

Although the New York Convention contains the uniform refusal rules, however, explanations by the judges of various jurisdictions are sometimes different from each other, which have affected the possibility of finally execution of foreign arbitral awards in various domestic courts. Therefore, even with the guidance of the most influential New York Convention, obstacles to smooth recognition and enforcement of foreign arbitral awards are still existed.

Reducing or eliminating those barriers is a critical issue which deserves deep research. There are already many arguments and discussions, of which the most controversial debates concentrate on the issue that whether the New York Convention shall be revised or not. Some famous arbitration jurists have proposed or supported the revision draft of the New York Convention, while some other jurists have provided opposite opinions, who do not agree with the proposed amendment to the most successful convention. They believe that the New York Convention is still effective for ensuring domestically recognizable and enforceable of arbitral awards which are made in other countries.

In order to evaluate the effectiveness of the New York Convention, and propose appropriate resolutions for eliminating obstacles to recognition and enforcement of international commercial arbitral awards among Countries, it is necessary to study practical cases, in which the application for recognition and enforcement of foreign arbitral awards has been rejected. Then it is necessary to analyze those refusal reasons vary from each case, and provide some feasible improvements for contemporary legal framework, in order to realize smoother recognition and enforcement of international commercial arbitral awards in various jurisdictions in the future.

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CHAPTER II BARRIERS TO RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS IN SEVERAL JURISDICTIONS

International practice on recognition and enforcement of commercial arbitral awards extraterritorially has been greatly improved since the promulgation of the New York Convention.\textsuperscript{154} However, as discussed above, even the uniform refusal grounds have been provided in the former Convention, there are still some controversial interpretations on such grounds. For instance, the validity of international commercial arbitration agreement, nationality of arbitral awards, the public policy issue and the judicial intervention issue are most frequently invoked, which have caused controversial rejection of international commercial arbitral awards in various domestic jurisdictions where the New York Convention have been implemented. In order to get rid of such barriers, it is necessary and urgent to do comparative research on those refused cases in various domestic courts, analyze the attitudes of various national competent authorities and try to find some improvement methods.\textsuperscript{155} Besides, how to decide the recognizable and enforceable of the latest online arbitral awards deserves further research, especially under the contemporary mechanism for recognition and execution of international arbitral awards.\textsuperscript{156}

2.1 Controversies on Invalid International Commercial Arbitration Agreement

1. Effect of the Invalidity of Arbitration Agreements

A valid arbitration agreement is the basis of the whole arbitral procedure, which ensures smooth organization of arbitration proceeding and execution of final arbitral award. Although Arbitration is a historical dispute resolution, however, both arbitration agreement and arbitral awards lack compulsory effectiveness during a long period of time, because few multilateral treaty or perfect domestic legislation for commercial arbitration system has been established. As discussed in the previous chapter, international commercial arbitration has been widely practiced since the early

\textsuperscript{154} For example, as professor indicates, “A recent survey of the views of in-house counsel at leading corporations worldwide found that 73 percent of corporate counsel favored international arbitration as a means for resolving cross-border disputes. The flexibility of procedure and the enforceability of awards pursuant to the Convention were the most widely recognized advantages of international arbitration. In fact, enforceability of awards was ranked as the single most important advantage by the highest of number of respondents.” See PricewaterhouseCoopers & Queen Mary, University of London, “international Arbitration: Corporate Attitudes and Practices 2006”, Press Release, 25 July, 2006.

\textsuperscript{155} As one professor says, “The harmonizing movement motivated and encouraged by United Nations within the UNCTAD/UNCITRAL, through model laws and international treaties, is clearly expressed in the regulation as it relates to the solution of disputes by means of the commercial arbitration, whether it is of a national, regional or international nature. The legislation has been adopted at those three levels. However, it is a must the continuous study, analysis and modifications of the Internal Procedure Law as to the enforcement of awards.” See Elvia Arcelia Quintana Adriano, Commercial Arbitration: Its Harmonization in International Treaties, Regional Treaties and Internal Law, 27 Penn St. Int’l L. Rev. 817, 2008-2009.

\textsuperscript{156} “Considering that all communications in online disputes will be allowed to take place electronically, what form should the award take? And as in traditional arbitration, should it be final and binding among the parties? These are the main issues relating to the award in international online arbitration.” See Nicolas de Witt, Online International Arbitration: Nine Issues Crucial to Its Success, 12 Am. Rev. Int’l Arb. 441, 2001.
20th century. In order to promote contemporary legal framework for recognition and enforcement of arbitration agreements and arbitral awards, a series of international and regional arbitration conventions have been negotiated since then, which have promoted the formation of international commercial arbitration system, and improved the enforceability of cross border arbitration agreements and arbitral awards.

Arbitration agreements are first time recognized extraterritorially under the Geneva Protocol 1923. According to Article 1 of the Protocol, “each of the contracting states recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.” This is the most significant step for contemporary international arbitration, which ensures arbitration being recognized as legitimate disputes resolution among the contracting states.

However, only recognizing the arbitration agreements or arbitral clauses is not enough. Resembling the proceeding of national courts, the arbitral tribunal will try the merits of the differences, and render the final arbitral awards. The Geneva Protocol has also provided a separate article on the execution of arbitral awards. Article 3 of the Geneva Protocol regulates that “each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.” Accordingly, signing a valid arbitration agreement constitutes the foundation of the validity of arbitral award. The relationship between the arbitration agreement and the arbitral award is so close that the following arbitration conventions have also emphasized that invalid arbitration agreement will cause barrier to recognition and enforcement of arbitral awards.

2. Domestic Authorities Recognize the Validity of Arbitration Agreement

International commercial arbitration agreement is not only regulated by international arbitration conventions, but also regulated by different domestic arbitration laws. Each country has its own legislation history and judicial practice on international commercial arbitration, and thus introduces conflicts on interpreting the

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157 See supra note 25, the Geneva Protocol on Arbitration Clauses was promulgated and signed on September 24, 1923. The depositary of this convention is at Secretary-General of the United Nations.
158 Id. Article I.
159 Id. Article 3.
160 For instance, Article 1(a), paragraph 2 of the Geneva Convention 1927 requires “That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto”; Article V(1) (a) of the New York Convention provides non-valid arbitration agreements may cause refusal of recognition and enforcement of arbitral awards. Under Article IX (1) (a) of the European Convention on International Commercial Arbitration 1961, the analogy contents of Article V(1) (a) of the New York Convention has provided a one of the reasons for setting aside arbitral awards, implying that such arbitral award could not be executed. Also Article 5 of the Inter-American convention on International Commercial Arbitration 1975 contents similar provision as Article V(1) (a) of the New York Convention.
validity of international commercial arbitration agreement, which will affect the possibility of recognition and enforcement of final arbitral awards. In fact, invalid international commercial arbitration agreement becomes the biggest obstacle to the recognition and enforcement of international commercial arbitral awards. For instance, according to the statistics of the Supreme People’s Court of the People’s Republic of China, from 2000 to 2011, 56 foreign arbitral awards were refused recognition and enforcement by the local people’s courts which invoked the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). After reporting to the supreme people’s court for instruction, 21 arbitral awards were finally refused recognition and enforcement, of which 8 cases were on the subject matter of none arbitration agreement or invalid arbitral clause. More than one third of the foreign commercial arbitral awards were refused recognition and enforcement due to the invalidity of arbitration agreement ground. This is not only the situation in China, but also the same in other countries, where many controversial issues have been argued on the relationship between the validity of international commercial arbitration agreements or arbitral clauses and the recognizable and enforceable of international commercial arbitral awards.

It is worldwide recognized that the New York Convention is the most successful international commercial arbitration during the past 55 years in Private International Law, which has greatly promoted the international trade, investment and other commercial activities. However, the provisions of the New York Convention are abstract and concise. Especially, the special background for promulgating the New York Convention has been greatly changed nowadays. According to the recent research, the main issues concerning the validity of international commercial arbitration agreement are the formal validity, the substantive validity, the validity of pre-required conditions of arbitration agreement and the validity of arbitral clauses combined into the Bill of Lading. All of these elements can affect the recognizability and enforceability of the final arbitral awards.

Actually, both academic researchers and international commercial arbitration practitioners have argued some contradictions between the old-fashioned provisions of different international arbitration conventions or domestic arbitration legislation and the latest international commercial arbitration practice. Thus it should not hesitate to do more research on the relationship between the validity of international commercial arbitration agreement and the execution of arbitral awards, examine the formal and substantive validity conditions, and analyze other latest controversial arguments on the validity issue of arbitration agreement. And their impact on recognition and enforcement of the following international commercial arbitral awards should be discussed in detail.

2.1.1 Formal Validity Conditions for Arbitration Agreement

As one professor indicates, enforcement is the ultimate goal in any arbitration,
and practitioners must keep that in mind when drafting arbitration clauses.\textsuperscript{162} It is a very important step to draft international commercial arbitration agreement or arbitral clause and make them valid. Ensuring the validity of an arbitration agreement is not always very easy, there are different legal jurisdictions all over the world, and each one has its own legal history and traditions. Another professor argues, “since arbitration agreements are formulated and approved by economic entities of different nationalities and may specify exactly which international commercial arbitration-institutional or ad hoc arbitration- has jurisdiction to examine a dispute which has already arisen or which might arise in the future, it is of great importance here to secure a uniform understanding of what exactly an arbitration agreement is. Such uniformity should be secured by way of fixing a definition of an arbitration agreement at three levels: first, at the level of international law- in international conventions on international commercial arbitration; second, at the national level- in national laws on international commercial arbitration; third, in the rules of the standing arbitration centers.”\textsuperscript{163} When discussing the validity of arbitration agreement, both aspects shall be considered, one is the formal validity, and the other is the substantive validity, coinciding with the international arbitration conventions and various domestic laws.

\textbf{2.1.1.1 Formal Validity Conditions Required by the New York Convention}

As the leading international arbitration convention, the New York Convention provides specific requirements for the formal validity of arbitration agreement, of which article II (1) indicates, “each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”\textsuperscript{164} Sub-article 2 further interprets the term of “agreement in writing”, including an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.\textsuperscript{165} The definition seems clear and easy.

However, this concise definition of sub-article 2 has caused many controversial problems. As an American professor argues, “At first glance, the term ‘agreement in writing’ appears relatively easy to define, apply and understand. However, as with most things in law, the task has proven much more difficult in practice than in theory.”\textsuperscript{166} After the creation of the New York Convention, communication methods have been great changed due to the fast development of technology. Nowadays it is difficult to imagine that everyday communication can only through writing letters or telegrams. People from all over the world will like to contact with each other more

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\textsuperscript{163} Nina Vilkova, Arbitration Agreements and their Impact upon the Efficiency of Dispute Resolution in International Commercial Arbitration, Baltic Yearbook of International Law, Vol. 8, 2008, p.70.

\textsuperscript{164} See supra note 30, Article II, sub-article (1) of the New York Convention 1958.

\textsuperscript{165} Id. Article II (2).

\end{footnotesize}
through E-mails or other telecommunication ways. Thus there are some conflicts between the provision of the New York Convention and the contemporary international commercial arbitration practice.

As referred above, the most famous international commercial arbitration professor Albert Jan van den Berg published a hypothetical draft convention in 2008, on the international enforcement of arbitration agreements and awards. Article 1 (b) of the hypothetical draft convention provides that a number of provisions needs to be revised, for example, the written form as required by article II(2) for the arbitration agreement is stricter than almost any national law. Considering the background of the New York Convention, the formal validity requirement under Article II seems going out of date, and becomes one of the most controversial obstacles to recognition and enforcement of international commercial awards.

2.1.1.2 Formal Validity Conditions Regulated by Several Domestic Legislation

The formally validity conditions of arbitration agreement does not only regulate by international arbitration conventions. Various domestic arbitration-related laws are also very important resources, which are also contained the formal validity regulations of arbitration agreement. Sometimes the specific domestic laws are more favorable than the abstract convention provisions. Thus there are some conflicts arose when arbitration agreements are reviewed among countries according to different legal framework.

Each country has its own legal tradition and legislation. However, international commercial arbitration law seems unified, especially after the United Nations Commission on International Trade Law (the UNCITRAL) published its model law on international commercial arbitration in 1985, which was amended in 2006 (herein after the Model Law). Article 7 provides two options for the definition and form of arbitration agreement. Option 1 requires the arbitration agreement shall be in writing. Then sub-article (3) to (6) of option 1 are interpretations of the term “agreement in writing”. The Model Law makes more liberal requirements for formal validity of arbitration agreement. For example, sub-article (3) indicates that “an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.” Moreover, the written form requirement can also be met according to electronic communications if the information contained therein is accessible for subsequent reference. This option gives detail definition of terms, such as ‘electronic communication’ and ‘data message’, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. Furthermore,

167 See supra note 123, Albert Jan van den Berg, Hypothetical Draft Convention on.
168 Option 1, Article 7: Definition and form of arbitration agreement, sub-article (2) provides the arbitration agreement shall be in writing, UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006.
169 Id. sub-article (3), Option 1, Article 7.
170 Id. sub-article (4), Option 1, Article 7.
written form of arbitration agreement can also be met by an exchange of statements of claim and defense, or reference to another document containing an arbitration agreement.171 In order to ensure international commercial arbitration agreement to be valid at the maximal level, the Model Law gives option 2 of Article 7, which indicates the definition of arbitration agreement and deletes the written form requirement of arbitration agreement.172

Until now there were more than 60 countries and some regions have promulgated their domestic arbitration law based on the Model Law.173 For instance, according to the list, Germany, Japan, Singapore and so on, have already adopted the Model Law, while People’s Republic of China, France, United Kingdom and United States have not taken it into domestic arbitration law. Thus different requirements of formal validity of international commercial arbitration agreement exist among countries.

1. United Kingdom

Arbitration Law of the United Kingdom is worldwide influential and remarkable since the early time.174 The present effective arbitration law is the Arbitration Act 1996.175 Under this Act, although arbitration agreement has been divided into two categories, domestic and foreign arbitration agreement, the formal validity condition for arbitration agreement is the same. Section 5 requires that arbitration agreement shall be in writing, and subsequently gives liberal interpretation of the term, including agreements is made in writing whether or not being signed by the parties, or made by exchanges of communications in writing, or agreement evidenced in writing.176 It further contents arbitration agreement by reference to terms which are in writing177, and interprets what agreement is evidenced to meet the written form.178 Further, tacit consent satisfies the agreement in writing when one party alleged the existence of a writing agreement while the other has not denied.179 Finally, a supplement provision is legislated at a maximum level to make sure of the formality valid of arbitration agreement.180 It ensures the formal validity of arbitration agreement between disputed parties.

Addition to those conditions on formal validity of domestic arbitration agreement,

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171 Id. sub-article (5), (6), Option 1, Article 7.
172 Option 2, Article 7 of the UNCITRAL Model Law provides, “Arbitration Agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
173 Those countries had legislated or amended domestic arbitration laws according to the UNCITRAL Model Law can be found at the website of UNCITRAL: last visit 2013/8/19. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
174 See supra note 13, as one professor indicated that one of the first extant arbitration statutes had been adopted in England what is sometimes called the 1698 Arbitration Act, which was named as “English Civil Procedure Act 1698”. See Samuel, Arbitration Statutes in England and USA, 8 Arb. & Disp. Res. L. J. 2, 4, 1999.
176 Id. sub section (2) of Section 5.
177 Id. sub section (3).
178 Id. sub section (4) provides, “An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
179 Id. sub section (5).
180 Id. sub section (6) indicates, “Reference in this Part to anything being written or in writing include its being recorded by any means.”
Section 100 (2) of Part III of the Arbitration Act 1996 expands the previous formality requirement of “agreement in writing” for arbitration agreement under the New York Convention. According to these provisions, formal validity conditions regulated by the domestic arbitration law of United Kingdom are quite favorable and liberal than that of the New York Convention.

2. United States of America

How about the formal validity condition of international commercial arbitration agreement under the Federal Arbitration Act (hereinafter FAA) of the United States of America? FAA contains three Chapters, of which Chapter 1 regulates domestic arbitration system. Section 2 of this chapter provides conditions of the validity of arbitration agreement, which requires arbitration agreement should be a written provision or a separate written agreement, indicating “a writing provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Arbitration agreement and arbitral award falls under the New York Convention shall be regulated by Chapter 2 of the FAA, and Section 202 is specifically for agreement or award falling into the category of the New York Convention. There is no specific condition provided for the formality of Convention agreement in Section 202, however, according to Section 201, the New York Convention shall be enforced in the United States. Therefore, the formal validity requirements of the New York Convention should be met when arbitration agreement or arbitral awards are divided into the category of Chapter 2 of the FAA. It is obvious that formal validity conditions under the FAA are almost as strict as the provision of the New York Convention.

3. Germany

The latest German arbitration law was legislated and based on the UNCITRAL Model Law in 1998. Section 1031 of the arbitration law is about the form of arbitration agreement. This section does not directly require the arbitration agreement to be in writing. Instead, subsection (1) provides that “the arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.” The other subsections of section 1031 list other interpretations of

181 Id. Section 100 (New York Convention awards), sub-section (2) requires, “(a) ‘arbitration agreement’ means an arbitration agreement in writing; in this subsection ‘agreement in writing’ …have the same meaning as in Part I.

182 As is known for us that different states of the United States have their internal arbitration law, this dissertation would not discuss those state arbitration laws, but only concerning the unified Federal Arbitration Act, as Title 9: Arbitration of the United States Code.


185 Arbitration Procedure, Section 1031 (1), the Tenth Book of the Code of Civil Procedure of Germany.
arbitration agreements which are considered to be complied with the requirement in subsection (1) above. Those interpretations include invoking the common usage to make the implied acceptance of arbitration agreement formality valid, and making reference to other documents which contain arbitration clause.\(^{186}\)

Another noticeable point is subsection (4) and (6) of section 1031, especially subsection (4) which has provided issuance of a bill of lading that contains an express reference to an arbitration clause in a charter party shall meet the formal requirement of an arbitration agreement. This is a controversial problem in international commercial arbitration practice. For example, the Supreme People’s Court of the People’s Republic of China have ruled some judgments concerning this topic and decided that such arbitration agreements shall not be valid.\(^{187}\) Subsection (6) is a more liberal provision. It regulates that any non-compliance with the form requirements will be cured by entering into argument on the substance of the dispute in the arbitral proceedings.\(^{188}\) According to section 1031 of the German Arbitration Law, it is believed that formal validity requirement will be met at the maximal level. Thus few refusals of the arbitral awards have been reported due to the formal invalidity of arbitration agreements.

4. Japan

The effective Arbitration Law of Japan was promulgated according to Law No.138 of 2003, which was enforced on 1 March 2004. The newest arbitration law is based on the UNCITRAL Model Law. Article 13 provides the effect of arbitration agreement. Unlike section 1031 of the German Arbitration Law, article 13 of the Japanese Arbitration Law contains writing requirements directly, of which sub-article (2) indicates, “the arbitration agreement shall be in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication device for parties at a distance which provides the recipient with a written record of the transmitted content), or other written instrument.”\(^{189}\) Although both Germany and Japan have reformed their domestic arbitration law under the guidance of the Model Law, there are some small differences on the formal validity conditions of arbitration agreement. The Japan Arbitration Law is more close to Article II of the New York Convention. However, sub-article (3) through (5) of article 13 also contain provisions for the written form requirements, including, referring to other documents containing arbitration clause, arbitration agreements recorded by electromagnetic methods and the implied arbitration agreements by exchange written statements during the arbitral

\(^{186}\) Arbitration Procedure, Section 1031 (2), (3), the Tenth Book of the Code of Civil Procedure of Germany.

\(^{187}\) Because of the “reporting system” on refusal of recognition and enforcement of foreign arbitral awards in People’s Republic of China, if the local people’s courts believe the arbitral awards shall not be recognized and enforced, they should report the cases to the higher people’s court, until the final check of the Supreme People’s Court. There are some judgments concerning combination of the arbitration clause into the Bill of Lading, and the Supreme People’s Court trialed those combination clauses invalid. Specific judgments see Supreme People’s Court: [2005] Min Si Ta Zi No.53; [2006] Min Si Ta Zi No.49; [2008] Min Si Ta Zi No.33; [2009] Min Si Ta Zi No.12; [2009] Min Si Ta Zi No.13.

\(^{188}\) Arbitration Procedure, Section 1031 (4), (6), the Tenth Book of the Code of Civil Procedure of Germany.

\(^{189}\) Arbitration Law of Japan, Article 13(2).
proceedings."\(^\text{190}\) From those extended interpretations, option 1 of article 7 of the Model Law has been incorporated into the domestic arbitration law of Japan. When discussing the formal validity conditions of international commercial arbitration agreements, the domestic regulations of Japan are more favorable than that of the New York Convention.

5. People’s Republic of China

The effective Arbitration Law of P.R.C was promulgated by the Decree No.31 of the President of the People’s Republic of China on October 31, 1994. Article 16 is concerning the formal validity of arbitration agreement, which requires “an agreement for arbitration shall include the arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs.”\(^\text{191}\) Because of the abstract expression of this article, it has caused confusions when practitioners interpret the term “other written agreement”. In order to reduce those controversial interpretations, the Supreme People’s Court has passed a judicial interpretation concerning several matters on application of the Arbitration Law on December 26, 2005. Under this interpretation, article 1 interprets in detail of the term ‘other written form’, which indicates “arbitration agreement in other written forms as stipulated in article 16 of the Arbitration Law shall comprise of the agreements on requesting for arbitration by means of contracts, letters or data message (including telegraph, telefax, fax, electronic data interchange and e-mail), etc.”\(^\text{192}\) It is clear that the arbitration legislation in P.R.C has not directly incorporated the Model Law, and the formal validity requirements under the Chinese law are not so favorable than that of Germany and Japan.

6. France

When referring international commercial arbitration legislation and practice, France is one of the friendliest countries for promoting arbitration system. Like Germany, Arbitration Law of France is also contained as part of the Code of Civil Procedure. The latest amendment of the Arbitration Law was through Decree No. 2011-48 of 13 January 2011, reforming the law governing arbitration.\(^\text{193}\) This newest arbitration law has been divided into two parts—Domestic Arbitration of Title I and International Arbitration of Title II. On provisions concerning the formal validity of arbitration agreement, it is absolutely different for domestic and international arbitration agreement. Article 1443 for domestic arbitration agreement requires written form, which indicates “in order to be valid, an arbitration agreement shall be in writing. It can result from an exchange of written communications or be contained

\(^{190}\) Id. Article 13(3), (4) and (5).

\(^{191}\) Arbitration Law of the People’s Republic of China, Article 16.

\(^{192}\) Article 1, Interpretation of Supreme People’s Court concerning Several Matters on Application of the Arbitration Law of the People’s Republic of China, adopted at the 1375th meeting of the Judicial Committee of the Supreme People’s Court on December 26, 2005.

in a document to which reference is made in the main agreement.” 194 While Article 1507 for international arbitration regulates, “an arbitration agreement shall not be subject to any requirements as to its form.” 195 No matter what formal validity conditions are contained in the New York Convention, it is obvious that Arbitration Law of France liberates these requirements, for promoting international commercial arbitration practices. It thus supports more favorable recognition and enforcement of international commercial arbitration agreement and arbitral awards.

7. Singapore

Unlike the previous Countries, Singapore has legislated its domestic arbitration law and international arbitration law separately. The first arbitration legislation in Singapore is the Arbitration Act 1986, which contains some provisions of foreign arbitral awards. After that, the first separate international arbitration legislation is the International Arbitration Act 1994, which has been amended several times and the newest version is the International Arbitration Act 2012 (Chapter 143A). 196 According to the interpretation, the principal Act is amended by inserting, immediately after section 2, the following section “2A Definition and form of arbitration agreement”. 197 The Amendment Act 2012 has directly taken into most provisions of the Model Law, while has rewritten some important sections, including this section concerning the validity of arbitration agreement. Comparing to the Option I of Article 7 of the Model Law, most contents of Section 2A are almost the same as the former. Sub section (3) through (7) of Section 2A equals to sub article (2) through (6) of Option I of Article 7. 198 Only one sub-section has been added, which confirms the validity of a reference in a bill of lading to an arbitration clause of a charter party or other document, if such reference is making that clause part of the bill of lading. 199 Therefore, the formal validity conditions for International commercial arbitration agreement under Singapore Law are less strict than that of the New York Convention.

2.1.1.3 The Influence of More-Favorable-Right Provision on Domestic Laws

As reviewed above, some domestic regulations for the formal validity of international commercial arbitration agreement are different from the requirement of article II of the New York Convention. How to solve the conflicts between the international conventions and various domestic laws deserves deep discussion. In recent researches, some professors argue that article VII(1) of the New York Convention can solve this problem. They argue that article VII(1) of the New York Convention is a more-favorable-right provision. 200 Article VII(1) indicates that the

194 Id. Article 1443.
195 Id. Article 1507.
196 International Arbitration (Amendment) Act 2012 (No.12 of 2012 was passed by Parliament on 9th April 2012 and assented by the President on 15th May 2012, date of Commencement: 1st June 2012.
197 Id.
198 See supra note 168, 169, 170 and 171.
199 Section 2A, International Arbitration Act, Chapter 143A, the Statutes of Republic of Singapore.
provisions of the New York Convention shall neither affect the validity of bilateral or multilateral agreements on recognition and enforcement of arbitral awards, nor deprive any interested party of any right he may have to avail himself of an arbitral award protected by the law or treaties of the country where the arbitral award be applied to be recognized and enforced.\textsuperscript{201}

The proponents argue that basing on this more-favorable-right provision, when provisions of the New York Convention and the domestic laws are different from each other, and if such domestic laws are more favorable, disputed parties can invoke the more liberal domestic legislation to regulate their arbitration agreements and arbitral awards. However, there are different attitudes toward the more-favorable-right provision among the contracting states of the New York Convention. For instance, one commentator argues that the US courts have very seldom invoked article VII(1) of the New York Convention, although that provision is central to many states’ approach to the form requirements under the New York Convention.\textsuperscript{202} At the same time, recourse to national law through article VII(1) is not without problems. As the Secretary General of the United Nations notes as follows: “Some national laws...have addressed the problem of the form requirement article II(2) and broadened the definition of writing. While the problem of the outdated form requirement is thereby being dealt with, the fact that these laws contain different solutions creates other difficulties, caused by the disparity of laws.”\textsuperscript{203} Therefore, how to solve this controversial issue, and try to find a higher degree of international uniformity on interpreting the relationship between Article II of the New York Convention and the “more-favorable-right provision” of Article VII(1) of the New York Convention is a difficult task. Nevertheless, maintaining the promotion of recognition and enforcement of international arbitration agreement must be insisted as the core objection of the New York Convention.

\textbf{2.1.1.4 Case Reports of Different National Courts on Formal Validity Issue}

After summarizing the legal framework of formal validity of international commercial arbitration agreement under the New York Convention and some selected domestic laws, it is worthy further studying of some cases and discussing the legal dilemma of international uniformity interpretation of formal validity of arbitration agreement and the “more-favorable-right” provision under the New York Convention.

\textbf{1. Federal Supreme Court of Germany: 21 September 2005}

\textbf{(1) Case Summary}

One of court reports of Germany concerning the formal validity of international

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\textsuperscript{201} See supra note 30, Article VII (1) of the New York Convention.

\textsuperscript{202} See supra note 163, p.74.

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commercial arbitration agreement was judged on September 21, 2005 by the Federal Supreme Court of Germany.\textsuperscript{204} In this case, the claimant and the defendant entered into a contract orally for certain dredging works to be performed by the claimant. After that, the claimant issued invoices that made a general reference to the claimant’s standard conditions of contract which contained a clause for arbitration of disputes in the Netherlands. The defendant failed to pay under the invoices and the claimant commenced arbitration in the Netherlands and got a prevailing award finally. Then the claimant sought enforcement of the Dutch arbitral award in Germany.

At the first instance, the Court of Appeal in Oldenburg denied the request for enforcement and gave the reasoning that the general reference in the invoices to the claimant’s standard conditions of contract was not an arbitration agreement in writing as required under the 1958 New York Convention.\textsuperscript{205} The court also denied recognition and enforcement of such arbitral award by means of the “more-favorable-right” provision of the New York Convention which should authorize invoking the less strict German laws, because the reference in the invoices did not meet the requirements under the Germany Arbitration Law for formality valid of arbitration agreement.

However, the Federal Supreme Court reversed the lower court’s decision. At one hand, the Federal Supreme Court shared the opinions and reasoning for refusal of enforcement, confirming that there was no valid arbitration agreement in writing both under the New York Convention and the more-favorable German substantive laws. Nevertheless, the Federal Supreme Court added its reasoning on the other hand, explaining that the more-favorable-right provision allowed for the application of more favorable domestic law in its entirety, which should include not only the domestic substantive law, but also the conflict of laws provisions. Because the lower court neglected invoking the German conflict of laws rules, and could not ascertain whether Dutch law would be applied according to the conflict of laws provision of Germany. If it did, the argued arbitration agreement should be valid under the Dutch law, and the final arbitral based on this arbitration agreement should be valid and be recognized and enforced in Germany.

Through the brief introduction, when recognition and enforcement of international commercial arbitral awards was sought in Germany, both courts had first examined that if there was a valid written arbitration agreement or any arbitral clauses between the parties, under article II of the New York Convention and through article VII (1) of the more-favorable-right provision.

The most interesting part of the reasoning of the Federal Supreme Court was of the application of domestic conflict of laws provision to determine the validity of arbitration clause. The Federal Supreme Court agreed with the findings and reasoning of the lower court. However, it had amplified the contents of more-favorable domestic laws being used to determine whether the arbitration clause was valid, explaining that not only the substantive laws, but also the conflict of laws should be considered when


\textsuperscript{205} It indicates Article II (1) and (2) of the New York Convention, see supra note 30.
practicing the more favorable right provision. As the Federal Supreme Court interpreted, “the application of a national law that is friendlier to arbitration, pursuant to the more-favorable-right principle, does not only concern the provisions on the recognition and enforcement of arbitral awards. The Court of Appeal failed to consider that it also includes the (national) conflict of laws provision and the national law applicable to the arbitration agreement determined there under.” Finally, the Federal Supreme Court concluded that “the Court of Appeal did not clarify this point. It cannot thus be excluded, in the context of this appeal on points of law, that the formal validity of the arbitration agreement is to be decided according to the less strict Dutch law and that this would lead to a finding that the arbitration agreement is formally valid. Nor can it be assumed, according to the Court of Appeal’s findings, that there is such an obstacle to enforcement.”

(2) More-favorable-right provision and domestic conflict of laws

In this case, the German Federal Supreme Court gives the interpretation of using the conflict of laws rules to find the more favorable domestic law to decide the formal validity of the disputed arbitration agreement, and then confirms the enforceability of the arbitral award. This is a very significant Private International Law issue which is called remission. Whether the term of “the law or the treaties of the country” of Article VII (1) of the New York Convention indicating also the conflict of laws rules of that country is controversial and deserves discussion. In fact, if the conflict of laws rules of one Contracting State is invoked to determine the validity of the arbitration agreements or enforceability of arbitral awards, then according to the nature of conflict of laws rules, the applicable law shall be only the substantive law or both substantive laws and conflict of laws of another country. Under this situation, it is doubtful that if the application of article VII (1) of the New York Convention has been excessive amplified or been appropriately interpreted. As discussed above, whether the “more-favorable-right” provision of article VII(1) of the New York Convention could be used to international commercial arbitration agreement or arbitral award deserves deep research, let alone the conflict of laws of those countries being used to determine the formal validity of arbitration agreements. Even if it is allowed, another problem may rise that the law of another country indicated by the conflict of laws rules may also allows the applicable of its domestic conflict of laws rules, then the law of a third country may be indicated, further the fourth, fifth…and may become endless. Thus, if the more-favorable-right provision should be practiced by various national courts, the sphere of “the law of the country” should be reconsidered. Whether only the substantive laws of such countries should be applied, or the conflict of laws rules of those countries should be applied simultaneously.

(3) Applicable law for determining formal validity of arbitration agreement

207 Id. P683-684.
208 See supra note 202.
The Federal Supreme Court of Germany interprets the formal validity of the disputed arbitration clause according to the more favorable right provision, and then according to the conflict of law rules of Germany to find the Dutch law to determine the formal validity of the said arbitration clause. However, both the Court of Appeal in Oldenburg and the Supreme Court ignore article V (1) (a) of the New York Convention, which regulates the invalid arbitration agreement as a ground of refusing recognition and enforcement of foreign arbitral awards. In this case, the arbitral award is made in Netherlands. When the claimant applies enforcement of award in Germany, the defendant has not raised any objection to the arbitration clause. Moreover, the parties have not agreed on the law applicable to determine the validity of the arbitration. Therefore, if article V (1) (a) is applied, the validity of the said agreement shall be determined by the law of the country where the award is made, which will indicate the Dutch law here. Both the Netherlands and Germany are contracting states of the New York Convention, and if the arbitration agreement is valid under the Dutch law, then the validity of the award will also be confirmed. If the defendant cannot give sufficient evidence to proof the invalidity of the arbitration clause which will further cause refusal of the award in Germany, then Germany courts shall recognize and enforcement the award at no delay. There are two questions should be discussed further:

First, should conflict of laws rules under article V (1) (a) of the New York Convention be used to determine the formal validity of the arbitration agreement?

According to the interpretation of both the court of first instance and the Federal Supreme Court, it seems that the conflict of laws rules under article V (1) (a) should not be used for the determination of the formal validity of arbitration agreements. Otherwise, at the situation where the defendant has not raised any objection to the recognition and enforcement of the arbitral award, the German courts will enforce the arbitral award directly, as the arbitral clause would be formally valid under the law of the country where the arbitral award is made, referring Netherlands here. In fact, other professor has argued that domestic choice of law concerns may be mitigated in this particular inquiry by the recognition that article II (2): deals exclusively with what has been termed as the formal validity of the agreement to arbitrate. In particular, it does not deal with other, perhaps more substantive, requirements. Under article V(1) of the Convention, these substantive requirements may be appreciated in light of domestic law. In other words: (a) formal validity of the agreement to arbitrate should be judged by applying the uniform rule of article II (2) of the New York Convention (unless domestic law is more liberal); and (b) substantive validity of the agreement to arbitrate may, under article V(1) of the Convention, be determined in accordance with national law. The German courts have expressed the same opinion as the argument above, and have not judged the formal validity of arbitral clause according to V(1) (a) of the New York Convention.

Second, what’s the relationship among article II (1), (2) and article VII (1) of the

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New York Convention?

It deserves deep research on the question of the relationship among article II (1), (2) and article VII (1) of the New York Convention. The key point is the effectiveness of Article II of the New York Convention. Is it a compulsory provision? Or is it free to comply with by the domestic courts or disputed parties? In this case, the arbitration clause is not valid according to article II, thus under the first dimension (under the direct provision New York Convention) the arbitral award based on this arbitration clause shall not be enforceable. Then how about the second dimension, which is decided through the more favorable right provision under article VII (1), providing that if the arbitration clause can be recognized as valid under the more liberal domestic law- Germany law here, then the arbitral clause may be recognized and the award based on it may be enforced. However, even invoking of the more liberal provisions of German domestic substantive law, the arbitral clause should be invalid. Under this situation, if interpreting “the law of the country” only includes the substantive law, the said arbitration clause is invalid and the award based on it should not be recognized and enforced in Germany. The interpretation of the Germany courts has been expanded. As discussed above, the Federal Supreme Court of Germany explains that “the law of the country” refers to both substantive and conflict of laws. The ruling of the Federal Supreme Court is complicated and doubted. Especially, when other countries have taken different attitudes toward the more favorable right provision, the judicial practice of the German courts is so liberal that may cause further confusions. Even if the more-favorable-righted provision should be practiced by domestic courts for deciding the validity of arbitration agreements, whether the conflict of laws rules should also be included simultaneously deserves more discussion. A different argument, that whether article V (1) (a) of the New York Convention can be interpreted to determine both formal and substantial validity of arbitration agreement, may be an effective approach, and may reduce some conflicts on interpreting the formal validity of international commercial arbitration agreements among various contracting states of the New York Convention.

2. Federal Supreme Court of Germany: 8 June 2010

Another case from the Federal Supreme Court of Germany was reported on the formal validity of arbitration agreement. In this case, German Claimants (investors) and the US Defendant (brokerage house X) entered into transaction service agreements through a broker, for helping German investors to invest in forward options on US stock exchanges. Intending to open an account with X, the investors signed an Option Agreement and Approval Form—an English-language standard form provided by X (the account management contracts), and an arbitration clause (Clause 15) was contained in the General Conditions of Contract printed on the reverse. Besides, every three months, brokerage house X sent account statements, each accompanied by a leaflet titled “Terms and Conditions”, which also contained an

arbitration clause. Other than Clause 15 in the General Conditions of Contract, the arbitration clause in the Terms and Conditions provided for the application of the law of the New York.

When disputes arose because the contracts ended and the investors suffered loess. The investors filed a case in a German court of first instance, while X replied to object the jurisdiction of the German court on the basis of the arbitration provision in Clause 15 of the General Conditions of Contract. The court of first instance granted the arbitration objection, but the court of appeal reversed this decision, holding that the arbitration clause in Clause 15 was invalid because the choice for New York law in the arbitration clause contained in the Terms and Conditions was tantamount to the choice of the law that can be made under German law in respect of non-contractual obligations after the occurrence giving rise to such obligations has arisen.

Then the Federal Supreme Court examined whether Clause 15 was formally valid. It held that at any event Clause 15 was not valid under the New York Convention, because it was neither signed by the parties nor contained in an exchange of letters or telegrams, because the account management contracts which contained the General Conditions of Contract were signed only by the investors. Nor could the sending of the leaflets (which also contained a different arbitration clause) be deemed an exchange of documents. The Supreme Court added that a clause that is not formally valid under the New York Convention can be still formally valid under the Convention’s more-favorable-right principle if the law applicable to the arbitration agreement sets less strict formal requirements and these requirements are met. However, in this case, the court couldn’t find what law is applied to the contracts, then Clause 15 containing the arbitration clause, because the court of appeal failed to determine whether the contracts were consumer contracts, in which case the law of the place of habitual residence of the investors—German law—would apply. Even if German law applied, noted by the Court, Clause 15 would not meet the formal requirements of the German Code of Civil Procedure and would therefore be invalid.212

In this case, even the Federal Supreme Court of Germany had took the view of the more-favorable-right provision of Article VII(1) of the New York Convention, the disputed arbitration agreement had not been recognized as formal valid because of lacking common consents of the parties. As discussed previously, the domestic arbitration law of Germany is less strict than provision of the New York Convention. However, even under German arbitration law, the said arbitration agreement was still short of formal validity, for one party hadn’t signing the contract which contained the arbitration clause.213 From these interpretations by the Supreme Court, it is obvious that no matter how liberal domestic legislation are the basic principle which approval by both parties for determining formal validity of arbitration agreement must be respected. Otherwise, such arbitration agreement would be treated as formal invalid.

212 Id. pp.217-219.
213 Similar judgments by the Federal Supreme Court of Germany was reported on 25 January 2011, No. XI ZR 351/08 (1), see Albert Jan van den Berg, Yearbook: Commercial Arbitration XXXVII, Kluwer Law and Taxation Pub. 2012, pp. 223-225.
3. **US District Court, Southern District of New York: 15 April 2011**

This case was concerning disputes of arbitration agreement “in writing” between a Mexican Plaintiff and a UK Defendant.214 “On 27 November 2002, the Mexican company Marecsa signed a Collaboration Agreement with the UK Company Sealion, a company acting as a manager for vessels owned by Tosia Limited, agreeing to work jointly to supply a well-testing services vessel to a state-owned Mexican oil exploration company PEP. Also on the same day, Selion and Marecsa executed a Side Letter in which provided that English substantive law applied and that all disputes would be referred to arbitration in London under the rules of the London Maritime Arbitrators Association (LMAA).

On 8 June 2003, Marecsa was awarded a five-year contract to supply a well-testing services vessel, the TOISA PISCES, to service PEP’s oil rigs in the Gulf (the first PEP Contract). Marecsa and Sealion then entered into two agreements concerning the execution of the First PEP Contract: a joint Venture Agreement and a Subcontractor Agreement. Both agreements provided that English law was the governing law, and that disputes would be referred to LMAA arbitration. After the first PEP Contract expired, PEP awarded Marecsa a second contract (the second PEP Contract) on 8 March 2008. On 14 March 2008, Marecsa, Sealion and A third Company entered into a Tripartite Agreement in respect of the parties’ role and responsibilities in fulfilling the Second PEP Contract. Also Marecsa and Sealion executed a separate agreement (the Disputed Terms Agreement) on the same day. Both the Tripartite Agreement and the Disputed Terms Agreement included the same choice of law provision and LMAA arbitration provision used in the Joint Venture Agreement and the Subcontractor Agreement. Besides, on 3 June 2008, Sealion and Marecsa entered into a Transaction Agreement in respect of dispute that had arisen between them concerning unpaid charter hire and other expense related to the First PEP Contract. This agreement also provided for the application of English law and referred disputes to arbitration in London.

After the second PEP Contract expired on 21 March 2010, while Sealion and Marecsa negotiated a third contract with PEP. Another company BP hired the TOSIA PISCES which remained on standby to assist in the cleanup of the oil spill caused by the Deepwater Horizon oil drilling rig. Sealion’s New York agent arranged with Marecsa for Marecsa to provide the personnel necessary for Sealion to perform the BP contract. However, the parties did not conclude a written agreement concerning this transaction. Then a dispute arose when Sealion failed to pay the invoices sent by Marecsa for the services provided in respect of the Deepwater Horizon cleanup. Marecsa commenced a court action in the US District Court for the Southern District of New York, while Sealion served Marecsa with a request for LMAA arbitration for alleged breaches of the Joint Venture Agreement and the Transaction Agreement relating to the First PEP Contract. Then Sealion filed a motion in the district court to

compel arbitration of the Deepwater Horizon cleanup dispute.

The district court denied Sealion’s motion to compel arbitration, reasoning that arbitration must be compelled under the 1958 New York Convention when (1) there is a written agreement…In the present case, this element was in dispute. Sealion acknowledged that there was no agreement in writing in which the parties agreed to arbitrate claims arising from the Deepwater Horizon cleanup. It argued that the term “agreement in writing” in the Convention and the Statute implementing the Convention in the United States, the FAA, should not be given an “overly literal” interpretation and that, under English law, an agreement to arbitrate can be implied from the parties’ prior course of Contract.

The district court found that this argument was unworthiness, and denied Sealion’s argument that English law should be the applicable law, on analyzing properly for determining that the controlling law was US federal law. Under the federal choice-of-law rules, the law of the US applied to the dispute, because Marecsa negotiated the Deepwater Horizon transaction with Sealion’s New York agent and the contract as to be performed on the US side of the Gulf of Mexico, and the subject matter of the contract—Marecsa’s services—were to be provided in US waters. At last the district court trialed that based on US law, it was not permitted for implying an agreement to arbitrate solely from a past course of conduct.”

In this case, formal validity of an arbitration agreement was challenged by national court. And according to different domestic laws, there would be different outcome of the formal validity of the disputed arbitration agreement applying English law and US federal law. Formal validity would be rejected under provision of the New York Convention if the disputed parties didn’t prepare any arbitration agreement or arbitral clause. No matter they had a long period of transactions or close commercial relationship between each other before, which was the situation in the present case. As discussed before, arbitration clauses in other documents which have incorporated into the contracts of the disputed parties could be treated as valid. If the parties failed to make such reference, no formal valid arbitration agreement between them is established successfully.

4. Supreme Court of Singapore, High Court: 10 May 2006

On 1 August 1998, a US company Aloe Vera of America (AVA) signed an Exclusive Supply, Distributorship and License Agreement (the Agreement) with a Singapore company which established by Mr. Chiew Chee Boon, called Asianic Food (S) Pte Ltd (Asianic). The Agreement provided for the application of the law of Arizona and arbitration of disputes under the rules of the American Arbitration Association (AAA).

After that, a disputed arose between the parties and the Agreement was terminated. AVA commenced arbitration proceedings in Arizona against both Asianic

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215 Id.

216 For example, Option I of Article 7 (6) of the UNCITRAL Model Law on International Commercial Arbitration; Article 5 (3) of the Arbitration Act 1996 of UK; Section 1031 (3) of the German Arbitration Law; Article 1443 of the French Arbitration Law; Article 13 (3) of Arbitration Law of Japan, etc.
and Chiew in February 2003. Chiew objected that he could not be a party to the arbitration as he was not a party to the Agreement. However, the sole AAA arbitrator made a preliminary order finding that he had jurisdiction over Chiew under the broad definition of “party” in the arbitration clause in the Agreement. Then the arbitrator made a final award in favor of AVA, directing the defendants to pay damages.

Then AVA sought execution of the rendered award in Singapore in June 2004. The High Court granted the enforcement order *ex parte* on 25 June 2004. Later, Assistant Registrar David Lee dismissed the defendants’ application to set aside the enforcement order on 9 November 2005, so the defendants appealed. But the High Court dismissed the appeal and affirmed the lower court’s decision. The court preliminarily examined whether AVA met the conditions for requesting enforcement by supplying a valid arbitration agreement. It affirmed the assistant registrar’s rejection of the defendants’ argument that “arbitration agreement” means an agreement that the court has found to be valid following a substantive review. Just on the contrary, the arbitration agreement is only subject at this stage to a formal review aiming to ascertain whether it is prima facie valid. This was the case here, as the Agreement between the parties contained an arbitration clause, was signed by Chiew on behalf of Asianic and clearly covered the dispute.217

In this case, the Supreme Court, High Court divided the prima facie formal validity review when applying enforcement of arbitral award requiring providing valid arbitration agreement, and substantive review of the arbitrator’s finding as to whether Chiew was a party to the Agreement and the arbitration clause therein could only be carried out at a later stage, when and if the corresponding ground for refusal of enforcement was raised. Two alternative courses of action were then open to Chiew: he could either apply to set aside the award before a court in the country of rendition or wait until AVA sought enforcement and raise an objection before the enforcement court.”218 That’s to say the standards for deciding the formal validity and substantive of an arbitration agreement are different, even in the later stage when an arbitration agreement may be examined as invalid, but if no contrary arguments have been raised, such an arbitration agreement should be treated as formal valid *prima facie* at the earlier stages of the arbitration proceedings. Here, considering the arbitral award rendered at a state party to the 1958 New York Convention under US law, Part III (Foreign Awards) of the Singapore International Arbitration Act (IAC) applied rather than Part II(International Commercial Arbitration). Hence, the conditions for requesting enforcement were those in Section 30 IAC219, together with Rule 6 of the Rules of Court, which sets out the procedure to be followed by a party seeking to enforce an arbitration award governed by the IAC.220

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218 *Id.* p.491.
219 Section 30 (1) requires the applicant for recognition and enforcement of foreign awards to provide an original arbitration agreement, indicating “in any proceedings in which a person seeks to enforce a foreign award by virtue of this Part, he shall produce to the court… (b) The original arbitration agreement under which the award purports to have been made, or a duly certified copy thereof”.
220 See supra note 217, p.490.
2.1.2 Substantive Validity Conditions for Arbitration Agreement

It is worldwide consensus that international commercial arbitration agreement or arbitral clause are separate from the main contract of the parties. It is a special kind of contract, and the main content is setting arbitration as an alternative dispute resolution to national court proceedings. Thus arbitration agreement should be formal valid and substantive valid.

Not only the formal validity of international commercial arbitration agreement faces many difficulties under the New York Convention and various domestic laws, the legal framework for determining the substantive validity of arbitration agreement is also complicated. The New York Convention has not provided specific rules for determining the substantive validity of international commercial arbitration agreement. It only uniformly regulates the formality of arbitration agreement, which indicates the Article II of the Convention as discussed above.\(^\text{221}\) Instead, the New York Convention authorized the right for determining the substantive valid of arbitration agreement to domestic competent authorities.

According to article V (1) (a) of the New York Convention, the substantive validity of an arbitration agreement shall be determined by the law chosen by the parties themselves. If the parties have not chosen the applicable law, then the law of the country where the award is made shall be used to decide the validity of the arbitration agreement.\(^\text{222}\) When the substantive validity of an arbitration agreement is disputed, the applicable law shall be found properly according to the conflict of laws rules of Article V(1) (a). Subjecting to different domestic applicable laws, the substantive validity of the disputed arbitration agreement will be decided finally.

2.1.2.1 Arbitrability of Disputes

As an alternative dispute resolution, not all disputes could be resolved through international commercial arbitration. Actually, article II (1) of the New York Convention does not only regulate the formal validity of arbitration agreement, but also includes the arbitrability issue, providing that any differences in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.\(^\text{223}\)

Since it is an abstract provision without any specific interpretation under the whole convention, the term “subject matter capable of settlement by arbitration” needs to be interpreted by different domestic laws. As one professor argues, “for an arbitration agreement to be valid in international commercial arbitration, the following conditions are required: 1. The agreement must be in writing. 2. The parties

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\(^\text{221}\) See supra note 30, Article II of the New York Convention.

\(^\text{222}\) Article V: 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 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.

\(^\text{223}\) See supra note 30, Article II (1) of the New York Convention.
must have capacity to arbitration (subjective arbitrability). 3. The issue must be arbitrable (objective arbitrability). The written form is a general and direct requirement under the New York Convention and under all other texts dealing with international arbitration. Capacity must satisfy the conditions set by the law applicable to each party. Arbitrability of the issue must be established under two different national laws.\(^{224}\)

Besides, Article I (3) of the New York Convention has also authorized different domestic declarations to limit the application of the Convention to restricted kinds of disputes, referring as the commercial reservation, which indicating “It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.\(^{225}\) Such reservation has been authorized to the contracting states of the New York Convention, and thus caused various interpretations in domestic jurisdictions.

The 1998 Arbitration Law of Germany contains provision on arbitrability. Section 1030 of the Arbitration Law provides three subsections: (1) any claim involving an economic interest can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute; (2) an arbitration agreement relating to disputes on the existence of a lease of residential accommodation within Germany shall be null and void. This does not apply to residential accommodation as specified in section 549 subs.1 to 3 of the Civil Code; (3) statutory provisions outside this Book by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only under certain conditions, remain unaffected.\(^{226}\) Section 1059 also provides that non-arbitrable subject matter of any disputes may lead the arbitral award to be set aside.\(^{227}\)

Under the Arbitration Law of Japan, there is not one special article concerning the arbitrability issue. Article 13 (1) is about the arbitrability of disputes, indicating that unless otherwise provided by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation).\(^{228}\)

Comparing the legislation of both Germany and Japan, what disputes could be resolved by arbitration are different in the two countries. The standard of determination of arbitrability issue under German law is claims involving economic interest, while the standard in Japan is that the subject matter is civil dispute which can be settled by the parties. Thus, when disputes concerning arbitrability issue filed upon, the judgments of the two countries may be different, and directly affect the substantive validity of arbitration agreement. On the other hand, both Arbitration Law


\(^{225}\) See supra note 30, Article I (3) of the New York Convention.

\(^{226}\) Arbitration Procedure, Section 1030, the Tenth Book of the Code of Civil Procedure of Germany.

\(^{227}\) The original provision indicates, 2. The court finds that (a) the subject-matter of the dispute is not capable of settlement by arbitration under German law; Arbitration Procedure, Section 1059, the Tenth Book of the Code of Civil Procedure of Germany.

\(^{228}\) Arbitration Law of Japan, Article 13 (1).
of Germany and Japan are legislated according to the UNCITRAL Model Law, and there are few controversial issues of arbitrability of arbitration agreement occurred. Besides, the judicial practice of both countries is friendly to international commercial arbitration, which is a great promotion for recognition and enforcement of arbitration agreements of various kinds of disputes.

While the Arbitration Law of the P.R.C provides two aspects of arbitrability issue. One is from the positive aspect that clearly states the disputes which are arbitrable. Article 2 of the Arbitration Law provides, “contractual disputes between citizens of equal status, legal persons and other economic organizations and disputes arising from property rights may be put to arbitration.”\(^\text{229}\) The other is from the negative aspect which excludes disputes to be arbitrable. Article 3 of the Arbitration Law lists, “the following disputes cannot be put to arbitration: 1. disputes arising from marriage, adoption, guardianship, bringing up of children and inheritance; 2. disputes that have been stipulated by law to be settled by administrative organs.”\(^\text{230}\) From the Arbitration Law of P.R.C, the arbitrability issue is more specific regulated, which indicates that disputes concerned with identity, parental power, inheritance and administrative matters are not arbitrable. According to the statistic of the Supreme People’s Court of P.R.C, in judicial practice, there was only one case which the arbitral award was refused recognition and enforcement because of the dispute lack of arbitrability.\(^\text{231}\) In fact, the nature of the legislation of arbitrability issue in China is almost the same as Germany and Japan, which mainly includes disputes that can be settled by parties themselves, and concerns with economic or property interests.

Other countries which have widely practiced arbitration, such as France and the U.S.A, have regulated matters of arbitrability by their domestic arbitration laws. Under the French Arbitration Law, there is not a provision on the interpretation of arbitrability. Article 1445 indicates, “in order to be valid, a submission agreement shall define the subject matter of the dispute.”\(^\text{232}\) However, what subject matter shall be arbitrable has not been clearly explained under this law. Also, when France ratified the New York Convention, it did not the commercial reservation.\(^\text{233}\)

Differently, the FAA of the U.S.A has contained specific definition of what matter should arbitrable. Section 1 of the FAA gives specific definition of the terms of “transactions” and “commerce”.\(^\text{234}\) Domestic disputes within such transaction or commerce would be arbitrable. On the other hand, there is also a sentence which removes the applicable of arbitration to disputes, indicating, “but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or

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\(^{229}\) Article 2, Arbitration Law of the People’s Republic of China.

\(^{230}\) Id.

\(^{231}\) “Reply of the Supreme People’s Court to the Instruction Request on Refusal of Recognition and Enforcement of Arbitral Award of Mongolia National Arbitral Tribunal”, [2009] Min Si Ta Zi No.33, see supra note 6.


\(^{233}\) When ratifying the New York Convention, France had only made reservation of (a), providing “This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State. See UNCITRAL website: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html Last Visit: 2013/11/15.

\(^{234}\) 9 U.S.C§1. “Maritime transactions” and “Commerce” defined; exceptions to operation of title, Chapter 1—General Provisions of the Federal Arbitration Act.
any other class of workers engaged in foreign or interstate commerce.” 

When discussing arbitrability issues within foreign arbitration agreement, Chapter 2 of the FAA would be applied, of which section 202 provides the definition of agreement under the Convention. The U.S.A made the commercial reservation when ratified the New York Convention.

2.1.2.2 Specific Contents of Arbitration Agreement

As discussed above, the New York Convention has only made a conflict of laws indication which authorized the various domestic laws to regulate this important issue. When judicial competent authorities in different countries review the substantive validity of arbitration agreement, there are numerous standards to decide the specific contents and validity of arbitration agreement. Many potential conflicts may occur in the proceeding of recognition and enforcement of international commercial arbitral awards later.

It deserves to take the related provisions of several domestic arbitration laws as an example, and try to analyze how substantive validity of arbitration agreement is determined by domestic laws. Under the provisions of Arbitration Law of both Germany and Japan, there are not specific contents requirements of an arbitration agreement. Only formal validity conditions of arbitration agreement have been specifically legislated in the Arbitration Law of the two countries, while other contents of an arbitration agreement or arbitral clause should be freely agreed by parties.

How about the Arbitration Law of UK, USA and Singapore on the Specific required contents for substantive valid arbitration agreement? Except institution arbitration, ad hoc arbitration is historical and widely practiced in the common law countries. Thus it is no necessary to require that an arbitration agreement contained a selected arbitration committee by the parties. In fact, the most important condition for a valid arbitration agreement is the consent of the disputed parties. For instance, Section 6 of the Arbitration Act 1996 of UK has provided a definition of arbitration agreement, providing “an arbitration agreement means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”. Further, reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. It contains no further required
contents for an arbitration agreement to be substantively valid. Descending from the UNCITRAL Model Law, the International Arbitration Act (IAC) of Singapore also has an article for the definition of arbitration agreement, which is Section 2A of the latest 2012 IAC. There is also no other special contents required by the FAA for recognizing validity of arbitration agreement, besides the written form and arbitrability issue of the disputes. 239

However, according to the Arbitration Law of P.R.C, article 16 and 18 requires some specific contents in an arbitration agreement. Article 16 provides, “an arbitration agreement shall contain the following: 1. the expression of application for arbitration; 2. matters for arbitration; 3. the arbitration commission chosen.” 240 Article 18 gives further interpretation of article 16, which indicates “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.” 241 With these requirements for substantive validity of arbitration agreement, there are many controversial issues concerning the validity of arbitration agreement or arbitral clause, and the enforceability of the final arbitral award. Due to the reporting system in the court instances of China which was established in 1995, 242 there are some foreign arbitral award being refusal recognition and enforcement for lacking valid arbitration agreement or arbitral clause, which will be discussed in detail below.

2.1.2.3 Exclusion of National Courts’ Jurisdiction

As worldwide accepted rule, arbitration is a settlement between disputed parties which is alternative method of court procedure to resolve differences. Once parties have chosen arbitration, whether signed an arbitration agreement or designated an arbitral clause in the main contract, shall not concurrently resort to national court jurisdictions. If the contents of an arbitration agreement or arbitral clause have chosen arbitration procedure and court jurisdiction, such agreement shall be recognized as not substantively valid. In addition, it is obvious required in the New York Convention that national courts have been obligated to compel arbitration when any party applied. However, what law should be used to try such arguments, concerning the validity and operability of arbitration agreement, has not been clearly regulated in the New York Convention. 243 When national courts have been filed with such cases, they would like to try such conflicts by lex forum and/or with reference to judicial practices there. Compelling arbitration is a very important pro-arbitration mechanism to solve the concurrently selection of arbitration and courts’ procedure.

239 See 9 U.S.C§1, §2 and §202 of the Federal Arbitration Act of the U.S.A.
241 See Article 18, Arbitration Law of the People’s Republic of China.
243 There is not a conflict of law rule contained in Article II (3) of the New York Convention, which had authorized domestic courts to refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
For instance, section 1032(1) of the German Arbitration Law regulates, “a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.”244 Similarly, there is a provision in the Arbitration Law of Japan.245

Under the FAA of the United States of America, disputed parties may apply to any court of the United States for staying proceedings where issues there is referable to arbitration246, or when another party being failure to arbitrate under agreement, petition to United States court having jurisdiction for order to compel arbitration.247 Concurrent arbitration and court proceeding is not desired situation, even for the national courts, potential conflicts of court judgment and arbitral awards is so complicated problem and may waste more time and judicial sources to resolve it. Especially when pro-arbitration is the main stream nowadays, compelling to arbitration by national courts will be beneficial rather than harmful.

Staying legal proceedings when claimant of reference to arbitration procedure applied is also permitted by the Arbitration Act 1996 of UK. Section 9 gives detail interpretation on stay of legal proceedings issue, which has more specific conditions for granting. For example, an application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.248 Additionally, the court may check the arbitration agreement is referable or not, resembling to the requirement under Article II(3) of the New York Convention, ensuring if such agreement is null and void, inoperative, or incapable of being performed.249 On occasion when interpleader is granted, reference of interpleader issue to arbitration is permitted under the Arbitration Act 1996.250

On this issue, the legislation of the P.R.C has been clearly provided by the arbitration law and judicial interpretation of the Supreme People’s Court, of which article 5 of the Arbitration Law indicates “whereas the parties concerned have reached an agreement for arbitration, the people’s court shall not accept the suit brought to the court by any one single party involved, except in case where the agreement for arbitration is invalid.”251 According to article 7 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of “Arbitration Law of

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244 See Section 1032(1), Arbitration Procedure, Tenth Book of the Code of Civil Procedure of Germany.
245 Article 14 of the Arbitration Law of Japan is about arbitration agreements and substantive claim before court, which states, (1) a court before which an action is brought in respect of a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action. Provided, this shall not apply in the following instances: (i) when the arbitration agreement is null and void, cancelled, or for other reasons invalid; (ii) when arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or (iii) when the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.
246 See 9 U.S.C§3 of the Federal Arbitration Act of the U.S.A.
247 See 9 U.S.C§4 of the Federal Arbitration Act of the U.S.A.
248 See Section 9 (3) of the Arbitration Act 1996 of UK.
249 See Section 9 (4) of the Arbitration Act 1996 of UK.
250 See Section 10 of the Arbitration Act 1996 of UK.
251 See Article 5 of the Arbitration Law of the People’s Republic of China.
the People’s Republic of China”, “an arbitration agreement shall be invalid if the parties thereto agree that disputes may be resolved either through submission to an arbitration institution for arbitration or by filing an action with a people’s court, unless one of the parties applies to an arbitration institution for arbitration and the other party fails to raise an objection within the time limit specified in paragraph 2 of article 20 of the Arbitration Law.”

As provided in the arbitration laws of the above countries, an arbitration agreement must designate arbitration procedure as the only resolution for the said disputes and eliminate jurisdiction of national courts. And a recent case from the Federal Supreme Court of Germany, which will be discussed detailed in the next part, is about the substantive invalidity of the arbitration agreement which fails completely excluding jurisdiction of national court and thus causes refusal of recognition and enforcement of the final arbitral award.

2.1.2.4 Case Reports on Substantive Validity of Arbitration Agreement

2.1.2.4.1 National Courts’ Interpretations on Arbitrability Issue

As some comments indicates, “historically, the nonarbitrable subject matter defense has been the narrowly construed of the public order defenses, and therefore it has been generally unsuccessful in international cases. The nonarbitrable subject matter defense has arisen frequently, but it has been generally unsuccessful in international cases until the Mitsubishi decision.” Using the nonarbitrable subject matter defense to invalidate arbitral awards with subjects not as definitively nonarbitrale as the act of state doctrine, for example, could threaten the advances made in recognition and enforcement of international arbitral awards. The court in Mitsubishi applied the nonarbitrable subject matter defense to antitrust issues, and this extension, along with others based upon it could minimize the New York Convention’s import.

1. Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.

This case was very influential which was trialed by United States Court of Appeals for the First Circuit on 20 December, 1983. Soler Chrysler-Plymouth (Soler) is a Puerto Rico corporation, with its principal place of business in Puerto Rico. Mitsubishi Motors Corp. (Mitsubishi) is a Japanese corporation and automaker with its principal place of business in Japan. Mitsubishi was formed in 1970 as a part of a joint venture between Chrysler International, S.A. (Chrysler), a Swiss corporation

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252 Paragraph 2 of article 20 of the Arbitration Law of P.R.C indicates that a doubt to the effectiveness of an arbitration agreement should be raised before the first hearing at the arbitration tribunal.

253 Article 7 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of “Arbitration Law of the People’s Republic of China”, adopted at the 1375th meeting of the Judicial Committee of the Supreme People’s Court on Dec. 26, 2005; and being effective from Sep. 8, 2006.


255 Id.

256 See 723 F.2d 155.
and wholly owned subsidiary of the U.S. Chrysler Corp., and Mitsubishi Heavy Industries, Inc. Under the joint venture, Mitsubishi manufactured vehicles for sale in certain territories outside the continental United States through Chrysler dealers. Soler became a Chrysler-Mitsubishi dealer in 1979 when it entered into a “distributor agreement” with Chrysler. And simultaneously, Soler entered into a separate “sales procedure agreement” with both Chrysler and Mitsubishi, paragraph VI of which contains the arbitration clause disputed here, which indicated “any disputes, controversies or differences which may arise between Mitsubishi and Soler out of or in relation to Article I-B through V of the sales procedure agreement or for breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

Two years later, the disputes arose and Soler disclaimed responsibility of Mitsubishi. Then Mitsubishi filed suit against Soler and made several allegations, on the basis of which Mitsubishi petitioned for an order compelling arbitration under the FAA and the New York Convention, and commenced arbitration within Japan Commercial Arbitration Association. Soler didn’t agree with such allegations and make counterclaims, alleging violations of the Sherman Act, 15 U.S.C and other related laws. The first instance court, the district court ordered arbitration of all above claims and counterclaims. And Soler appealed. The principal issue on this appeal is whether arbitration of federal antitrust claims may be compelled under the Federal Arbitration Act, 9 U.S.C. §§ 4, 201, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970).

Before the Mitsubishi case, antitrust exception to arbitrability, which began with American Safety Equipment Corp. v. J.P. Maguire & Co., had applied to pure domestic agreements. This was the first time for determining the important question whether, despite such coverage, they are nonarbitrable because of a judicially created policy, hitherto applied only to “domestic” contracts involving United States citizens, reserving antitrust issues for judicial determination.

Because this was the first time to deal with such question, judges of the court of appeal for the First Circuit heard the views of the United States as an amicus curiae. In a brief submitted by the Department of Justice and joined in by the Legal Advisor of the Department of State, the United States urged the judges to apply the same antitrust exception to arbitrability to international contracts the same as the domestic one. The judges considered there areas when discussing such important issue. The first one was whether recognition of the antitrust exception to arbitrability is compatible with the New York Convention which was adopted by a United Nations conference in 1958, consented to by the U.S. in 1970, and implemented when Congress passed Chapter 2 of the FAA. The judges found it was compatible. The second one was whether, as the district court held, Scherk v. Alberto-Culver Co., proscribes application of the American Safety Equipment doctrine to the contract in this case. The answer was that the Scherk does not so proscribe, then the judges made

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257 Id.
258 See 391 F.2d 821 (2d Cir. 1968).
259 See supra note 256.
the third inquiry, since Soler’s antitrust claims against Mitsubishi must be decided by a court, should the district court stay all arbitration pending a judicial decision? The judges answered this question by concluding that decisions as to separability of issues, likelihood of success of the antitrust claims and timing were within the informed discretion of the district court.260

The court of appeal finally extended the application of antitrust exceptions to international contracts, here the case was . The judges explained that “we therefore conclude that an agreement to arbitrate antitrust issue is not ‘an agreement within the meaning of’ Article II(2) of the Convention because such an agreement does not concern ‘a subject matter capable of settlement by arbitration’, as required by Article II(1).”261 Finally, the judgment of the district court submitting Sloer’s antitrust claims to arbitration was reversed. For such a result, critical opinions had been expressed, which indicating “with its liberal interpretation of the language involved and its justification that other countries are treating the New York Convention similarly, Mitsubishi reveals the national courts’ primary concern for their own interests, a change which is discouraging for advocates of the New York Convention. Mitsubishi and comparable cases threaten to erode the gains achieved under the New York Convention. Disregard of the arbitral clause frustrates parties’ expectations and disturbs orderly international trade transactions. If Mitsubishi stands and is followed or expanded upon, it may cripple the New York Convention and the future of international commercial arbitration.”262

However, on certiorari of the Supreme Court of the United States, the order finding that defendant’s antitrust claims were not arbitrable was reversed. It was held that claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction are arbitrable pursuant to the Federal Arbitration Act.263 As one commentator indicates, “the (Supreme) Court’s position makes it clear that a situation in which a party is foreclosed from invoking an antitrust violation defense at all stages of a dispute is inconsistent with both the nature and importance of U.S. antitrust law, and the role of private actions in the antitrust law.”264

2. Court of Appeal of United Kingdom: 13 November 2006

Arbitrability issue may be different in various domestic jurisdictions, such as the antitrust issue discussed previous, while some other nonarbitrable grounds may be raised by the disputed parties according to various domestic laws. There was a case reported by the Court of Appeal of UK on 13 November, 2006, which concerned with arbitrability of oil dispute.265 On 28 April 1993, Svenska Petroleum Exploration AB

260 Id.
261 Id.
262 See supra note 254.
263 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., Supreme Court of the United States, 105 S. Ct. 3346.
(Svenska) entered into a Joint Venture Agreement (JVA) with AB Geonafta (Geonafta, then called Gargzdai State Oil Geology Enterprise or EPG), intending to exploit certain oilfields in Lithuania. This JVA contained an arbitration clause for ICC arbitration of disputes in Copenhagen, Denmark. And the Government of Republic of Lithuania approved the JVA and acknowledged itself to be legally and contractually bound as if the Government were a signatory to the Agreement. Article 35 of the JVA included that: “(1) Government and EPG hereby irrevocably waive all rights to sovereign immunity; (2) This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania.”

After that a dispute arose and a ICC arbitration commenced in Copenhagen according to the JVA arbitral clause. On 30 October 2003, the final arbitral award was rendered in favoring of the Svenska. Then Svenska applied execution of the arbitral award against the Government of Lithuania and Geonafta in the High Court of London, where enforcement order was granted. However, on 31 August, 2004, the Government of Lithuania applied to set aside the enforcement order, insisting its sovereign immunity. And further another question on whether dispute on exploiting oil could be arbitrable or not was argued.

The Court of Appeal agreed with the lower court’s conclusion that the dispute here could be arbitrable. It reasoned that according to the Law on Underground Exploration (1995) and the Law on Commercial Arbitration(1996), disputes relating to issue or revocation of oil exploration and production licences could not be settlement through arbitration under Lithuania law. However, the court explained that such new laws should not be retroactive and did not affect the validity of arbitration agreement signed before. The argument therefore depended on the proposition that the subsequent legislation had rendered nonarbitrable that which had previously been arbitrable.267 The court noted continually, that Counsel for the Government did seek to rely on the non-arbitrability of the dispute in support of his argument on construction, but even in that limited form it does not assist the Government’s case. If disputes arising under the Agreement were arbitrable at the time the contract was made, subsequent legislation is of no assistance in determining the parties’ intentions.268

According to the previous introduction, arbitrability issue is difficult to deal with, which may be different in various countries, and changes from time to time. In this case, after the arbitration agreement had been entered into, domestic laws changed and such subject matter under the arbitration agreement become inarbitrable. Therefore it is very critical to pay more attention to various domestic legislation on the arbitrability regulation. Just as one professor concludes, “the parties to a dispute, when considering whether its subject matter is arbitrable, must ensure the said dispute is arbitrable not only in accordance with the law of the lex arbitri, but that it also conforms to the laws and public policy of the governing law of the contract and of

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266 Id. p.630.
267 Id. pp.641-642.
268 Id.
those states where enforcement of the award will be sought. It should be said that some confusion exists with regard to the precise terminology associated with the concept of arbitrability.”

2.1.2.4.2 Cases on Specific Contents Required for Substantive Validity

As provided above, the specific contents of arbitration agreement required in the P.R.C are special, especially for the selected arbitration commission in an arbitration agreement, and have caused a number of controversial issues on the validity of the disputed arbitration agreements and the final arbitral awards. As one law report indicates, “while most of the requirements for a valid arbitration under Chinese law are similar to those found in the UNCITRAL Model Law on Arbitration, Chinese arbitration law differs from arbitration laws of most other countries in two critical respects; …when the place of arbitration is within mainland China, Chinese law requires that the arbitration be administered by a Chinese arbitration institution rather than an international arbitration institution.” In practice, arbitration agreement which does not contain the specific permanent arbitration institutions constitutes the most refusal of recognition and enforcement of arbitral awards in P.R.C.

1. Supreme People’s Court of P.R. China: [2011] Min Si Ta Zi No.61

This case was on disputes of ship building contract which contained an arbitration clause between a Singapore company CS Marine Technology Pte. Ltd., and a Chinese company Bohai Ship Building Ltd. of Penglai City. The parties had signed a contract for designing and building 6800t multipurpose bulk-cargo Vessel, of which Chapter 8 had negotiated the disputes resolution, indicting “when any disputes arose, the parties should take amicable negotiation, if none settlement had got, then the parties should solve their disputes by arbitration, and the outcome of the arbitration procedure should be final and binding for both parties. And such arbitration proceeding should be commenced at a third city in China which both parties agreed with.”

When disputes arose, the Singapore claimant sued to Shanghai Maritime Court, while the Chinese defendant had argued that Shanghai Maritime Court should had no jurisdiction, because of the existence of valid arbitration agreement between them. The Shanghai Maritime Court trialed the arbitration agreement to be invalid, then the court reported the decision for instruction to the High Court of Shanghai Municipal Court of China, 08 December 2011.

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271 The Chinese character for this case number is [2011] Min Si Ta Zi No.61. “Min Si” means the Forth Civil Division of the Supreme People’s Court, which is authorized to trial cases concerned with validity of foreign-related arbitration agreements, cases on application of setting aside arbitral awards, cases on recognition and enforcement of foreign judgments and foreign arbitral awards. This is the same as the following cases.
272 [2011] Min Si Ta Zi No.61, Reply of the Supreme People’s Court on instruction of CS Marine Technology Pte. Ltd. v. Bohai Ship Building Ltd. of Penglai City on validity of arbitration agreement issue, Supreme People’s Court of China, 08 December 2011.
City. The latter also believed such arbitration agreement should be invalid and request for instruction of the Supreme People’s Court. After a specific trial, the Supreme People’s Court replied and agreed with the lower courts’ opinion, reasoning that the disputed arbitration agreement was with foreign-related nature, for *CS Marine Technology Pte. Ltd.* was a Singaporean company. So it should apply the Law of People’s Republic of China on Application of Laws to Foreign-Related Civil Relations, the Arbitration Law and the Judicial Interpretation on Arbitration Law of the Supreme People’s Court to review the validity of the arbitration clause contained in the main contract.

In this case, the parties hadn’t agreed with the applicable law to determining the validity of arbitration, however, place of arbitration had been decided, which was a third city of China. So *lex arbitri*, here the law of People’s Republic of China should be applied. According to article 18 of the Arbitration Law, if an arbitration agreement contains no or unclear provisions concerning the arbitration commission, then parties could reach a supplementary agreement. Further, if no supplementary agreement can be reached, then the arbitration agreement should be null and void. In this case, both parties did not clearly select a arbitration commission, even no such supplementary agreement required, thus according to article 16 and article 18 of the Arbitration Law of People’s Republic of China, this arbitration agreement should be recognized as invalid, and the People’s Court should have jurisdiction on disputes.  

This was one of the latest cases reported by the Supreme People’s Court. Because the Arbitration Law of China hadn’t been amended yet, so the Supreme People’s Court continues to trial such controversial problem of valid arbitration agreement as before, where many arbitration agreements had been recognized as substantively invalid, then affect the enforceability of the final awards.

2. Supreme People’s Court of P.R. China: [2009] Min Si Ta Zi No. 7

Another reply from the Supreme People’s Court on application of conferring the validity of arbitration agreement between *Panyu Zhujiang Steel Tube L.L.C.* (applicant) and *Shenzhen Fanbang International Freight Transport Agency L.L.C.* (respondent) in 2009.  

In this case, the parties had only agreed with any disputes between them should be settled by arbitration in Beijing, and shall under the guidance of Chinese laws. However, because of no specific arbitration commission being agreed, when disputes arouse, the respondent sent a lawyer’s letter, informing the applicant that any disputes arouse between them shall be resolved by the China Maritime Arbitration Commission at Beijing, if the applicant hadn’t replied at 3 days’ time, it shall be presumed agreed with the arbitration commission by implied manner. However, the applicant didn’t reply and the 3 days’ period expired. After that, the defendant raised that the applicant had agreed with the arbitration commission impliedly, and the arbitration agreement should be substantive valid under the Chinese law. Nevertheless,

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273 *Id.*

the High People’s Court of Guangdong Province as the first instance court refused the argument of the respondent and trialed the arbitration agreement to be invalid, then under the reporting mechanism, the High People’s Court of Guangdong reported this case to the Supreme People’s Court for instruction, and got a reply from the Supreme Court who confirmed the trial of the High Court, and made the final judgment that according to the arbitration legislation of China, the disputed arbitration agreement was not valid, for lacking clear indication of a specific arbitration commission.

There were some other cases concerned the same issue above, and the results of which were almost the same as the previous one. When the people’s courts of P.R.C facing the similar cases, they would like to apply article 16 and 18 of the Arbitration Law and the related provisions of the Judicial Interpretation of the Supreme People’s Court. From these cases, it can be generalized that specific legislation of domestic arbitration law adjusting the substantive validity of arbitration agreement is critical to the recognition and enforcement of international commercial arbitral awards based on those arbitration agreements or arbitral clauses. Article V(1) (a) of the New York Convention only gives one sentence on the conflict of laws rules for determining the substantive validity of arbitration agreement, However, it is a very influential authorization to various domestic legislation. When we research the refusal of recognition and enforcement of international commercial arbitral awards, not only the provisions of the New York Convention, what deserves paying more attention to is the specific domestic laws, where the practitioners shall concentrate more on the substantive validity conditions in domestic laws and try to avoid the final refusal of the arbitral awards due to invalid arbitration agreement. Just as one argument of the deficiencies of Chinese law for recognition and enforcement of arbitral awards, which states “to be sure, many of the problems are due to shortcomings in the legal system. Clearly, deficiencies in the regulatory framework make enforcement more difficult.”

3. Federal Supreme Court of Germany: 30 January 2003

How about the validity of an arbitration agreement when more than one arbitration institution has been selected simultaneously? There was a case tried firstly by Court of Appeal at Celle, then by the Federal Supreme Court of Germany on 30

275 This indicates Article 18 of the Arbitration Law of P.R.C. and Article 10 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China” in the judgment of the Supreme People’s Court here.


277 Through Article 3 to Article 7, Article 13, Article 16, Article 27 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of “Arbitration Law of the People’s Republic of China”, see supra note 253.

January 2003. In this case, the Seller (Claimant) and Buyer (defendant) signed a Frame Contract on 24 April 1998, which was drawn up in Russian and German, provided that “all controversies and divergences that may arise under this contract or in connection therewith” be referred to arbitration either at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation (ICAC) or at the “International Court in X”. When disputes arose, the seller terminated the contract and commenced ICAC arbitration and the arbitrators rendered an award in favor of the seller. Then the seller sought enforcement of the Russian award in Germany.

The Celle Court of Appeal granted enforcement and denied the argument of the buyer that the arbitration clause in the contract was invalid because it provided for “alternative jurisdiction” However, the Court of Appeal didn't agree with such argument, instead, reasoning that the clause was valid under the 1958 New York Convention as it clearly gave the party commencing arbitration an admissible choice between two arbitral institutions. After the appeal raised by the defendant, the Federal Supreme Court trialed and affirmed the lower court’s decision, holding in particular that an arbitration agreement may provide for more than one arbitral tribunal, in which case, as a rule, the party commencing arbitration has a choice. Accordingly, an arbitration agreement containing more than one designated arbitration institution should be treated as valid. Such liberal condition of specific content of an valid arbitration agreement would ensure its validity at the maximum level, and reduce the controversial interpretations on such issue in different courts.

4. Supreme People’s Court of P.R. China: [2005] Min Si Ta Zi No.50

Practical controversial arguments on the concurrent choosing of two or more arbitration institutions in the arbitration agreement had also reported by Supreme People’s Court of China, according to Chinese Arbitration Law and judicial interpretations. There was a case reported on 30 December 2005 by the Supreme People’s Court of China, concerning the validity of an arbitration clause which contained nonexclusive choice of arbitration institution in a Sale and Purchase Contract.

In this case, the Contract in English and Chinese languages signed by the Aier (Tianjin) and Masa (German) both include the arbitration clause and clearly stated that the contract in Chinese language shall prevail. Therefore, the validity of the arbitration clause shall be determined according to the provisions of the Chinese version Contract, in which the parties concerned agreed that any dispute arising from the performance thereof would be resolved through friendly consultation between the

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280 Id.p.304.

parties, and if no agreement was reached thereby, the dispute would be resolved through arbitration. Further, the parties had decided the place of arbitration should be Beijing or Tianjin, where the arbitration proceeding should be conducted by either China or Tianjin Council for Promotion of International Trade. However, they failed to agree on the applicable law for determining the validity of the arbitration clause.282

After trial, the Supreme People’s Court rendered the reply, reasoning “Since the parties concerned hadn’t chosen the applicable law for the validity of the arbitration agreement, while agreed on the place of arbitration, i.e., Beijing or Tianjin, China, therefore the validity of the arbitration clause shall be determined in accordance with the laws of the place of arbitration, that is the laws of China here.

According to article 18 of the Arbitration Law of China, if the arbitration agreement contains unclear provisions concerning the arbitration commission, and if no supplementary agreement can be reached, then such arbitration agreement shall be null and void. 283 More specific explanations have been made by the judicial interpretation of Supreme People’s Court on certain issues concerning the application of the Arbitration Law, in which article 5 indicates, “If two or more arbitration institutions are agreed upon in an arbitration agreement, the parties concerned may select, by agreement, one of these arbitration institutions to which they will apply for arbitration. If the parties fail to reach an agreement on the arbitration institution, the arbitration agreement shall be deemed invalid.”284 Referring this case, the parties chose two arbitration institutions in their arbitration clause, and according to previous analysis, the applicable law to deciding the validity of the arbitration agreement should be Chinese laws. Thus this arbitration clause should be recognized as invalid strictly.

Nonetheless, considering the specific situation in this case, where one of the agreed arbitration institutions was not actually existed, the Supreme People’s Court interpreted the disputed arbitral clause to be valid, reasoning “the arbitration clause expressed the parties’ intentions to have their contractual disputes resolved through arbitration. Tianjin Council for Promotion of International Trade, however, did not exist. The parties also agreed to select the China Council for Promotion of International Trade for arbitration, therefore the China International Economic and Trade Arbitration Commission (CIETAC) was deemed their selection. 285 The arbitration clause shall be therefore determined to conform to the arbitration law of China and be valid. The contractual dispute between Aier (Tianjin) and Masa (German) shall be resolved through arbitration and the people’s court does not have

282 Id.
284 See supra note 253, Article 5 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”.
jurisdiction over the dispute.”

According to the judgment of the Supreme People’s court, although the arbitral clause contains two arbitration institutions, however, one of which did not exist, so if the other one can be decided clearly, then the disputed arbitral clause should be valid. In fact, the name of another arbitration institution had not been clearly stated, where only the organization by which the arbitration institution being established. Nevertheless, it had been recognized that an arbitration institution had been clearly selected by the Supreme People’s Court, which may trial and render the final judgment by virtue of article 3 of the judicial interpretation of Supreme People’s Court on certain issues concerning the application of the Arbitration Law.

5. Supreme People’s Court of P.R. China: [2007] Min Si Ta Zi No.45

Another recent case reported on the controversy of choosing concurrent arbitration institutions had been recognized as invalid by the Supreme People’s Court of China. In this case, the Hong Kong Ace Medical Packaging Co., Ltd. (Claimant) signed a Compensation transfer agreement of Land-use Right and Ownership of Building with Dongguan Weihong Metal Product Factory Ltd. (Defendant 1) and Virgin Islands New Guanyu Industrial Co., Ltd.(Defendant 2) , in which article 7 agreed, “any disputed arising under this agreement between the parties shall be solved by negotiation, if no settlement can be reached, each party will be able to apply for arbitration to Hong Kong or Shenzhen International Arbitration Commission. The arbitral award shall be final and be executed unconditionally by both parties.”

After disputes arose, the Defendants and the Claimant couldn’t reach a supplementary agreement for decide the unique arbitration institution, and then the Claimant filed a suit to the Intermediate People’s Court of Dongguan, Guangdong Province. After the court proceeding, the Intermediate People’s Court made a judgment, recognizing that the disputed arbitration clause should be void according to article 5 of the judicial interpretation of Supreme People’s Court on certain issues concerning the application of the Arbitration Law. After that, the case was reported to the High People’s Court of Guangdong Province, where the lower court’s judicial opinion had been affirmed, and then reported to the Supreme People’s Court for instruction. Finally, after trial, the Supreme People’s Court agreed with the lower courts’ judicial reasoning, and trialed the disputed arbitration agreement to be invalid.

Specific contents required for a valid arbitration agreement are different in those contracting states of the New York Convention, which would potentially caused barriers to recognition and enforcement of international commercial arbitration agreement and arbitral award. As discussed in detail in the previous cases, the strict

286 See supra note 264.
287 Under this article, “If the name of the arbitration institution agreed upon in an arbitration agreement is not describe in an accurate way, but the specific arbitration institution is determinable, it shall be deemed that the arbitration institution has been selected.”
288 [2007] Min Si Ta Zi No.45, Reply of the Supreme People’s Court to Instruction Request on the validity of arbitration clause over transfer contract of land-use rights in the Case of Hong Kong Ace Medical Packaging Co., Ltd. v. Dongguan Weihong Metal Product Factory Ltd. and Virgin Islands New Guanyu Industrial Co., Ltd., 5 April 2008.
conditions for substantive valid of arbitration agreement under the Chinese arbitration laws, which required a sole elected arbitration institution to be clearly contained in the arbitration agreement, had created lasting refusal of such kinds of arbitration agreements and arbitral awards. If such cases happened in other countries, like selected double arbitration institutions in one arbitration agreement, or no specific arbitration institution had been decided, would be valid and enforceable.

2.1.2.4.3 Cases on Concurrent Jurisdictions of Arbitration and Litigation

1. Federal Supreme Court of Germany: 1 March 2007

When one arbitration agreement concurrently contains jurisdiction of arbitration and court procedure, it is likely to be treated as substantively invalid, and affect the enforceability of arbitral awards. There was a case trialed by the Federal Supreme Court of Germany on March 1, 2007, in which the subject matter is about the invalidity of arbitration agreement for failure to completely exclude jurisdiction of State court. According to the brief introduction of this case, the Claimant, the general partner in a limited partnership (KG), and the defendant (Mrs. X) allegedly entered into a contract under the KG’s General Conditions of Contract. Clause no.15 of the General Conditions of Contract provide for arbitration of disputes at the German Arbitration Institute (DIS). It additionally provided that if a party was dissatisfied with the outcome of the arbitration, it could commence a court action in respect of the same dispute within one month of the award. If no claim was filed within that time limit, the award became final and binding. As a dispute arose between the parties and the defendant commenced DIS arbitration and got a prevailing arbitral award. After that, DIS arbitrators also issued an additional award on costs, specifying the actual amount to be paid by Mrs. X to the KG. The KG then sought enforcement of the latter award before the Frankfurt Court of Appeal. As the first instance, the Frankfurt court of Appeal denied the request for enforcement of the arbitral award, holding that the clause no.15 was not a proper arbitration clause as it did not completely exclude the jurisdiction of state courts. The KG was not satisfied with the judgment of the first instance and filed an appeal on points of law before the Federal Supreme Court. Final, the Federal Supreme Court reversed the Frankfurt Court of Appeal’s decision, and held that the complete exclusion of the jurisdiction of state courts is not a requirement for the validity of an arbitration agreement. It reasoned that contractual freedom is the basis of arbitration and that the binding force of an award originates from the parties’ agreement. Thus, just as they are free to agree to

289 No. 15 of the General Conditions of Contract: “Place of performance and jurisdiction. All disputes arising in respect of this contract or its validity shall be decided first in accordance with the Arbitration Rules of 1 January 1992 of the German Arbitration Institute (DIS). The arbitral tribunal may also decide on the validity of this arbitration agreement. The outcome of the arbitration can be recognized by both parties as conclusive, final and binding on both parties. If one of the parties is dissatisfied with the outcome of the arbitration, it shall commence a court action within a month from the date of the arbitral decision. If this time limit expires, the arbitral decision shall be final and binding on both parties.” See Albert Jan van den Berg, Yearbook: Commercial Arbitration XXXIII, Kluwer Law and Taxation Pub., 2008, pp.232-233.

have their dispute decided by arbitrators, the parties may make their acceptance of the award conditional. In the present case, however, Mrs. X did not commence a court action on the same dispute within the agreed time limit following the first award on the merits, nor did she seek relief against the additional arbitral award that could question its binding force. Since the additional award was effective and binding and no grounds for annulment were either raised or apparent, the Court held that declaration of enforceability should be granted.291

2. Supreme People’s Court of P.R. China: [2005] Min Si Ta Zi No.4

There were some similar cases on the concurrently chosen of arbitration and court jurisdiction in an arbitration agreement or arbitral clause in the P.R.C, and the Supreme People’s Court gave replies absolutely opposite to the Federal Supreme Court of Germany. For Example, one reply of the Supreme People’s Court on March 25, 2005 concerning an arbitration agreement between the parties who agreed with each other that “when any disputes arose under the contract, the two parties shall negotiate with each other immediately; if failed to reach any settlement, any party shall apply for conciliation and arbitration to arbitration institution, and also be entitled to sue to people’s court of the place where the contract was signed.” According to the reply of the Supreme People’s Court, in this case the parties neither agreed with the applicable law of the arbitration agreement, nor clearly indicated the place of arbitration, thus the law of lex fori shall be used to determine the validity of such arbitration agreement. According to the law of lex fori, which indicates the Arbitration Law of P.R.C, such arbitration agreement shall be invalid and thus the people’s court should have jurisdiction on disputes between the parties.292

3. Supreme People’s Court of P.R. China: [2009] Min Si Ta Zi No.19

Another reply of the Supreme People’s Court on similar issue was made on May 18, 2009. In this case, the parties had first negotiated an arbitration clause in their contract, which indicates that any disputes related to the contract, if not being able to be resolved by settlement, shall resort to arbitration by the Chinese International Economic and Trade Arbitration Commission (CIETAC) in Beijing, according to its arbitration rule. However, under another provision in the same contract, the parties had also agreed with the non-exclusive jurisdiction of the people’s court of P.R.C. Thus this arbitration agreement should be void under article 7 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of “Arbitration Law of the People’s Republic of China”, excepting that one party commenced arbitration and the other hadn’t raised any objection during the period provided under the second paragraph of article 20 of the Arbitration Law.293

Id. p.232.


After comparative cases study of Germany and P.R.C, it is sure that when an arbitration agreement contains concurrent choice of arbitration and court procedure as dispute resolution may be valid in Germany while invalid in China. Such conflict may be existed under arbitration-related laws of various contracting states of the New York Convention, whereas the validity of such arbitration agreement or clause may be uncertain, and finally affect the enforceability of arbitration awards. How to eliminate such conflict among countries deserves future research, in order to promote international commercial arbitral award being recognized and enforced easily and smoothly in the nearly future.

2.1.3 Matter of Consent for Determining Validity of Arbitration Agreement

2.1.3.1 Importance of Matter of Consent for Arbitration Agreement

In order to make sure of the substantive validity of an arbitration agreement, it must be sure that such agreement is negotiated by the parties concerned, with their true intentions to refer arbitration procedure. As one professor argues, “Courts are required to enforce arbitration agreement according to their terms so long as general contract defense do not invalidate the agreement and when there is clear and unmistakable evidence the parties agreed to arbitrate the issue in dispute.” Matter of consent is very important basis for arbitration system, justifying its legitimacy and fulfillment of due process under such alternative dispute resolution. Parties can only be bound to an arbitration clause if they intend to be bound. They must sign the contract, or at least demonstrate a manifest intent to be a party to the contract. Recently, there are some controversial arguments on whether a non-signatory to a contract may be compelled to arbitration. As indicated by another professor, “this attempt, understandably, is often met with resistance from those third parties who do not want to be brought into the dispute. This issue has raised considerable concern among courts and scholars as well.”

Actually, there are some influential cases reported by different national courts on the matter of consent on arbitration agreement. Even such cases are rendered by courts of countries with different legal culture and history, common intention of the parties to arbitration is the basic requirement for a substantive valid arbitration agreement. As professor argues, “when parties litigate, they refer their dispute to an established judicial tribunal with established procedures structures and legal system. Arbitration is fundamentally different. The obligation to arbitration is dependent on the agreement of the parties. This establishes the width of the obligation or the scope of matters which are required to be referred to arbitration.” Therefore, when parties

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have successfully agreed with their arbitration agreements with common intention, they must obey such valid arbitration agreements and fulfill their obligation to take part in the following arbitral proceedings. Even if one of them challenges the validity of arbitration agreement later, the competent national courts shall not permit such reasonless assertion, and maintain the validity of those disputed arbitration agreements and arbitral awards.

2.1.3.2 Cases Reported on Matter of Consent Issue

1. Tokyo High Court of Japan: Case (Ne) No. 2785 (2011)

This case is an appeal of a decision entered by the Tokyo District Court regarding a breach of contract dispute. The Appellant, a port operator based in Maizuru, Japan, and the Respondent, a ship owner based in Seoul, Republic of Korea signed a charter agreement, where the Appellant chartered the Respondent’s ship for freight transport from Japan to Nakhodka, Russia. The charter agreement was executed by a Fixture Note signed by both parties, which set forth basic concrete terms of the charter. Besides, other details were pursuant to form charter contract of Tokyo Freighting, which itself was based on a form contract of the New York Produce Exchange (NYPE). The Fixture Note didn’t contain any arbitration agreement or mention of arbitration, however, in this form contract, an arbitration clause was contained. As originally written in the NYPE form, where the arbitration clause called for arbitration in New York, had been rewritten to provide for arbitration in Tokyo in accordance with the rules of the Japan Shipping Exchange.

According to the judgment of the Tokyo High Court, it examines the issue of whether an arbitration agreement is valid when that arbitration agreement is found in a form contract drafted by a third party, incorporated in the parties’ contract by reference and not independently executed, and received by the parties after they had executed their main contract. Giving weight to practices within the shipping industry, past dealings of the parties, and performance by the parties after receiving the form contract, the court ultimately decided that the form contract’s arbitration clause was properly incorporated in the parties’ contract and bound the parties to arbitration under its terms.

In determining the substantive validity of the disputed arbitration agreement, the court explains “the substantive requirement for valid formation of an arbitration agreement is that there be a mutual agreement by the parties”. But how to make sure of the mutual agreement or common intention of the disputed parties shall be discussed. It further argues that Article 7.2.3 of the UNCITRAL Model Law on International Commercial Arbitration supports the execution of contract by citing and incorporating form contracts or generalized terms and conditions that include arbitration clause. In order to determine whether there was mutual agreement to arbitration, it is appropriate to examine the whole circumstances including the nature.

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299 Id. pp.566-567.
of the parties, general practices with the industry and previous dealings by the parties.\textsuperscript{300}

Here again referring back to the case, the Appellant and the Respondent have continue doing business in an industry in which arbitration agreements are widely practiced. And both parties have received the same form contract in their previous transactions. So the parties could be aware of the content of the arbitration clause there. Moreover, with regard to their present contract, although the form contract was received later than the execution of the contract, both parties commenced their contractual performance without raising any objection after having received the form contract. Thus it is believable that parties have made mutual consent to arbitration with the Japan Shipping Exchange in Tokyo.\textsuperscript{301}

\section*{2. Supreme Court of the United States: 24 June 2010}

This is a very important court judgment on the matter of consent issue by the Supreme Court of the United States of America.\textsuperscript{302} The subject matters of this case were the existence of contract containing arbitration clause and the pro-arbitration policy and consent to arbitrate. Combining with the controversies of this case, it was on the collective bargaining agreement (CBA) reached by the representative of the Petitioner and the Respondent which contained no-strike clause and an arbitration clause. However, the Respondent didn’t accept CBA unless a hold-harmless agreement was reach in respect of their former strike-related damages. After that, the Respondent advised members not to go back to work and the strike continues.

Then the Petitioner sued in federal court, claiming federal jurisdiction under the Labor Management Relations Act 1947 (LMRA) and seeking strike-related damages. The district court thought that such issue as whether the CBA was ratified in time to apply to the following strike should be decided by the court. However, the court of Appeal reversed this reasoning, emphasizing that as the arbitration clause undisputedly covered the strike claims, parties’ dispute on the CBA ratification date was a matter for an arbitrator to resolve. Moreover, national policy favoring arbitration required any ambiguity about the arbitration clause’s scope to be resolved in favor of arbitrability. The Supreme Court reversed the appellate court’s decision in respect of the finding that the ratification date was a matter for the arbitrator, and reaffirmed the principle which had been well settled in both commercial and labor cases, that whether parties have agreed to arbitrate a particular dispute and disputes concerning contract formation are generally for court to decide.

Further, the Supreme Court continues, a court may order arbitration of a particular dispute only where it is satisfied that the parties agreed to arbitrate that dispute. According to the Court of Appeal, the district court erred in finding that the CBA’s ratification date was an issue for the arbitrator to decide because of two principles of arbitrability set forth in the Supreme Court’s precedents, namely: (1) the

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\textsuperscript{300} Id. p.568.  \\
\textsuperscript{301} Id. p.569.  \\
\textsuperscript{302} Supreme Court of the United States, 24 June 2010, No. 08-1214, reported in Albert Jan van den Berg, \textit{Yearbook: Commercial Arbitration XXXVI}, Kluwer Law and Taxation Pub., 2011, pp.615-618.  \\
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principle that where, as here, the parties concede that they have agreed to arbitrate some matters pursuant to an arbitration clause, the pro-arbitration policy in US law counsels that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration and (2) the principle that this presumption of arbitrability applies even to disputes about the enforceability of the entire contract containing the arbitration clause.\(^{303}\)

The Supreme Court held that the appellate court “overreads our precedents”. Because the language and holdings on which the appellate court relied cannot be divorced from the first principle that underscores all of the Supreme Court’s arbitration decision, that arbitration is strictly a matter of consent. Applying this principle, the Supreme Court’s precedents hold that arbitration should be compelled only when neither the formation of the arbitration agreement nor its enforceability or applicability to the dispute are in issue. The Supreme Court also disagreed with the Respondent’s argument that it has strong public policy favoring arbitration of labor disputes, particularly under the LMRA, holding that its cases invoking the federal policy favoring arbitration of commercial and labor disputes apply the same framework describe above. Then the Supreme Court concluded that it never held that pro-arbitration policy, whether commercial or labor cases, overrides the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit.\(^{304}\)

3. Supreme Court of United Kingdom: 3 November 2010

Whether disputed parties have agreed to the arbitration agreement is a controversial issue and may get different results when national courts of different countries trial on the basic legal relationship and facts in the same case. For instance, there was an influential case which was concerned on the issue that if a non-signatory party could be a party to an arbitration agreement under the applicable law, which had been trialed through both courts proceedings of UK and France separately and got different judicial opinion on such issue.\(^{305}\)

In this case, the Government of Pakistan (GoP) approved a proposal to establish the Awami Hajj Trust (the Trust), which would invest savings of members in order to facilitate and fund their Pilgrimage to Mecca (Hajji). In 1995, the Ministry of Religious Affairs of Pakistan (MORA, Respondent) was proposed that a Albaraka company, Dallah Real Estate and Tourism Holding Company (Dallah, Appellant), could provide to the GoP a housing complex in Mecca on a long-term lease for use by Pakistani Hajj Pilgrims. After a series of preparation work by the Dallah, on 24 July 1995, Dallah and the President of the Islamic Republic of Pakistan, through the MORA, concluded a Memorandum of Understanding (MOU), which contained that Dallah would find land within Mecca, construct housing facilities for Pakistan

\(^{303}\) Id. p.617.

\(^{304}\) Id. p.618.

pilgrims on that land and lease the houses and the land to the MORA on a ninety-nine-year lease, subject to Dallah arranging the necessary financing. The MOU had also contained that it was governed by Saudi Arabian law and for arbitration of disputes in Saudi Arabia.

After that, representative of Dallah sent proposals to Secretary of the MORA, concerning the lease and financing of the project. The MORA didn’t approve the proposals within the contractually agreed period of ninety days. Then, Dallah got the land necessary in Mecca. On 31 January 1996, the President of Pakistan promulgated Ordinance No.VII of 1996, and established the Trust to be a corporate entity. However, after several times’ renewed according to the Constitution of Pakistan, and the Ordinance had been terminated on 12 December 1996, for failing to be laid before Parliament. Accordingly, the Trust ceased to exist as a legal entity. During the same period, Dallah and the Trust signed an agreement (the Agreement), providing for the construction of housing facilities for 45,000 Pakistani Hajj pilgrims against payment by the Trust to Dallah of a lump sum of US $ 100 million, and the Dallah was required to arrange financing facility in the same amount against a guarantee of the GoP. The Agreement did not clearly select the governing law, and clause 23 was an ICC arbitration clause.

A disputed arose between the parties when a letter which was written on the MORA’s stationery sent to Dollah, insisting that Dallah had failed to submit the project’s specifications and drawings within the agreed time limit. This was a breach of a fundamental term of Agreement and amount to repudiation. It also indicated that Dallah failed to arrange the financing facility, on which the effectiveness of the Agreement depended. Then the Trust commenced court proceedings against Dallah in Islamabad, seeking declaration that the Agreement stood repudiated on account of Dallah’s breach. And Dallah objected to the court, for applying to stay the proceedings on the basis of the existed arbitration clause. Because the Trust didn’t exist, the MORA started court proceedings in its own name against Dallah before the same court in Islamabad.

On 19 May 1998, Dallah in turn commenced ICC arbitration against MORA, Government of Pakistan. MORA had challenged the jurisdiction of the ICC through Pakistani law. However, the arbitration procedure continued, and MORA informed the ICC later that it would not submit to arbitral jurisdiction because there was no contract or arbitration agreement between MORA and Dallah on 15 August 1998. After that, the arbitral tribunal established in Paris and rendered there arbitral awards in default: (1) a First Partial Award on 26 June 2001, holding that “the Ministry of Religious Affairs, Government of Pakistan” was bound by the arbitration agreement in clause 23 of the Agreement and that the dispute fell within the scope of that arbitration agreement; (2) a Second Partial Award on 19 January 2004, determining that Saudi Arabian law applied to the merits of the case and that the MORA’s termination letter of 19 January 1997 constituted an unlawful repudiation of the Agreement; and (3) a Final Award on 23 June 2006, ordering the defendant to pay Dallah US $ 18,907,603 by way of damages for breach of the Agreement, as well as the costs of the arbitration and Dallah’s costs.
Dollah then resorted to courts of both England and France, requesting enforcement of the final award there. On the other hand, the MORA sought setting aside all of the three awards in France.

In France, Dallah sought enforcement of the Final Award on 19 August 2009, and the president of the Paris court of first instance granted an ex parte enforcement order. 306 However, on 21 December 2009, the MORA filed three applications to set aside the ICC awards on the ground that the arbitral tribunal erred in finding that MORA was a party to the Agreement and that consequently the arbitrators had jurisdiction.

After trial by the court, it rendered that the applications of the MORA should be dismissed at all, holding that the MORA was the true Pakistan party to the Agreement and reasoning, “the MORA and the GoP had been Dallah’s only counterpart in the pre-contractual negotiations and all successive dealings. The court of Appeal concluded that the MORA’s involvement and behavior at all stages of this contractual relationship confirmed that the creation of the Trust was purely formal and that the MORA behaved as the true Pakistani party to the financial operation. 307

However, the outcome was absolutely different under courts’ proceedings of the United Kingdom. As reported by courts of different instances, on 9 October 2006, the High Court in London granted Dallah’s application for leaving to enforce the Final Award. However, after a later trial, the High Court granted the MORA’s application to set aside the enforcement order, holding that the arbitration agreement clause of the Agreement didn’t validly bind the MORA because there was no evidence of a common intention of the parties that the MORA be so bound. What’s more Interesting that the High Court reached such judgment on applying the French law, which it believe to be applied to the determination of the validity of the arbitration clause, being the law of the country where the award was made.

On 20 July 2009, the Court of Appeal affirmed the lower court’s decision and dismissed Dallah’s appeal. After that, the Supreme Court confirmed the lower courts’ opinions on 3 November 2010 and again dismissed Dallah’s appeal, interpreting that “the lower courts had correctly concluded that the MORA was not a party to the Agreement or the arbitration clause therein”. 308 It reasoned that since the jurisdiction of an arbitral tribunal is founded on the consent of the parties, if there is no consent under the applicable law, there can be no jurisdiction. Here, the MORA sought to prove there was no common intention of the parties that the MORA be a party to the Agreement according to the applicable principles of French Law. Moreover, the Supreme Court explained that even the arbitral tribunal had already decided its jurisdiction by competence-competence, however, the tribunal’s own view of its jurisdiction has no “legal or evidential” value, and a court seized with an action to execute an arbitral award must trial in detail on the issue that any party resisting enforcement of such award because it was not a party to the arbitration agreement

307 Id. p.593.
308 See supra note 305, Supreme Court of United Kingdom, 3 November 2010, p. 361.
under the law applicable to it.\textsuperscript{309}

Comparing the two reports of different national courts, it is not difficult to find that how controversial a mutual consent issue is, even a little satire. Originating from the same legal relationship between the same parties, the outcome of the issue whether a non-signatory of an arbitration clause could be one party of such arbitration agreement is totally different through two different trials of courts in two countries, both had joined into the New York Convention. As indicated by commentator that “the consequences of concluding an arbitration agreement may be divided into two groups, the first group comprises a set of issues which are import for dispute settlement on the basis of the arbitration agreement. Among them are the following: 1. Submission of the parties to the rules of a standing arbitration centre agreed upon by the parties; 2. Ruling by the arbitral tribunal on the existence or lack of jurisdiction to settle a dispute on the basis of an arbitration agreement by the parties; 3. The possibility for the parties to challenge the jurisdiction of a respective international commercial arbitration institution over a specific dispute. Procedure and substantive consequences of recognition by the arbitral tribunal of lack of its competence…”\textsuperscript{310}

It is satirized here because the French court believed that the non-signatory party is a party to the arbitration agreement, thus the challenge of the following arbitral award on such arbitration agreement shall be denied according to French laws. However, courts of three instances of the UK render different judgments, also on application of the French laws to determining the validity of such disputed arbitration agreement. Applying the same French laws on the same legal relationship of the same parties can results in different court opinions. From this petty point, it is obvious that conflicts on interpreting the matter of consent containing in arbitration agreements or arbitral clause can often happen, especially in cross border arbitration or international arbitration system.

\textbf{2.1.4 Validity of Combined Arbitral Clauses into the Bill of Lading}

In the recent years, one issue connected with the validity of arbitration agreement has become very controversial, which is the combined arbitral clauses of the charter party into bill of lading. It is complicated because different countries have taken various interpretations, both by legislation and practices. For example, Germany and Singapore have already legislated on their arbitration laws, making sure of such kind of arbitration agreement being legitimate through status, while the judicial practices of the People’s Republic of China, where the Supreme People’s Court almost concludes that such combination of arbitral clauses should not be valid and trialed similarity arbitration agreements to be invalid, will be discussed in detail below. Just as one commentator indicates, “courts vary in their approaches in determining the effect of a charter party arbitration clause on holders. Each country applies its own approach to determine the underlying issue. The legal diversity among jurisdictions

\textsuperscript{309} Id.

\textsuperscript{310} Nina Vilkova, \textit{Arbitration Agreements and Their Impact upon the Efficiency of Dispute Resolution in International Commercial Arbitration}, Baltic Yearbook of International Law, Volume 8, 2008, pp.82-83.
may create choice-of-law and forum-selection problems.”

2.1.4.1 Legislation on Combination Arbitral Clause into Bill of Lading

Different States have taken diversity attitudes towards such new phenomenon of combination arbitral clause into bill of lading, inflicted in their domestic arbitration-related legislation directly. Whether such combination could generate a valid and legitimate arbitration agreement depends on the domestic laws of such countries. For instance, Section 1031 (4) of the German Arbitration Law 1998 has clearly indicated “an arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party”. This clear provision has recognized the validity of combined arbitral clause into bill of lading, which would reduce or eliminate controversy interpretations when different courts facing such issue.

Under FAA of the United States, Section 1 has made clear definition of maritime transactions, which means “charter parties, bill of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction”. Although it is obvious stated that disputes of maritime transactions could be settlement by arbitration, however, no specific regulations has been added on the incorporation of arbitral clauses of charter parties into bill of lading. Nevertheless, as indicated by other commentator, “a majority of courts in the United States agree that a holder of a bill of lading is bound to arbitrate where the charter party shows a sufficient intent to be bound by an arbitration clause.” The case law has already made perfect supplementary to the validity of the combined arbitral clause. As concluded by other commentator, “American cases demonstrate that as long as the arbitration clause in the charter party is broad enough, and the incorporation clause in the bill of lading is specific enough to give notice to its holder, the consignee as well as the underwriter are going to be bound by it.”

Arbitration Act 1996 of UK has not contained a provision on the combination of charter party arbitral clause into the bill of lading. On the other hand, expressly and specifically incorporation of the charter party arbitral clause into bill of lading is required. On deciding whether an arbitral clause has been effectively incorporated into a bill of lading, the English Court takes a stricter approach than the U.S. courts. General words of incorporation in a bill of lading shall not be recognized as successfully incorporated. As an English Commentator argues, “three conditions

must be met in order for a charter party arbitration clause to be successfully incorporated into the bill of lading. First of all, the operative words of incorporation must be found in the bill of lading itself; secondly, such words must be suitable to describe the charterparty clause that is being incorporated; finally, the incorporated clause must be consistent with the terms of the bill of lading, and in the event of conflict, the provisions of the bill of lading will prevail.\textsuperscript{318}

The latest International Arbitration Act of Singapore was promulgated in 2012, which was based on the UNCITRAL Model Law. Provision on the reference of arbitral clause in a bill of lading has been added besides Option 1 of Article 7 of the Model Law, which provides “a reference in a bill of lading to a charter party or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to made that clause part of the bill of lading.”\textsuperscript{319} Resembling the provision contained in the Arbitration Law of Germany, specific and clear legislation on the incorporation arbitral clause of charter party into bill of lading will be great promotion on legal practices concerning such issue. Recognizing incorporated arbitral clause as valid will also make the execution of the final arbitral awards based on such arbitration clause smoothly, reducing refusals of arbitral awards.

In other countries, like France, Japan and People’s Republic of China, such incorporated arbitral clauses have not yet been protected through their domestic arbitration legislation. For instance, as a commentator points out that in China, there is no statutory law that addresses the effect of an arbitration clause incorporated from a charter party on a holder. Case law on this issue is limited and inconsistent, making this a difficult area in Chinese maritime law.\textsuperscript{320} It has caused controversial arguments on the validity of incorporated arbitral clauses into bill of lading. Uniform interpretation on the validity of arbitral clause combined into bill of lading is expected, even if no legislation amendments are anticipated recently, at least relevant unification of judicial practices of various domestic. A few cases will be discussed in detail below, comparing different attitudes of national courts concerning on this issue.

2.1.4.2 Comparative Case Study on Validity of Incorporated Arbitral Clause

1. High Court of Justice, Queen’s Bench Division of UK: 1 April 2009

This case was partly concerned with the incorporation of arbitration clause in bill of lading between the National Navigation Co. (Egypt) and the Endesa Generacion SA (Spain).\textsuperscript{321} Endesa Generacion SA (Endesa) bought coal through other contract on 14 December 2007, which had been shipped on 6 December 2007 in Indonesia aboard the Vessel \textit{WADI SUDR} owned by the National Navigation Co. (NNC), as evidenced by a Bill of Lading issued on that date. The Bill of Lading

\textsuperscript{318} Miriam Goldby, 	extit{Incorporation of Chapterparty Arbitration Clauses into Bill of Lading: Recent Developments}, 19 Denning L.J. 171, 2007.
\textsuperscript{319} Section 2A (8) of the International Arbitration Act of Singapore.
\textsuperscript{320} See supra note 311, p.117.
\textsuperscript{321} High Court of Justice, Queen’s Bench Division (Commercial Court), 1 April 2009, Case No.: 2008 Folio 64 and Case No.: 2008 Folio 667, reported in Albert Jan van den Berg, \textit{Yearbook: Commercial Arbitration XXXIV}, Kluwer Law and Taxation Pub., 2009:pp830-861.
covered a provision on the opposite side, which indicated “all terms, liberties and exceptions of the Charter party dated as overleaf, including the law and Arbitration clause are herewith incorporated”. The *WADI SUDR* was subject to three charters at that time. However, no chapter party had been clearly indicated on the front page of the Bill of Lading. Besides, the first time-charter and third voyage chapter contained separately an arbitral clause, providing for the application of English law and arbitration of disputes under the Rules of the London Maritime Arbitrators Association (LMAA).322

After the *WADI SUDR* sustained damage and general average was declared, the coal had been discharged in another port, and could not be easily transported to port where decided in their original contract. Therefore, Endesa made a court suit in the First Instance Court in Spain, requiring reimbursement of this additional cost from NNC. While NCC challenged jurisdiction of the First Instance Court and argued that dispute here should be referred to arbitration in London. Then NNC applied a stay of the proceedings in the Spain court. However, the Spain court trialed, recognizing that no arbitration clause had been validly incorporated form any charter party into the Bill of Lading under Spanish law.

Simultaneously, NNC issued an arbitration claim form in the proceedings before the Commercial Court in London, applying that … (ii) a declaration that the London arbitration clause in the Voyage Chapter was validly incorporated into the Bill of Lading…The High Court granted NNC’s Declaration Application, where it reasoned, in any event it could refuse to recognize the Spanish decision, though with some degree of hesitation, because it would be contrary to English public policy to recognize a judgment obtained in breach of a valid arbitration agreement, where there is a clear obligation for an English court to give effect to an arbitration agreement that is valid in accordance with its proper law under English law and Article II(1) of the New York Convention. It continued that English law applied as both chapters had chose English law as the applicable law, and held that it was unnecessary to determine to which charter party the Bill of Lading was meant to refer, as both charters contained a London arbitration clause.323

In this case, the English court rendered the incorporation of a chapter party’s arbitration clause into Bill of Lading to be valid, even there was only easy express of the incorporation and no specific chapter party had been decided. It is quite liberal of the English court’s attitude toward such combination of arbitral clause, where there were other sophisticated arguments on the jurisdiction of courts of other member states of the EC, referring to the Council Regulation No.44/2001(the Regulation) , and party’s waiver of arbitration agreement issue, etc. The English court had considered the question that if it should be refraining from granting a declaration as to incorporation that should conflict with the judgment by a court of another Member State. Finally, it denied such hypothesis, believing the exclusion of arbitration from the scope of the Regulation may lead occasionally to conflicting judgments in

322 Id. p.831.
323 Id. p.834.
different Member States in relation to arbitration issues. 324


This case was connecting with the issue whether the incorporated arbitral clause into a bill of lading should be valid or not according to American domestic laws.325 By a certiorari to the United States Court of Appeals for the First Circuit, the US Supreme Court, with a majority affirmation opinion, held that the Carrier of Goods by Sea Act (COGSA) does not nullify foreign arbitration clauses contained in maritime bills of lading.326 Besides, as argued by other commentator, “the Supreme Court attempted to address these competing interesting in resolving a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading.”327

In this case, a New York fruit distributor’s produce was damaged in transit from Morocco to Massachusetts aboard respondent vessel, owned by respondent Panamanian company and chartered to a Japanese carrier. Petitioner insurer paid the distributor’s claim, and then both of them sued the respondents to a Federal District Court of the US, where the respondents required compelling arbitration pending the court action in Tokyo under the bill of lading’s foreign arbitration clause and the FAA.

The District Court granted the motion to stay court judicial proceedings and to compel arbitration, retaining jurisdiction pending arbitration. Further, at petitioner’s request, it certified for interlocutory appeal under 28 U.S.C. §1292(b) its ruling to compel arbitration, stating that the controlling question of law was “whether COGSA§3(8) nullifies an arbitration clause contained in a bill of lading governed by COGSA.” The District Court also rejected the argument of the petitioner and the distributor that the arbitration clause was unenforceable under the FAA, because, inter alia, it violated §3(8) of the Carriage of Goods by Sea Act (COGSA) in that the inconvenience and costs of proceeding in Japan would ‘lessen liability’ in the sense that COGSA prohibits.328

After appealed to the First Circuit Court, it affirmed the order to arbitrate. The First Circuit expressed grave doubt whether a foreign arbitration clause lessened liability under §3(8), but assumed the clause was invalid under COGSA and resolved the conflict between the statutes in the FAA’s Favor, which it considered to be the later enacted and more specific statute.

The Supreme Court granted certiorari, in order to resolve a Circuit split on the enforceability of foreign arbitration clauses in maritime bills of lading. Contrary to the precedent, the Supreme Court affirmed this controversial issue. It reasoned, (a) Examined with care, §3(8) do not support petitioner’s argument that a foreign arbitration clause lessens COGSA’s liability by increasing that transaction cost of obtaining relief. For the United States to be able to gain the benefits of international

324 Id.
326 Id. pp.533-541.
328 See supra note 325.
accords, its courts must not construe COGSA to nullify foreign arbitration clause because of inconvenience to the plaintiff or insular distrust of ability of foreign arbitrators to apply the law. (b) Also rejected is petitioner’s argument that arbitration clause should not be enforced because there is no guarantee foreign arbitrators will apply COGSA. (c) In light of the foregoing, the relevant provisions of COGSA and the FAA are in accord, and both Acts may be given full effect. It is therefore unnecessary to resolve the further question whether the FAA would override COGSA were COGSA interpreted otherwise.329

After the First Circuit, then the Supreme Court had rendered their judgments, affirming the validity of incorporation of arbitration clause into bill of lading, comments had been divided against each other on such affirmation. For instance, supporter had argued that “The First Circuit’s approach, affirming the primacy of the FAA over COGSA on the issue of arbitration, offers a rational solution to the current judicial dissension. By resolving this conflict, the Supreme Court will come closer to achieving COGSA’s stated purpose of effectuating a predictable regime of rights and duties for shippers and carriers bound by maritime bills of lading. The First Circuit’s Sky Reefer holding should serve as a beacon to guide the Court through the stormy seas of statutory interpretation and light the way towards this elusive goal.330

On the other hand, critiques on the Supreme Court’s reasoning are also strongly. For example, one professor criticized, “Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer appears to be wrongly decided and could result in unintended and harmful effects on international commerce. While the Court was certainly correct in supporting the proposition from The Bremen331 that the expanding world economy cannot permit the United States to ‘insist on a parochial concept that all disputes must be resolved under our laws and in our courts’, the Court went too far in upholding this principle at the expense of enforcing an adhesionary clause. The Sky Reefer majority, in trying to bring the Court’s guidance to lower courts in conformity with valid concerns of international comity and modern international commerce, likely went farther than necessary.”332 Criticize opinion by another commentator argued, “The majority opinion in Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer goes against long standing precedent and violates the general purposes of both COGSA and the FAA. Consequently, I propose that the dissenting opinion is more on point and the majority opinion’s applicability should be limited.”333

From the previous analysis, it is obvious that issue of incorporation of arbitration clause into bills of lading can be very controversial in domestic jurisdiction, especially in countries where legislation had not yet clearly stated on this issue. Considering the legal history and jurisdiction of the United States, this Supreme Court judgment could be influential for lower courts’ trials. As the above commentator

329 Id.
332 See supra note 327, Stuart C. Gauffreau.
concluded that, “lower courts have already started applying Vimar as overruling the Indussa line of cases and as primary authority for the proposition that arbitration clauses are enforceable under the Carriage of Goods by Sea Act.”

3. Supreme People’s Court of P.R. China: [2007] Min Si Ta Zi No.14

There were several cases reported by the Supreme People’s Court of China during the past decade, which were mainly argued on the validity of combined or incorporated arbitral clauses in bills of lading. One of those cases was reported on 29 September 2007, referring to (China) Beijing Ailisheng Imp. & Exp. Ltd. (Claimant) v. (Japan) Solar Shipping and Trading S.A., (Singapore) Songa Shipholding Pte Limited (Defendants), was concentrating on the validity of arbitral clause incorporated in the bill of lading which was holding by the claimant (Beijing Company), and then if the Maritime Court of Wuhan had jurisdiction over the controversy of the parties.

According to the report of the Supreme People’s Court, the Claimant Beijing Company had signed a foreign trade contract with a third party on 3 March 2005, who had decided that the Defendant Singapore Company would carry the goods under the contract, from the loading port in Houston and the discharge port in Zhang Jiagang in China. The captain had issued clean lading bill of lading on 31 March 2005. After the cargo had been carried to the destination port of Zhang Jiagang by the “Swift Tiger” vessel of Defendant Japan Company, the Claimant found that the cargo had been seriously damaged and therefore it had suffered 1.25 million dollar damage. Thus the Claimant sued against the Defendants to Maritime Court of Wuhan for damages.

During the trial in the Maritime Court of Wuhan, the Defendant (Singapore Company) had raised jurisdiction challenge, arguing that there were some articles on the front side of the bill of lading containing following statement: “In the event charter party is not sufficiently incorporated above, any and all disputes arising out of this bill are to be arbitrated in London or New York, at Owner’s/Carrier’s option, subject to the SHELLVOY 84 arbitration clause.”

Therefore, the Singapore Defendant argued that the holder of the bill of lading should resolve disputes with the owner/carry through arbitration, either in London or New York, where the owner/carry have the right to choose the place of arbitration. Because the owner had chosen London as the place where arbitration should take place, then English law should be used to decide the validity of such agreement in a bill of lading. According to English law, such agreed article in the bill of lading was valid and binding on the parties. Further, the concerned arbitral clause would also be valid even according to Chinese law, which was the judicial interpretation of the Supreme People’s Court Fa Han [1996] No.176, concerning issue of choosing two arbitration institutions simultaneously and how to decide the validity of such arbitral

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335 See supra note 333, Cherie L. LaCour.
clause. So the parties should resolve their disputes by arbitration, but not litigation, and the people’s court has no jurisdiction over this case. The claim of the plaintiff should be dismissed.

However, the court of the first instance didn’t agree with the argument of the Singapore Defendant, reasoning, although parties had chose the place of arbitration, there were two places had been chose. It therefore should be recognized that place of arbitration had not been clearly decided. Then it was unable to find the *lex arbitri* to decide the validity of the arbitral clause. So *lex forum*, here the Chinese law, should be the applicable law to decide the validity of the arbitral clause. According to *Fa Han [1997] No.36* of the Supreme People’s Court, “if the parties had only agreed on the place of arbitration, while no arbitration institution had been decided. If the parties couldn’t make supplementary agreement for deciding the arbitration institution when disputes arose, then according to Article 18 of the Arbitration Law of China, such arbitral clause should be invalid. In this case, the Claimant had already filed the disputes to the people’s court, therefore the disputes couldn’t reach a supplementary agreement on specific arbitration institution, and this arbitral clause should not be valid. The Maritime Court of Wuhan should have jurisdiction. The jurisdiction challenge of the Singapore Defendant should be dismissed.

After received the decision of the court of the first instance, the Singapore Defendant made an appeal to the High People’s Court of Hubei Province, insisting that the articles in the front side of the bill of lading had clearly agreed with arbitration as an dispute resolution for any differences connecting with freight of cargo between the holder and owner/carrier. The owner/carrier had chose the London arbitration, thus the judgment of the lower court was wrong. The High People’s Court of Hubei Province had reviewed in detail, and rendered the arbitral clause in the bill of lading had no binding force on the appellees. And the reasons of the court of first instance had been affirmed. The High People’s Court of Hubei applied instruction from the Supreme People’s Court according to article 1 of *Fa Fa [1995] No.18*. After careful recheck and research by the Supreme People’s Court, it replied as follows: “In this case, the related bill of lading was issued basing on the charter party; however, the arbitral clause in the front side of the bill of lading was not the type that incorporated arbitral clause of chapter party into bill of lading, but agreement on separate arbitral clause of bill of lading. According to Article 95 of the Maritime Law of China, the rights and obligations between the carrier and the holder of bill of lading

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338 *Fa Han [1997] No.36, Letter of the Supreme People’s Court on the Validity of Arbitration Clause which has chosen the Place of Arbitration but not decided the Arbitration Institution.*

339 *Fa Fa [1995] No.18, Notice of the Supreme People’s Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by the People’s Courts. Article 1 requires, “With respect to any foreign-related, or Hong Kong, Macau or Taiwan-related economic or maritime dispute cases filed to a people's court, if the parties involved have included an arbitration clause in the contract or have concluded an arbitration agreement afterwards, and if the people's court considers the arbitration clause or the arbitration agreement null, void or unclear to the extent of being non-executeable, the people's court, before deciding to accept the lawsuit filed by a party concerned, must report to the higher people's court that covers its jurisdiction for examination; if the higher people's court agrees to the acceptance, it shall report to the Supreme People's Court on its examination opinions. Before the Supreme People's Court gives its reply, the people's court may dismiss the lawsuit on temporary basis.”
shall subject to the contents of the bill of lading. Although there was an arbitral clause in the front side of the bill of lading, for requiring refer to arbitration in London or New York, such arbitral clause of bill of lading was the *ex parte* declaration of intend of the carrier, therefore it shall have no binding force on the Claimant Beijing Company. Finally, the Maritime Court of Wuhan shall have jurisdiction over this case.  

According to the explanation of the Supreme People’s Court, it had changed the opinions of the lower people’s courts which recognized the arbitration clause here was incorporated from the charter party into bill of lading. The disputed arbitral clause in this case had been treated as separate arbitration clause, which was contained in the front side of the bill of lading. However, the judgment of the Supreme People’s Court emphasized on the mutual consents of the parties to an arbitration agreement, which recognized that the holder of bill of lading should not subject to the arbitral clause in the bill of lading, because the draft of such arbitral clause was only according to the will of the carrier, potentially indicating that no consensus of both the carrier and the holder had been reached when such arbitration agreement was negotiated at the issue of the bill of lading.

As one commentator summaries that, “Chinese maritime courts use two different approaches to analyze the effects of incorporation. The first approach examines whether the arbitration clause is effectively incorporated from a charter party before the court makes a final decision on whether the holder is bound to the arbitration clause; the second approach is simply to determine whether an arbitration clause is binding on the holder of the bill of lading. The second approach yields contrasting outcomes. Some courts have denied the application of the arbitration clause to holders; in contrast, other courts have held that the provisions in bill of lading are always binding on the holder because the holder is a party to the bill of lading.”

Different cases had been reported in recent years by the Supreme People’s Court of China, which were mainly on determining the validity of incorporated charter party arbitral clause in bills of lading, or its effectiveness to the third holders of such bills of lading. Generating from those judgments or replies, the Supreme Court had always reasoned those combined arbitral clauses to be invalid, and rejected the parties’ intentions to resolve disputes through arbitration system.

For instance, in *Hanjin Shipping Co., Ltd v. Guangdong Fuhong Oil Product Ltd.*, disputes arose between a Korean company (Hanjin Shipping) and a Chinese company (Guangdong Fuhong). Although the disputed bill of lading had clearly stated in the front side, indicating that “this bill of lading shall be used along with the charter party”. And in the back side it contained such provision “The whole conditions, provisions, rights, obligations and exceptions in the chapter party indicated in the front side of the bill of lading, including application of law rules and arbitration clause, shall be all incorporated into this bill of lading.” However, the Supreme People’s...
Court analyzed that Hanjin Shipping couldn’t demonstrate the contract of affreightment which submitted by him was the chapter party indicated in the bill of lading. Besides, Hanjin Shipping wasn’t a party to such affreightment contract. Therefore neither the contract of affreightment, nor the arbitration clause contained therein hadn’t been successfully incorporated into the disputed bill of lading. Thus there wasn’t any effective written arbitration agreement or arbitral clause between Hanjin Shipping and Guangdong Fuhong, and the following application on recognition and enforcement of an arbitral award basing on the disputed arbitration clause should be refused.  

Another foreign related case Chinese Zhonghua Co. v. Haili Co. on the validity of combined arbitral clause of the chapter party into bill of lading was reported by the Supreme People’s Court on April 4, 2009. The reason for rejecting the validity of the incorporated arbitral clause was almost the same as the previous Hanjin Shipping case, mainly for lacking clear indication of which charter party had been combined into bill of lading. Not only foreign-related cases on the validity of incorporated arbitral clause into bill of lading and arbitral awards had been refused recognition and enforcement, some domestic cases on the same topic had the same destiny as the foreign-related cases, which were reported by the Supreme People’s Court in the past few years.  

The legal practice on the incorporation of chapter party arbitral clauses into bill of lading is a new topic for Chinese judges and legal practitioners. Until now most cases on this category have been reported to the Supreme People’s Court for instruction, and finally get negative replies. It is not strange that almost the same results had reached, for the legislation vacancy of China on this issue. As discussed previously, Arbitration Law of Germany and the International Arbitration Act of Singapore had already contained a provision on deciding the validity of combined arbitration clause into bill of lading, which have made definite guidance for the judges and legal practitioners. While in China, the deficiency of legislation on this issue has confused jurists, even the judges of the Supreme People’s Court. In 2008, on the 50th anniversary of the New York Convention, vice-present of the Supreme People’s Court had pointed out eight controversial issues faced by people’s courts and judges, one of which was connected with the maritime arbitration, where the common situation was that there was an arbitral clause in a chapter party, while no any arbitral clause in the bill of lading, then incorporation of the chapter party into bills of lading, specifically combining such arbitral clause into, whether such combined arbitral clause should

343 Id.
345 [2005] Min Si Ta Zi No. 29, 2005/10/09 (The arbitral clause in bill of lading should not bind on a third party— here the insurer); [2007] Min Si Ta Zi No.49, 2007/01/26 (The arbitral clause in the charter party hadn’t been effectively incorporated into the bill of lading, therefore the defendants’ arguments on request of referring to arbitration should be dismissed, the former arbitral clause should have no binding force on the Claimant); [2008] Min Si Ta Zi No.33, 2008/11/25 (Although it was recorded in the front side of the bill of lading that all the provisions of the charter party had been incorporated into the bill of lading, However, such incorporation clause hadn’t clearly indicated there was arbitral clause contained in the chapter party, therefore, such arbitral clause in the chapter party wasn’t effectively incorporated into).
have binding force on any third parties, such as guarantors or insurers, or not. Should those insurers or others like be authorized to accept or refuse such arbitral clause?\footnote{Vice-president of the Supreme People’s Court, Exiang Wan, \textit{Speech on the Academic Workshop for Commemorating the 50 anniversary of the New York Convention}, 2008/06/06.} This bewilderment is still not being well resolved till today, for lacking any amendment of the arbitration related legislation in China.

\textbf{2.1.5 Brief Remark on the Validity of Arbitration Agreement}

Benefitted from uniform limited refusals of the New York Convention, Recognition and Enforcement of Foreign Arbitral Awards has been greatly promoted in the past decades. However, there are many obstacles to recognition and enforcement of international commercial arbitral awards occurred in recent practices under its provisions, of which the validity of international commercial arbitration agreement has been one of the most controversial obstacles to recognition and enforcement of international commercial arbitral awards.

In order to ensure the validity of arbitration agreement and enforceable of the final arbitral awards, arbitration professionals have devoted to deep research. Such as the UNCITRAL publishes the Model Law on International Commercial Arbitration and gives suggestions on interpreting the controversial interpretations of the New York Convention on issues of validity of arbitration agreement.\footnote{The UNCITRAL has made a Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session.} The most important work the UNCITRAL has done is to provide a highly qualified and timely amended version of International Commercial Arbitration Law, instructing various domestic arbitration laws. However, it cannot be ignored that not all of the contracting states of the New York Convention have adopted the Model Law, thus potential conflicts between different countries may still arise.

Some countries have already relied upon the said “more-favorable-right” provision, indicating article VII (1) of the New York Convention. When discussing the formal validity of arbitration agreement, countries like Germany, Japan and Singapore whose latest arbitration laws are based on the Model Law, are more friendlier to make international commercial arbitration agreement being maximum valid. As reported previously, the German interpretation of the “More-favorable-right” provision of article VII (1) of the New York Convention even expands to the conflict of laws rules of the more favorable domestic laws. Nevertheless, this “extra-friendly” attitude toward international arbitration agreement is not always perfect, which may cause new controversial barriers to recognition and enforcement of arbitral awards. It is worthy of reconsideration of the relationship between article II(2) and article VII (1) of the New York Convention when make decisions on the formal validity of arbitration agreement. In order to keep the worldwide unification of writing requirement of arbitration agreement, article II(2) should not be derogated absolutely. Written requirement of arbitration should be kept while on the other hand, remembering the goal of the New York Convention, promoting the maximum
recognition and enforcement of arbitration agreement and arbitral awards. It is reasonable to rely on the more favorable right provision, which is appropriately restricted to be used to determine the formal and substantive validity of arbitration agreement. And it is expected that if more countries, especially the most actively arbitration practicing countries, like the People’s Republic of China and the United States of America, would adopt the more favorable right provision in the nearly future.

When deciding the substantive validity of arbitration agreement, more attentions shall be paid to various domestic laws. The New York Convention is so abstract that has authorized domestic laws to determine the substantive validity of arbitration agreement separately. What constitute an substantial valid arbitration agreement varies from country to country, or states to states, thus it is admirable that international commercial arbitration practitioners be conscious with the application law of the arbitration agreement, and try to avoid the potential challenges to the validity of arbitration agreement and affect the arbitral award finally when drafting the arbitration agreement at the very beginning of the whole arbitration procedure. As one commentator states, “the harmonizing movement motivated and encouraged by United Nations within the UNCTAD/UNCITRAL, through model laws and international treaties, is clearly expressed in the regulation as it relates to the solution of disputes by means of the commercial arbitration, whether it is of a national, regional or international nature. The legislation has been adopted at those three levels. However, it is a must the continuous study, analysis and modification of the Internal Procedure Law as to the enforcement of awards.” 348

Further, it is expected that more research should be done on the controversial issue of the validity of incorporation of arbitral clauses into bill of lading. According to the above discussion, within the selected countries, each State has its legislation and judicial interpretation on this issue. It will potentially cause conflicts on the recognizability and enforceability of the combined arbitration clauses, and the following arbitral awards. With the fast growth of international trade and transactions, arbitral clauses incorporated into the bill of lading may become frequently applied between parties of different countries. In order to maintain the validity of contemporary framework, mainly constituted by the New York Convention and various domestic laws, controversy on the validity of incorporated arbitration clause in bill of lading should be discussed and try to find uniform resolution.

The most important element for international commercial arbitration system is its private dispute resolution character, which is workable on the common consent of the parties. Many controversial issues on the validity of arbitration agreement may be perfectly resolved if the matter of consent of the arbitration agreement has firstly been respect when practicing arbitration, no matter where the arbitration proceedings take place, or what laws are applied to. One commentator argues, “If arbitration is to be a consensual arrangement, involving the relinquishment of substantial rights, the favored approach should be one that binds non-parties to arbitration only when such parties (1) have notice of the arbitration provision and (2) agree to same either before

entering into a transaction implicating the arbitration or by thereafter ratifying the arbitration agreement.349 This argument resembles the importance of mutual consent of the parties to commence international commercial arbitration procedure. For instance, among discussions and arguments till now, there were some professors argue on the binding effect of combined arbitral clauses into bill of lading on thirds parties350, including, but not limited to the consignees of negotiable bills of lading, which are closely connected with such basis of arbitration system that mutual consent to refer to arbitration is necessary and shall be strictly complied with.

2.2 Judicial Interventions on International Commercial Arbitration

The international commercial arbitration system has gained rapid growth during the past century. The controversy on dividing the authority of arbitral tribunals and competent national courts has never come to an end. As discussed above, arbitration agreement and arbitral awards were subject to very tight judicial interventions at the early 20th century, when the two Geneva treaties were promulgated and double exequatur was required for execution of cross border arbitral awards.351

How to define judicial intervention and what is its general character? And at what level could it be permitted? One Chinese Professor asserts that “on interpreting the concept of judicial intervention by national courts, there are two approaches, one being interpreting judicial intervention at the broad sense, and the other being at the narrow sense. Judicial intervention at the broad sense contains both auspices and review of national courts, while judicial intervention at the narrow sense, which is the judicial intervention under a traditional interpretation, only includes the review and control of arbitration by national courts.”352 A glance at the history of arbitration system development will reveal that, judicial interventions on arbitration have generally undergone three periods, i.e., no judicial intervention period; excessive judicial intervention period and appropriate judicial intervention period.353

Another argument states that, “viewed from a general perspective, the legal framework designed to steer a safe passage between these competing interests emphasizes minimal judicial interference. Accordingly, domestic courts are given very limited scope to set aside awards. Similarly, courts that are requested to enforce an award are given very narrow grounds on which to refuse such a request.”354

Japanese professors also discuss the purpose of regulations on setting aside

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351 See supra note 57 &58.
353 Id. p.140.
arbitral awards. One of the arguments indicates that “the States would like to reserve the right of reviewing whether the 'private trial' is coincided with the legal order of this country, through the review or intervention or control of arbitral procedures by national courts.” Another view is that “For any arbitral award, if the basic conditions of an arbitration agreement, etc., which is the basis of an arbitral award having binding force on the parties, does not exist, then parties could require not being bound by such arbitral awards.”

When discussing the judicial intervention issue, another related topic, which is the foundations of international commercial arbitration, should be reviewed firstly. Different attitudes towards this issue will lead to various interpretations on the relationship between arbitral tribunals and national courts, and further affect the following procedures of rendering and executing international commercial arbitral awards. As one arbitration professor summarizes that, “International commercial arbitration has been perceived as the most popular method of alternative dispute resolution. It is also noted that different interpretations have been given by national courts on various aspects of arbitration. One explanation of this is the fact that different national courts adopt different theories in relation to international commercial arbitration. Generally speaking, the various commentaries about the nature of arbitration have been collected into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory.”

For different opinions regarding the nature of arbitration, the former professor continues that “the jurisdictional theory is based on the complete supervisory powers of states to regulate any international commercial arbitrations within their jurisdiction, whereas the contractual theory argues that international commercial arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be conducted according to the parties’ wishes. The hybrid theory stands as a compromise between the jurisdictional and contractual theories. It maintains that international commercial arbitration has both a contractual and a jurisdictional character. The autonomous theory, which has been developed more recently, dismisses the traditional approach and places emphasis on the purpose of international commercial arbitration. Instead of fitting arbitration into the existing legal framework, the autonomous theory defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. As a result, parties should have unlimited autonomy to decide how the arbitration should be conducted. The theory a national court applies in respect of international commercial arbitration also affects its attitude towards the operation of arbitration.”

Considering the close relationship between the arbitration procedures and

355 Nakata jyunichi, Tokubetu Sosho, Sosho Oyobi Chusai No Hori (Special Litigation: the Jurisprudence of Litigation and Arbitration), Yuushindou 1953, p.152.
358 Id.
national courts, the hybrid theory on the nature of international commercial arbitration shall be appropriate and persuasive. Nowadays, it is submitted that neither complete judicial supervisory nor absolute contractual liberal is appropriate for arbitration procedures. International commercial arbitration is still closely connected with relative jurisdictions, where arbitration laws and policies will greatly affect the judicial interventions of different national courts at different levels and to certain extent.

As some commentators insist that, “without prejudice to autonomy, international arbitration does regularly interact with national jurisdictions for its existence to be legitimate and for support, help, and effectiveness.” 359 “In this overall scheme international arbitration can be envisaged as a giant squid which seeks nourishment from the murky oceanic world where the domain of international arbitration and national jurisdiction meet. One might therefore speak of the international arbitration process as stretching its tentacles down from the domain of international arbitration to the national legal system to forge for legitimacy, support, recognition and effectiveness.”360

On the basis of the hybrid character of international commercial arbitration system, judicial intervention or involvement on arbitration system is necessary and legitimate. Nonetheless, at what level or what content of national courts’ jurisdictional involvement shall be appropriate is another urgent issue that deserves discussion. The New York Convention has permitted a relative judicial intervention on international commercial arbitration agreements and arbitral awards. For judicial review of international commercial arbitral awards, one professor argues that, “the Convention establishes two tiers of review competence, making a sharp distinction between so-called ‘primary’ or ‘venue’ of jurisdiction and ‘secondary’ or ‘enforcement’ jurisdiction. Traditionally, the place of arbitration was called the forum or the lex loci arbitri. Since those terms are closely related to other functions performed by this venue, a different, though hardly arcane term has been used to refine the focus on the operation of the control system: ‘primary’ jurisdictions refer to those in which the arbitration was sited and the award was rendered, or those whose law governed the award—in other words, the state where the arbitration took place, ‘the arbitration state’ or the state whose law governed the arbitration, the ‘law state’. ‘Secondary’ or ‘enforcement’ jurisdictions include any other jurisdiction, subject to the Convention, in which enforcement is sought.”361

The distinctions of judicial interventions for the primary and secondary state have been reflected in the provisions of the New York Convention separately. As the former professor mentioned above continues arguing that, “The legal effects which the Convention assigns to the national judicial acts of the primary and secondary jurisdictions differ significantly. The secondary jurisdiction may only decide whether or not to enforce the award. There are not to be any ‘nullificatory’ consequences for

decisions in secondary forum. By contrast, nullificatory (as oppose to non-enforcement) consequences of decisions in primary jurisdictions have a universal effect. In terms of the dynamic of the Convention, once an award has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else.\footnote{Id. p.7.}

However, during the past decades, there were some famous cases tried by several jurisdictions, and contrary to the previous argument that international commercial arbitral awards which had been nullified or set aside in their home country were not enforceable. In such cases, the nullified international commercial arbitral awards had been recognized and enforced by other contracting states of the New York Convention. The \textit{Hilmarton} and \textit{Chromalloy} case were the most famous ones. Some academic opinions or judicial reasons by court judges had recognized the residual discretion theory, which indicated that even if commercial arbitral awards had been set aside at the \textit{loco arbitri}, they could recognize and enforce such vacated arbitral awards.


In this section, discussion on the judicial interventions of national courts will be divided into three periods, i.e., before the arbitration proceeding, after the arbitral awards being made and at the recognition and enforcement stage. The former two stages of judicial involvement are authorized to the forum of arbitration proceedings, while other national courts of the contracting states of the New York Convention are empowered to practice the last stage as the “secondary” jurisdiction on international commercial arbitration agreements and arbitral awards.

\textbf{2.2.1 Reference of Arbitration Procedure and Its Exceptions}

Before one of the disputed parties commences the arbitration procedure, the
other party may sue to any national court for starting litigation proceeding. This is the first time national court will contact with the arbitration system, for referring the parties to arbitration when application by the parties has been made. The courts may reject such application and maintain its jurisdiction. In order to restrict the injustice as may be incurred by judicial intervention, the New York Convention has prepared one sub-article for compulsory reference of arbitration procedure when such situation arose,364 and of course there are some exceptions.365 As argued by a famous judge and professor, who indicates that “the Convention achieves its purpose by requiring national courts to refer cases to arbitration provided that arbitration agreement is not null and void, inoperative or incapable of being performed. In this way, parties are not permitted to ignore their contractual obligation to arbitrate.”366

It has already been generally accepted that submissions to arbitration shall exclude national courts’ jurisdictions. One famous Japanese professor summarizes as follows, providing that “As arbitration agreement is a contract between the disputed parties, intending to resolve their differences by arbitration, if one party acts counter to such agreement and sues to the court, the other party may request to dismiss the lawsuit on the basis of asserting the existence of an arbitration agreement. This is the negative effectiveness side of an arbitration agreement. It is generally agreed that if the protest of arbitration has made and the existence of arbitration agreement is certified, then there shall be a lack of interest of lawsuit.”367

However, whether or not to commence arbitration procedure will be decided by the national courts where such case has been filed at the early stage. In order to refer to arbitration procedure, the courts will first make sure of the validity of such arbitration agreement. There are some preliminary questions, which are important for ensuring the pro-arbitration attitudes of different national courts, should be discussed.

2.2.1.1 Applicable Law for Determining the Referable of Arbitration

As referred previously, Article II (3) of the New York Convention has only required the relevant national court referring the parties to arbitration when all the conditions are met under that article. In other words, if the parties have intended to resolve their disputes through arbitration, but one of the parties broke such arbitration agreement and another party applied for arbitration, the national court should determine whether to refer the parties to arbitration or not. The decisive condition is that such arbitration agreement be valid. However, the latter of this sub-article clearly includes some exceptions, which indicates the invalid or inoperative or the incapable

364 See supra note 30, Article II (3) of the New York Convention requires “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration.”

365 Id. The last section of Article II (3) contains some exception of reference to arbitration, including “the said agreement is null and void, inoperative or incapable of being performed”.


of being performed character of the disputed arbitration agreement.

Under such situation, how does the related national court determine the validity of arbitration agreement? As one commentator argues that “the basic question which arises is how to find the law which could determine and govern the issue of nullity, voidness or incapacity of performance. In simple terms, what are the rules which determine which law will govern these issues? Although diverse options are available, an overall examination of the situation suggest that van den Berg’s thesis is perhaps more reasonable. The thesis would involve the following three steps procedure to ascertain the law applicable for determining an issue of nullity or voidness: (a) first, it should be seen as to whether the choice of law is provided by the New York Convention; (b) if the choice of law rule is not so provided, find and ascertain the choice of law rule applicable under the law of the forum State; and (c) apply the actual substantive law found under either (a) or (b).”

Another Chinese arbitration professor indicates, “On deciding the substantive validity aspect, one important point is how to apply laws for arbitration agreements. The (New York) Convention does not contain any applicable law rules for litigations before rendering the arbitral award. That means when one party challenges the jurisdiction, the court will determine whether such arbitration agreement is valid or not, however, the Convention has no direct provision with respect to the law of which country shall be the applicable law. Therefore, for resolving such question it should refer to the legal precedents or academic arguments. Nowadays the authoritative argument insists that for litigations before rendering the arbitral awards, Article V(1) (a) shall be analogized to apply on deciding the substantive validity of arbitration agreements. That is because Article II of the Convention does not indicate clearly the applicable law for execution the arbitration agreements, and thus reviewing the academic arguments of various countries, analogies application shall prevail.”

Accordingly, it has been widely accepted that the applicable law for determining the validity of arbitration, at the stage before the commencement of arbitration proceedings, shall be the lex loci arbitri. Domestic laws of the relevant jurisdiction will be selected and applied to judge the referability of arbitration procedure when litigations of national courts are pending simultaneously. It is clear that commencement of international commercial arbitration proceedings, if not autonomously initiated by the disputed parties, will be largely influenced by the arbitration policies of different jurisdictions. If the legislation and legal practices of such jurisdictions are pro-arbitration, then commencement of arbitration proceedings by reference will be achieved at the maximally level. Otherwise, more arbitration agreements may be more easily judged as invalid or void, even inoperative or incapable of being performed, according to the strict domestic laws and less arbitration-friendly environment of those relevant jurisdictions. The applicable law

rule for deciding whether referable to arbitration or not is critical at the early stage of the whole arbitration procedure. Even if the New York Convention lacking unified regulation, the academic researchers and legal practitioners have argued the generally accepted rules, for creating harmonies in replying to the application of referring to arbitration.

2.2.1.2 Restriction on Excessive Invalidation of Arbitration Agreements

After the determination of the conflict of law rules, then specific domestic laws shall be found. National courts will judge whether the arbitration agreements being invalid or not, and decide the application of reference to arbitration. As one commentator states, “In all cases, the court’s duty is to uphold the agreement to arbitrate. In the first and second cases, the court must deal with this in accordance with the New York Convention, i.e., refer the matter to arbitration if there is a valid arbitration agreement. Differences exist between national laws as to what extent the courts can review the existence of a valid arbitration agreement before the arbitration tribunal has done so.”\(^{370}\) Based on the applicable conflict of law rules discussed in the previous section, domestic laws of various countries will be applied to determine the validity of the disputed arbitration agreements at the stage when arbitral tribunal has not been established. Therefore, excessive invalidation of arbitration agreements at this stage shall be strictly restricted by different national laws, showing respect to the arbitration intentions of the parties and trying one’s best to interpret the questioned arbitration agreements as valid.

Relying on the applicable conflict of law rules, one can easily find the specific law of a State to be used at the next step. However, selected domestic laws are also very complicated. What kinds of laws shall be used to judge the validity of the international commercial arbitration agreements, only the arbitration-related procedure laws, or both the procedure laws and the substantive laws? As argued by a jurist, who believes that “the solution seems less certain as to court proceedings, started before the arbitral proceedings, for establishing the validity of the arbitration agreement. It must be established whether even this issue comes under the arbitration agreement and must therefore be submitted to the arbitrators. They reply to this query, although it depends in each case on the specific arbitration agreement, might be positive in principle.”\(^{371}\)

1. Germany

Actually, contracting states of the New York Convention which take pro-arbitration attitudes towards international commercial arbitration system will restrict the judicial interventions positively. For example, Section 1026 of the Arbitration Law of Germany provides the general principle for the extent of court intervention, “In matters governed by sections 1025 to 1061, no court shall intervene except where so

\(^{370}\) See supra note 360, Professor Julian D M Lew QC.

provided in this Book.” 372 For the application of reference to arbitration procedure, the Arbitration Law of Germany contains almost the same regulation as Article II(3) of the New York Convention. 373 Further, the German Arbitration Law includes a sub-article which is considered to be more liberal than the New York Convention, where an action or application for reference of arbitration procedure is initiated, the arbitration proceedings may be commenced or continued even if such actions are pending in national courts. 374 Accordingly, the German Arbitration Law has given high degree of autonomy for commencing arbitration proceedings, which are able to be organized or continued before the national courts make the final judgments ex officio, on deciding whether or not to refer to arbitration. This liberal regulation has greatly restricted the possibility of excessive invalidation of arbitration agreements.

2. France

Under the Arbitration Law of France, Article 1444 and 1448 of the Code of Civil Procedure governs reference of arbitration. According to Article 1444, reference to arbitration rules is compulsorily required when parties conclude their arbitration agreement. 375 This regulation has largely ensured the validity of arbitration agreement, especially when one of the parties violates the arbitration agreement, such as commencing court litigation, their counterparty can apply for reference of arbitration procedure. Besides, Article 1448 requires the reference of arbitration ex officio by courts. The general principle for reference of arbitration procedure is identical to the New York Convention, and the German Arbitration Law, in terms of insisting that any court cannot decline their jurisdiction on its own motion. 376 In other words, application to reference by any parties is necessary.

However, the exception of reference under the French Arbitration Law is broader than that of the New York Convention and the German Arbitration Law. Under the exception, when an arbitral tribunal has not yet been seized of the dispute, the court required will not refer the parties to arbitration. In comparison, Section 1032 of the Arbitration Law of Germany contains more liberal regulations, especially under subsection (2), providing that even when an arbitral tribunal has not been established, the parties may be free to apply for determining the possibility of reference to arbitration. 377 One more ground for refusing reference to arbitration under Article 1448 of the Arbitration Law of France is almost the same with the New York Convention and domestic arbitration regulations of some contracting states, that is,

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372 Arbitration Procedure, Section 1026, the Tenth Book of the Code of Civil Procedure of Germany.
373 Section 1032, sub-section (1): “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.” Sub-section (2) provides “Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible. See Arbitration Procedure, Section 1032 (1) and (2), the Tenth Book of the Code of Civil Procedure of Germany.
374 Id. sub-section (3), indicating that “Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court.”
375 See supra note 193, Article 1444 indicates: “An arbitration agreement shall designate, including by reference to arbitration rules, the arbitrator or arbitrators, or provide for a procedure for their appointment. Alternatively, Article 1451 through 1454 shall apply.”
376 Id. Article 1448, paragraph 2: “A court may not decline jurisdiction on its own motion”.
377 See supra note 373.
the manifestly void or not applicable nature of the argued arbitration agreements.378

3. Japan

Speaking of the Arbitration Law of Japan, although the expression of Article 14 on “Arbitration Agreement and Substantive Claim before Court” is a little different from Section 1032 of German Arbitration Law, the contents on referring parties to arbitration procedure is the same with the German Arbitration Law.379 Influenced by the UNCITRAL Model Law and resembled to the Germany Arbitration Law 1998, paragraph (2) of Article 14 also admits the right to continue arbitral proceedings by the arbitral tribunals.380

One may wonder why such permission is allowed when legislators draft the provision. Some professors have made specific interpretations on this question, indicating “the reason for this type of provision is as follows. It is necessary to enable the continuation of the arbitration proceedings to prevent the filing of court action with the intent of delaying arbitration proceedings, and to enable the prompt progression of arbitration proceedings and resolution of the dispute. Whereas, given that it will not be possible to proceed with arbitration proceedings if the arbitration agreement is invalid, arbitration proceedings that have been conducted up until the point in time when the agreement is determined to be invalid will also necessarily become invalid. Thus, an arbitral tribunal may make a decision on whether or not to suspend arbitration proceedings based on whether the possibility of the arbitration agreement being held invalid in the court action is high.”381 Under these thorough regulations, the possibility of excessive invalidation by domestic courts is greatly restricted and reference to arbitral proceedings is easier.

4. People’s Republic of China

The reference of arbitration procedure is not directly regulated by the PRC Arbitration Law and related judicial interpretations of the PRC Supreme People’s Court which, however, provides that any people’s court should not accept a lawsuit if the disputed parties have successfully established an arbitration agreement.382 According to Article 5 of the PRC Arbitration Law, disputes which are covered by arbitration agreements shall not be accepted and tried by any people’s court. Thus there is no further issue on the reference of arbitration procedure. Such regulation is contrary to the former three countries, under the laws of which reference of arbitration proceedings should be applied by any parties, but not be exercised by the national courts themselves. Moreover, such Chinese legislation also means that parties have

378 See supra note 376, paragraph 1 of Article 1448, “When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”
379 See Article 14 of the Arbitration Law of Japan.
380 Id. paragraph (2) contends “An arbitral tribunal may commence or continue arbitral proceedings and make an arbitral award even while the action referred to in the preceding paragraph is pending before the court.”
382 See Article 5 of the Arbitration Law of the People’s Republic of China, indicates “Whereas the parties concerned have reached an agreement for arbitration, the people’s court shall not accept the suit brought to the court by any one single party involved, except in case where the agreement for arbitration is invalid.”
been compulsorily referred to arbitration procedure, even if they intended to resolve their differences covered by the said arbitration agreement through court. Because the disputes are not able to be seized by any people’s courts, and the following reference of arbitration procedure is of course not necessary at the stage before the arbitral tribunal has been established.

Nonetheless, in order to judge whether lawsuits of the parties should be rejected or not, the people’s courts have to decide the validity of arbitration agreements, just like those competent authorities of other countries determining the validity or enforceability of arbitration agreements when application for reference to arbitration has been filed. The PRC Arbitration Law has not specifically provided the standards for deciding such issue, including, but not limited to, the applicable law for determining the validity of arbitration agreements. Alternatively, Article 16 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the PRC lists the conflict of law rules for determining the validity of arbitration agreements involving foreign elements, that is, firstly governed by the laws agreed by the parties, and in case of failure to reach an agreement with respect to the applicable law by the parties, then governed by the law of the place of arbitration. And if the above two methods are not available, the validity of the disputed arbitration agreements will finally be determined based on the law of the court.383

Moreover, in order to avoid the lower people’s court mistake in judging the validity of arbitration agreements, a reporting system was established by the Supreme People’s Court on August 20 1995. Such a system requires that for any foreign-related, or Hong Kong, Macau or Taiwan-related economic and maritime dispute cases filed to a people’s court, if the parties involved have drafted an arbitration clause in the contract or have concluded an arbitration agreement afterwards, and if the people’s court considers the arbitration clause or the arbitration agreement being null, void or unclear to the extent of being executable, the people’s court, before deciding to accept the lawsuit filed by a party concerned, must report to the higher people’s court for examination. If the higher people’s court does not agree to the acceptance, it shall report to the Supreme People’s Court for its opinions. Before the Supreme People’s Court gives its reply, the lower people’s court may dismiss the lawsuit on temporary basis.384 Accordingly, any invalidation of foreign-related arbitration agreement would be finally reviewed by the Supreme People’s court, and thus less error would happen on judging the validity of arbitration agreements and people’s courts’ jurisdiction in China.

5. Common Law Countries: UK, USA and Singapore

In the selected Common Law Countries such as the UK, the USA and Singapore, compulsory enforcement of international commercial arbitration agreement is also regulated by their respective arbitration laws. According to the specific provisions on

383 See Article 16 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration law of the People’s Republic of China”.
the reference of arbitration procedure, when national courts of the three countries have been filed with petitions whose subject are the negotiated arbitration conventions and reference of arbitration, these courts will stay the legal proceedings conditionally, which is different from the continental jurisdictions, such as Germany, Japan, France and the People’s Republic of China, where reference by application or by *ex officio* will not result in a stay of legal proceedings of those courts.

Arbitration Act of the United Kingdom has provided the stay of legal proceedings when arbitration agreement and arbitration procedure is referable conditionally. Section 9 (1) provides generally regulation on the stay of court proceedings, requiring that the legal proceedings brought in respect of a matter which is under the arbitration agreement, and applied by one dispute party. Other conditions for reference of arbitration are clearly listed in the following subsections of Section 9, of which application to refer to arbitration may only be made when the parties have exhausted other dispute resolutions procedures\(^{385}\), and the applicant shall be acquainted with such legal proceedings, or has not taken any step to answer the substantive claim.\(^{386}\) Similar to the continental countries, exceptions are available when the arbitration agreement is null and void, inoperative or incapable of being performed\(^{387}\), which also resembles the provision of Article II(3) of the New York Convention.

Under such situations, the courts may refuse to stay the previous legal proceedings and continue their trial. Further, any regulation requiring that an arbitral award being a condition to bring legal proceedings will not be practicable.\(^{388}\) Section 10 of the 1996 Arbitration Act of UK has simultaneously regulated the reference of interpleader issue to arbitration, specifically indicating that “where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed”\(^{389}\). Benefited from this provision, more disputes will be resolved by arbitration. It has also reflected the pro-arbitration attitudes of UK, because less judicial interventions are available at the stage before the establishment of arbitral tribunal.

According to the Federal Arbitration Act of the USA, Chapter 1 and Chapter 2 contain provisions on the stay of proceedings where issues therein are referable to arbitration. Thus both domestic and international commercial disputes can be referred to arbitration separately. Under Section 3 of Chapter 1, any party of a valid arbitration agreement is authorized to apply for reference to arbitration, and the court being filed with an application shall stay the trial of the action if it is satisfied that such dispute is referable to arbitration.\(^{390}\) Specific procedures on the jurisdiction, notice and service thereof, hearing and determination of reference to arbitration has been provided in

\(^{385}\) See Section 9 (2) of the Arbitration Act 1996 of the United Kingdom.

\(^{386}\) Id. See Section 9 (3).

\(^{387}\) Id. See Section 9 (4).

\(^{388}\) Id. See Section 9 (5).

\(^{389}\) See Section 10 (1) of the Arbitration Act 1996 of the United Kingdom.

\(^{390}\) Section 3 of the Federal Arbitration Act.
Similarly, Section 206 of Chapter 2 on the arbitration agreement falling into the New York Convention has ordered any court to compel arbitration, requiring that “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provide for, whether the place is within or without the United States.” This article is very concise for compelling such kind of arbitration procedure. Nevertheless, Section 208 indicates that Chapter 1 (of the FAA) applies to actions and proceedings brought under this Chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States. Therefore, Section 3 and 4 of Chapter 1 of the FAA will also be used to decide whether the disputes in court proceedings shall be stayed and be referred to arbitration or not. The specific procedures regulated thereof will also be practiced in arbitration agreements under the New York Convention and Chapter 2 of the FAA. As one professor comments, “in general, the U.S. Congress and courts have been in favor of international arbitration. For example, the U.S. Convention Act has been largely considered an instrument aimed at promoting international arbitration agreements and awards. The detailed implementation of the New York Convention in the United States however, is discounted by inappropriate judicial intervention. Amplified by Jones, the ambiguity of the U.S. domestic legislation further complicates courts’ implementation of the New York Convention. Additionally, an individual court’s misinterpretation of §202 seriously jeopardizes the predictability of the application of the Convention.”

On April 9 2012, Singapore passed the amendment to the International Arbitration Act (the IAA), in which compulsory enforcement of arbitration agreement was also included. Section 6 (1) of the amended IAA contains the following statements, “Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.”

In order to maintain the position of Singapore as the important international commercial arbitration centre, the judicial intervention by national courts of Singapore has been restricted, and the pro-arbitration attitude is emphasized. The exception of reference to arbitration is almost the same as the former countries, that is,
the applied national courts are satisfied that the relevant arbitration agreements are
null and void, inoperative or incapable of being performed. Those exceptions reduced
judicial interventions on determining the validity of disputed arbitration agreement
and the referable of arbitration procedure.

In light of the importance of arbitration agreement, it is necessary to control the
judicial interventions on evaluating the validity of arbitration agreement at the very
beginning of the whole procedure, so as to ensure the reference of the disputed
arbitration procedure. In other words, excessive judicial interventions at this stage
before the arbitral tribunal has been established will frustrate the whole arbitration
system, and undermine the possibility of resolving differences by arbitration which is
autonomously selected by the parties. Thus, paying more attention to unnecessary
judicial involvements or unreasonable invalidation of arbitration agreements is critical.

2.2.2 Appeal of Arbitral Awards

International commercial arbitration awards are recognizable and enforceable
only when they are binding on the parties.398 If an interested party can prove to the
competent authorities that the arbitral awards have not become binding on the
disputed parties, the awards will not be recognized and enforced. Whether the
international commercial arbitral awards being deemed binding or not, shall be
decided by different national laws. It has been generally accepted that arbitration
system is the most effective alternative dispute resolution, and unlike litigation
procedure of national courts, arbitration procedure will be organized by arbitration
tribunal selected by the parties or composed by the arbitration institutions. After the
arbitral tribunal renders the arbitral awards, the proceedings under the arbitral tribunal
is terminated. The arbitral awards shall have final binding force on the parties.
However, if the final arbitral awards are appealable to courts of a higher level, those
awards may lose the binding force, because their finality may be challenged by
inappropriate judicial interventions of those higher courts. As one professor indicates,
“A court should consider the intent of the parties to determine whether an award is
‘binding’ under Article V (1) (e). Arbitration is, after all, a contractual remedy, and the
key to enforcing a contract is to be bound by a particular tribunal, they should be
bound by it.”399

Traditionally in England, judicial interventions from courts on arbitration were
very common. As a famous professor argues, “the English Arbitration Act 1996 was
preceded in the 20th century by three other major pieces of arbitration legislation,
enacted in 1950, 1975 and 1979. The 150 and 1975 Acts established a highly-
regulated legal regime for arbitration in England, with substantial scope for judicial
involvement in the arbitral process and review of arbitral awards.”400 In particular,
arbitration legislation in England prior to 1979 provided for a widely-criticized “case
stated” procedure, which granted parties to arbitrations seated in England a mandatory

398 See supra note 30, Article V (1) (e) of the New York Convention.
right of access to the English courts to review *de novo* issues of English law that arose in the course of arbitral proceedings (without the possibility of exclusion agreements to contract out of such review). 401 Following the three predecessors, the 1996 Arbitration Act contains a number of provisions granting arbitrators broad freedom in conducting arbitral proceedings, with a minimum judicial interference.

With respect to awards made in England, the 1996 Act departs entirely from the historic “case stated” procedure and provides only limited grounds for annulling international arbitral awards made in England. The Act limits appeals on points of law (which may only be brought with leave of the court and may be excluded by agreement between parties). 402 Generally, as provided in Section 58 of the 1996 Arbitration Act, unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any person claiming through or under them. 403 However, this does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this part. 404

Although appeal of arbitral awards has been restricted greatly and it may even be excluded by parties’ agreements, it is still available if such exclusion has not been established. Section 69 of the 1996 Arbitration Act regulates the appeal on point of law of arbitral awards, with several conditions enumerated. Subsection (1) indicates, “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.” 405 From this regulation, it is clear that if the parties would like to ensure the finality of the arbitral awards rendered by the arbitrators, the following appeal of the awards on point of law will be impossible to be instituted. This provision will greatly restrict the judicial involvement of the courts on the effectiveness of arbitral awards.

An appeal shall not be initiated except in two situations, i.e., with the mutual intentions of the parties to the proceedings, or with the leave of the court. 406 For the latter, when the court is satisfied with the specific conditions under subsection (3) of this article, it can authorize leave to appeal *ex officio*. From the contents of subsection (3), however, leave to appeal is limited. The court to which the appeal is sought can review the decisions of the arbitral tribunal, which may affect the finality of the arbitral awards. Subsection (7) of this article lists the final results of the appeal, that is, the competent court may by order (a) confirm the award; (b) vary the award; (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or (d) set aside the award in whole or in part. 407

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401 See supra note 1, p.128.
402 Id. pp.130-131.
403 See Section 58 of the Arbitration Act 1996 of UK.
405 See Section 69 (1) of the Arbitration Act 1996 of UK.
406 Id. See Section 69 (2).
407 Id. See Section 69 (7).
Thus, it is very important to discuss in what situations can the court leave to appeal. If not well controlled, excessive judicial interventions may cause extra barriers to the effectiveness of international commercial arbitral awards in the territory where the 1996 Arbitration Act will be used. Referring to subsection (3), there are four grounds satisfying the court for leave to appeal: (a) the determination of the question will substantially affect the rights of one or more of the parties; (b) the question is one which the tribunal was asked to determine; (c) on the basis of the findings of fact in the award that (i) the decision of the tribunal on the question is obvious wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) despite the agreement of the parties to resolve the matter by arbitration, it is just proper in all the circumstances for the court to determine the question.\textsuperscript{408} Of those four grounds which shall satisfy the court to authorize leaving to appeal of the arbitral awards, there are doubts on the judicial review of the merits of the arbitral awards. Especially under ground (c), whether the decision of the arbitral tribunal on the question is obvious wrong, or the question is one of general public importance and the decision of the tribunal is with serious doubt or not, it will be judged by the court before giving leave to appeal. In all those circumstances, the merits of the arbitral awards will be examined by the courts. No matter how much restriction the court gives to limit the leave to appeal, the finality of the arbitral awards will not be respected and ensured. In other countries, for example, Germany, Japan and China, appeal of arbitral awards is not permitted, because no provision has supports such appeal of the final decisions of an arbitral tribunal selected by the disputed parties autonomously.

France has also authorized the parties to appeal an arbitral award, which is different from the provisions of the English 1996 Arbitration Act. Article 1489 of the French Arbitration Law regulates the appeal of arbitral awards, which provides that “An arbitral award shall not be subject to appeal, unless otherwise agreed by the parties”.\textsuperscript{409} The article followed continues regulating on the results of the appeal of the arbitral awards, which has limited the competence of the courts, indicating that “An appeal may seek to obtain either the reversal or the setting aside of an award. The court shall rule in accordance with the law or as amiable compositeur, within the limits of the arbitral tribunal”.\textsuperscript{410} Although both England and France law have authorized the appeal of the decisions of arbitral tribunals, there are fundamental differences between the two countries. As discussed above, even if the appeal of arbitral awards under the 1996 English Arbitration Act can be brought with the agreement of all the parties to the proceedings,\textsuperscript{411} the mainstream of appeal of arbitral awards is the leave of the court under the controversial circumstances of Section69 (3). However, in France, appeal of arbitral award may be brought only by the agreement of the disputed parties, and no court can accept appeal of arbitral awards rendered by any arbitral tribunals ex officio. Further, even if such appeal procedure has been brought up by the parties, the ruling of the competent court will be restricted within

\textsuperscript{408} Id. See Section 69 (3).
\textsuperscript{409} Id. Article 1489. Book IV of the Code of Civil Procedure of France.
\textsuperscript{410} Id. Article 1490.
\textsuperscript{411} See supra note 406.
the permitted scope of the laws and the arbitral tribunal’s mandate, which will absolutely eliminate excessive judicial interventions on the arbitral awards.

Both the English and French arbitration laws have regulated the appeal of arbitral awards, however, with separate legal traditions and arbitral cultures, the involvement of national courts on the arbitration procedures are different in the two countries, which has been reflected in their legislation on judicial interventions on the validity and finality of the decisions of arbitral tribunals. To sum up, the pro-arbitration attitudes of French legislation and court practice is better than that of England.

2.2.3 Set Aside and Execute the Nullified Arbitral Awards

After the arbitrators or arbitral tribunals have rendered the arbitral awards, the resistant party may apply to national courts to challenge those awards. According to the New York Convention, arbitration awards which have been set aside shall constitute one ground for refusal of recognition and enforcement. Traditionally, arbitral awards can be set aside by the competent authority of the country in which, or under the law of which, that award is made. As argued previously, due to the ambiguity of the New York Convention articles, it has authorized different jurisdictions to decide whether or not to set aside arbitral awards according to relevant domestic procedures and laws.

2.2.3.1 Grounds for Set Aside of Arbitral Awards in Various Jurisdictions

Regulations of each arbitration law applied to set aside of arbitral awards are generally provided under the recourse procedure of arbitral award, or separate setting aside procedure. When some countries join into multilateral or bilateral conventions or agreements, and if there are some specific provisions for the nullification of international commercial arbitral awards, they must abide by such special provisions. For instance, both Germany and France have ratified the 1961 European Convention, as discussed previously, the European Convention has unified the grounds for setting aside of the arbitral awards, indicating that “in relations between contracting states that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above”. Thus the provision of the multilateral convention has priority over the domestic laws of each country. This approach will ensure that the minimal grounds for vacating international commercial arbitral awards are available, which will maximally reduce the arbitrary judicial interpretations of different jurisdictions when nullification of arbitral awards is applied.

Article 44 (1) of the Arbitration Law of Japan contains eight grounds which permit setting aside of arbitral awards. Those grounds are almost originated from Article V of the New York Convention, excepting Article V (1) (e). More specifically,

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when the presentation of invalid arbitration agreement, violation of due process, excess of legitimate jurisdiction of the arbitral tribunal, illegal composition of the arbitral tribunal or the arbitral procedure, inarbitrability of the claims and violation of the public policy or good morals of Japan.\textsuperscript{414} Arbitration Law of Japan was amended in 2003, according to the outcome of the questionnaires, for the question that whether the grounds of nullification of arbitral awards should be the same with the refusal grounds of recognition and enforcement of foreign arbitral awards under Article V of the New York Convention or not, 91\% of the people who had answered the questionnaire approved. The reasons were explained as follows, “(i) It is believed that such an approach will help easier to get international understand on the grounds for setting aside; (ii) providing the same standard to both domestic and foreign arbitral awards, moreover, coordinating with the international standard; (iii) it is accepted that the ground for retrial can be authorized by Article V (1) (d), (false testimony or forgery of evidence on the applicable law of arbitration procedure is regarded as violation of procedure laws); (iv) as the UNCITRAL Model Law should be incorporated without modification, this provision is harmonized with the stream of international arbitration system, thus there is no excuse to oppose this identicalness; (v) it is favorable that if those grounds for setting aside of arbitral awards being enumerated. And it is understandable that if keeping the abstract conditions, such as conflicting with the public policy, response to legal practice and change of cases is possible.\textsuperscript{415}

Further, it has time limit to apply for setting aside of arbitral awards. Only three months is permitted, from the date on which the party has received the notice through a copy of the arbitral award, or after the enforcement decision under Article 46 has become final and conclusive.\textsuperscript{416} According to other sub-articles, a court can only make a decision on whether set aside an arbitral award or not through an oral hearing or oral proceeding that the parties can attend.\textsuperscript{417} An arbitral award may be set aside by the court in the event that it finds any ground described in each of the items under the same paragraph exists (which through items under (i) through (vi) should be proved by the applicant).\textsuperscript{418} Moreover, when an arbitral award contains decision on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings, and if such a part of matters prescribed in the same item can be separated from the other parts, then only part of the arbitral award should be set aside by the court.\textsuperscript{419}

According to the PRC Arbitration Law, regulations for setting aside of domestic arbitral awards and foreign-related arbitral awards are different. There are two different standards for disposing the nullification applications. Specifically, when setting aside of pure domestic arbitral awards, Article 58 of the Arbitration Law shall be applied, and thus some merit parts of the arbitral proceedings will be retried to

\textsuperscript{414} See Article 44 (1) of the Arbitration Law of Japan.
\textsuperscript{415} Uchida Minoru, Kondou Masaaki, Dougauchi Masato, Nakamura Tatuya, Matumae Keichiro, Miki Koichi, Yamamoto Katsumi, Chusai Ho Kaisel No Kongo No Tenbo—Anketo Wo Daizai Ni (The Prospect of Amending the Arbitration Law—through Questionnaire), Bessatsu NBL No.67, Shoji Homu Kenkyu Kai, Heisei 14, p.109.
\textsuperscript{416} See Article 44 (2) of the Arbitration Law of Japan.
\textsuperscript{417} Id. See Article 44 (5).
\textsuperscript{418} Id. See Article 44 (6).
\textsuperscript{419} Id. See Article 44 (7).
decide if the arbitral awards should be vacated. Under this article, there are two
grounds for nullifying domestic arbitral awards, providing that: (i) the evidence on
which the ruling is based is forged, and (ii) things that have an impact on the
impartiality of ruling have been discovered concealed by the opposite party. This
provision authorizes people’s courts being able to check not only pure procedure
deficiencies, but also with the right of reexamining the evidence which is the basis of
the final arbitral tribunal. Other grounds for setting aside pure domestic arbitral
awards are about procedural problems, including that: (1) there is no agreement for
arbitration; (2) the matters ruled are out the scope of the agreement for arbitration or
the limits of authority of an arbitration commission; (3) the composition of the
arbitration tribunal of the arbitration proceedings violate the legal proceedings; (4)
Arbitrators have accepted bribes, resorted to deception personal gains or perverted
the law in the ruling. Moreover, the court can set aside an arbitral award *ex officio*
which goes against the public interest of People’s Republic of China.

When drafting the PRC Arbitration Law, the legislators considered another type
of arbitration, which was arbitration involving foreign interests, and set special
rules for such kind of arbitration, including the vacation procedure. Article 70 of the
PRC Arbitration Law states that “whereas the claimant has produced evidence to
substantiate one of the cases as provided for in the first paragraph of Article 260 of the
Civil Procedure Law, the People’s court shall form a collegiate bench to verify the
facts and order the cancellation of the award.”

Referring to paragraph 1 of Article 274 of the PRC Civil Procedure Law, it
provides the grounds for denying enforcement of arbitral awards involving foreign
interests, which shall be proofed by the party against whom the application for
execution is made, providing that: “(1) the parties have not concluded an arbitration
clause in the contract or have not subsequently reached a written arbitration
agreement; (2) the party against whom the application for execution is made has not
received notice for appointment of an arbitrator or for the inception of the arbitration
proceedings, or is unable to present his case due to cause for which he should not be
responsible; (3) the composition of the arbitration tribunal or the procedure for
arbitration is not in conformity with the rules of arbitration, or (4) the matters dealt
with by the award fall outside the scope of the arbitration agreement or which the
arbitral organ is not empowered to arbitrate.” All of those four grounds for refusing
recognition and enforcement of and setting aside of arbitral awards with foreign
interests reflect Article V (1) of the New York Convention.

It is odd that such division still exists nowadays. For a special period of time

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420 See Article 58 (5) and (6) of the Arbitration Law of the People’s Republic of China.
421 Id. See Article 58 (1) through (3), (6) of the Arbitration Law of the People’s Republic of China.
422 Id. paragraph 3 of Article 58, “Whereas the people’s court establishes that an arbitral award goes against the
public interest, the award should be cancelled by the court.”
423 Chapter VII of the Arbitration Law of the People’s Republic of China is legislated as special provision on
arbitration involving foreign interests, of which article 65 has briefly defined the term of “arbitration with foreign
interest” as “arbitration of disputes arising from foreign economic cooperation and trade, transportation and
maritime matters.
424 With the amendment of the Civil Procedure Law of People’s Republic of China on 31 August 2012, the article
number had been changed to Article 274.
426 See Article 274, paragraph 1 of the Civil Procedure Law of the People’s Republic of China.
before the promulgation of the PRC Arbitration Law, there were many defects of the legal framework for arbitration system in People’s Republic of China, where only few provisions were provided in the Civil Procedure Law. Simultaneously, commercial arbitration with foreign elements could only be filed and tried by the sole foreign-related arbitration institution, which was the predecessor of the China International Economic and Trade Arbitration Commission (CIETAC). However, such situation was absolutely changed when the PRC Arbitration Law was promulgated on 31 October 1994. Since then, not only the foreign-related arbitration institution could accept arbitration cases with foreign interests, a large number of the newly formed domestic arbitration institutions are permitted to accept such type of arbitration cases. Therefore, dividing foreign-related arbitration procedure from pure domestic arbitration procedure seems inappropriate, even strange. Arbitral awards rendered in the territory of People’s Republic of China by Chinese arbitration institutions are all domestic awards, and it is unjust to set different standards for carrying out judicial review of those arbitral awards.

Going with the rapid economic growing, international commercial arbitration has been widely practiced in India during the past decades. India has promulgated the latest Arbitration and Conciliation Act in 1996, which has incorporated the 1985 UNCITRAL Model Law. Part I of this arbitration act applies to arbitration procedure seated in India.\(^{427}\) Specifically, Chapter VII of Part I regulates the recourse against arbitral award, the core part of which is the provisions permitting setting aside of arbitral awards. Article 34 (2) of the 1996 Arbitration and Conciliation Act has specifically enumerated seven grounds for setting aside of arbitral awards, of which the former five reasons should be proved by the applicant of the nullification proceedings.\(^{428}\) Since the domestic arbitration law of India resembles both the New York Convention and the UNCITRAL Model Law, the grounds for nullifying the arbitral awards are almost the same as other countries which have incorporated the Model Law, such as Germany and Japan discussed above. Those grounds permitting vacation of arbitral awards under the Indian arbitration act are similar to the refusal grounds listed in Article V of the New York Convention, sub-article (1) through (a) to (d) and sub-article (2).

Although arbitration statute has been well established, however, the judicial interpretations of the relevant provisions are far to be perfect, some of which have violated the effectively set up legal framework and the basic principle of international commercial arbitration. There were two cases reported by two different Indian courts, which concerned the set aside of foreign arbitral awards that were rendered outside India. Specific discussion will illustrate the confusing question that whether national courts of one country can set aside or nullify such kind of foreign arbitral awards.

(1) **Supreme Court of India: Appeal (civil) 309, 10 January 2008**

This case, which was *Venture Global Engineering v. Satyam Computer Services Ltd. and another*, happened between a US company Venture Global Engineering

\(^{427}\) See Article 2 (2) of the Arbitration and Conciliation Act 1996 of India.  
\(^{428}\) See Article 34 (2) of the Arbitration and Conciliation Act 1996 of India.
(VGE) and an Indian company Satyam Computer Services Ltd. (Satyam). The subject matter was that whether the Indian courts could set aside award rendered abroad or not, basing on the grounds of public policy.\textsuperscript{429} The VGE and Satyam signed a Joint Venture Agreement to form an Indian company which was called Satyam Venture Engineering Services Ltd. (SVES), providing engineering and information technology services for automotive industry. The parties had signed not only the Joint Venture Agreement, but also another Shareholders Agreement (SHA). The SHA contained an “event of default” provision which included bankruptcy, authorizing an option for one party to purchase the other party’s shares of SVES at book value within a time limit of 120 days. The parties had chosen the Michigan law to be the applicable law, and negotiated to resolve their disputes through arbitration by the London Court of International Arbitration (LCIA).

On March 28 2003, several affiliate corporations of VGE filed for bankruptcy, but VGE did not notice Satyam. VGE denied such petitions of the affiliates had sufficiently made VGE constituted default event of the SHA. On February 8 2005, Satyam was familiar with the bankruptcy of the affiliates of VGE and believed that such situation equaled a default event. Then Satyam sought to purchase VGE’s shares according to their agreement. VGE did not agree with the purchase and insisted that the 120-day time period had elapsed. However, Satyam did not agree with such argument, insisting that it had never received any notice of the bankruptcy of the affiliates from VGE. On July 25 2005, Satyam commenced LCIA arbitration, and got an arbitral award in favor of it, rendered by a sole arbitrator, holding that the bankruptcy of the VGE affiliates constituted an event of default. Since VGE failed to provide Satyam any written notice of the bankruptcy, the running of the time for the 120-day deadline never began. Thus the arbitrator directed VGE to transfer SVES’s shares to Satyam at book value.

After Satyam received the arbitral award, it sought enforcement in the United States Court for the Eastern District of Michigan, where the award was granted enforcement, and then affirmed by the United States Court of Appeal for the Sixth Circuit. However, VGE applied to an Indian court to require setting aside of the LCIA arbitral award, and requested authorizing permanent injunction on the transfer of SVES’s shares on the ground that the arbitral award violated public policy of India, that is, conflicting with the Indian law on inhibiting transfer of shares. The judge of the Indian court issued a provisional order \textit{ex parte}, which had ruled an injunction restraining Satyam from seeking or effecting the transfer of shares either under the terms of the arbitral award or otherwise.

In the appellate proceeding, the court of appeal denied the VGE’s request for annulment of the award, holding Part II “Enforcement of Certain Foreign Awards” of the 1996 India Arbitration and Conciliation Act which should be applied to foreign arbitral awards subject to the 1958 New York Convention, the 1923 Geneva Protocol and the 1927 Geneva Convention, did not authorize any Indian court to set aside a foreign arbitral award. The court found that Part I of the 1996 Arbitration and

Conciliation Act, which in contrast had authorized Indian courts to set aside awards on ground of public policy, but should not be applied to arbitration rulings which was made abroad.\textsuperscript{430}

However, the Supreme Court of India reversed the judgment of the court of appeal, holding that foreign awards could be challenged in India unless the parties otherwise provide. The Supreme Court affirmed its holding in the 2002 decision in \textit{Bhatia International}\textsuperscript{431} that Part I of the 1996 Act could be applied to arbitrations where the place of arbitration is not in India, unless its application had been expressly excluded by the parties. The Supreme Court reasoned that the “scheme” of the Act was such that the general provisions of Part I could be used to all arbitrations, including international commercial arbitrations. As the parties here did not expressly exclude the application of Part I of the 1996 Act, such Part should be applied, and then the Indian courts could review foreign award, on the basis of contrary to the public policy of India. \textsuperscript{432}

In this case, the Supreme Court of India has maintained its consistent interpretations on the issue that foreign awards can be challenged in India, unless the parties have otherwise agreed. Although the arbitration statute of India has not directly authorized the right of set aside of foreign arbitral awards, however, the case law of the Supreme Court has established such an abnormal interpretation for vacating arbitral awards made outside the territory of India. This approach is contrary to the international common jurisprudence on the competence of nullification of arbitral awards, which is a typical example of excessive judicial intervention by national courts on international commercial arbitration system. Under the legal framework of the New York Convention and various domestic arbitration-related laws, setting aside of arbitral awards can only be practiced by the competent authority of the country where the arbitral awards are made, or under the law of which those awards are rendered. Thus, if more countries have taken such an interpretation as the Supreme Court of India, conflicts on nullification of arbitral awards will be endless, that is, both active conflict and negative conflict may happen, when answering the question that which country is be able to challenge the arbitral awards. The development and future progress of international commercial arbitration system will be frustrated due to inappropriate nullification of arbitral awards by various national courts.

(2) High Court, Calcutta, Ordinary Original Civil Jurisdiction: 20 March 2012

The case of \textit{Coal India Limited v. Canadian Commercial Corporation} was also connected on the issue of the competence for challenging arbitral awards. \textsuperscript{433} According to this case, the approach of raising a petition to an Indian court for

\begin{itemize}
\item \textsuperscript{430} Id. p.240.
\item \textsuperscript{431} \textit{Bhatia International v. Bulk Trading S.A.} As summarized by a professor, “The Supreme Court, in \textit{Bhatia International}, held that Part I of the Act would apply to international commercial arbitration held outside India (“outside arbitration”) but parties could exclude the applicability of Part I expressly or impliedly.” See Badrinath Srinivasan, \textit{Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination}, 4 NUJS L. Rev. 639, 2011.
\item \textsuperscript{432} Id. pp.240-241.
\end{itemize}
nullification of a foreign arbitral award was not still maintainable.\textsuperscript{434}

The petitioner, Coal India Limited and the respondent, the Canadian Commercial Corporation, entered into a contract on January 12, 1989. The respondent was responsible to set up a coal extracting facility for the petitioner under the contract which was governed by Indian law. The parties further agreed to resolve disputes through arbitration in Geneva under the rules of the International Chamber of Commerce (ICC). After that, a dispute happened and the petitioner commenced ICC arbitration in Geneva according to the previous arbitral clause. An ICC arbitral tribunal was organized and rendered an arbitral award in favor of the respondent. The petitioner lost the case, who eventually applied to set aside the ICC award in India.

The judge of the High Court of Calcutta decided that the nullification application was not permissible, indicating the question that whether or not an Indian court might set aside an arbitral awards rendered abroad.\textsuperscript{435} The judge reasoned that India had already been one of the contracting states of the 1958 New York Convention. It thus implied the acknowledgement of reciprocity, which demanding the adopting States and their courts to be guided by certain fundamental norms that would meet universal acceptability. If courts in other jurisdictions accepted that there was a distinction between the law of the arbitration agreement and the law of the arbitration—and nothing in Indian law expressly opposed that view—this distinction must be endorsed in India as the “logical extension of conferring full meaning to the juridical seat of arbitration when the concept of the judicial seat of arbitration has been accepted by the Supreme Court”.\textsuperscript{436}

Here again referring to the case, although the main contract of the disputed parties was governed by Indian law, and as lacking any other contrary indication, the arbitration agreement was also governed by the same law. However, the arbitration did not appear to be governed by Indian law, but the Swiss law, which was the law of the place of arbitration. Therefore, only the competent Swiss court had been authorized to hear a petition for vacating an arbitral award.\textsuperscript{437}

Different from the precedent of the Supreme Court of India, the latest ruling of the High Court of Calcutta went back to the generally accepted norm, which provided that nullification of an arbitral award should only be recognized as the authority of the country of rendition or the country under whose law the award was made. Before this interpretation, as criticized by one professor, the courts had alleged that the Act (1996 Arbitration and Conciliation Act) was not a well-drafted legislation. The blame game started prominently with \textit{Bhatia International}, where the (Supreme) Court held that there was a lacuna in the Act, because the Act did not provide for interim relief in case of arbitration procedures held outside India, and thus the Act was not a well-drafted legislation. As the criticisms of the judgment would show, the only “lacuna” of the Act was not providing for interim relief in such situations. This, as stated previously, might have been deliberate. Instead of leaving it to the legislature to correct the “defect”, the (Supreme) Court went on an interpretative adventure resulting in a

\textsuperscript{434} Id.
\textsuperscript{435} Id. p.243.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
confusing law.\textsuperscript{438} Getting rid of these criticized interpretations by the precedent, the recent explanation by the High Court of Calcutta is attractive and appreciable. The annulment procedure of foreign arbitral awards may be restricted in the Indian courts. If the reasoning of this case could be exemplified to other courts of India, especially to the Supreme Court, then the validity of foreign commercial arbitral awards will be respected by the courts through reciprocity, and excessive judicial interventions by Indian courts on setting aside of foreign commercial arbitral awards will be greatly reduced and gradually eliminated in the nearly further.

\textbf{2.2.3.2 Recognize and Enforce the Nullified Arbitral Awards}

Another debate on the excessive judicial intervention of international commercial arbitral awards is the recognition and enforcement of nullified arbitral awards. As discussed previously, this controversy originates from the different interpretation of the general nature of Article V of the New York Convention for those refusal grounds thereof to be permissibility or exclusivity. This special explanation of the core provision of the New York Convention has been practiced in some contracting states, including Belgium, France and the United States.\textsuperscript{439} As one commentator indicates that “the Convention then attacks the other end of the process by strictly limiting the grounds upon the party seeking to deny enforcement and leaving with the court a residual discretion to enforce notwithstanding the proof of one of the specified grounds.”\textsuperscript{440}

Permitting enforcement of vacated arbitral award by competent authority of different jurisdictions will derogate the uniform effectiveness of the contemporary legal framework for recognition and enforcement of international arbitral awards. It is generally believed that if an arbitral award has been set aside in the country where the place of arbitration was seated, it did not still exist, and thus unable to be recognized and enforced. The execution of such vacated arbitral awards will cause confliction among jurisdictions, which is harmful for further practice and progress of international commercial arbitration in those countries.\textsuperscript{441} One famous professor

\textsuperscript{438} Badrinath Srinivasan, \textit{Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination}, 4 NUJS L. Rev. 639, 2011.

\textsuperscript{439} One commentator indicates, “this question has already been extensively discussed at the ICCA Conference in Paris in 1998 namely: can an award that has been set aside by a judgment in the country of the seat of the arbitration be recognized and enforced in another country? The orthodox answer, which prevails in most countries, is clearly in the negative. It is, in particular, embodied in Art.V, Sect.1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, this view has been challenged in the recent case law of a few countries—namely Belgium, France and the United States—who have permitted enforcement of awards that had been set aside in their country of origin.” See Pierre Mayer, \textit{Revising Hilmarton and Chromalloy}, General Editor Albert Jan van den Berg, International Arbitration and National Courts: the Never Ending Story, Kluwer Law International 2001, p. 165.

\textsuperscript{440} Neil Kaplan Q.C., \textit{A Case by Case Examination of Whether National Courts Apply Different Standards when Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is There a Worldwide Trend towards Supporting an International Arbitration Culture?} General editor Albert Jan van den Berg, International Dispute Resolution: Towards an International Arbitration Culture, Kluwer Law International 1998, p.188.

\textsuperscript{441} As argument indicated that “such a practice (enforcement of annulled arbitral awards) has been viewed with consternation by international firms which anticipate the arbitral forum to be the final locale of resolution of any commercial disputes”. See W. Michael Reisman & Heide Iravani, \textit{Conflict and Cooperation: The Changing
summaries that Article V (1) (e) has neither permitted non-recognition of annulled award, nor articulated criterion for determining whether it is appropriate or not to refuse recognizing such vacated arbitral award. Additionally, as discussed elsewhere, Article VII provides that the New York Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.” This leaves few questions except that, if national law will give effect to vacated awards (or awards otherwise not subject to mandatory recognition), nothing in the Convention forbids this. Textually, the language of Articles V and VII strongly suggests that an annulled or suspended award may, but need not be denied recognition in other contracting states.442

In judicial practices, national courts of several contracting states of the New York Convention have reported some cases on the recognition and enforcement of nullified international commercial arbitral awards, of which the France and the United States have practiced the most controversial approaches. This difficult issue has not yet been unified settled, which deserves further research. In order to reduce the conflict interpretations of various jurisdictions, and maintain the consolidated mechanism of the New York Convention, it is necessary to strictly control the excessive judicial involvement of the national courts in which recognition and enforcement of annulled arbitral awards are relied upon.

1. Recognition and Enforcement of Vacated Arbitral Awards in France

France has joined into several international conventions on recognition and enforcement of international commercial arbitration agreement and arbitral awards, for instance, the Geneva Protocol, the Geneva Convention, the New York Convention and the European Convention. The New York Convention and the European Convention are still effectively affecting the international commercial arbitration practices in France. As professor Gary B. Born explains that “the text of European Convention goes a step further than the New York Convention. It provides in Article IX(1) that a decision setting aside an arbitral award shall only constitute a ground for the refusal of recognition and enforcement if: (a) the setting aside occurred in a state in which, or under the law of which, the award has been made, and (b) the setting aside was based on one of several grounds specified in Article IX (1) (a) to (d) of the Convention (essentially, the limited grounds set out in Article V (1) (a) to (d) of the New York Convention). The European Convention appears to provide that, if an award is annulled on one of the grounds set out in Article IX (1) (a) to (d), then non-recognition is required.”443

There were some cases reported by the French courts on the recognition and enforcement of annulled arbitral awards. In 1984, the cour de cassation reversed a lower court judgment, which had applied Article V (1) (e) to deny recognition of an arbitral award which had been set aside in the arbitral seat in Austria. The cour de cassation relied on Article VII of the New York Convention, where it held preserved

442 See supra note 1, Gary B. Born, pp.2676-2677.
443 European Convention, Article IX (1), see supra note 1, Gary B. Born, p.2677.
the more liberal French regime (under Article 1502 of the New Code of Civil Procedure) for recognizing and enforcing foreign arbitral awards, and remanded the case to the French first instance court to determine whether the vacated award was entitled to recognition under French law. A subsequent decision of the **cour de cassation** in 1993 confirmed its earlier ruling, and elaborated on the rationale for recognizing an annulled award. However, the most famous case was *Hilmarton v. Omnium de Traitement et de Valorisation (OTV)*. This case was discussed during a long time, concentrating on the issue of the recognizability and enforceability of nullified arbitral awards.

(1) *Hilmarton v. Omnium de Traitement et de Valorisation*

This case happened between a French company *Omnium de Traitement et de Valorisation* (OTV) and an English Company *Hilmarton* (Hilmarton). Hilmarton signed a contract with OTV, which would provide advice and to coordinate efforts to obtain a contract in Algeria for the latter. After the OTV successfully got the contract in Algeria, a dispute arose between them, because Hilmarton had not received the remaining 50% payment of the agreed consultancy fee. Then Hilmarton commenced the ICC arbitration in Switzerland, requiring the payment of the remaining fee. The sole arbitrator tried the case, but rejected the request of Hilmarton, reasoning that the real object of the contract violated the Algerian Law and the Public policy of Switzerland (the first award made on August 19 1988). However, the first award was set aside by the Geneva Court of Appeal in 1989, after that such annulment was finally confirmed by the Supreme Court of Switzerland on 17 April 1990.

In France, OTV applied to the Court of Appeal of Paris, requesting for exequatur to the first award according to the French Arbitration Law on 19 December 1991. The exequatur was finally granted on 23 March 1994, when the final judgment gave by the French Supreme Court rejected the appeal brought by Hilmarton. However, Hilmarton had successfully appealed the first arbitral award to the Appeal Court of Geneva and the Supreme Court in Switzerland, and got a final ruling on setting aside the first award. Then, a second arbitration proceeding was commenced in April 1992, and the second arbitral award was made in favor of Hilmarton at Switzerland. Subsequently, Hilmarton applied to the Court of First Instance of Nanterre in France on 25 February 1993, petitioning for the exequatur of the second arbitral award. Simultaneously it also applied to the same court of France for enforcement of the annullment judgment of the first award rendered by the Switzerland Supreme Court. Both applications had been accepted and granted by the Court of First Instance of Nanterre. Then OTV appealed to the Versailles Court of Appeal on 29 June 1995, however, both of the decisions of the lower court were approved, that is, enforcement of the Swiss Supreme Court decision for setting aside the first award and enforcement of the second award.

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444 It indicates the relevant provisions of the latest Arbitration Procedure in the Code of Civil Procedure: Article 1499, 1520, 1522, 1524 and 1525 of Book IV Arbitration of the Code of Civil Procedure of France, which was reformed according to Decree No. 2011-48 of 13 January 2011.

445 See supra note 1, Gary B. Born, pp.2677-2678.

OTV did not comply with the judgment of the Versailles Court of Appeal, and again appealed to the Supreme Court of France. The Supreme Court overturned the two decisions of the Versailles Court of Appeal, reasoning that “the two decisions which are appealed against –in spite of the decision rejecting appeal against the decision granting enforcement of the first award rendered by the Supreme Court on March 23 1994- granted exequatur to the decision of 17 April 1990 of the Swiss Federal Tribunal which had vacated the first award, and exequatur to the second arbitral award. Deciding in this way, the existence of a final French decision which was based on the same subject between the same parties would create an obstacle to any recognition of court decisions or arbitral awards rendered abroad in France which are incompatible with the former. The Court of Appeal violated the Article 1351 Civil Code.”

(2) The Arab Republic of Egypt v. Chromalloy Aero services, Inc.

In this case, a US company called Chromalloy Aero services, Inc. (Chromalloy) had signed a contract with the Air Force of the Arab Republic of Egypt (Egypt), according to which Chromalloy agreed to provide parts, maintenance and repair for helicopters of the Egyptian Air Force on 16 June 1988. After that, Egypt noticed Chromalloy to cancel the contract in December 1991 and triggered the objection of Chromalloy. Then Chromalloy commenced arbitration proceeding basing on the arbitration clause of the contract, who was finally favor of the arbitral awards rendered by the arbitral tribunal, ordering Egypt to pay damages to Chromalloy.

Chromalloy sought enforcement of the final arbitral award in the United States in the District Court of Columbia on October 28 1994. However, while the execution procedure was pending in the US court, Egypt filed a lawsuit to the Egyptian Court of Appeal, requesting for setting aside of the arbitral award on November 13 1994. This arbitral award was finally vacated by the Egyptian Court of Appeal on December 5 1995. Simultaneously, Egypt had applied to the US court to adjourn Chromalloy’s petition to enforce the said award, it was failed because the US District Court of Columbia decided that such an arbitral award, even been set aside in their country of origin, should be valid according to US law and then granted enforcement on July 31 1996.

Meanwhile, Chromalloy filed a lawsuit to the competent French court, which was the case here, applying for recognition and enforcement of the arbitral award which was suspended by the Egyptian Court of Appeal and eventually set aside. Nevertheless, the Paris Court of First Instance granted exequatur to the arbitral award on May 4 1995, and then the Paris Court of Appeal confirmed the decision of the

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447 Id. p.697. Article 1351 of the French Civil Code reads: “Only those matters which have been the subject of the judgment are res judicata. The claim must be the same, it must based on the same ground and be between the same parties, and raised by and against each other in the same capacity.”


449 This court report will be discussed in the next section, where the execution of annulled arbitral awards approach of the United States of America will be discussed in detail, and the Chromalloy was a also very important and outstanding case for this topic in the US courts. This case was reported in Yearbook: Commercial Arbitration XXII, Kluwer Law and Taxation Pub.1997, pp.1001-1012.

450 Id.
lower court to be right, reasoning that the more-favorable-right provision of the New York Convention allowed the application of French law. The award was an international award and was thus not integrated in the Egyptian legal order. Although it had been annulled in Egypt, it remained in existence and its enforcement in France would not be in violation of international public policy. Moreover, it was found that the award contained reasons, and that the reasons were not contradictory.₄₅¹

(3) Discussion of the French Approach

As professor Gary B. Born comments on this case, who indicates that “the precise rationale and reach of foregoing French decisions is not entirely clear. In particular, it is unclear whether the French decisions consider Article V (1) (e)’s grounds for non-recognition, based on annulment of an award in the arbitral seat, to be mandatory or permissive. The decision do not expressly address this question, referring instead only to Article VII of the Convention, which preserves parties’ rights to seek recognition under national law, even if the Convention does not require recognition. Nonetheless, the logic of the French decision is necessary that Article V (1) (e) is permissive (i.e., that it does not affirmatively require non-recognition of annulled award), because this is necessary in order to prevent a conflict between that provision and Article VII’s savings clause; this is not, however, made explicit in the reasoning of the French decisions.”₄₅²

According to the cases reports of the French courts, they were mainly relied on Article 1502 of the 1981 New French Code of Civil Procedure (NCCP)₄₅₃, which was on the issue of challenge of arbitral awards rendered abroad or in international arbitration. Article 1502 states that “An appeal against a decision granting recognition or enforcement may be brought only in the following cases: First, if there is no valid arbitration agreement or the arbitrator ruled on the basis of a void or expired agreement; Second, if there are irregularities in the appointment of the arbitral tribunal or of the sole arbitrator, as the case may be; Third, if the arbitrator exceeded the authority conferred upon him; Fourth, whenever due process (literally: the principle of an adversary process) has not been respected; Fifth, if the recognition or enforcement are contrary to international public policy (ordre public).₄₅₄

Referring to the reasoning of different courts, they did not concern the statute and validity of the annulled decisions on those foreign arbitral awards. They interpreted the core provision of the New York Convention, which concerned Article V (1) (e) to be permissive, but not absolute exclusive, and insisted invoking Article VII (1) of the Convention as the said “more-favorable-right” provision. As the previous Article 1502 of the French Arbitration Law contained less strict grounds for refusing recognition and enforcement of international arbitral awards than that of the New York Convention, and if Article V (1) (e) of the New York Convention is permissive, then disputed parties could require the application of more favorable

₄₅₁ See supra note 448, p.692.
₄₅² See supra note 1, Gary B. Born, pp.2679-2680.
₄₅₄ Id., Article 1502.
domestic law of France, which did not reject recognizing or enforcing annulled arbitral awards. Thus, such kind of vacated arbitral awards could be successfully executed in France.

At a glance, the French approach seems very pro-arbitration, i.e., even if the international arbitral awards have been set aside, they could be recognized or enforced by French courts. Just as argued by one commentator who has compared the major arbitration jurisdictions and indicated that the French attitudes on the judicial review of the arbitrators’ award is restricted, arguing that “where a party seeks to challenge an international arbitral award in the court of the country where the award was made, grounds for such challenge are the most circumscribed under French and United States law. The validity of the award according to American, English and French law depends on the fundamental fairness of the proceedings, whether the subject of the dispute was arbitrable, and the scope and validity of the arbitration agreement.” However, such interpretations of the French courts may generate a number of conflicts among the contracting states of the New York Convention, and result in harmful effect to the uniformity of the Convention.

Other different opinions have been elaborated, as one commentator concludes that, “in general, liberal statutes and jurisprudence on international commercial arbitration should be encouraged. However, they must not be adopted if they have a detrimental effect on legal certainly or quality. The French example perfectly illustrates the danger of excessive liberalism in the field of recognition and enforcement of awards. Nevertheless, the French system along should not be blamed. The excessive liberalism of the French legislation and jurisprudence concerning recognition and enforcement of awards is only the consequence of the excessive liberalism of the more-favorable-right provision of Article VII (1) of the Convention, which in turn is a response to the conservatism of Article V (1) (e). Finally, these controversial articles result from an elaborate search by the drafters of the Convention for large consensus, such as easier ratification.”

On January 13 2011, France adopted a new amendment to the arbitration law, which was composed with both domestic and international commercial arbitration mechanism. As introduced by one professor, the purpose of the new law, however, was not to fix something that was broken. Rather, it was principally designed to capture the pro-arbitration case law the French courts which have been developed over the past thirty years and reflect them in the arbitration code. This is an appreciable development, as it makes the law more accessible. Title II of the new arbitration law is on the International Arbitration procedures. For international arbitral awards made in France, it is generally regulated by Article 1524, in which no recourse is permitted against an order granting enforcement of an award, except as provided in Article 1522, paragraph 2. Referring to paragraph 2 of Article 1522, right to bring

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an action to set aside of arbitral awards has been waived. Parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520.459

Article 1520 regulates the specific grounds for setting aside an international arbitral award rendered in France. It is an amendment to Article 1502 of the former NCCP that has been widely used by the French courts to grant recognition and enforcement of annulled foreign arbitral awards. Article 1520 of the new arbitration law includes: (1) the arbitral tribunal wrongly upheld or declined jurisdictions; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.460 Moreover, Article 1525 of the new arbitration law has also indicated to apply Article 1520 for refusing enforcement of international arbitral awards which are made abroad.461

Accordingly, the substantive contents of this article has not modified the former Article 1502 of the NCCP, where only some mite changes of the words or expressions of the provision. Thus, the phenomenon of recognition and enforcement of vacated arbitral awards may be continued in French courts.

2. Execution of Annulled Arbitral Awards in the United States

In the United States of America, a series of cases on matters of recognition and enforcement of annulled international arbitral awards were reported during the past two decades. According to the most outstanding case of Chromalloy, as reported in the above section462, the United States District Court for the District of Columbia authorized recognition and enforcement of an international arbitral award which had been set aside by foreign court. Such a odd approach attracted a large quantity of discussion thereafter.463 However, in some descending courts decisions, this approach on approval of execution of nullified international arbitral award in the United States has been gradually derogated and denied, such as the cases of Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.464, Martin I. Spier v. Calzaturificio Tecnica, S.P.A,465 and Termorio S.A. E.S.P. and Leaseco Group, LLC v. Electranta S.P., Et Al466. Comparing the two cases of Chromalloy and Termorio here in detail, to discuss the dynamic attitudes of the United States courts on the involvement of judicial proceedings of recognition and enforcement of foreign arbitral awards which have already been

459 Id. Article 1522, paragraph 2.
460 Id. Article 1520.
461 Id. See paragraph 4 of Article 1525: Awards Made Abroad, “The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520”.
462 See supra note 449.
466 See 478 F. 3d 928, 2007.
nullified by competent authorities of the place of arbitration.

(1) Chromalloy Aero services v. The Arab Republic of Egypt

This was a leading case in the United States on the recognition and enforcement of annulled arbitral awards by the US court. The introduction of the background and basic information was the same as reported in the above discussed French case. After the arbitral award was rendered in Egypt, Chromalloy applied to the United States District Court for the District of Columbia for the enforcement of the arbitral award, while Egypt filed an appeal to the Egyptian Court of Appeal, seeking annulment of the arbitral award. Subsequently, Egypt filed a motion to the US court to request suspending Chromalloy’s petition of execution of the award. Later Egypt again filed another motion to the same court to require dismissing Chromalloy’s petition on May 5, 1995. Egypt’s Court of Appeal at Cairo issued an order nullifying the arbitral award on December 5, 1995. Then Egypt made an action to the US court, requesting rejection to Chromalloy’s petition for recognition and enforcement of the arbitral award. However, Chromalloy argued that this court should confirm the award because Egypt did not present any serious argument that the nullification decision was consistent with the New York Convention or United States federal arbitration law.

According to the memorandum of the court, this was a case of first impression on such an issue. According to the discussion of the reasoning, the US court specifically considered the jurisdiction on the Arab Republic of Egypt and the Egyptian Air Force, then it discussed carefully the Chromalloy’s petition for enforcement, analyzed the decision of Egypt’s Court of Appeal, explained the Choice of Law issue of the arbitral procedure, and answered the argument on conflict between the Convention and the FAA. In conclusion, the Court decided that the award of the arbitral panel was valid as a matter of US law, and further concluded that it needed not grant res judicata effect to the decision of the Egyptian Court of Appeal at Cairo. Accordingly, the Court granted Chromalloy Aero services’ petition for recognition and enforcement of the arbitral award, and denied Egypt’s motion, reasoning that the arbitral award in question was valid, and Egypt’s arguments against enforcement were insufficient to allow this Court to disturb the award.

(2) Termorio S.A. E.S.P. and Leaseco Group, LLC v. Electranta S.P., Et Al

This was a recent case reported by the United States federal court on issue of the recognition and enforcement of nullified arbitral awards, which overturned the Chromalloy precedent. TermoRio S.A. E.S.P. (TermoRio Appellant) and Electrificadora del Atlantico S.A. E.S.P. (Electranta Appellee), a public utility controlled by Colombia, agreed and signed a power purchase agreement (Agreement) in 1997, pursuant to which TermoRio consented to generate energy and Electranta agree to buy it. After that, in March 1998, Colombia decided to sell the assets of Electranta to private owners and other Colombian utilities. On April 16, 1998, a new

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467 See supra note 450.
469 Id.
A company called Electrocaribe was incorporated to privatize the Electranta, which had received and held the assets and liabilities of Electranta. However, Electranta did not transfer its obligation to purchase power from TermoRio under the Agreement. Although it should bear the obligation to purchase, it had no resources to do so. Therefore, Electranta failed to buy power from TermoRio and constituted breach of the Agreement. As the parties had listed an arbitration clause in the Agreement, they commenced a long arbitration process, and finally on December 21, 2000, the arbitral tribunal with three arbitrators rendered an arbitral award, holding that Electranta violated the Agreement at the direction of Colombia and thus must pay TermoRio an award of $60.3 million USD.

Nevertheless, neither the Republic of Colombia nor Electranta fulfilled the arbitral award, even any portion of it. On the contrary, Electranta filed an “extraordinary writ” with a court in Barranquilla, Colombia, to annul the arbitral award. In due course, the Consejo de Estado (Council of State) Colombia’s highest administrative court set aside the arbitral award on the ground that the arbitration clause contained in the parties’ Agreement violated Colombian law. It reasoned that the arbitration should be conducted in accordance with Colombian law, while the Colombian law in effect as of the date of the Agreement did not expressly permit the use of ICC procedure rules in arbitration.

Following the judgment by the Council of State of Colombia, TermoRio and co-appellant LeaseCo Group, LLC, an investor in TermoRio, filed a lawsuit in the District Court of Columbia (the District Court) against Electranta and the Republic of Colombia, seeking enforcement of the arbitral award according to 9 U.S.C. §201 of the Federal Arbitration Act which implements the New York Convention. However, the District Court dismissed firstly LeaseCo as a party for want of standing, and dismissed TermoRio’s enforcement petition for failure to state a claim upon which relief could be granted. After the trial of the United States Court of Appeals for the District of Columbia Circuit (the Court of Appeal), the judgment of the Court of Appeal affirmed the judgment of the District Court, reasoning that “the arbitration award was a made in Colombia and the Consejo de Estado was a competent authority in the country to set aside the award as contrary to the law of Colombia. Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it. According, we hold that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of

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470 The arbitration clause contained in this Agreement provides (as translated): “Any dispute or controversy arising between the Parties in connection to the execution, interpretation, performance or liquidation of the Contract shall be settled through mechanism of conciliation, amiable composition or settlement, within a term no longer than three weeks. If no agreement is reached, either party may have recourse to an arbitral tribunal that shall be governed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The tribunal shall be made up of three members appointed by the Chamber, and shall be seated in the city of Barranquilla, Colombia. The award, which shall be binding on the parties, must be rendered within a maximum term of three months.” See 487 F. 3d 928, 2007.


472 Id.
the award under the FAA or the New York Convention.\textsuperscript{473}

The Court of Appeal approved the relevant facts which set forth in the District Court’s published Memorandum, and analyzed the following matters: it first reviewed \textit{de novo} the District Court’s dismissal for failure to state a claim, then discussed the applicable international agreement, after that it continued analyzing the validity of a foreign judgment which nullified an arbitral award, and reviewed the considerations of “public policy” in detail. Finally, the Court of Appeal reviewed the District Court’s grant of Appellees’ motion to dismiss, and rendered the former conclusion which affirmed the judgment of the District Court.\textsuperscript{474}

\textbf{(3) Analysis of the United States Approach}

According to the two cases introduced above, the attitudes of the United States courts on recognition and enforcement of annulled arbitral awards were changed during the past two decades. As one professor indicates that “US court have considered whether to recognize annulled awards in a number of cases, developing an analysis that is less expansive than the French and Belgian approach, but which in some cases has nonetheless permitted recognition of annulled awards in some circumstances. In other cases, US courts appear to have rejected or narrowly limited the possibility of recognizing an award that has been annulled in the arbitral seat.”\textsuperscript{475}

Referring to the court’s reasoning of the Chromalloy case, it explained that “in the present case, the award was made in Egypt, under the laws of Egypt, and has been nullified by the court designated by Egypt to review arbitral awards. Thus, the Court may, at its discretion, decline to enforce the award. While Article V (of the New York Convention) provides a discretionary standard, Article VII of the Convention requires that ‘the provisions of the present Convention shall not… deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allow by the law…of the country where such award is sought to be relied upon.’ In other words, under the Convention, Chromalloy maintains all rights to the enforcement of this arbitral award that it would have in the absence of the Convention. According, the Court finds that, if the Convention did not exist, the Federal Arbitration Act would provide Chromalloy with a legitimate claim to enforcement of this arbitral award.”\textsuperscript{476}

Based on such analysis, the court which was filed with the Chromalloy case took the same approach as some French courts, it firstly interpreted the general nature of Article V of the New York Convention to be permissive, including Article V (1) (e), and secondly it relied on the Article VII (1) of the said residual discretion in favoring of the more-favorable-right provision. The court further explained that under the laws of the United States, arbitral awards might only be vacated by a court under very limited circumstances.\textsuperscript{477} The court’s analysis thus far addressed the arbitral award,
and as a matter of US law, the award was proper.

As one commentator summaries that Chromalloy case has taken a beating over the past fifteen years with numerous writers levying sharp criticism against it. Whether Chromalloy is savior or scourge depends upon which author’s work you read. 478 For instance, one commentator objects the opinion that nullified arbitral awards could not be recognized and enforced anywhere else. He believes that it is overly simplistic to insist that an arbitral award has been set aside in the country where it is rendered means no longer existence, and therefore is incapable of enforcement anywhere. 479 Continually, the author argues that “the real question, therefore, is the following: should the judgment setting aside the award be recognized in other countries? This is a question of pragmatic, rather than theoretical, nature and both camps have, quite rightly, insisted on the practical consequences of answering it in the positive or in the negative.” 480 He argues that if valid arbitral awards could be rejected recognition and enforcement in other contracting states of the New York Convention, then such awards which have been set aside could be executed in other countries. 481 Thus, as concluded by him, no reason why a court should refuse to enforce an award which is enforceable according to its own criteria. The very fact that the award has been vacated in the country of the seat, while it is deemed worthy of recognition in the country of enforcement, proves that the grounds for recognition in the former are archaic, insufficiently liberal. 482

Another professor criticizes the court’s analysis of the Chromalloy case, who argues that “the Chromalloy court’s claim that it was obligated to enforce the annulled award under the Federal Arbitration Act is not justified. To begin with, there is no statutory framework in the United States, as there is in France, which mandates domestic enforcement of foreign arbitral awards notwithstanding their annulment in the countries of origin. The Federal Arbitration Act of the United States lacks the statutory provisions that would compel enforcement of a foreign award notwithstanding its annulment in the country of origin. Furthermore, grounds for annulling local awards are not necessarily the same in substance form grounds for refusing to enforce foreign awards. Ignoring these differences and limitations, the court made a twofold error in construing the Convention, the FAA, and their

corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

477 Robert C. Bird, 


480 Id.

481 See Id. p.171. The author indicates “more specifically, in the field of arbitration, it is unanimously admitted that, when an application to set aside an award has been dismissed, and the validity of the award has therefore been confirmed in the country of the seat, the courts of other countries where enforcement is sought still are entitled to exercise their control on the award, and to deny leave to enforce if the award does not conform with the requirements of their own law. If it is permissible to disregard the decision of the courts of the seat to hold the award valid, why should it be necessary to abide by their decision in the converse situation, namely when the said courts have set aside the award? International harmony is not more important in one situation than in the other, symmetrical one.”

482 Id. p.171.
Accordingly, the author interprets the critique of the court’s statutory construction in two aspects, one is that the Court misconstrued the enforcement test and misapplied the law; the other is denying the existence of the more-favorable-right provision for the execution of foreign awards under the FAA. The issue of the executable of nullified arbitral awards is difficult to resolve, as the former argument suggesting that a double State control system could help achieving a balanced result, which indicates that “the judiciary in the country of origin retains the primary supervision of awards made within its territory, but judiciaries in enforcement countries maintain a secondary supervision of awards to ensure that the judiciary in the country of origin does not itself violate due process or judicial integrity in its primary supervisory role. Specifically, if the annulment court is corrupt, manifestly biased, arbitrary or clearly erroneous in its annulment decision, or does not respect due process of law, the losing party may have a second chance to have its award reinstated and enforced elsewhere. While secondary supervision should not be second-guessing, it should serve as an effective deterrent against naked abuse of the supervisory system in the country of origin.” If dual judicial control of different national courts are permitted, how to maintain the uniformity of the provision of the New York Convention, especially the core Article V, is another intractable issue. As argued in previously, the general nature of Article V has not been uniformly interpreted, being permissive or exclusive, which will cause more problems such as the dilemma here, the recognizable or enforceable of the vacated arbitral awards among those contracting states of the New York Convention.

In addition to those criticisms on the controversial explanations on the general nature of Article V (1) (e), there are some other critiques towards the approach of applying the more-favorable-right provision of Article VII (1) of the New York Convention to resolve the Chromalloy case by the US court. One professor indicates that the court incorrectly relied upon Article VII of the Convention to supporting its holding, including firstly, the importation of domestic norms, by virtue of Article VII, introduces a significant element of disunity into the Convention; secondly, an even serious problem may exist under the United States law, namely, the inapplicability of the enforcement provisions of Chapter One of the FAA to international arbitration. The author believes that Chapter One of the FAA shall not be used to enforce foreign arbitral awards, because the US courts appear to lack the proper jurisdiction under the terms of its provisions, and the enactment of Chapter Two (of the FAA) would appear, by its own terms, to be exclusive. Continually, he criticizes that the approach of relying on Article VII is at the cost of interjecting a large degree of discordance and uncertainty into the award confirmation process, which may further create inflexible and excessively liberal approach vis-a-vis award enforcement, and finally result in an

484 Id. pp.159-162.
485 Id. pp.214.
487 Id. p.1675.
overreliance on domestic law that may introduces more new obstacles to enforcement of awards, working against both the letter and spirit of the Convention.488

Fortunately, as the following cases reported by the federal courts of the United States, the Chromalloy precedent has already been revised. Two cases were reported by the relevant federal courts in 1999. One of the cases was the Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., according to which the United States Court for the Northern District of New York denied Baker Marine’s petitions to enforce the arbitral awards being set aside by the Nigerian court. It explained the reasons that by virtue of the New York Convention and the comity principle, it was not suitable and appropriate to recognize and enforce a foreign arbitral award if such award had already been annulled by the Nigerian courts. Subsequently, the United States Court of Appeal for the Second Circuit tried and affirmed the decision of the court of first instance.489

Another case was reported by the United States District Court for the Southern District of New York in Martin I. Spier v. Calzaturificio Tecnica, S.p.A. In this case, Spier applied to the District Court to enforce an arbitral award that had already been nullified by an Italian court of first instance, and then affirmed by the Court of Appeals of Venice and the Supreme Court of Cassation of Italy. Spier argued that the court should confirm the award and enter judgment thereon, notwithstanding the decisions of the Italian courts.490 However, the judge analyzed the arguments and counterclaims of both parties, especially explained the application of Article V (1) (e) of the New York Convention, and then considered the arguments and final judgment of the Baker Marine case rightly tried by the Second Circuit. Further, the judge explained that even if Spier was entitled to test this award by the measures of domestic law, it availed him nothing, because all three judgments of the relevant Italian courts had vacated the arbitral award, on the ground for setting aside under the FAA (9 U.S.C. §10 (a) (4)) that the arbitrators exceeded their powers in making the award.491 Thus, the petition of Spier to enforce such a void arbitral award was dismissed finally.

Descending the two influential cases reported by the federal courts in 1999, the latest case has been introduced and discussed in detail previously.492 Accordingly, the United States Court of Appeals for the District of Columbia has also affirmed that if an international arbitral award has been appropriately annulled in the country where the award was made, it should not be recognized and enforced by the United States courts. The American approach on recognition and enforcement of foreign arbitral awards has changed the Chromalloy precedent by several other courts, which has promoted the respect of the unification of the New York Convention and helped reducing the conflicts among the United States courts and national courts of other countries.

488 Id. p.1679.
491 Id.
492 See supra note 470-474.
3. Brief Remark

Different courts have various interpretations on the controversy issue of recognizable and enforceable of annulled arbitral awards. Except those countries discussed above, many other countries do not approve the practice of recognition and enforcement of nullified arbitral awards in other jurisdictions. The balance between the judicial interventions on setting aside procedures and the following enforcement procedures is difficult to get, because various judicial traditions and different attitudes towards contemporary international commercial arbitration system exist.

Many professors and commentators have argued on the issue of how to resolve the judicial involvement dilemma between the jurisdictions of the place of arbitration (or whose law had been invoked), and the place where such vacated arbitral awards were relied upon for final execution. For instance, one jurist argues that the negotiation of contractual provisions relating to annulment actions before disputes arose, indicating that the problems attending annulment actions highlight the desirability of addressing them by appropriate provisions in the arbitration agreement, according to which the parties should firstly consider the necessity of an annulment action and secondly consider where an annulment action, if permitted at all, may be brought. Then they should negotiate contractual provisions relating to recognition and enforcement actions. Parties, who prefer arbitration to court litigation, should welcome a contractual regime of a neutral forum that tends to afford them a decisive judicial adjudication of their arbitral award. And that is what the regime here proposed would achieve.

Another Dutch professor introduces the approach of the 1961 European Convention, specifically indicating the interaction of Article IX of the European Convention and Article V (1) (e) of the New York Convention. This approach has been specifically analyzed in the former chapter, which has clearly regulated under what situations nullified arbitral awards could not be recognized and enforced anymore, but not being rejected under other situations. As indicated by the professor, proponents of the enforcement of nullified awards often refer to the supplementary character of Article IX of the 1961 European Convention, in order to support the appropriateness of the intention of giving effect to annulled awards. Similarly, the professor also suggests that parties should take due care when negotiating and drafting arbitration agreements...the reasons for which an arbitral award can be annulled must have been known to both parties at the moment of entering into the arbitration

493 See Section 1061 (3) of the German Arbitration Law, which indicates that “if the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.” As analyzes by one Chinese professor, “under such approach, the German court takes an attitude of limited judicial instruction on foreign arbitral awards, while leaves the main task of reviewing arbitral awards to the national courts of the place of arbitration. Those courts of the arbitration situs only recognize arbitral awards rendered not violating the due process, and the courts of the countries where such awards are relied upon accept such recognition, and thus maintains the expectation and stability of arbitral awards.” ZHANG Xiaojian, Bei Chexiao Zhi Guoji Shangshi Zhongcai Caijue De Chengren Yu Zhixing (Recognition and Enforcement of nullified International Commercial Arbitral Awards), Zhongwai Faxue 2006 No.3, p.363.
495 See supra note 147, Article IX (2) of the European Convention 1961.
agreement.\textsuperscript{497}

Both of the two opinions have the common point that the parties should pay attention to the possibility of annulment of arbitral awards when negotiating their arbitration agreement. Actually, as lacking unified grounds for setting aside international commercial arbitral awards and uniform regulations for the enforceability of nullified arbitral awards under the New York Convention mechanism may cause further disordered judicial decisions in various jurisdictions on such controversy.

Therefore, some other commentators prefer to seek effective resolutions for such dilemma, of which the most controversial one is the creation of a New Convention, whether the amendment version of the New York Convention, or a special Convention only for adjusting of annulment of arbitration awards and the following enforcement procedures. For example, Professor Albert Jan van den Berg approves this approach, and has suggested revising the New York Convention. He published the “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards” in 2008. Such arguments is based on Article 5 (3) (g) of the Draft Convention.\textsuperscript{498} As the commentator appreciates that “embedded within this short revision is a significant and useful clarification regarding enforcement of annulled awards”.\textsuperscript{499} The Draft Convention’s narrow and clear grounds would deter losing parties from “forum shopping” to obtain a favorable remedy, and the also furthers finality in disputes resolution.\textsuperscript{500} He concludes that professor van den Berg’s proposal for a contemporary Convention represents the most thoughtful and realistic proposal to date.\textsuperscript{501}

Another commentator argues analogously, who believes that an effective option to comprise the traditional view and the modern view, separately representing the rejection of the annulled arbitral awards and the acceptance of set aside arbitral awards, is to draft of a Convention, along the lines of Article IX of the Geneva Convention (European Convention 1961), but aiming at the same level of general application as the New York Convention-restricted, however, to international arbitration, which should include the resolution of a delicate issue that the Geneva Convention has failed to settle. Further, the author argues that there should contain two grounds as international standards for annulment of arbitral awards in such New Convention, which are not included in the Geneva Convention: non-arbitrability and violation of public policy. However, such universal nature of these grounds for voiding the arbitral awards could be described as “generic” only, because every country will interpret the substance of public policy and the scope of arbitrability, and the New Convention regulates that a judge who has been requested for execution of

\textsuperscript{497} Id. p.203.
\textsuperscript{498} Article 5 (3) indicates, “Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that: (g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph.
\textsuperscript{500} Id. p.1044.
\textsuperscript{501} Id. p.1054.
arbitral awards must refer to its own conceptions when he tries such cases.\textsuperscript{502} Finally, the commentator concludes that such a new international convention may never take place because of the divergence interpretations, such as the term of public policy, and such absence of an international convention is not possible to go beyond this concession to the spirit of the \textit{Hilmarton} and \textit{Chromalloy} decisions.\textsuperscript{503}

As the various opinions and explanations on the legitimacy of judicial interventions on the enforcement of nullified arbitral awards, this issue is very difficult to get a uniform resolution among countries. Each view has its persuasion aspects and simultaneously its defect aspects. Thus, referring to the general intention of signing the New York Convention seems to be an appropriate method to resolve such dilemma. Although the main purpose of the New York Convention is promoting worldwide recognition and enforcement of international arbitral awards, however, some interpretations of the general nature of Article V (1) (e) of the Convention to be permissive are not acceptable, because the pro-arbitration objective of the Convention should be based on the more important intention, which is the unification of the limitations grounds for rejecting foreign arbitral awards. Therefore, it is wiser to render the general nature of Article V of the New York Convention to be exclusive, but not permissive, and no further to pursue to the said more-favorable-right provision of Article VII of the New York Convention on disposing such an issue. This approach may cause more danger to the contemporary international commercial arbitration system, which has permitted more judicial involvements on arbitral awards, not only one side, but dual. In fact, such attitudes have been taken by most of the contracting states of the New York Convention, and it is expected no more courts of other countries being guided to take the same approach as the French courts or some US courts on the controversial interpretation of recognition and enforcement of vacated international commercial arbitral awards.

\textbf{2.2.4 Judicial Intervention on Executing Non-domestic Arbitral Awards}

Another difficult issue is the judicial interpretations on the term of “non-domestic arbitral awards” under the arbitration system of the New York Convention and various jurisdictions. It is Article I, paragraph 1 of the New York Convention that stipulates the application of its provisions to the recognition and enforcement of non-domestic arbitral awards.\textsuperscript{504} The difficulty on issue of non-domestic arbitral awards lies firstly on the standards for determining the nationality of cross border arbitral awards, and secondly its potential influence on the judicial involvements of national courts. In this section, we compare the latest legal practices in the United States, India and the People’s Republic of China in detail; try to figure out what judicial involvement is inappropriate and how to solve this problem when the recognition and enforcement of non-domestic arbitral awards are applied in the relevant courts.

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\textsuperscript{502} See supra note 479, Pierre Mayer, pp.175-176.

\textsuperscript{503} \textit{Id.}

\textsuperscript{504} See supra note 30, New York Convention, Article I, paragraph 1 indicates “ this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought…It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”
2.2.4.1 Origin of Non-domestic Arbitral Awards Issue

There was no correspondent term of non-domestic arbitral awards under the Geneva Convention 1927. The concept of non-domestic arbitral awards originated from the negotiation of delegates of different countries on the New York Convention draft in 1958, which finally was reflected as a compromise in Article I (1) of the New York Convention. As a matter of factor, the New York Convention failed to give a specific definition on this controversial term, instead, it authorized such power to each contracting state. As Dr. Albert Jan van den Berg summarized as follows:

“The Draft of the Convention prepared by ECOSOC in 1955, which formed the basis for the discussions at the New York Conference in May and June 1958, provided solely that the Convention was to apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon. Thus, what constituted a foreign arbitral award was, according to ECOSOC, to be determined by a territorial criterion. However, some delegates objected to such territorial criterion, such as Italia, France, the Federal Republic of Germany, etc, had discussed and submitted an alternative argument concerning the application sphere of the Convention, providing this Convention shall apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon.”

Those delegates of the Civil Law countries disagreed with the unique standard of territorial criterion, instead, they insisted on the non-domestic criterion for determining the application of the New York Convention. While the delegates of the United Kingdom, the United States, etc, argued that in the common law countries, the place of arbitration would determine whether the award was a foreign award or not, and they found the territorial criterion fully satisfactory. As the divergence among different countries, the final draft of the Convention made a comprise resolution, to contain both the territorial and non-domestic criteria for the application of the Convention, which constituted the final content of Article I (1) as discussed.

During the past decades after the New York Convention being enforced in more and more contracting states, different interpretations on the standards for determining the application to non-domestic awards have appeared. As one professor summarizes, there are essentially three possible categories of arbitral awards that could fall within the scope of the term “non-domestic”: (i) an award made in the State where enforcement is sought under the procedural law of another state; and/or (ii) an award made in the State where enforcement is sought under the arbitration law of that State but regarding a dispute involving an international element; and/or (iii) an award that is regarded as “a-national” in that it is not governed by any arbitration law.

506 Id. p.35.
507 See supra note 1, Gary B. Born, p.2380.
controversial and special kind of so-called a-national arbitral awards which purports not to be subject to the law of any state. 508

In legal practices, several questions which are connected with the non-domestic arbitral awards issue shall be deeply discussed and researched. Specifically, the first one is to what extent judicial involvement on setting aside of non-domestic arbitral awards is permitted. The second one is how does various domestic arbitration laws regulate recognition and enforcement of the said non-domestic awards. The practice of US, PRC and India will be discussed in detail. The American approach has emphasized the traditional territorial criterion on determining the judicial involvement of non-domestic arbitral awards. However, other countries have taken different explanations. For example, When an Indian court explained the determination of non-domestic arbitral award basing on the standard of (award) made “under the law of which”, it deemed that such “law” shall include both the substantive law and the procedural law of India. Fortunately, such mistaken approach has been changed by the supreme court of India in 2012. As for the People’s Republic of China, non-domestic arbitral awards issue has been argued by jurists on few cases occurred recently. Thus it is urgent to research and propose feasible and appropriate method for disposing such a controversial issue, in order to reduce potential unnecessary judicial interventions on non-domestic commercial arbitral awards on the nullification and rejection proceedings in different jurisdictions.

2.2.4.2 Latest Judicial Interpretations on Non-domestic Criterion

When discussing the judicial interpretations on non-domestic criterion, there are two important sub-issues deserve deeply discussion, one is the annulment of arbitral awards, and the other is the recognition and enforcement of non-domestic arbitral awards. In this section, the latest judicial practices of the United States, the People’s Republic of China and India will be compared and discussed in detail, in order to find the potential conflicts, actively or negatively, on the judicial involvements on non-domestic commercial arbitral awards.

1. The United States Approach on Non-domestic Arbitral Awards

(1) Section §202 of the Federal Arbitration Act

The United States incorporated the New York Convention into its domestic law on July 31 1970. Chapter 2 of the FAA recognizes the effectiveness of the New York Convention, Section §202 of the Chapter gives specific definition of the arbitration agreements and arbitral awards which should be recognized and enforced according to the Convention. In addition, the commercial preservation of the United States is reflected, and connected with Section§ 2 of FAA, indicating any legal relationship, whether contractual or not, which is considered as commercial falls under the Convention. 509 Then the standard for deciding the application of the New York

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508 Id. p.2380.
Convention is further explained, involving the nationality of the disputed parties and the foreign-related character of such commercial relationship, property located abroad, envisages performance or enforcement abroad, or some other reasonable relation with one or more foreign countries. As one commentator summarizes, “the U.S. courts give ‘non-domestic’ status to an award, even awards rendered in the U.S. between two U.S. citizens, if the disputes concern the operation of foreign law, or have some reasonable ties with one or several countries, or even more generally, if the object of the dispute is connected to international commerce.”

Actually, the American approach on the interpretation of non-domestic arbitral awards criterion is mainly relied upon on the judicial practices, because there is not any clearly definition of the term “non-domestic” arbitral awards in the FAA, and the holding of territorial standard for deciding the application of the New York Convention as discussed previously. However, many cases related to the application of the New York Convention have been adjudicated by different federal courts, which interpret the non-domestic arbitral awards approach in the United States. Those judicial explanations on the terminology of “non-domestic” are almost related to Section §202 of the FAA, which has expanded the application of the New York Convention in arbitration practices in the U.S. federal courts.

(2) Jacada (Europe) Ltd. v. International Marketing Strategies, Inc.

One of the latest cases on the subject matter of non-domestic arbitral awards was reported by the United States Court of Appeals for the Sixth Circuit on 18 March, 2005. According to this case, the judges made the final ruling, deciding that Section §202 of the FAA defines the term of non-domestic arbitral awards, and further authorizes the US court vacating the arbitral awards according to domestic law. Jacada (Europe) Ltd. (Jacada), a UK software development company, signed a distribution agreement with a U.S. company International Marketing Strategies (IMS), according to which IMS was authorized to market and distribute a software package called Jacada/400 in Europe, the Middle East and Africa. The parties chose the laws of the State of Michigan as the application law and drafted an arbitration clause for resolving disputes exclusively by arbitration by the American Arbitration Association in Kalamazoo, Michigan, according to its commercial arbitration rules.

Subsequently, Jacada and IMS agreed with each other to sell the Jacada/400 software package to another UK company JBA, and disputed on the compensation which should be paid to IMS for its efforts in securing the sale. Then IMS applied for AAA arbitration and finally won the arbitral proceeding. Jacada tried to apply to the Kalamazoo County Circuit Court for setting aside the arbitral award, while IMS sought to execute the award in the United States District Court for the Western District of Michigan, and removed the annulment action to federal court according to the New York Convention. Such remove was granted by the district court and

510 Id. Section §202 of the Federal Arbitration Act.
511 Ei Ei Khin, Enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore, Gendai Shakai Bunka Kenkyu No.42, 2008, p.239.
consolidated with the enforcement action. It reasoned that such action should be resolved through the New York Convention, because the award should be nondomestic arbitral award under Article I (1). Specifically, the district court explained that Section §202 of the FAA contained definition of non-domestic arbitral awards, including all except a small class of awards which had no foreign citizens’ involvement or non-relationship with foreign country. This case involved both foreign party and anticipation performance abroad. Moreover, the district court reasoned that it could apply domestic law to set aside the arbitral award filed by Jacada.

Through an appellate proceeding, judges of the Court of Appeals for the Sixth Circuit affirmed the lower court’s decision. The judges firstly answered two preliminary questions: the first one was whether the removal was proper under the New York Convention or not, which meant that whether the award should fall under the Convention. The Court of Appeals reviewed the debate on the standards for determining the application of the New York Convention, and then analyzed the present arbitral award, to determine whether it should fall under the New York Convention only on the circumstance of “non-domestic”, because of its making procedure was organized in the United States. Upon the review of the statutory language and relevant sister circuit precedent, the judges concluded that 9 U.S.C. Section§202 provided the definition of non-domestic for the purpose of the Convention. The court reasoned that “we can divine no purpose for the second sentence of Section§202 other than determining whether an award will be ‘not considered as domestic’ under American law. In fact, all of the limitations in the second sentence of Section§202 speak to the domestic or foreign nature of the award. The citizenship of the parties, the location of the property involved in the dispute, where the agreement was to be performed or enforced, or whether the award contains another reasonable relation with a foreign country, all impact whether an award is foreign or domestic in nature, and has little relevance to any other inquiry. Therefore, we believe that the text of Sect.202 indicates that its second sentence is meant to define what constitutes a non-domestic award under the Convention.”

The Court also overviewed the precedents of other circuit courts to examine whether Section§202 had created a general standard for determining the applicability of the Convention. Finally, the Court concluded that this arbitral award qualified as non-domestic under Section§202.

The second preliminary question was deciding the standard for vacating an award when the parties made an arbitration clause and a general choice-of-law provision, requiring the application of Michigan law. This question was with great importance because it was a controversial issue on the judicial involvement of non-domestic arbitral awards, indicating which court should set aside non-domestic arbitral awards, and relying on what laws to nullify. In casu, the Court of Appeal reasoned that it should seek remedies firstly from the New York Convention, where according to Article V(1) (e) of the Convention, an arbitral award could not be

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513 Id. p.1061-1062.
514 Such precedents had also been briefly summarized in the court’s report, see id. pp.1062-1063, including Jain v. de Mere, (51 F. 3d 686, 689 7th Cir. 1995); Ledee v. Ceramiche Ragno, (684 F. 2d 184, 186-187 1st Cir. 1982); Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, (141 F.3d 1434, 1441 11th Cir. 1998).
recognized and enforced if it had been set aside by a court of the state of rendition. Here as the arbitral award was made in the United States, the court applied the US domestic law, found in the FAA, to annul the award. The Court considered the federal policy in favor of arbitration and interpreted the agreement’s choice-of-law provision in light of the Supreme Court’s reading of a similar agreement in \textit{Mastrobuono}, and concluded that the choice-of-law provision in the Agreement did not unequivocally suggest intent to displace the default federal standard. \footnote{Finally, the Court of Appeals for the Sixth Circuit affirmed the award because it found no ground for setting aside under the federal law.}

\section*{2. Debate on Non-domestic Arbitral Awards Issue in China}

China acceded to the New York Convention in 1987, and promulgated the domestic arbitration law in 1994; nevertheless, the Chinese domestic arbitration law has no regulation adjusting the non-domestic arbitral awards. According to the Civil Procedure Law of the People’s Republic of China, there are three types of arbitral awards: Chinese domestic award, Chinese foreign-related arbitral award and foreign arbitral award. \footnote{China acceded to the New York Convention in 1987, and promulgated the domestic arbitration law in 1994; nevertheless, the Chinese domestic arbitration law has no regulation adjusting the non-domestic arbitral awards. According to the Civil Procedure Law of the People’s Republic of China, there are three types of arbitral awards: Chinese domestic award, Chinese foreign-related arbitral award and foreign arbitral award.} On the other hand, there were several cases reported by different people’s courts, concerning the non-domestic arbitral awards during the past decade, especially for the enforceability of commercial arbitral awards rendered by the arbitration tribunal of International Chamber of Commerce (ICC). For such cases, the scholars and commentators have written many articles, criticizing or approving the new attempt on recognizing and enforcing non-domestic arbitral awards in China, and further discuss the judicial interventions on the new type of arbitral awards under the Chinese legal system.

\subsection*{(1) Züblin International Construction & Engineering Co., Ltd. v. Wuxi Wo Ke Universal Engineering Rubber Co., Ltd.}

In this case, the Wuxi intermediate people’s court of Jiangsu Province rejected the recognition and enforcement of an ICC arbitral award which was made in Shanghai, China. \footnote{Züblin International Construction & Engineering Co., Ltd. (Züblin), a German company, entered into a construction engineering contract with a Chinese company \textit{Wuxi Wo Ke Universal Engineering Rubber Co., Ltd} (Wo Ke), a Chinese company \textit{Wuxi Wo Ke Universal Engineering Rubber Co., Ltd} (Wo Ke)}
Company) on December 12, 2000, in which an arbitral clause was added, indicating “Arbitration: 15.3 ICC Rules, Shanghai shall apply”. Subsequently, the parties disputed with each other, and the ICC arbitration court made an arbitral award 12688/TE/MW at Shanghai on March 30, 2004, which was subject to the former arbitral clause.

After the arbitral award was rendered by the ICC arbitrator, the people’s court of Wuxi New and High Technology Development Zone made a ruling on September 2, 2004, which judged the arbitration clause contented in the contract to be invalid. This ruling was made according to the Reply of the Supreme People’s Court to the Instruction Request on the application of Züblin Construction & Engineering Co., Ltd. and Wuxi Wo Ke Universal Engineering Rubber Co., Ltd. for determining the validity of the arbitration agreement concerned. According to reply of the Supreme People’s Court, the disputed arbitration clause was not valid, providing that “notwithstanding the clear indication of the manifestation of the parties’ intention for arbitration, the arbitration rules, and the place of arbitration in the arbitration clause involved in this case, the provision on arbitration institution was deemed inexplicit. It was therefore determined that such arbitration clause should be deemed invalid.”

Accordingly, the Wuxi intermediate people’s court rendered the judgment, which decided this case should be recognized as the category of recognition and enforcement of foreign arbitral award. China has acceded to the New York Convention in 1987. According to Article I, it provides that the Convention shall also be applied to recognition and enforcement of non-domestic awards in the country where the award is sought to be relied upon. Here, the award was made by ICC arbitration tribunal in Shanghai, and was affirmed through sealing by its Secretary General, thus it should be treated as a non-domestic award in China. According to the reply of the Supreme People’s Court, the Wuxi intermediate people’s court dismissed the application of recognition and enforcement of the arbitral award by Züblin. It gave the reason that “the arbitral clause which the final award based on had been recognized as void by the Chinese court, thus it met the ground in Article V (1) (a) of the New York Convention, which had been appropriately proved by the defendant Wo Ke Company in casu. The arbitral ward should not be recognized and enforced.”

The Wuxi intermediate people’s court does not give specific standard for the determination of non-domestic arbitral award under its interpretation. It just refuses to execute the award due to the invalidity of the arbitral clause, and avoids the judicial explanation on the definition of non-domestic. As one Chinese professor criticizes, the Wuxi intermediate people’s court has considered the ICC award made in Shanghai to be a foreign arbitral award on the one hand, and defines it to be a non-domestic arbitral award on the other hand. It is in fact not difficult to understand that the court has confused itself with the concept of “arbitral award made by foreign arbitral

520 See supra note 517.
521 Id.
This case is one of the precedents on interpreting non-domestic arbitral award. However, some other important questions on the judicial intervention on such kind of arbitral award have not been raised and discussed in detail.

(2) **DUFERCO S.A. v. Ningbo Arts & Crafts I/E Co., Ltd.**

Another famous case on the category of non-domestic arbitral was **DUFERCO S.A. v. Ningbo Arts & Crafts I/E Co., Ltd.** tried and judged by Ningbo Intermediate People’s Court on April 22 2009. It was the first time that a local people’s court recognized and enforced an arbitral award rendered by an ICC arbitral tribunal in China. The arbitral award was clearly recognized as non-domestic arbitral award by the Ningbo court.

**DUFERCO S.A.** (DUFERCO) and **Ningbo Arts & Crafts I/E Co., Ltd.** (Ningbo Co.) entered into a sale contract for sale of Cold Rolled Steel on January 23 2003. Except the most important contents of the price, loading period, pay condition and liability for breach of contract, there was an arbitral clause both written in Chinese and English. After dispute happened between the parties, DUFERCO commenced arbitration in Paris on September 12 2005, filing the differences to ICC Arbitration Court in France. ICC Arbitration Court rendered an arbitral award 14006/MS/IB/JEM in Beijing, which resolved the disputes originated from the sale contract between the two parties. Then DUFERCO applied to the Ningbo Intermediate People’s Court for recognition and enforcement of the arbitral award, while the Ningbo Co. insisted the arbitration procedure organized by an ICC tribunal in China violated the Chinese law. In addition, the disputed arbitral clause meant to submit arbitration in CIETAC, but not to ICC Arbitration Court. Moreover, the defendant was deprived of the right to get proper notice of choosing arbitration or preparation for the organization of arbitral procedure, and thus made it unable to defend itself. On all those grounds, the Ningbo Co. requested to dismiss the application of DUFERCO.

Through the adjudication of the Ningbo Intermediate People’s Court on the argued arbitral award, it gave a final order that the ICC award was enforceable, reasoning, “China is a contracting state of the New York Convention 1958, if the provision of the Convention and the relative Chinese laws are fulfilled, foreign arbitral awards should be recognized and enforced. Here the arbitral award is not a domestic award, and its execution should be judged pursue to the New York Convention. Article I (1) of the New York Convention has provided two categories of arbitral awards, foreign arbitral award, and non-domestic award which is relevant to the country where the recognition and enforcement is sought.”

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523 Ningbo Shi Zhongji Renmin Fayuan: [2008] Yong Zhong Jian Zi No.4 Minshi Caiding Shu.

524 The English version of the arbitration clause: “Arbitration: all disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted to the Arbitration of the International Chamber of Commerce in China, in accordance with the United National Convention on the International Sale of Goods, the award of which be accepted as final and binding upon both parties.” See supra note 523, p.69.

525 See supra note 523, also see Wang Jing, *Waiguo Zhongcai Jigou Huojiang Sikai Zhongguo Zhongcai*.
Intermediate dismissed the request of Ningbo Co., reasoning that the Ningbo Co. did not raise any objection to the validity of the arbitral clause in a permitted period of time. Thus, according to Article 13 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”\(^{526}\), the argument of Ningbo Co. on the invalidity of the arbitral clause could not be admitted. Then the court recognized this arbitral award as a non-domestic arbitral award. It recognized and enforced the ICC award 14006/MS/IB/JB/JEM rendered in Beijing, because it found that there was not any ground for rejecting the recognition and enforcement.\(^{527}\)

(3) Discussion

After the Ningbo Court recognized and enforced the ICC arbitral award which was made in Beijing, a large quantity of comments have drawn on this judgment since then, mainly concerning the topics of the legitimacy of the ICC arbitration procedure in China, and whether the ICC award rendered in China should be recognized as non-domestic arbitral award or not.

As one Chinese professor Chen Li summarizes, there are great divergences on this issue, and generally can be divided into three groups, the approval group, the objection group and the uncertain group.\(^{528}\) For instance, one professor approves the opinion to treat the ICC arbitral awards made in China to be non-domestic award, by reasoning that “for ICC award made in our country, it is not domestic arbitral award subject to the Arbitration Law on the one hand, and it is not foreign arbitral award according to Article I (1) (of the New York Convention). The appropriate interpretation should be that the award rendered by ICC in our territory according to ICC arbitration rule is neither domestic award nor foreign award against our court where application is filed for recognition and enforcement such arbitral award. It should be recognized as non-domestic award under the New York Convention.”\(^{529}\) Another famous Chinese arbitration professor also argues that the Ningbo Intermediate People’s Court defines such kind of arbitral award to be “non-domestic arbitral award” is in line with the provision of the New York Convention, because such kind of awards is made in the territory of the country (China) where enforcement is sought, and it should not be recognized as domestic award according to the Chinese law.\(^{530}\)

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\(^{526}\) Article 13 indicates “According to the provisions of paragraph 2 of Article 20 of the Arbitration Law, where a party fails to submit an objection to the validity of an arbitration agreement prior to the first arbitration hearing, and applies to a people’s court to invalidate the arbitration agreement, the people’s court shall dismiss the application. Where a party applies to a people’s court after an arbitration institution has made a decision on the validity of an arbitration agreement for the people’s court to determine that the arbitration agreement is invalid, or for it to repeal the decision made by the arbitration institution, the people’s court shall dismiss the application.”

\(^{527}\) See supra note 525.


\(^{529}\) See supra note 522, p.73.

\(^{530}\) Liu Xiaohong, Fei Neiguo Zhongcaiyuan Caijue De Lilun Yu Shizheng Lunxi (On the Theoretical and Practical
Another professor argues against the approval group, and provides comments on the “non-domestic” category of ICC arbitral award in our country. He indicates that the judicial order (by Ningbo Intermediate People’s Court) of the non-domestic standard is nothing but a temporary method before legislation, which could not completely resolve the determination of the nationality of such kind of arbitral award. Moreover, such temporary method on the interpretation of the application of the New York Convention is contrary to the reciprocity reservation of our country, and thus renders the recognized non-domestic award being unable to be executed in our country.531

Moreover, some lawyers argue for the uncertain view. For example, one lawyer states the final result of the Züblin case has been recognized by the Supreme People’s court, which means the opinion of Wuxi Intermediate People’s Court that “non-domestic arbitral award could be recognized and enforced” being authorized by the Supreme People’s Court after reported one instance by another (at least not been clearly objected). It seems that the Supreme People’s Court takes a more tolerable attitude towards the recognition and enforcement of non-domestic arbitral awards in our courts. Nevertheless, it still lacks specific regulation on how to deal with non-domestic award, as the deficiency of relevant legislation.532 Another Chinese lawyer argues almost the same as the above view, indicating, “There is not any law, regulation and judicial interpretation on the standard of non-domestic arbitral awards and it is still not very clear about the attitude of the Supreme People’s Court on the validity of arbitral awards rendered by foreign organs in the territory of China. Thus, on certain meaning, the order of Ningbo Intermediate People’s Court is only an individual case and its symbol significance should not be amplified.” 533

The definition of non-domestic awards and the nature of arbitral awards which are made by foreign arbitration institutions in the territory of China are still argued with different opinions. In addition, a further question on the judicial intervention of such kind of arbitral awards deserves discussion, including set aside procedure and refusal of recognition and enforcement procedure. As discussed above, the American approach gives a special explanation according to Article V (1) (e) of the New York Convention, where the federal courts believe that they could nullify the American style of non-domestic arbitral awards under its domestic laws, specifically indicating the FAA.

However, it is clear that the standards of legal practices of both countries for deciding non-domestic arbitral awards are different from each other. According to the

PRC arbitration-related laws, if an award is recognized as non-domestic, which court should be authorized to annul such kind of award? Can the people’s courts being able to set aside? If it is affirmaible, according to what laws such annulment procedure being pursued? One professor argues that it could make sure of the nationality of award made by ICC Arbitration Court in China to be a Chinese award if such kind of awards being defined as foreign-related award. Then such an approach provides unarguable legislative authority for the court of our country to practice judicial control, both judicial support and judicial supervision, according to the principle of judicial sovereignty. 534 No matter which court should have jurisdiction on the set aside procedure and the refusal procedure, and what law should be used in these procedures, it deserves to pay more attention to the positive and negative conflicts on judicial interventions of such kind of non-domestic arbitral awards, particularly controlling the excessive and improper judicial interventions of various people’s courts.

3. Latest Judicial Practice by the Supreme Court of India

As discussed previously, international commercial arbitration practices developed very fast during the past decades in India. However, there were many controversial problems arising simultaneously, especially on the excessive judicial interventions on the nullification of foreign arbitral awards which were not rendered in the territory of India. Fortunately, this misunderstood judicial trial has been overturned by the Indian Supreme Court on September 6 2012. 535 According to the judgment, the Supreme Court effectively set aside its earlier holdings in Bhatia International and Venture Global Engineering. 536 Bharat Aluminium Co. (BALCO) signed an agreement with Kaiser Aluminium Technical Service, Inc. (KATSI) on April 22 1993, according to which KATSI was obligated to supply and install a computer-based system for Shelter Modernization at BALCO’s Korba Shelter. The parties negotiated an arbitration agreement as article 17 of the agreement, agreeing that any disputes should be settled through arbitration in England according to English Arbitration Law and subsequent amendment thereto. Another choice-of-law provision was also contained in the agreement, providing the prevailing law of India should be applied to the agreement, while again referring English law as the application law of arbitration. 537

When disputes happened between the parties, each party claimed separate remedy. KATSI commenced arbitration according to the arbitral clause in the agreement on November 13 1997, and the arbitral tribunal rendered two arbitral awards in favor of KATSI separately on November 10 2002 and November 12 2002. On the other hand, BALCO applied to the Indian court for setting aside the two

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534 See supra note 529, p.87. The similar opinion can be found in other professor’s argument, see supra note 531.
536 See supra note 429, Venture Global Engineering v. Satyam Computer Services Ltd. and another, Supreme Court of India, 10 January 2008. Venture Global Engineering case was referring to the decision of Bhatia International, the latter was reported by the Supreme Court of India in 2002 on the subject matter that a foreign party sought interim relief in India under Part I of the 1996 Arbitration and Conciliation Act, which had been granted. See Id. pp.246-247.
537 Id. p.245.
arbitral awards. However, the district court as the first instance in Bilaspur dismissed the annulment application on July 20, 2004, reasoning that the requirement of BALCO was not permitted. The High Court of Judicature at Chattisgarh, Bilaspur affirmed the decision of the district court. Thus BALCO appealed to the Supreme Court of India. Judges of the Supreme Court overturned their former precedents in *Bhatia International case* (2002) and *Venture Global Engineering case* (2008), holding that Indian courts had no authority to set aside arbitral awards rendered in proceedings outside India.

In this case, the Supreme Court changed its former judicial interpretations and adhered to the general practice of international commercial arbitration. Although the parties chose the prevailing law of India to be the applicable law of the arbitration agreement, however, the place of arbitration was not in the territory of India, and the applicable law of the arbitral proceedings was not Indian law. Then the judges concluded that “under the law of which (Article V (1) (e) of the New York Convention) refers to the procedural law governing the arbitration, the law of the seat, rather than the law governing the substantive contract or the law governing the arbitration agreement.” Therefore, the Indian court here had no jurisdiction over the annulment of the disputed award, which was not made in India pursue to the relevant procedural laws of India.

In the previous practices before this latest judgment by the Indian Supreme Court, there had been misunderstandings of the judicial control of foreign arbitral awards. The Indian court had set aside foreign arbitral awards on public policy ground which was strange and not compatible to the general practices of international commercial arbitration. However, such inappropriate jurisprudence has been changed now. As analyzed by the judges of the Indian Supreme Court here, the 1996 Arbitration and Conciliation Act took the territorial principle and followed the UNCITRAL Model Law in deciding the seat of arbitration. A plain reading of Section 2 (2) made it clear that the application of Part I of the 1996 Act was limited to arbitrations which had their seat in India. Under Section 2 (7) of the 1996 Act, an award made under Part I of the Act should be considered as a domestic award. The Indian Supreme Court reasoned that this provision did not affect the territorial principle adopted by the 1996 Act, but rather reinforced it.

According to this case, another potential problem was not specifically discussed, indicating the non-domestic arbitral award standard. The Supreme Court of India did not regard the disputed award to be a non-domestic award of India and then authorized judicial intervention on it. It dismissed the appellant’s request relied on Section 48 (1) (e) of the 1996 Act, which was almost the same as Article V (1) (e) of the New York Convention. The judges affirmed the two situations for authorizing...

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538 Id. p.248.
539 See supra note 429, *Venture Global Engineering v. Satyam Computer Services Ltd. and another*, Supreme Court of India, 10 January 2008.
540 Id. p.247.
541 Section 48(1) (e) of the Arbitration and Conciliation Act 1996 of India indicates “Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that: (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, the award was made.”
annulment of an arbitral award, one was the competent authority of a relevant country to set aside when the disputed award was made in its territory, and the other one was the award made under the law of such relevant country. In this case, the agreement of the disputed parties was governed by the prevailing law of India. But the arbitration procedure was governed by the English law. The Supreme Court reasoned that the term “under the law of which” in Section 48 only referred to the procedural law, but not the substantive law of India. Therefore, the disputed award should not be treated as a non-domestic award before the Indian courts, and clearly no judicial intervention was permitted by the Indian courts. Accordingly, the Indian court took a correct interpretation on defining of non-domestic arbitral award, and potentially indicated that if an arbitral award was made according to the procedural law of India, and such award was rendered outside the territory of India, then it might be respected as an Indian award, and further the India courts could have legitimate authority to set aside the arbitral award. This potential interpretation resembled the arguments of the non-domestic criterion the civil law countries when negotiating the sphere of application of the New York Convention.

2.2.4.3 Brief Remark

After the comparison of the legislation and legal practices of the United States, China and India on the non-domestic issue, we may conclude that the criterion for determining the non-domestic award has not been unified worldwide. Each country interprets the non-domestic criterion separately. What standard should be used in a specific territory? And when the criterion for non-domestic arbitral award is well established, another important question of judicial interventions, such as setting aside or finally recognition and enforcement of the said non-domestic award, should be carefully researched. For example, the U.S. courts have recognized the non-domestic arbitral award on the one hand and authorize setting aside of those non-domestic awards according to its domestic law. Thus, it is not very easy to understand how the following judicial control should be practiced when the disputed arbitral award is recognized as a non-domestic award. And it is submitted that negative or positive conflicts on judicial control of those non-domestic awards may occur. For example, if an arbitral award is rendered in the United States according to the procedure law of India, and some matters of the case concerns with India, or with one Indian party, then such arbitral award may be recognized as non-domestic at the relevant US court, while according to the American approach, the US court could set aside the arbitral award according to the federal laws. However, such award may also be recognized as a non-domestic award or purely domestic award by the relevant Indian court, which is also authorized to nullify the award. Then positive conflict on the setting aside of the award occurs and it is difficult to get a conclusion that which court should have jurisdiction on the annulment procedure.

Another situation may happen when the ICC Arbitration Court tries in China, and renders an arbitral award in the territory of China. As discussed previously, such an arbitral award is possible to be recognized as non-domestic awards by the relevant
people’s court of China, or be treated as a French award according to the prevailing arbitration-related laws of China. Therefore, the people’s court may dismiss the application for setting aside the award. On the other hand, although ICC Arbitration Court is located in France, its arbitral tribunal or arbitrators’ trial are organized in many other countries and areas, such as the United States, Singapore or Hong Kong, etc. The competent French court will not ready to treat the ICC award made in China being a French award, and then rejects the annulment jurisdiction. At such situation, the negative conflict on the judicial review of the non-domestic award may happen. And the disputed parties may lose the opportunity to get appropriate remedy through setting aside procedure.

Moreover, another potential controversy may occur, which may cause new obstacles to international commercial arbitral awards, indicating the rejection of recognition and enforcement of non-domestic awards. Not only the criterion for determining non-domestic award is vague, the execution of such non-domestic award is not prospective, even under the framework of the New York Convention. Many contracting states have made reciprocitarian reservation when acceded to the Convention, and such reservation may be explained to be an excuse to reject recognition and enforcement of the said non-domestic arbitral awards. Thus, the judicial intervention over non-domestic awards deserves further research, in order to guarantee the effectiveness of certain provision of the New York Convention, and promote smoother execution of international commercial arbitral awards.

2.2.5 Balance between Pro-Arbitration and Judicial Interventions

In this section, the influence of the judicial intervention on the recognition and enforcement of international commercial arbitral awards has been specifically discussed. It is believed that absolutely non-judicial involvement on international commercial arbitration system is inappropriate. Parties may face some controversial problems during the arbitration procedure, such as the initiation of the arbitration procedure, or appealing of arbitral award, or applying for annulment. Under these difficult situations, appropriate judicial interventions may help carrying on the arbitration proceeding smoothly. However, the judicial involvements should be limited at a certain level, otherwise excessive judicial interference may harm the whole international commercial arbitration system, as the previously discussed issue on rejecting the reference to arbitration, or enforcement of vacated arbitral awards at some contracting states of the New York Convention. It is very critical to make a balance between the pro-arbitration attitudes and the judicial interventions in different jurisdictions. As one professor comments that the role of state courts should aid but not interfere in arbitration procedure, by noting that “the position adopted by state courts in the various jurisdictions shows tendencies which vary from interference to non-intervention and from non-intervention to aid.”

Another professor indicates, “Parties tend to call on courts for assistance in very specific ways. For example, they may ask a court to enforce an agreement to arbitrate.

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Other times, courts may be asked to rule on the tribunal’s decision that it has jurisdiction, or on a challenge to one of the arbitrators for conflict of interest. In addition, courts may be asked to rule on issues of consolidation, and on motions to vacate, or to recognize and enforce the arbitration award. Although courts generally respect the parties’ autonomy in arbitration, their assistance is sometimes more and sometimes less than what the parties want. There is also a wavering line between helpful assistance and unhelpful interference. When considering the proper role of domestic courts on their interventions over international commercial arbitration procedures, it is recommended to respect the primary and secondary jurisdiction separately, and accordingly arrange the appropriate judicial controls on setting aside of or refusing recognition and enforcement of international commercial arbitral awards. Reaching the balance between the primary and secondary jurisdiction of judicial involvement is critical for keeping the effectiveness and unification of the legal framework composed with various international arbitration conventions and different domestic laws.

2.3 Contrary to the Public Policy of Different Jurisdictions

During the past decades, one of the most controversial barriers to recognition and enforcement of international commercial arbitral award was the public policy issue. Under the mechanism of the New York Convention, the public policy ground for the refusing recognition and enforcement shall not only be raised by the party against whom the award is invoked, but also be able to refer *ex officio* by the competent courts of the country where the recognition and enforcement is sought. As the New York Convention does not specifically interpret the contents of public policy in the relevant provision, such authority belongs to various jurisdictions. Nowadays many domestic arbitration laws contain the public policy doctrine, which is both used as the ground for setting aside and refusing recognition and enforcement of international commercial arbitral awards. However, as one professor indicates, “Although applicable in the recognition context under almost all leading international arbitration conventions and national arbitration legislation, the content of the public policy exception remains controversial in numerous respects.” In arbitration practice, the reluctant defendants prefer to raise the public policy for annulment of arbitral awards or for rejection of execution of those awards. Public policy ground is always raised for rejecting recognition and enforcement of foreign arbitral awards under the New York Convention, and those court reports on public policy issue could be found in the Yearbook: commercial arbitration since 1976.

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544 See supra note 30, New York Convention, Article V (2) (b), indicating “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: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

545 See supra note 1, Gary B. Born, p.2827.

2.3.1 How to define the term of “public policy”

As a historical terminology in private international law, the term of “public policy” has been widely used in various international conventions or domestic laws. As one professor summarizes, “in the context of the recognition of arbitral awards, these public exceptions derive in part from historic treatment of foreign judgments, in both common law and civil law nations. More generally, most private international law conventions and domestic private international law legislation contain ‘public policy’ exceptions to otherwise uniform rules. These various public policy exceptions in different private international law contexts provide escape devices designate to protect the fundamental, mandatory policies of national legal regimes.”547 If properly practiced, public policy could provide appropriate protection for different jurisdictions when transnational trades or other cross-border legal activities are practiced between parties with different nationalities.

Specifically, public policy in the sphere of international commercial arbitration has been widely practiced since the 1927 Geneva Convention. As discussed above, Article 1 (e) of the 1927 Geneva Convention indicates that “to obtain such recognition or enforcement, it shall, further, be necessary: (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”548 Under the Geneva Convention, the public policy exception is strict, including not only violation of public policy, but also the principles of the law of such countries where enforcement is requested. When discussing the provision of the New York Convention, the public policy exception was limited to include only public policy, where the principles of domestic laws had been eliminated.549 However, both the 1927 Geneva Convention and the New York Convention only provided the public policy doctrine as the ground for refusing recognition or enforcement of foreign arbitral awards, but not authorized the violation of public policy as the ground for setting aside of arbitral awards. Nevertheless, most of the domestic laws have taken this almighty ground for setting aside arbitral awards in their domestic jurisdictions.

The 1961 European Convention, which has been discussed in detail previously, has eliminated the public policy ground for annulment of international commercial arbitral awards among the contracting states. As specifically discussed, Article IX of the European Convention clearly states the grounds for setting aside an arbitral award covered, and there is no public policy exception for voidance of cross-border commercial awards in its member states.550

However, most of those multilateral arbitration conventions have only given the term of public policy, without specific interpretations of the definition of this vague concept. Then different national courts should interpret the public policy through their judicatory practices. As one professor summarizes the approaches of the England, United States and Germany, and concludes that “those decisions, form courts in

547 See supra note 1, Gary B. Born, p.2828-2829.
548 See supra note 27, Geneva Convention 1927, Article 1(e).
549 See supra note 544, New York Convention, Article V (2) (b).
550 See supra note 147, Article IX (2) of the European Convention 1961.
different parts of the world, show a readiness to limit (and sometimes to limit severely) the public policy defense to enforcement. However, the boundaries of national public policy are not fixed. According to those domestic arbitration laws, public policy has been divided into international public policy and domestic public policy separately, which has further influenced the setting aside and execution procedures of international commercial arbitral awards.

2.3.2 Public Policy as an Obstacle to Annul Arbitral Awards

2.3.2.1 Comparison of Selected Domestic Arbitration Legislation

Although the relevant provision of the New York Convention does not give specific grounds for setting aside arbitral award, various domestic arbitration-related laws have provided the public policy as an excuse for annulment of commercial awards. The setting aside procedure is very critical in international commercial arbitration system. Just as discussed above, if an award being vacated in one state, then it may not be recognized or enforced in other member states of the Convention. Thus, the public policy doctrine may cause barriers to the recognition and enforcement proceeding, if the relevant arbitral award may be challenged on this vague ground.

For instance, Section 68 of the 1996 English Arbitration Act has provided serious regularity ground for challenging the award, under which sub-section (2) (g) refers to the public policy reason for the successful challenge, holding “Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant: (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy”. Connecting with Section 68 (3) of the 1996 Arbitration Act, which specifies the possible consequences of the challenging procedure, an award which has been challenged may be finally set aside or declared void in whole or in part, when the court is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration. Therefore, the public policy may potentially being an excuse to annul an arbitral award rendered by the arbitrators.

The Chinese situation on this matter is a little bit different under the PRC Arbitration Law, which reflects the unique criterion for dividing the arbitral award into domestic arbitral award and foreign-related arbitral award under the Chinese arbitration system. According to the relevant provisions of the Arbitration Law and Civil Procedure Law, the grounds for setting aside a purely domestic arbitral award and foreign-related arbitral award are different from each other. Specifically, the public policy doctrine could be a ground for annulment of purely domestic arbitral awards.

552 Section 68 (2) (g) of the English Arbitration Act 1996.
553 Section 68 (3) indicating “If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may— (a) remit the award to the tribunal, in whole or in part for reconsideration, (b) set aside the award in whole or in part or, (c) declare the award to be of no effect, in whole or in part.”
554 Under the Arbitration Law and Civil Procedure Law of China, the term of “public policy” being called as
Article 58 of the PRC Arbitration Law regulates the reasons for cancelling of arbitral rulings, of which paragraph 2 emphasizes that people’s court has been authorized to cancel an arbitral award which goes against the public interest of China ex officio, stipulating “whereas the people’s court establishes that an arbitral award goes against the public interests, the award should be cancelled by the court.” 555

In addition, Article 70 of the Arbitration Law provides the annulment of arbitral awards involving foreign interest, requiring the setting aside of an arbitral award may be ordered by the people’s court under the numerated grounds of paragraph one of Article 260556 of the Civil Procedure Law. According to the relevant provision of the Civil Procedure Law, the first paragraph of Article 274 resembles Article V (1) (a) through (d) of the New York Convention, which forms the grounds for refusing recognition and enforcement of foreign-related arbitral awards, and here being amplified and used for setting aside of the foreign-related awards, while the second paragraph of Article 274 indicates the public policy issue, but which cannot be raised as a appropriate reason for annulment of foreign-related arbitral awards. 557 This approach is strange and may cause confusion on the judicial interventions on setting aside of arbitral awards. Because both purely domestic arbitral awards and foreign-related arbitral awards are domestic Chinese arbitral awards for other member states of the New York Convention, thus it is unreasonable to distinct and take different norms for setting aside of the two types of domestic arbitral awards, even the intentions of the drafters might be that public policy doctrine should be restricted practiced in annulment of foreign-related awards in the territory of China. However, with the promulgation of the Arbitration Law, such distinction has lost its appropriate basis nowadays and thus should be unified.

According to the Arbitration Law of Japan, public policy is one of the grounds for setting aside of commercial arbitral awards made in the territory of Japan, including contrary to the public policy or good morals of Japan. Article 44 (1) regulates eight grounds for a court to annul an arbitral award, which are substantially the same with Article 34 (2) of the UNCITRAL Model Law on International Commercial Arbitration. Article 44 (1) provides that a party may apply to a court to set aside the arbitral award when any of the following grounds are provided, containing sub-article (viii): the content of the arbitral award is in conflict with the public policy or good morals of Japan. 558 As summarized by some Professors, the wording of paragraph (6) (of Article 44) means that a court may in its discretion dismiss an application even when it considers that grounds for the setting aside are present. 559 Further, this paragraph reflects Article V of the New York Convention,

556 Together with the amendment of the Civil Procedure Law of China on 31 August 2012, this article number had been changed accordingly to Article 274 of the amended Civil Procedure Law.
557 Paragraph 2 of Article 274 of the Civil Procedure Law of China indicates, “If the people’s court determines the execution of the award goes against the social and public interest of the country, the people’s courts shall make a written order not to allow the execution of the arbitral award.”
558 Article 44 (1) (viii) of the Arbitration Law of Japan.
providing that controversial grounds around arbitrability or public policy may be exercised *ex officio* by the courts.\(^{560}\)

Under the FAA of the United States, public policy is not authorized as an excuse for setting aside arbitral awards. Section §10 of the FAA stipulates the grounds for vacating arbitration awards, which applies mainly to the violation of due process, such as arbitrators who try the proceedings and render the disputed awards which are procured by corruption, fraud, or undue means.\(^{561}\) In a large quantity of cases reported by different federal courts, the public policy obstacle was raised by the reluctant parties who applied for rejection of those arbitral awards. The U.S. courts concluded a criterion for the public policy ground, which supports the refusal situation under the New York Convention, referring to the violation of the forum state’s most basic notions of morality and justice. The refusals of recognition and enforcement of arbitral awards due to public policy will be discussed in detail in the next section.

The latest Arbitration Law of Germany allows public policy as a ground for setting aside an arbitral award. Section 1059 contains one provision that analogies to Article V(2) (b) of the New York Convention, indicating that “the court finds that (b) recognition or enforcement of the award leads to a result which is in conflict with public policy (order public)”\(^{562}\). The German Arbitration Law has been deeply influenced by the New York Convention and the UNCITRAL Model Law, which allows courts to annul any arbitral awards made in the territory of Germany on the public policy ground *ex officio*.

According to the latest regulations of French Arbitration Law, the annulment procedure has been divided into two separate parts, one for normal domestic arbitral awards and the other for international arbitral awards made in France. Nonetheless, public policy has been one of the grounds for setting aside arbitral awards. However, the latest arbitration legislation of France has distinguished the public policy into domestic public policy and international public policy. Specifically, Article 1492 of the French Arbitration Law provides six reasons for setting aside an award, of which sub-article (5) indicates “an award may only be set aside where: (5) the award is contrary to public policy”.\(^{563}\)

In addition, Title II of Book IV of the Code of Civil Procedure regulates the international arbitration procedure, under which Article 1504 gives a brief definition of international arbitration under the French law, providing that “an arbitration is international when international trade interests are at stake.”\(^{564}\) Then Article 1520 provides the recourse for setting aside international arbitral awards, in which sub-article (5) is about the international public policy excuse for annulment of international arbitral awards which were made in France, holding “recognition or

\(^{560}\) Paragraph (6) of Article 44 of Arbitration Law of Japan indicates that grounds for setting aside an arbitral award, “with respect to the grounds described in items (i) through (vi) of paragraph 1 of Article 44, this shall be limited to where the party making the application has proved the existence of such grounds.” That means when application for setting aside on grounds (vii) and (viii), which refers to arbitrability and public policy, the burden of proof is not on the applicant.

\(^{561}\) See Section § 10 (a) of the Federal Arbitration Act.

\(^{562}\) See Article 1059 (2) (b) of the Arbitration Procedure, Tenth Book of the Code of Civil Procedure of Germany.


\(^{564}\) See Article 1504 of the Arbitration Law of France.
enforcement of the award is contrary to international public policy.” Moreover, the parties have been authorized to exclude the setting aside procedure for international arbitral awards rendered in France, through expressly waiver of the right to bring such vacation proceeding. It is still lacking further interpretations on the term of “domestic public policy” or “international public policy” under the French Arbitration Law, which should be explained by the judges when the issue is filed to the French courts.

Under the 1996 Arbitration and Conciliation Act of India, the violation of the public policy of India is one of the grounds for setting aside an arbitral award. Article 34 (2) (b) (ii) provides that “an award may be set aside by the court if the court finds that the arbitral award conflicts with the public policy of India.” As Part I of the 1996 Act only adjusts the domestic arbitration procedure, public policy ground can only be used to vacate domestic arbitral awards. However, as discussed above, during a certain period, the Supreme Court of India insists that Indian courts may set aside arbitral awards on the ground of public policy exception, no matter the award was rendered inside or outside the territory of India. Such judicial interpretation has been finally changed recently.

Referring to the latest International Arbitration Act of Singapore, public policy excuse has also been recognized as legitimate ground for setting aside an arbitral award, because the Act has incorporated Article 34 of the UNCITRAL Model Law. It is clearly stated in the Model Law that when the relevant finds the arbitral award is in conflict with the public policy of that state, it may be set aside ex officio.

As compared with these selected domestic arbitration-related legislation, it is acquainted that most of those countries have provided public policy for setting aside arbitral awards, even non-specific interpretations on the contents of public policy, and the criteria for determining the domestic or international public policy. However, it is clear that the finality of the decisions of the arbitral tribunals may be challenged in those relevant jurisdictions on such a vague and abstract ground. When the international commercial arbitral awards are set aside, they may be potentially rejected execution both domestically or exterritorialy.

### 2.3.2.2 Case Study of Annulment of Arbitral Award on Public Policy Ground

The latest case of the annulment of arbitral awards based on the violation of public policy was tried and decided by the District Court of Tokyo, Japan on June 13, 2011. The subject matter of the case was the application of setting aside an arbitral award.
award made by the JCAA, arguing its violation of the procedural public policy of Japan. Dispute arose between two companies, one was a Japanese company X and the other party was an American company Y. Y had a valid patent for blast-furnace slag in Japan when it negotiated with X for incorporating a Joint Venture. They signed an agreement called “Manufacturing License and Technical Assistance Agreement”, which authorized using the patent to make and sell blast-furnace slag in Japan. An arbitral clause included in the agreement. When this agreement was expired, the parties renewed the agreement, and X continued paying the technical assistance fees after the protection period of the patent was expired. In 2001, the parties again renewed the Joint Venture agreement, and they agreed with each other that X would make and sell the products. According to the renewed agreement, Y would provide technical assistance and information for the manufacture and sale activities of X, while X should pay technical service fees to Y. Disputes arose when X rejected to pay such technical service fees. Then Y commenced JCAA arbitration, pleading confirmation of the validity of the Joint Venture agreement and the renewed agreement. Y also claimed the payment of the technical service fees. The sole arbitrator of JCAA rendered an arbitral award in favor of Y on August 20 2009.

After that, X filed a petition to the District Court of Tokyo for setting aside the arbitral award of JCAA, arguing that the existence of a ground of Article 44 (1) (viii), indicating the violation of public policy or good morals of Japan, should result in vacating the award. The reasons for requiring annulment of the arbitral award argued by X could mainly be divided into two aspects: (1) Although X had argued during the arbitration procedure that the technical service fees were the License fees, the arbitrator rendered the award, reasoning that such argument was not disputed, and stated that the technical service fees was the distribution of the profit of the Joint Venture. Thus it violated the procedural public policy of Japan and met the annulment ground of Article 44 (1) (viii); (2) As the decision of the arbitrator explained that the technical service fees meant the License fees, however, the patent had been expired the protection period. In addition, because there was no any valid patent or knowhow corresponding to the payment, the agreement between the parties here violated Article 19 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan and should be illegal. However, the arbitral award affirmed the binding force of the technical service fees and compelled the payment obligation of X. This arbitral award admitted that the trade, which was contrary to public policy or good morals, was practicable in the future. Thus it argued that the content of the arbitral award conflicted with the public policy or good morals of Japan, and met the annulment ground of Article 44 (1) (viii).

After specific discussion, the District Court of Tokyo made the judgment and affirmed the request of X for the annulment of the disputed arbitral award, basing on the analysis of ground (1) of the argument of X. As Article 44 (1) (viii) of the Arbitration Law regulates that “the content of the arbitral award is in conflict with the public policy or good morals of Japan”, the court firstly decided whether this provision includes the confliction of procedural public policy of Japan, where two
sub-issues were discussed as follows:

(1) Considering that arbitration is an autonomous dispute resolution which is based on the arbitration agreement of the parties, therefore, it is clear provided by the arbitration law (article 44) the attitude that excess judicial interventions of national courts are not permitted. However, as arbitral awards have been authorized with compulsory validity for dispute resolution, the same as valid judgments, they should not be granted with unrestrained validity. Thus, according to 44 (1) (viii) of the Arbitration Law, if the validity of such an arbitral award could not be recognized when its contents violated the public policy of Japan, judicial involvement of the court shall be admitted. Besides, according to the overview of the provisions of arbitration procedure and its purpose contained in the Arbitration Law, no matter what is the application law of arbitration procedure, if such arbitration procedure is conflict with the procedural public policy of the country, and the following arbitral award which is rendered under such procedure, it is submitted that the contents of this arbitral award does not bare on the procedure which corresponds with the procedural public policy, thus it will be considered as conflict with the fundamental legal order of the country and cannot be recognized as valid compulsorily dispute resolution. Further it corresponds with the setting aside ground of Article 44 (1) (viii). And the court analyzed the former argument of X positively.

(2) Although there was a former case on the subject of setting aside arbitral award on the public policy excuse, there is not a case on adjudicating on the issue whether the procedural public policy violation is contained in Article 44 (1) (viii) of the Arbitration Law. There are some arguments on such a discussion. According to the academic opinions, it seems that confliction with procedural public policy should be included in Article 44 (1) (viii). Nevertheless, some other arguments on the relationship among Article 44 (1) (iii), (iv), (vi) and Article 44 (1) (viii) have been raised. The court reasoned that whether the violation of procedural public policy issue being correspond with Article 44 (1) (iii), (iv), (vi) (for violation of specific procedure regulated) or Article 44 (1) (viii) (matters existed which violated public policy connecting with arbitration procedure) could be divided as different questions, where the latter is decided by the court *ex officio*.

In the next step, the court discussed the question that whether it violated the procedural public policy of Japan or not, because the arbitral award treated the disputed facts argued by the parties as not being disputed. According to the order of the court, it reasoned that an arbitral award should be made to resolve the differences according to application of certain regulations or rules, no matter through laws or equity or goodness. If the parties had legitimately provided matters to advocate, which could be critical on deciding the main contents of the arbitral award, however, the arbitrators did not consider such matters and rendered the final arbitral award. Accordingly, the party who believed that his defense was able to affect the arbitral award and applied to resolve disputes through arbitration. This negligence of the arbitrators identified with receiving non-adjudication, and would be harmful to the confidence in arbitration system. Therefore, the court concluded that under this situation, as violating the appropriate notion of arbitration, it was submitted properly
that it conflicted with the procedural public policy of Japan.

In conclusion, the court analyzed and reasoned positively on reference to Article 338 (1) (ix) of the Civil Procedure Law of Japan, which indicated the provision for retrial of civil disputes in civil litigations, specifically indicating the violation of Article 338 (1) (ix) when negligence of adjudicating on the important matters which could affect the judgment. The court interpreted in detail, including parties legitimately provided matters corresponding to the advocating methods, or matters investigated *ex officio* which promoted by the parties, and even such matters could affect the main contents of the judgments, they were neglected and not contained in the reasoning of the judgments. Finally, the court was satisfied that the application period was not expired, and concluded that even expired, those grounds for setting aside of arbitral awards under Article 44 (1) (vii) and (viii) could be raised *ex officio* by the relevant courts, and such annulment request was approvable. So the District Court of Tokyo affirmed the application of X for setting aside the arbitral award on the ground of conflicting with the procedural public policy of Japan.

This case is meaningful because it is the first time for a Japanese court authorizing annulment of an arbitral award based on the violation of public policy or good morals of Japan. After the judgment was published, some professors objected the decision and the reasoning of the court. It is doubtful about the court intervention on arbitral award here, invoking Article 44 (1) (viii) of the public policy excuse. The argument of one of the Japanese professor was based on two aspects: (1) It is clear that comparing to Article 118 of the Civil Procedure Law of Japan, Article 44 (1) (viii) of the Arbitration Law refers only to the contents of arbitral award which conflict with public policy or good morals. Thus it is naturally believed that procedural problems are not included; (2) The proposers who believe the violation of procedural public policy should be included in Article 44 (1) (viii) argue according to the UNCITRAL Model Law. However, the formation of the Model Law and the Arbitration Law of Japan are different from each other, it is not appropriate if directly taking the report of the UNCITRAL on the Model Law for interpreting the domestic arbitration law of Japan. Because the Article 34 (2) has distinct the situations for proving by the parties under sub-article (a) and other matters by *ex officio* in sub-article (b), while Article 44 (1) of the Arbitration Law of Japan has not taken this separation way. Even it is natural to interpret that the public policy issue under Article 34 (2) (b) of the Model Law includes the procedural defect of sub-article (a) of Article 34 (2), nevertheless, the interpretation should not be proper for understanding the arbitration law of Japan, where the formation of the provisions are different from the Model Law. Accordingly, it is submitted that Article 44 (1) (viii) of the Arbitration Law of Japan does not include the procedural public policy excuse. Even included, such violation of procedural public policy should be corresponded with the same level of

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as other serious situations such as bribery or perjury, etc.”

Finally, the professor expressly indicates that as arbitration was not so active and trustable in Japan, this judgment introduces the worry of excessive judicial intervention of court over arbitration, and will cause further avoidance of arbitration practice. Additionally, if the procedural public policy being accepted in a wide sense, then the failed party may easily to apply for annulment of arbitral awards subject to the confliction of public policy. It may weaken the function of arbitration system which is recognized as a speedy and flexible dispute resolution. And it will sway the trustiness of arbitration in the whole judicial system. It is the first time for the Japanese court to set aside an international commercial arbitral award rendered in its territory on the public policy excuse. As stated by a lawyer, this is a precedent in the field of international commercial arbitration where an arbitral award was vacated for violation of procedural public policy, and such a precedent may be important reference for legal practice, guiding under what situations the application for setting aside an arbitral award could be granted.

It is obvious that judicial interventions on the public policy ground can cause obstacles to the smoothly recognition and enforcement of international commercial arbitral awards, when the relevant domestic law allows the annulment of international arbitral awards on the public policy exception. As introduced previously, if such situation faced in China, the arbitral award may not be set aside on the reason of violation of procedural public policy according to the arbitration-related law, and will not be rejected recognition and enforcement both in the territory of China and abroad. The importance of arbitration-related laws of various jurisdictions should be paid more attention to, particularly for the public policy issue.

2.3.3 Public policy Barrier to Recognize and Enforce Arbitral Awards

2.3.3.1 Comparison of Selected Domestic Arbitration Laws

Public policy exception can be applied as an obstacle to recognition and enforcement of international commercial arbitral award. As summarized previously, the public policy exception originated from the multilateral conventions of international commercial arbitration. Since the 1927 Geneva Convention, violation of public policy of the country where the arbitral awards were relied upon had already been one of the barriers to execute foreign arbitral awards. It was further developed by the New York Convention. Nowadays, besides the international conventions, public policy has been widely practiced in domestic arbitration systems. As one professor indicates, “paralleling the New York Convention, national arbitration legislation uniformly permits the non-recognition of arbitral awards because they

575 Id. p.110.
576 Hasekawa Shunmei, Arasoi No Aru Jiijitsu Wo Nai Toshite Kudasaita Chusai Handan Ha Tetsuduki Teki KōjiyoNi Hansuru Toshita Jirei (Arbitral Award Rendered on the Facts which were argued by the disputed Parties while being recognized as not argued and thus Violated the Procedural Public Policy) , Kokusai Shoji Homu Vol.40, No.1 (2012), p.133.
577 See supra note 27, 1927 Geneva Convention, Article 1 (e).
violate public policy, also variously termed ‘order public’ or ‘good morals’ in some national laws. In those selected countries discussed in this part, each country has maintained the public policy for rejecting recognition and enforcement of foreign arbitral awards.

According to the Civil Procedure Law of China, Article 283 is provided for recognition and enforcement of foreign or international arbitral awards. It is required that different people’s courts shall deal with the matter in accordance with the international treaties concluded or acceded to by the People’s Republic of China or with the principle of reciprocity. As China has joined into the New York Convention since 1987, the provisions of the Convention shall be directly used when such actions are filed in the relevant people’s court. Therefore, Article V (2) (b) of the New York Convention which concerns the public policy issue would be one of the exceptions for denying recognition and enforcement of international commercial arbitral awards. In legal practice, however, limited permission of invoking public policy doctrine has been developed, and few foreign arbitral awards have been refused execution because of their violation of public policy or public social interest of China. However, there is not a specific legislation interpretation on the concept of public policy under the Arbitration Law and Civil Procedure Law of China. The same approach of directly using Article V (2) (b) of the New York Convention has been taken by Germany and the United States.

Article 45(2) of the Arbitration Law of Japan regulates the grounds for rejecting recognition and enforcement of arbitral awards, whether domestic or not. Specifically, Article 45 (2) (ix) provides that “the content of the arbitral award would be contrary to the public policy or good morals of Japan”, which resembles the grounds for setting aside arbitral awards listed in Article 44.

Under the 1996 English Arbitration Act, public policy has also been regulated in Section 103(3), being a ground for refusing recognition or enforcement of foreign arbitral award under the framework of the New York Convention. The latter part of Section 103 (3) indicates that “recognition or enforcement of the award may also be refused …or if it would be contrary to public policy to recognize or enforce the award.” This can also be implied from the same section that this public policy exception should be practiced ex officio by the relevant courts.

The Arbitration and Conciliation Act 1996 of India has also contained the public

578 See supra note 1, Gary B. Born, p.2830.
579 See Article 284 of the Civil Procedure Law of China.
580 See Section 1061 of the Germany Arbitration Law, which provides “(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.” Thus the provisions of the New York Convention could be directly used in such category of foreign or international arbitral awards.
581 The approach of the United States is incorporated the New York Convention into its domestic arbitration law—Chapter 2 of the Federal Arbitration Act. Subject to Chapter 2 of FAA, there isn’t any special provision for the public policy issue, so when public policy doctrine being invoked for refusing recognition and enforcement of foreign arbitral awards, Article V (2) (b) of the New York Convention would be directly referred to.
582 See Section 103 (3) of the English Arbitration Act 1996.
583 See Section 103 (2) of the English Arbitration Act 1996 which provides that through (a) to (f) of this sub-section, providing grounds for refusal of recognition or enforcement, could be granted only when the party against who such application is invoked has proved the existence of one of the grounds. However, for sub-section (3) of Section 103, which refers to the inarbitrability and public policy exceptions, the situation is different from sub-section (2).
policy exception for rejecting execution of foreign arbitral awards under the New York Convention. Section 48 (2) (b) reflects Article V (2) (b) of the Convention and Article 36 (1) (b) (ii) of the UNCITRAL Model Law. However, it is appreciated that this Act has given specific interpretation on the contents of public policy, which is provided in the explanation of Section 48 (2) (b), indicating “without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.” Such a clear interpretation is better than nothing, as comparing to other domestic arbitration laws, because it could restrict the limitless amplification of the public policy doctrine to refuse execution of valid foreign commercial arbitral awards in India. Further, the public policy exception is also being able to be invoked \textit{ex officio} by the courts. The similar legislation of the latest International Arbitration Act of Singapore reflects almost the same provision, which is also guided by the relevant provision of the UNCITRAL Model Law.\footnote{See Section 31 (4) (b) of the International Arbitration Act of Singapore, providing “In any proceedings in which enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that- (b) enforcement of the award would be contrary to the public policy of Singapore.”}

Different from the above approaches, the French Arbitration Law regulates the international public policy approach, which could be an obstacle to recognition and enforcement of both arbitral awards made abroad and international arbitral award rendered in France. Another unique character of the French approach is the burden of proof of public policy issue, which should be shouldered by the party who applies for recognition and enforcement of an award. It is clearly provided in Article 1514 of the Arbitration Law, that “an arbitral award shall be recognized or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.”\footnote{See Article 1514 of the Arbitration Law of France, Book IV of the Code of Civil Procedure.} Oppositely, the public policy doctrine may be invoked by the relevant national courts \textit{ex officio}.

\textbf{2.3.3.2 Influential Academic Research and Legal Practice on Public Policy}

According to the various academic researches and legal practices, important and influential interpretations on the public policy issue as an obstacle to recognition and enforcement of international commercial arbitral awards were published during the past decades. Referring to these materials, it may promote a clearer understanding of the concept of public policy.

\textbf{1. Final Report of International Law Association on Public Policy}

The Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (final report) was prepared and published by the Committee on International Commercial Arbitration of the International Law Association on its New Delhi conference in 2002.\footnote{See Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, Committee on International Commercial Arbitration, International Law Association New Delhi Conference 2002.} As introduced by the final report, it should be read together with the Committee’s Interim Report presented at the London Conference in
June 2000 (interim report). The final report was arranged through several Recommendations on the application of public policy. Firstly, in the general recommendations, it states 1(a) “The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances.” Then it particularly indicates such exceptions including the international arbitral awards that conflict with international public policy.

As referring to the term of “international public policy”, the explanation indicates “the expression is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. International public policy is generally considered to be narrower in scope than domestic public policy.” Further, according to recommendation 1 (c), international public policy has been divided into procedural international public policy and substantive international public policy, which separately concerns the violation on account of procedure that the arbitral award pursuant to, or of its contents.

Subsequently, recommendation 1 (d) of the final report classifies the international public policy into three specific categories: (i) fundamental principles; (ii) lois de police or public policy rules; (iii) international obligations. Considering that arbitrability issue has been separated by the New York Convention and the Model Law, it doesn’t incorporate the arbitrability issue as a part of public policy.”

Specifically, the next recommendation gives some examples for the three categories separately. (1) An example of a substantive fundamental principle is the principle of good faith and prohibition of abuse of rights. The explanation of this recommendation 1(e) on substantive fundamental principle has been invoked by various national courts or commentators includes pacta sunt servanda, prohibition against uncompensated expropriation, prohibition against discrimination, and activities contra bonos mores, such as proscription against piracy, terrorism, slavery, smuggling, drug trafficking, etc.

An example of procedural public policy is that arbitral tribunal should be impartial. In addition, other situations has been recognized as violation of procedural public policy, for instances, the arbitral award which was induced or affected by fraud or corruption, breach of the rules of natural justice, inconsistence with a court decision or arbitral award which has res judicata effect in the enforcement forum, and parties on unequal footing in the appointment of the tribunal. It is submitted that procedural public policy should not include manifest disregard of the law or the facts, and overlaps with the requirements of due process of Article V(1) (b) of the New York
According to the explanation, an example of the public policy rule is antitrust law. And other examples have been stated, including currency controls, price fixing rules, environmental protection law, measures of embargo, blockade or boycott, tax laws, and laws to protect parties presumed to be in an inferior bargaining position.

(3) The Committee also gives an example of international obligation, providing that a United Nations Security Council resolution imposing sanctions meets. Moreover, Any State must respect the obligations in other international conventions which it has ratified.

(4) Other important aspects of international public policy may fall into more than one category. The report raises bribery and corruption as an example, which are generally recognized to be contra bonos mores, while simultaneously they may be legislated in laws or regulations and constitute the status of lois de police.

It also deserves appreciation that the assessment of an arbitral award’s conformity with international public policy should not be distinct according to the place of arbitration in domestic or abroad according to recommendation 1 (f). If such attitude being taken into domestic legal practice, the divergent interpretations of various national courts may be controlled at a relevant level. Further, recommendation 1 (g) suggests and encourages courts to concern the practice of national courts of other countries in relation to the application of public policy, which will be a great promotion for getting consensus or consistence explanation of this vague term. As the final report concludes, the Committee hopes that states will consider the recommendations and strive for consistency, to the greatest extent possible, in the interpretation and application of public policy as a bar to enforcement of international arbitral awards. This academic report is very important for achieving the explicit contents of public policy, especially for the divided interpretations on domestic public policy and international public policy, or the distinction of substantive public policy and procedural public policy. It is expected that more national courts would concern such report and practice more carefully on using public policy excuse for refusing international commercial arbitral awards.

2. Digest of Case Law on the UNCITRAL Model Law

In order to promote uniform interpretation of the UNCITRAL instruments, it has established a reporting system for case law on UNCITRAL texts called CLOUT, which is established to assist making available decisions of courts and arbitral

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595 Id.
596 Id.
597 Id.
598 Id.
599 Recommendation 1 (f) provides, “Whether the seat of the arbitration was located within the territory of the forum or abroad is not a consideration which should be taken into account by a court when assessing an award’s conformity with international public policy.”
600 Recommendation 1 (g) suggests, “If the court refuse recognition or enforcement of the arbitral award, it should not limit itself to a mere reference to Article V (2) (b) of the New York Convention 1958 or to its own statute or case. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.”
601 See supra note 587, p.12.
tribunals interpreting UNCITRAL texts, and further the uniform interpretation and application of those texts. CLOUT covers case law related to conventions and model laws prepared by UNCITRAL.602 As the wide sphere of the CLOUT, the Commission is required to prepare clear, concise and objective information on the interpretation of the Model Law, which promotes the publishing of the Digest of case law on the Model Law.603 It is greatly expected that the Digest will be a further support for the CLOUT which has already improved the harmonization of the Model Law. As explained in the Introduction, “the Digest aims at promoting uniformity in its application by encouraging judges to consider how the Model Law has been applied by courts in jurisdictions where the Model Law has been enacted.”604 Continually, the Digest is expected to serve as a reference summarizing and pointing to the decisions that have been included in the Digest, but not to be recognized as absolutely independent interpretation for individual provisions of the Model Law. It has only been expected to assist the dissemination of the information on the Model Law and its further adoption as well as uniform interpretation.605 The Digest has a part on the public policy issue, because it has been arranged based on the chapters corresponding to each chapter of the Model Law. It is similar to the Final Report of the ILA on the recommendations of public policy discussed above, suggesting judges interpreting the public policy doctrine on referring to the practices of other jurisdictions.606

According to the contents of the Digest, article 52 through 62 provide explanation of Article 36 (1) (b) (ii) of the Model Law, which refer to the refusal of recognition and enforcement of arbitral awards on public policy excuse. At the very beginning, it summarizes various standard of review, indicating that “courts which had to define the appropriate standard of review under paragraph (1) (b) (ii) supported a restrictive interpretation of the defense. The public policy defense should be applied only if the arbitral award fundamentally offended the most basic and explicit principles of justice and fairness in the enforcement State, or evidences intolerable ignorance or corruption on part of the arbitral tribunal. Additionally, such grounds as arbitral award must either be contrary to the essential morality of the State in question, or disclose errors that affect the basic principles of public and economic life. Besides, interpretation insisting that not every infringement of mandatory law amounts to a violation of public policy, while in other jurisdiction, public policy was defined so as to cover cases where the arbitral award is patently in violation of statutory provisions.”607

Moreover, the Digest has also divided the public policy issue into procedural public policy and substantive public policy, and summarizes separately. Firstly, it has summarized the violation of procedural public policy, only if “the award was the result of a procedure which differed from the fundamental principles of procedural law of the enforcement State; or, if it could not be considered the result of a fair and

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603 Id. p.2.
604 Id.
605 Id.
606 See supra note 600.
607 See supra note 602, p. 183.
constitutional procedure, because it contained substantial errors touching upon the
very foundations of public and economic life; or violation of the right to be heard; or
complete absence of any reasoning at least in cases where such reasons for arbitral
awards required; or the finality or principle of res judicata considered to form part of
public policy, etc.” 608

Secondly, as the contents of substantive public policy, it has been summarized as
relating primarily to the content of the award. Other contents including, but not
limited to, “the principle of proportionality as a part of public policy; or arbitral award
merely violates certain laws or regulations of the enforcement State not being
recognized as conflicting with public policy; or potential availability of remedies at
the place of arbitration being regarded as violation of public policy at the enforcement
State, because of the violation of basic notions of natural justice or party having no
right to defend itself properly; or arbitral award based on a contract tainted in one way
or another by bribery or corruption, etc.” 609

From the overview of the Digest of the UNCITRAL, it is clearly understood that
interpretation of public policy can be divergence, and a large quantity of matters may
potentially being argued forming part of public policy of a relevant jurisdiction. In
legal practice, it is not controllable of the various judicial interpretations of public
policy when recognition and enforcement procedures pending in different national
courts. Thus, it is urgent to study those case laws of different countries, and discuss
appropriate solutions for restricting excessive judicial interventions. Specifically, it is
necessary to limit using public policy exception to reject recognition and enforcement
of international commercial arbitral awards.

2.3.3.3 Case Study on Public Policy Exception

As summarized above, each of those selected jurisdictions has provided the
public policy exception, either directly relying on the New York Convention or
incorporating the Convention into domestic laws, for refusing recognition and /or
enforcement of international commercial arbitral awards. Nevertheless, it is still very
abstract of the specific definition, as no universal interpretation on the contents of
public policy has been reached. Although different arguments have been stated, such
as the final report of the International Law Association, which indicates that
“notwithstanding that there has been little attempt at harmonization, the Committee
has found in its study that most State courts favor a restrictive interpretation and
application of public policy, which has resulted in a notable consistency of decisions
amongst courts of different countries and legal traditions.” 610 This argument has been
repeated in the UNCITRAL Digest discussed above. It is still necessary to study some
specific court reports of those jurisdictions, compare them and give deeper discussion
on how public policy being barrier to smoothly execution of international commercial
arbitral awards.

608 Id. pp.183-184.
609 Id. pp.184-185.
610 See supra note 587, p.5.
1. China: Supreme People’s Court [2008] Min Si Ta Zi No.11

After ratified the New York Convention, the Chinese courts have judged a large quantity of cases on the subject matter of recognition and enforcement of foreign arbitral awards according to the Convention. As summarized by the judges of the Supreme People’s Court of China, there was only one case being rejected enforcement on violation of public policy, which was *Hemofarm DD, MAG Intertrade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.*, reported on June 2, 2008.611

According to the introduction of the basic facts of the case, Hemofarm DD, MAG Intertrade Holding DD signed a Joint Venture Contract with Jinan Yongning Pharmaceutical Co. Ltd. (the Respondent) on December 22, 1995, and established a joint venture called Jinan-Hemofarm Pharmaceutical Co., Ltd. (Jinan-Hemofarm). Another applicant Suram Media Ltd. joined the joint venture in April 2000. Under the joint venture contract, article 57 was the applicable law provision, providing that the formation, validity, interpretation and performance of this contract shall be governed by Chinese law. Further, article 58 contained the dispute resolution: Any disputes from the execution of, or in connection with the Joint Venture Contract arose, the parties shall settle through amicable negotiation; if no settlement being reached, then such disputes should be submitted to the Arbitration Commission of ICC in Paris, which should try the case according to the temporary Arbitration rule of ICC.”

After that, disputes arose between Yongning Co. Ltd. and Jinan-Hemofarm on the payment of rent and return of some property. Yongning Co. filed a petition to the Intermediate People’s Court of Jinan. The court dismissed the jurisdiction objection by the Joint Venture, who argued that disputes should be submitted to ICC arbitration in Paris according to article 58 of the contract. The court reasoned, “The present lawsuit filed by Yongning Co. is subject on disputes of the property lease between Yongning Co. and the Joint Venture, but the arbitration clause in the joint venture contract shall be binding on the investors of the Joint Venture. As the Joint Venture is not an investor of itself, the arbitral clause shall not affect the case here.” Besides, Yongning Co. requested for property preservation and submitted the security, such property preservation request was granted by the court, freezing part of the bank deposits and sealing up some property of the Joint Venture. After that, a new petition was brought by Yongning Co., requesting the payment of the newly default rent and return of some leased property. The latter litigation was tried and the requests of Yongning Co. were also granted.

Subsequently, the Applicants (Hemofarm DD, MAG Intertrade Holding DD and Suram Media Ltd.) commenced ICC arbitration on September 3, 2004, claiming that (1) the Respondent breached the obligations towards the Applicants; (2) requiring return of investment property and reimbursement of damages of profits; (3) requesting to reject payment of the rent ordered by the judgments of the people’s courts; (4) requiring trial to order the respondent Yongning Co. to withdraw the petitions; (5)


requiring for the reimbursement of any fees for the court litigations in Chinese courts; (6) requesting the declaration of substantial breach of contract and termination of the Joint Venture; (7) requesting for the payment of all the arbitration fees. The Respondent submitted counterclaims.

The ICC tribunal firstly affirmed its jurisdiction over this case, according to the relevant provisions of the Civil Procedure Law and Arbitration Law of China, and then rendered an arbitral awards. The main contents of the award could be divided into two parts: (1) the property preservation order maintained by the respondent in the Chinese courts had caused direct, substantial and adverse influence to the rights and interests of the Applicants under the Joint Venture, which had ultimately caused the termination of the Joint Venture. Therefore, the respondent violated the contract, and the Applicants could commence ICC arbitration according to article 58 of the contract; (2) the respondent had breached the contract for bring a lawsuit on the subject matter of land lease, because such a dispute should be resolved by ICC arbitration according to article 58 of the contract. The arbitral tribunal decided finally that the unique, speedy and effective cause of the ultimate termination of the Joint Venture was Respondent’s petitions and the property reservation request in the first litigation. Finally, the arbitrators rendered the award in favor of the Applicants, and dismissed the counterclaims of the Respondent.

In September 2007, the Applicants applied to the Intermediate People’s Court of Jinan for recognition and enforcement of the ICC award. The Intermediate People’s Court of Jinan decided the following questions, that: (1) whether the arbitral award exceeded the arbitration agreement; (2) whether the trial of the property reservation was outside the submission of arbitration and Yongning Co. was granted defense or not; (3) whether the legitimacy of property preservation belonged to the non-arbitrable issues under Chinese laws; and (4) whether recognition and enforcement of the arbitral award would conflict with public policy of China. Finally, the Intermediate People’s Court of Jinan refused recognition and enforcement of the arbitral award.

According to the reporting system established by the judicial interpretation of the Supreme People’s Court of China,613 the High People’s Court of Shandong Province retried the rejection ruling of the lower court. The High court also rendered the judgment, confirming the judgment of the Intermediate People’s Court of Jinan, and reasoned that: (1) the subject matter of the arbitral award exceeded the arbitration clause, and met the situation of Article V (1) (d) of the New York Convention; (2) the arbitral tribunal tried disputes not being arbitrable under Chinese law, and violated Article V (2) (a) of the New York Convention; (3) recognition and enforcement of the arbitral award would conflict with the public policy of China. Thus the High court decided that the ICC arbitral award should not be recognized and enforced, and further reported the case to the Supreme People’s Court for instruction.

613 Fa Fa [1995] No.18: “Notice of the Supreme People’s Court on the Handing of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People’s Courts, 1995/08/20. According to Article 2, if a lower court decides to refuse recognition and enforcement of a foreign arbitral award, it shall report this case to the higher court for reviewing, and if the higher court confirms the lower court’s judgment, then it shall report again to the higher court over it, till finally to the Supreme People’s Court of China for the final reply.
The Supreme People’s Court replied after the review through the arbitration-related laws and the New York Convention, which gave two reasons: “(1) The trial of the ICC arbitral tribunal exceeds the scope of arbitration clause in the Joint Venture contract; (2) After the competent court of China authorize property reservation on the property of the Joint Venture and make a final judgment on the disputes between Yongning Co. and the Joint Venture on matter related to the rent contract, the ICC arbitral tribunal again make an arbitral award on the dispute of the rent contract between Yongning Co. and the Joint Venture, which offends the judicial sovereignty and judicial jurisdiction of Chinese court. According to Article V (1) (c) and V (2) (b) of the New York Convention, the arbitral award should be refused recognition and enforcement.”

As summarized by the judges of the Supreme People’s Court of China, the Chinese courts take a limited and restricted interpretation of the term “public policy”, even the disputed parties often referring to the public policy as advocatory tool, the courts have seldom supported the invoking of public policy exception. For instance, in some decisions of the Supreme People’s Court, when the defendants protest on the violation of public policy, the Supreme People’s Court reply that violation of compulsory laws cannot completely equate to the violation of the public policy; 614 or violation of the compulsory provisions of the administrative laws or部门 regulations cannot be recognized as absolutely violation of the public policy; 615 or it cannot be relied upon the justice or reasonableness of the substantive result of the arbitral awards to determine whether conflicting with the public policy or not. 616 According to the general judicial practice, it is very careful for the people’s courts to apply the public policy exception. Only if the recognition and enforcement of arbitral awards will cause violation of the fundamental principle of laws, or offend the sovereignty of China, endanger the national and social security, conflict with the good morals, etc, which constitute the fundamental social interest of China, the invoking of public policy to reject recognition and enforcement of foreign arbitral awards could be granted. 617

It is obvious that raising public policy defense in the Chinese courts is hardly to get positive affirmation. Nevertheless, public policy doctrine is still an obstacle to the recognition and enforcement of international commercial arbitral awards, and according to the Chinese law, public policy has not been divided into domestic and international public policy, which still needs further clear interpretations and definition for public policy in international commercial arbitration practice.

2. Germany: Hanseatic Court of Appeal, 30 September 1999, no. (2) Sch 04/99

615 [2005] Min Si Ta Zi No.12, Reply of the Supreme People’s Court to the Instruction Request of Haikou Intermediate People’s Court for not Recognition and Enforcement of Arbitral Awards made by SCC.
616 [2008] Min Si Ta Zi No.48, Reply of the Supreme People’s Court to the Instruction Request applied by GRD Minproc Co. Ltd. for Recognition and Enforcement of the Arbitral Awards made by SCC.
617 See LIU Guixiang, SHEN Hongyu, Overview of the Judicial Practice on Recognition and Enforcement of Foreign Arbitral Awards in our Country, Beijing Arbitration No.79, 2012, p.22-23.
In this case, the Claimant and Defendant signed a contract on July 23, 1992, under which a Turkish limited company was established and the two parties were equal shareholders. The parties also clearly chose the dispute resolution, as they inserted an arbitral clause intending to submit disputes to the Arbitral Commission of the Istanbul Chamber of Commerce. Subsequently, disputes arose when the Defendant prevented third companies under its control providing payment to the deliveries of goods by the Claimant. Therefore, the Claimant commenced arbitration procedure according to the arbitral clause on May 26, 1994, while the Defendant filed an action to the Istanbul district court, petitioning for the declaration of the lacking jurisdiction of the arbitral tribunal, which was finally dismissed by the Supreme Court of Turkey on November 18, 1996.

The arbitral tribunal continued the trial while the challenge of jurisdiction proceeding pending the district court. It rendered an arbitral award in favor of the Claimant on 25 July/15 August 1994 (the First Award). After that, the Defendant requested recourse for setting aside the First Award, arguing that the arbitral tribunal tried and made the arbitral award without waiting the final decision of the court. The application for annulment of the arbitral award was finally affirmed by the Turkish Supreme Court on February 6, 1995. Thus the application for recognition and enforcement of the award was rejected.

The Claimant commenced a second arbitration proceeding in the same arbitration commission, and the arbitral tribunal rendered the Second Arbitral Award on May 26, 1998, with the same contents of the First Award. Different from the first time, the Turkish Supreme Court denied the application of the Defendant for setting aside the Second Award. Then the Claimant sought recognition and enforcement of the Second Award in Germany. The Court of Appeal in Bremen dismissed all the objections of the Defendant basing on the New York Convention, and left to enforcement the Second Award. The Defendant raised the argument that recognition and enforcement of the Second Award would violate the public policy of Germany. The court discussed the public policy argument, and divided it into the domestic public and international public policy. It ultimately concluded that the reasons given for the Second Award did not violate the international (procedural) policy of Germany. Moreover, the court analyzed another question that the explanation of the arbitral tribunal on deciding whether the Claimant’s petitions fell under the statute of limitations, which belonged in principle to the area of international public policy. And finally the court decided that the arbitral tribunal correctly applied the statute of limitations on analyzing the claims of the Claimant.

Specifically, the Defendant argued that the arbitral tribunal did not consider the Defendant’s request and means of defense in the second arbitral proceeding, merely asserted that the defendant’s requests to supply evidence violated the prohibition to modify or expand the means of defense. However, all the requests made in the second arbitral proceeding should have been dealt with because the first arbitral award was

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set aside. Therefore, the defendant argued that there was a violation of due process.\textsuperscript{619} The court decided that this violation of due process was not occurred, because the arbitral tribunal examined and considered the argument of the Defendant extensively. The arbitral tribunal rendered the Second Award, and deemed the evidence provided by the Defendant in the second but not in the first proceeding was inadmissible, reasoning that this could lead to a denial of due process only if that evidence could have influenced the outcome of the proceeding. However, such situation had not been proved here. The arbitral tribunal did not violate the due process.

The court also dismissed the objection of the Defendant on argument of the lacking of reasons for the Second Award, and divided the standards for domestic public policy and international public policy of Germany. The court reasoned, “The Second Arbitral Award does not discuss the facts on which the claimant proves its individual claims and the reasons for the tribunal’s rejection of the defendant’s individual objections thereto. Such reasons for the award would hardly meet the requirements of German domestic procedural public policy. However, German international public policy is violated only when the decision of the foreign court or arbitral tribunal was rendered in proceedings that art to such extent at odds with basic principles of German procedural law, that in the German legal system the decision cannot be deemed to have been rendered in proper legal proceedings, because of a grave defect that affects the principles of state and economic life.”\textsuperscript{620} Further, the court had considered other arguments and concluded “the only requirement as to the scope of the parties’ statements and the reasons for the decision is that there is an arbitral award, and that this arbitral award is only to be reviewed form the point of view of German international public policy. In the court’s opinion, the statements and reasons for the decision in the Second Award comply with such requirement.”\textsuperscript{621} Thus there was no violation of procedural or substantive public policy of Germany, and had no ground for refusal of recognition and enforcement of the Second Award under Article V (2) (b) of the New York Convention.

The German approach on interpreting the public policy exception is limited and controlled. In another case, the German court also dismissed the application for refusing recognition and enforcement of a foreign arbitral award basing on the argument of violation of due process, where the reluctant defendant argued that the arbitral award was rendered on arguments not being raised in the arbitration and the arbitral tribunal tried according to an arbitration clause which had been challenged in a foreign court. The German court disagreed with such objection and reasoned that recognition and enforcement of the arbitral award would not violate the public policy of Germany, because the defendant was given opportunity to have the arbitral award reviewed in a foreign court, which had been denied finally. Therefore due process was not violated, and the public policy confliction was not certified and justified.\textsuperscript{622} It is obvious that public policy exception has also been strictly restricted in the German

\textsuperscript{619} Id. p.647.
\textsuperscript{620} Id. pp.648-649.
\textsuperscript{621} Id. p.649.
judicial activities, especially on the distinction of international public policy and domestic public policy, together with the separation of procedural policy and substantial public policy.

3. France: Supreme Court, First Civil Chamber, 4 June 2008

The same as the German approach, the French courts provides a pro-arbitration attitude which limits the application of public policy to reject recognition and enforcement of international commercial arbitral award. A recent case reported by the Supreme Court of France emphasized the criterion of international public policy. According to this report, a French company SNF and a Netherlands company Cytec entered into a contract for the supply of a chemical compound of acrylamide monomer (AMD) in 1991, and signed a second contract in 1993, which permitted SNF to buy its additional ADM supplies exclusively from Cytec for a period of 8 years.

Subsequently, a dispute arose between them and ICC arbitration was commenced. The arbitral tribunal rendered a partial award on November 5 2002, which indicated that the 1993 contract was not valid because its contents conflicted with the European competition law, and both parties should bear the consequences of the nullity of the contract equally. The arbitrators had also decided that it had not been proved that Cytec was in and abused a dominant position. After that, the ICC arbitral tribunal rendered the final arbitral award on July 28 2004, which granted only the Cytec’s requests for compensation. Following this final award, Cytec filed a petition in France for execution of the award.

During the court proceedings in France, the Paris Court of First Instance granted enforcement of the final award on September 15 2004, and the Paris Court of Appeal affirmed the enforcement order on March 23 2006. One of the objections was the public policy violation argued by SNF, which was dismissed by the Paris Court of Appeal. The court of appeal held that enforcement of the arbitral award would not conflict with the public policy of France.

The Supreme Court of France affirmed the decision of the court of appeal, and rejected SNF’s request for refusing recognition and enforcement on public policy exception. Argued by SNF, “the court of appeal should have verified the correct application of European competition law by the arbitrators and should have ascertained that enforcement of the awards did not lead to recognition in the French legal system of a decision endorsing a competition-restricting practice at odds with international public policy. Also, the court of appeal failed to deal properly with SNF’s argument that the arbitral tribunal’s refusal to draw the necessary conclusion from its own finding of all the elements of an abuse of dominant position was a violation of international public policy.” The French Supreme Court disagreed with such argument, holding that “where, as here, international public policy is concerned,

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625 See supra note 623, p.490.
a court shall only examine whether the award’s recognition or enforcement constitutes a flagrant, effective and concrete violation of international public policy." The Supreme Court affirmed the court of appeal’s reasoning that “SNF did not prove a flagrant, effective and concrete violation of international public policy. The court of appeal, within the limits of its powers, that is, without reviewing the merits of the arbitral award, reviewed the award in light of the application of the community rules on competition, correctly held that their recognition and enforcement were not contrary to international public policy.”

According to the previous case, the Supreme Court of France takes a limited interpretation on the violation of international public policy, and it reflects the relevant provisions of the French arbitration law, which requires the party who requests refusal of recognition or enforcement on public policy excuse should prove the existence of such an exception. This approach is again interpreted by another case reported by the French Supreme Court recently, which reasoned the claimant who requested the rejection of recognition and enforcement of a foreign arbitral award in French courts had not proved how enforcement would violate international public policy. It merely sought to challenge the final decision of the court of appeal that the defendant did not commit fraud. The court thus dismissed the argument of the claimant that fraud was a ground for violation of public policy. It is obvious that refusal of recognition and enforcement of international commercial arbitral awards on the violation of public policy ground has been strictly restricted by judicial practice of French courts, which will maintain and promote the pro-arbitration attitudes of the French arbitration legal system.

4. The United States: District Court, Southern District of New York

One of the latest cases reported by the United States federal courts on the interpretation of public policy had re-emphasized the narrow concept of public policy approach established by the U.S courts. This case concerned a dispute between a Japanese company NTT Docomo, Inc. (Docomo) and a Slovenian company Ultra d.o.o (Ultra), where the parties signed a Stock Purchase Agreement, according to which Docomo would sell its shares of common stock in Telargo, Inc., a Delaware corporation owned by Docomo and Ultra. The agreement contained an arbitral clause, intending to submit any dispute to International Chamber of Commerce (ICC) arbitration. When Ultra argued that Docomo breached the agreement and then failed to fulfill the first installment payment and repudiated its obligation to make the remaining two installment payment, dispute arose between the two parties. Docomo commenced ICC arbitration in New York City, which was based on the Stock Purchase Agreement.

After the trial organized by the arbitrators, an arbitral award was made in favor of Docomo on January 26 2010, ruling that Ultra should pay for the exchange for the
Telargo shares to Docomo. In addition, the arbitral tribunal also ordered Ultra to pay interest of the payment, to reimburse Docomo one-half of the cost of the arbitration which was paid in advance, and to pay an additional partial reimbursement of Docomo’s costs and attorney’s fees during the arbitration procedure. Then Docomo applied to the United States District Court for the Southern District of New York for confirmation of the ICC award. The respondent Ultra objected the confirmation proceeding and argued that the confirmation of an award for specific performance would violate the public policy of the United States. This argument was dismissed by the court. Then it granted the confirmation, analyzing that “the public policy exception under the 1958 New York Convention is a narrow one that concerns the most basic notions of morality and justice and covers cases where the award violates some well-defined, dominant and explicit public policy. Here, Ultra failed to meet its burden of identifying and proving such public policy, merely invoking due process concerns.” 630 A similarly case reported recently by the United States Court of Appeals for the Ninth Circuit has also taken the same approach that deciding confirmation of a ICC award would not contrary to the public policy of the United States under the New York Convention. 631

There are great number of cases on the recognition and enforcement of international commercial arbitral awards which are related to the public policy objections reported by various U.S. federal courts, under the legal framework of the FAA and the New York Convention, and the U.S. federal courts have already established a criterion for determining the violation of U.S. public policy, providing only contrary to the most basic notions of morality and justice of the United States. These judicial interpretations on restricting exercising of public policy reflect the pro-arbitration attitude of the United States, which will promote the smooth recognition and enforcement of international commercial arbitral awards in the United States.

2.3.4 Remark on the Practice of Public Policy Doctrine

According to the previous discussion, it is not difficult to get an overview that recognition and enforcement of international commercial arbitral awards may be challenged on the public policy ground at two stages, one for the annulment proceeding at the place of arbitration, and the other at the place of execution. One commentator argues that public policy is more important in theoretical aspect than in practical aspect, and this trend will continue as countries become increasing interdependent, and as the principles in the field of international business transactions become more uniform and homogeneous. Public policy has already been omitted as a basis for deny enforcement in some international conventions, such as the Convention on the Settlement of Investment Disputes. And such a trend is probably because the risks connected with public policy exception obviously outweigh its possible

630 Id. p.388.
advantages. However, it should not be ignored that in the international commercial arbitration field, public policy is still a potential obstacle to smooth execution of cross border commercial arbitral awards. It is believed that further uniform interpretation on the public policy issue is necessary and deserves more research in the near future.

2.4 Brief Summary

The international trade, transaction and other commercial activities have been greatly promoted during the past decades. Simultaneously, commercial disputes arose between parties with different nationalities have increased in a fast speed. With the rapid development of international commercial arbitration system, more and more parties have chosen arbitration as their dispute resolution, especially after the most influential multilateral conventions has been generally accepted. However, in judicial practice, there are still some cases concerning the recognition and enforcement of commercial arbitral awards which have been refused in various countries. It is known that even most of the countries have ratified or acceded to the New York Convention, these different results of the recognition and enforcement of cross border commercial arbitral awards reflect the importance of different domestic arbitration laws. As discussed above, obstacles of validity of arbitration agreements, improper judicial interventions and the uncertainty of the public policy exceptions may cause further refusal of recognition and enforcement of international commercial arbitral awards.

As a private dispute resolution, complete recognition of international arbitration system as a valid alternative dispute resolution has endured a long period of time. Of all those obstacles and difficulties, the most controversial one is the validity of the arbitration agreement, which is the basis of the whole arbitration system. In judicial practices, most international commercial arbitral awards may be challenged by the excuse of existence of non-valid arbitral clause or submission to arbitration. Together with the fast development of high technology, world-wide prosperous economy and transactions, the legal practice of international commercial arbitration has been gradually challenged. Specifically, the conditions for the formality and substantive validity of arbitral agreements covered by some domestic legislation are different from the multilateral conventions, which reflect the latest development of international practice of arbitration and commercial activities. However, in other jurisdictions, these conditions for determining the validity of arbitration agreements or arbitral clauses are at odds, and have caused a lot of rejection of commencing arbitration proceedings, or recognition or enforcement of the final arbitral awards. Amending such domestic arbitration-related laws on the relevant part for deciding the validity of arbitration agreements seems urgent and necessary from now on.

Another difficult issue connecting with the recognition and enforcement of international arbitration awards is the judicial involvement of various national courts. The interaction of the national courts and arbitral tribunals has never ended since the

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very beginning of arbitration system. Nowadays, the pro-arbitration attitudes have been admitted by more and more jurisdictions, providing the promotion of referring disputes of the parties to arbitration when they have actually intended to, and controlling or limiting the annulment of arbitral awards. During the past decades, some courts of different States have made suspicious actions, such as the recognition or enforcement of set-aside arbitral awards, and different interpretations of the relevant provisions of the New York Convention, which may cause new problems and rejections for international commercial arbitral awards. Parties may doubt the effectiveness and finality of arbitral awards, and may restrict choosing arbitration as their primary dispute resolution. Other issues on the judicial interventions on arbitration decisions, for example, the authorization of appeal of arbitral awards, or the definition of non-domestic awards, may introduce more barriers to smoothly recognition or enforcement. It is submitted that judicial involvements should be limited and restricted to an appropriate level.

Furthermore, under the mainstream of international restriction of public policy exception when recognition and enforcement of international commercial arbitration awards are requested in the relevant jurisdictions, it deserves deeper research on the concept of public policy issue in the international commercial arbitration field. Considering the risk of public policy, which may be invoked and explained as a versatile ground for refusing recognition and enforcement of international commercial arbitral awards, it would be better if public policy being specifically interpreted by domestic legislation. Although it is widely believed that a uniform and worldwide definition of public policy is impossible at present, it may be practicable as the first step to interpret the concept in each jurisdiction. As most of those rejections of execution happened in different jurisdictions, such an approach may be useful and effective for further reducing the refusals of recognition of an enforcement, and may promote the next step, which help to accomplish the uniform interpretation for the concept of public policy doctrine in the whole international commercial arbitration system.

No matter how many obstacles and barriers exists, with the fast development of international research on commercial arbitration system, especially the influence of the research and practice of UNCITRAL on international commercial arbitration, the amendment of different domestic arbitration-related laws shall be critical for further decreasing those barriers to international commercial arbitral awards.

633 As discussed by a French professor, indicating “For an arbitral award being set aside, the arbitral award is not the main research object of the courts of place of enforcement. The existence of an arbitral award depends on the recognition by the legal order of the place or arbitration, if not obtained such recognition, arbitral award may only be executed only if the judicial decision of the place of arbitration would not be recognized according to the public policy of the place of enforcement. An arbitral award is part of the legal order of the place of arbitration, and the autonomous character of international arbitration is not existed. Accordingly, arbitration is nothing but only the beginning of trialing, the authority of final determination of the case belongs to the courts of the place of arbitration.” See Emmanuel Gaillard, Legal Theory of International Arbitration, Huang Jie Yi, Beijing Daxue Press 2010, p. 124. The author further indicates that “it worthy no more discussion on such a problem (recognizable and enforceable of annulled arbitral awards). The different destiny of the annulled arbitral awards in the United States and France is sufficient to demonstrate that such a distinction is not only a simple technology argument, but represents the fundamental different views of the laws of the two countries on the philosophy expression of international arbitration. Id. p.125.
3.1 Background of Promulgation of the UNCITRAL Model Law

In order to harmonize worldwide arbitration systems on recognition and enforcement of commercial arbitral awards, the United Nations Commission on International Trade Law (UNCITRAL) has made great efforts with this regard over the years. At its twelfth session, the UNCITRAL Secretariat published a report entitled “Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)” (A/CN.9/168) and a note on further work in respect of international commercial arbitration (A/CN.9/169).634 The note suggested that the Commission commences working on a model law on arbitral procedures which could help to overcome most of the problems identified in the above study and to reduce the legal obstacles to arbitration.635 Following this note, the Commission drafted and then promulgated the Model Law on International Commercial Arbitration on its 18th session in 1985.

As expressed clearly in the General Assembly Resolution 40/72, the purpose of the Model Law was “Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations. And convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.”636 On this General Assembly, it was recommended that all States would consider the adoption of the Model Law, which was intended to uniform the law of arbitral procedures and the specific needs of international commercial arbitration practice.637

As introduced by a commentator, at the time when the Model Law was promulgated, “a great number of States, in fact the majority of all states numbers of the United Nations, had not ratified or acceded to the Convention. Because of its limited scope and the universal lack of adherence to it, the New York Convention has not succeeded in harmonizing all national laws governing the enforcement of international arbitral awards.”638 Therefore, the purpose of the Commission was to

637 Id.
promote the harmonization of international arbitration laws.\textsuperscript{639} Just as another commentator indicates, “The Model Law reflects a worldwide consensus on the principles and many of the important issues of international arbitration practice. It promises to contribute considerably to the needed harmonization and improvement of national arbitration laws.”\textsuperscript{640}

It was clearly stated that “the ultimate goal of a model law would be to facilitate international commercial arbitration and to ensure its proper functioning and recognition. Its practical value would, in particular, depend on the extent to which it provides answers to the manifold problems and difficulties encountered in practice. Thus, in preparing the model law an attempt should be made to meet the concerns which have repeatedly been expressed in recent years, sometimes even labeled as defects or pitfalls in international commercial arbitration.”\textsuperscript{641} The problems of various national laws had been divided into two aspects by the Explanatory Note of the 1985 Model Law, one was the inadequacy of domestic laws and the other was disparity between national laws.\textsuperscript{642} The former indicated that “recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. The unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.”\textsuperscript{643} On the other hand, the latter indicated that “problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration.”\textsuperscript{644} The Explanatory Note further stated that “The range of place of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.”\textsuperscript{645}

Further, the former commentator Gerold Herrmann argues the importance of the Model Law on the harmonization of international commercial arbitration law originates from its international origin, where representatives of more than fifty States as well as fifteen international organizations participated in the preparatory work\textsuperscript{646},

\textsuperscript{639} As introduced in the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, indicating, “Background to the Model Law: the Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.”

\textsuperscript{640} Gerold Herrmann, \textit{Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration}.

\textsuperscript{641} See supra note 635, p.77.

\textsuperscript{642} See supra note 639, the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

\textsuperscript{643}\textit{Id.}

\textsuperscript{644}\textit{Id.}

\textsuperscript{645}\textit{Id.}

\textsuperscript{646} See A/CN.9/263, \textit{Analytical compilation of comments by Governments and International Organizations on the
holding “while it is often said that the international origin of the text will contribute to its broad adherence and so enhance the extent of harmonization, what is rarely perceived or mentioned is that its international origin is likewise of considerable value in respect of individual countries, irrespective of the prevailing idea of harmonization. The reason lies in the unique character of national law governing international arbitration. Such national law, unlike the ordinary laws of States, is primarily designed for foreign readers and users, be they parties, counsel or arbitrators. It is thus of advantage to have a model which was made primarily by foreigners and which reflects the various interests and expectations.”

Meanwhile, there were some other worriers or critiques on the promulgation of the UNCITRAL Model Law. Considering its non-binding nature, the Model Law should be taken into their domestic legal systems autonomously by different States. Just as another commentator Kenneth T. Ungar concluded, “However, the success of UNCITRAL’s effort to unify the law of international commercial arbitration depends greatly on how many states which are not presently parties to the New York Convention adopt articles 35 and 36 in their entirety.” Others criticized the actual effect of the Model Law, arguing “Has UNCITRAL missed opportunities to enhance uniform standards of arbitral procedure? It would seem, if only in light of the two subjects explored in this article—arbitrability and confidentiality—the answer must be in the affirmative.” Such worrier or critique has been certified to be not necessary, because there are more 60 countries which have incorporated the Model Law into their domestic arbitration legal systems. The UNCITRAL has already amended its arbitration rule in 2010. Accordingly, the Model Law is regarded as another successful international document in terms of promoting further development of international commercial arbitration system, especially for enhancing smoother recognition and enforcement of international commercial arbitral awards worldwide.

Over two decades has passed since the promulgation of the Model Law, the research work by the UNCITRAL has never ended. At its thirty-second session (Vienna, May 17 to June 4 1999), the Commission decided that the priority items for the Working Group should be: the requirement of written form for the arbitration agreement contained in article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration and Article II (2) of the 1958 New York Convention, as well as enforceability of interim measures of protection. And the Working Group finalized its work on the draft legislative provisions regarding interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of article II (2) and article VII(1) of the New York Convention at its forty-fourth session (New York, January 23-27 2006). On April 13 2006, the Secretariat published the
note on “Draft declaration regarding the interpretation of article II, paragraph (2) and article VII, paragraph (1) of the New York Convention”. Through recalling the establishment of the UNCITRAL, and taking into account represents with different level, the importance of uniformity on international commercial arbitration laws for promoting international tread, and the various interpretations and the latest trends of the relevant provisions of the 1985 Model Law and the 1958 New York Convention, and various more-favorable domestic legislation, in order to reach the objection of the New York for promoting recognition and enforcement of arbitral awards, and considering the changed legislation background of the New York Convention and the Model Law, UNCITRAL added two recommendations: (1) The first one is that article II, paragraph (2), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, June 10 1958, be applied recognizing that the circumstances described therein are not exhaustive; (2) The second one is that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, June 10 1958, should be applied to allow any interested party to avail itself of right it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”

Accordingly, as specifically explained in the Explanatory Note by the Secretariat of UNCITRAL, the revision of the Model Law adopted in 2006 were mainly concentrated on article 2A, article 7 and article 17, respectively referring to the internationally accepted principles for interpreting the contents of the Model Law, the definition and the formality conditions of arbitration agreement, and the interim measures and preliminary orders of arbitration proceedings. Article 2A was designed to facilitate interpretation with reference to internationally accepted principles and was aimed at promoting a uniform understanding of Model Law. The revision of article 7 was intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasing relied upon the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. After the amendments, the Model Law has reflect the latest development of international commercial arbitration practice, and met the needs of further unifying various domestic arbitration-related laws, which has been a great progress for fulfilling the objection of the New York Convention and the Model Law.

3.2 The Relationship between the New York Convention and the Model Law

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653 A/CN.9/607, Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1) of the New York Convention, 13 April 2006, p.4.

It is obvious that at the time when the UNCITRAL Model Law was drafted, the New York Convention had been promulgated for nearly thirty years, and therefore had great influence on the contents of the Model Law. It is clear that the provisions of the Model resemble those of the New York Convention on the relevant parts of recognition and enforcement of foreign arbitral awards. Even under the framework of the New York Convention, the Model Law was still necessary and critical for unification of international commercial arbitration practice and smoothly recognition and enforcement of international commercial arbitral awards. As one commentator states, “What is needed to achieve a greater globalization of the Convention is strengthening the support system—for instance, by a wider dissemination of advantages of the UNCITRAL Model Law. Till then, we will just have to be content with the present regime of different national courts operating under different legal systems, giving recognition to and enforcing foreign arbitral awards—and on rare occasions surprising us by not doing so.”

Nonetheless, there are some differences between the two instruments. For instances, the nature of the Model Law and the New York Convention are different. The New York Convention is signed and ratified by various sovereignty countries, which has compulsory effect on the relevant territory of those contracting states; while the UNCITRAL Model is only a proposed draft which has no compulsory effect on different countries, and only intents to make uniformity of international commercial arbitration legislation and practical activities.

Specifically, there are following differences between the two instruments. First, the approaches of the two instruments are different. As discussed before, the New York Convention had been promulgated as a multilateral convention for recognition and enforcement of international arbitration agreements and arbitral awards. Each state is obligated to obey the contents of the Convention once it has ratified or acceded to it, confirming to the doctrine *pacta sunt servent*. Under the New York Convention, the contracting states could only reject recognition and enforcement of foreign arbitral awards according to the limited grounds authorized. As those grounds are only concerned with procedural violations or public policy exception, promotion of smoother recognition and enforcement of foreign arbitral awards may be accomplished when more states become member states of the Convention. On the other hand, the Model Law takes another approach, which would promote harmonization of worldwide recognition and enforcement of cross border arbitral awards through affecting the domestic arbitration-related laws, providing a reasonable and ideal model for those countries where arbitration laws would be legislated or amended. Provisions of the Model Law are pro-arbitration based on the actual needs of arbitration practice. It will help reduce the divergence of arbitration laws of different jurisdictions, and promote the same or similar standards for recognition and enforcement of arbitral awards. Besides, the Model Law lacks binding forces, thus it could only count on more States to be interested and incorporate the Model Law into

Second, the applicable scopes of both documents are different from each other. As summarized by a famous professor, the Model Law is designed to be implemented by national legislatures, with the objective of further harmonizing the treatment of international commercial arbitration in different countries. The Law consists of 36 articles, which deal comprehensively with the issues that arise in national courts in connection with international arbitration. Among other things, the law contains provisions concerning the enforcement of arbitration agreements (Article 7-9), appointment of and challenges to arbitrators (Article 10-15), jurisdiction of arbitrators (Article 16), provisional measures (Article 17), conduct of the arbitral proceedings, including language, *situs*, and procedures (Article 18-26), evidence-taking and discovery (Article 27), applicable substantive law (Article 28), arbitral awards (Article 29-33), setting aside or vacating awards (Article 34), and recognition and enforcement of foreign arbitral awards, including bases for non-recognition (Article 35-36).

This is a comprehensive composition of the whole arbitral proceeding, from the very beginning to the end, and with more liberal contents than that of the Convention for the most important stages of the whole arbitration proceeding, indicating the signing and getting validity of the arbitration agreement, and limiting grounds for setting aside arbitral awards. However, the New York Convention concerns only the last part of the proceeding—the recognition and enforcement procedure—which is directly reflected in the title of the Convention. Nowadays it has not so much controversy on the application of the New York Convention for both recognizing and enforcing arbitration agreements and arbitral awards. It has still not changed the nature of this multilateral treaty pointing on the final stage of the whole arbitration procedure, with two possible reservations. It has relevant contents for the requirements of valid arbitration clause or submission to arbitration, and validity conditions of international arbitral awards. Its core provisions concentrate on the uniform grounds for refusing recognition and enforcement.

Third, the potential effects of the two documents are different. As a compulsory Convention, the New York Convention will be treated as part of the compulsory laws of the relevant jurisdiction. When any country intends to join the Convention, it has no other choice but accept its contents. No contracting state would be permitted to alter the contents of the New York Convention, thus it can make sure that the unified provisions can be widely practiced together the increasing number of the contacting

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656 See A/CN.9/169, Future work in respect of international commercial arbitration, para.8, indicating “Such a (Model) law, if adopted by all U.N. Member States, could eliminate the problems caused by the disparity of national arbitration laws among Convention States.”
657 As appreciated by one commentator, “the form of a model law, rather than a convention, was deliberately chosen and for very good reasons. Of the various advantages, the most important one is flexibility. While a convention must be taken as it is or rejected, with a limited flexibility built in by way of reservation clauses, a model law may be adopted in full or in part and modified in any respect. It is a recommended text and as a model it works by the strength of its attractiveness.” Gerold Herrmann, The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions, Petar Sarcevic: Essays on International Commercial Arbitration, Graham & Trotman Limited Published, Martinus Nijhoff 1989, p.18.
658 See supra note 1, Gary B. Born, p.117.
659 See supra note 30, New York Convention, Article I.
660 See supra note 30, New York Convention, Article V.
states. On the other hand, the situation is different for the UNCITRAL Model Law. Although it is satisfied if these states where the Model Law would be incorporated will not change the contents of the Model Law, it is obvious that any state can change the specific contents \textit{ex parte}. And sometimes the Model Law itself has authorized more than one choice on the relevant contents.\footnote{For example, as for the conditions of valid arbitration agreement, Article 7 has provided two options, one is specifically numerated the conditions meets the writing form requirement, the other option completely eradicate the written form requirement.} It is not strange if those countries that legislate or amend their domestic arbitration laws not directly incorporate the whole articles of the Model Law, and thus affect the efficiency of the Model Law for promoting internationally coordination of recognition and enforcement of international commercial arbitral awards. As one commentator states, “the aim of the drafters of the Model Law to facilitate international arbitration has been fulfilled by adopting common standards in the post-award proceedings. The reasons for this are obvious: first, it assures that the achievements of the New York Convention will be preserved, and secondly, a unified approach has been achieved in the setting-aside and enforcement proceedings which guarantee the parties a degree of certainty.”\footnote{Petar Sarcevic, \textit{The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law}, \textit{Essays on International Commercial Arbitration}, Graham & Trotman Limited Published, Martinus Nijhoff 1989, p.195.} Therefore, the effectiveness of the Model Law is uncertain if its provisions, especially those for refusing recognitions or enforcement, have not been absolutely complied with.

Further, in addition to those differences discussed above, there are some common points of the New York Convention and the Model Law. Indeed both instruments are drafted to promote smoother recognition and enforcement of international arbitral awards, and exemplify the application of international commercial arbitration system to resolve commercial disputes. Unifingy grounds for rejection of execution would decrease obstacles to international commercial arbitral awards. The final text of the Model Law has absorbed the corresponding article on the refusal grounds. However, when deciding the final text of the Model Law, views on whether taking the Article V of the New York Convention into the Model Law were divided, which was finally inserted as Article 36 of the Model Law.

As reported in the UNCITRAL 18\textsuperscript{th} session, divergent views were expressed as to whether the model law should contain provisions on the recognition and enforcement of both domestic and foreign awards. Some argued that the draft chapter on recognition and enforcement should be deleted. It was not appropriate to retain in the model law provisions which would cover foreign awards, in view of the existence of widely adhered-to multilateral treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was stated that those states which did not ratify or accede to that Convention should be invited to do so. However, a state which decided not to adhere to that Convention was unlikely to adopt the almost identical rules laid down in article 35 and 36. In addition, such provisions in the model law might cast doubt on the effect of the reciprocity reservation made by many member states and might create other difficulties in the
However, the prevailing view was to retain provisions covering both domestic and foreign awards. It is reckoned that “there was a great number of States, in fact a majority of all States members of the United Nations that had not ratified or acceded to that Convention. Some of those States might, for constitutional or other reasons, find it easier to adopt the provisions on recognition and enforcement as part of the model law than to ratify or accede to that Convention. A model law on arbitration would be incomplete if it lacked provisions on such an important subject as recognition and enforcement of arbitral awards.” 664 The Commission, after deliberation, decided to retain in the model law the chapter on recognition and enforcement of awards, irrespective of where they were made. It was noted that it was compatible with that decision and in fact desirable to invite the General Assembly of the United Nations to recommend to those states that had not already done so to consider adhering to the 1958 New York Convention.665

Accordingly, the Model Law approach is different from the ratification or accession of the multilateral arbitration convention approach, which lacks the compulsory application effect over those contracting states. However, the Model Law has taken a right direction as a critical supplement for the harmonization of globally recognition and enforcement of foreign arbitral awards. In the past thirty years after the Model Law was published, it has already been incorporated into various domestic jurisdictions all over the world. Nowadays the number of member states of the New York Convention has also been greatly increased, which may have been benefited from the great influence of the Model Law. As more and more nations being directly or indirectly affected by the Model Law, the importance and beneficial of ratifying the New York Convention is also realized simultaneously. The close relationship between the New York Convention and the Model Law will further consolidate and promote the mechanism of recognition and enforcement of international commercial arbitral awards. As the former report states, “as regards those States that were parties to that Convention, the draft chapter might provide supplementary assistance by providing a regime for non-convention awards, without adversely affecting the operation of that Convention.”666

It is deemed that the New York Convention has provided a framework and basis for drafting of the Model Law, while the Model Law has contributed to further development of the Convention Mechanism. Especially, restricted grounds for setting aside arbitral awards in the Model Law are identical to the grounds for refusing recognition and enforcement of arbitral awards under the Convention. The Model Law has made clear interpretation for the uncertain part of the New York Convention on legitimate reasons for vacating of arbitral awards.667 It is expected that such a

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664 Id. para.309.
665 Id.
666 Id.
667 See supra note 30, Article V(1) (e) of the New York Convention, indicating “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, the award was made.” It is vague because the specific reasons for permitting setting aside
transparent explanation would reduce the excessive judicial interventions of the relevant courts, for applying the unified reasons of the Model Law to nullify arbitral awards after more states have incorporated the contents of the Model Law. Other merits of the Model Law which have influenced various domestic arbitration laws will be discussed in detail in the next section. In a word, the increasingly closer relationship between the New York Convention and the Model Law has greatly reduced barriers to the recognition and enforcement of international commercial arbitral awards.

3.3 Contributions of the Model Law on International Commercial Arbitration

According to the contents of the UNCITRAL Model Law, it has made great contributions for contemporary international commercial arbitration, of which the most important four aspects will be analyzed here, specifically the liberal validity conditions for arbitration agreements, available of provisional measures, restricted judicial interventions on arbitral awards and the elimination of distinction of arbitral awards when recognition and enforcement procedure is relied upon in different courts.

3.3.1 Liberalized Validity Conditions of Arbitration Agreement

Under the Model Law, Chapter II concerns the validity conditions for arbitration agreement, of which there are two options of Article 7 on the definition and form of arbitration agreement. This approach was adopted by the Commission at its thirty-ninth session in 2006. Option 1 of Article 7 includes the definition and formal validity conditions of arbitration agreement (1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. 668 This definition resembles Article II(1) of the New York Convention at one hand, but has made a tiny change of the former. It does not still require the condition that “a subject matter capable of settlement by arbitration.” 669 This slight change is appropriate, because the arbitrability issue will endure careful examination through the annulment proceeding, if any, and the final stage of recognition and enforcement of arbitral awards. Therefore it is no need to add an onerous check at the very beginning of the arbitration proceeding, and thus respect the intentions of the parties for commencing arbitration to the maximum extent.

Sub-article (2) through (6) provides the formal validity conditions of an arbitration agreement under the Model Law. Sub-article (2) requires the arbitration agreement shall be in writing. 670 Subsequently, sub-article (3) indicates that the

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668 Option 1, Article 7: Definition and form of arbitration agreement, UNCITRAL Model Law on International Commercial Arbitration.
669 See supra note 30, Article II (1) of the New York Convention.
670 See supra note 668, Option1, Article 7 (2).
The formality of the content of an arbitration agreement will not affect it meeting the written condition, providing “an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.” Sub-article (4) provides “the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.” It further interprets some terms concerned. “Electronic communication” means any communication that the parties make by means of data messages; and “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. This interpretation reflects the latest practice of technology development and its influence on international commercial arbitration field. Sub-article (5) further explains the written form requirement may be met by implication, meaning “an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.” Moreover, the formality requirement of an arbitration agreement may be fulfilled by incorporation of arbitral clause or arbitration agreement in other documents, indicating “the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

Comparing to the writing form requirement of valid arbitration agreement under the New York Convention, the suggested Option 1 of Article 7 of the Model Law is more liberal than Article II (2) of the Convention. It reflects the changes during the past five decades, especially with the rapid developing of technology, which has greatly influenced the everyday life of natural persons and activities of legal persons. Just as the Working Group of the UNCITRAL generally affirmed, “there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form, and the practice in some respect was no longer reflected by the position set forth in article II, paragraph (2), if interpreted narrowly.”

Comparatively, Option 2 has completely eliminated the formality requirements of arbitration agreement, which only gives a general definition of arbitration agreement under the Model Law. As provided in the Explanatory Note by the UNCITRAL Secretariat, “no preference was expressed by the Commission in favor of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting States. Both options are intended to preserve the enforceability of arbitration agreements under the

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671 Id. Option 1, Article 7 (3).
672 Id. Option 1, Article 7 (4).
673 Id. Option 1, Article 7 (5).
674 Id. Option 1, Article 7 (6).
675 A/CN.9/468, para.88.
676 The contents of Option 2 identifies to the first sentence of Option 1, Article 7 (1). It has omitted any form requirement.
Another merit of the Model Law, as amended in 2006, is the provision of interim measures and preliminary orders. Chapter IV A. of the Model Law gives specific regulations on these two procedures. The legislation on interim measures had endured a long time for discussion. It was concerned by the Working Group of Arbitration at its thirty-second session from March 20 to 31 2000. As reported by the UNCTIRAL Secretariat, it generally remarks on the purpose of interim measures, power to order interim measures, arguments in favor of enforceability of interim measures ordered by arbitral tribunal, scope of interim measures that may be issued by arbitral tribunal and procedures for issuance. Considering that it is now widely recognized that interim measures of protection are increasingly relied upon in practice, and lacking of uniform rules for enforcement has affected the attractiveness and effectiveness of arbitration as a method of settling commercial disputes, the Model Law has interpreted the interim measures in detail. Accordingly, interim measures can be granted by arbitral tribunals or the relevant courts. It is a great progress that arbitral tribunals are authorized to grant preliminary measures. Further, such provisional measures may be authorized recognition and enforcement.

First, Article 17 (2) gives a specific definition on interim measure. Specifically, “an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.” Article 17 A. further provides the conditions for granting interim measure, and two standards for granting: one is for interim measure under Article 17 (2) (a), (b) and (c), while the other is for interim measure under Article 17 (2) (d). This means that arbitral tribunals have more discretion on deciding the evidence preservation.

Second, arbitral tribunals have been authorized to grant preliminary orders when applied by the parties. Article 17 B. (1) indicates that “unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to...
frustrate the purpose of the interim measure requested.” The authorization of preliminary orders is also with conditions, requiring that “the arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure. And the conditions defined under Article 17 A apply to any preliminary order, provided that the harm to be assessed under article 17 A (1) (a), is the harm likely to result from the order being granted or not.” In order to facilitate the issuance of preliminary orders, specific regime for preliminary orders has been regulated in Article 17 C of the Model Law.

Further, considering the temporary character of the interim measures and preliminary orders, they may be modified, suspended or terminated upon any application of any party. Moreover, the relevant order on provision of security, disclosure and award of costs and damages has also been provided under Article 17 E, 17 F and 17 G. The other issue worth concerning is the recognition and enforcement of interim measure. Article 17 H and 17 I provide the recognition and enforcement of interim measures and its exceptions. Article 17 H (1) states that “an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Article 17 I.” Referring to Article 17 I, there are five grounds for refusing recognition and enforcement of interim measures, which mainly refer to Article 36 of the Model Law on the grounds for refusing of recognition and enforcement of arbitral awards.

With the availability and executability of interim measures and preliminary measures from the arbitral tribunal, recognition and enforcement of international commercial arbitral awards may be further promoted. The disputed parties can take earlier preservations and protections to make sure following proceedings going on smoothly. For instance, maintaining or restoring the status quo, or preserving assets may help the relevant party to get reimbursement when the final arbitral award is rendered; taking actions or refraining from taking actions may help reducing the harmful or prejudicial elements for arbitration proceedings; or, preserving evidence would help smoother trial of the relevant proceedings. All of those interim measures, if effectively resorted to, shall promote the whole arbitration proceeding and the recognition and enforcement of international arbitral awards generated from such proceedings.

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682 Id. Sub-article (2) and (3).
683 Article 17 C. Specific regime for preliminary orders.
684 Article 17 D. Modification, suspension, termination.
685 Article 17 I, Grounds for refusing recognition or enforcement. Also introduced in the Explanatory Note, “an important innovation of the revision (in 2006) lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modeled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.” See supra note 638, the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.
3.3.3 Reduction of Judicial Interventions on Arbitral Awards

Recalling the previous reported cases on different attitudes towards recognition and enforcement of foreign arbitral awards in different courts, especially those countries where excessive judicial involvements from various courts being allowed, the Model Law has authorized a limited permission for court intervention. Article 5 of the Model Law generally indicates that “in matters governed by this Law, no court shall intervene except where so provided in this Law.” Moreover, Article 6 of the Model Law regulates the court or other authority for certain functions of arbitration assistance and supervision. Specifically, it concerns the issues of appointment, challenge and termination of the mandate of arbitrator (article 11(3), 11(4), 13(3) and 14), jurisdiction of the arbitral tribunal (article 16(3)) and setting aside of the arbitral award (article 34(2)). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to article 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce).

Apart from the above group of permitting court intervention, another group of court involvement during the whole arbitration proceeding is comprised of court assistance of taking evidence (article 27), recognition of the arbitration agreement, including its compatibility on court ordered interim measures (article 8 and 9), court ordered interim measures (article 17 J), recognition and enforcement of interim measures (article 17 H and 17 I), and recognition and enforcement of arbitral awards (article 35 and 36).

All of those permitted court interventions, limited grounds for setting aside of arbitral awards under article 34 deserves further discussion. According to article 34 (1), recourse to a court against an arbitral award may only be requested through raising an application of nullification in accordance with paragraph (2) and (3) of the same article. Therefore, other court involvement, such as granting appeal of the decisions of the arbitral tribunal, shall no further be available if the model law has been incorporated into. Under article 34 (2), the grounds for allowing setting aside arbitral awards has been numerated, which are absolutely the same as article 36 of the Model Law on grounds for refusing recognition and enforcement. Both articles resemble Article V of the New York Convention as a unification of grounds for rejection of foreign arbitral awards. As explained by the Secretariat of the UNCITRAL, as a further measure of improvement, the Model Law lists exhaustively the grounds on which an arbitral award may be set aside. Such an approach (of the Model Law) is reminiscent of the approach taken in the 1961 European Convention. Under Article IX of the latter, a court judgment which has set aside an award based on a ground other than the ones listed in article V of the New York Convention does

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686 Article 5 of the UNCITRAL Model Law on International Commercial Arbitration.
687 Article 6 of the Model Law indicates “the functions referred to in article 11(3), 11(4), 13(3),14,16 (3) and 34 (2) shall be performed by...(each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.)”.
689 Id.
not constitute a ground for refusing enforcement.\textsuperscript{690} The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.\textsuperscript{691}

Before the UNCITRAL Model Law was promulgated, the judicial intervention on the annulment of arbitral awards could be infinity, and different from each other, due to the abstract authorization of the New York Convention to the interpretations of different jurisdictions. As is known, nullifying arbitral awards by national courts constitutes the most severe obstacle to recognition and enforcement of foreign or international commercial arbitral awards. Although some states have taken a unique approach, for example, those reported cases on recognition and enforcement of vacated arbitral awards, most of the jurisdictions have not taken this approach, while insisting the non-recognizability and enforceability of annulled arbitral awards. Thus, if such setting aside procedure is not transparent and expected, judicial involvements on setting aside arbitral awards may be inappropriate and excessive, and further affect the executability of final arbitral awards. At least on this point, the Model Law has promoted effective and admirable contribution to further development of international commercial arbitration system. And if more countries will like to take the Model Law into their local laws separately, it will help reduce the nullification and maintain the certainty of foreign or international commercial arbitral awards.

3.3.4 Eliminated Distinction of International and Domestic Awards

As summarized by a professor, national jurisdictions usually differentiate between domestic and foreign awards, which are a complex and difficult matter in cases not falling under multilateral or bilateral international agreements. Here again the Model Law attempts to achieve uniformity by prescribing the same grounds for the recognition and enforcement of all awards regardless of the place of arbitration.\textsuperscript{692} Chapter VIII of the Model Law provides two articles for recognition and enforcement of arbitral awards under the mechanism of the Model Law, where article 35 (1) indicates that “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.”\textsuperscript{693} Professor Petar Sarcevic states that it is with good reason that the Model Law contains no possibility for a reciprocity reservation. The decision on whether or not it will require reciprocity for the recognition of foreign arbitral awards should be left to the discretion of each state.\textsuperscript{694} Another commentator argues that the Model Law seeks to eliminate the distinction between foreign and domestic awards. For this reason, an award from an “international arbitration” under the Model Law might be more

\textsuperscript{690} See supra note 147, Article IX(2) of the European Convention on International Commercial Arbitration 1961.

\textsuperscript{691} See supra note 639, the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.


\textsuperscript{693} Article 35 (1), UNCITRAL Model Law on International Commercial Arbitration.

appropriately called an “international award”. The Model Law, in abandoning the Convention’s emphasis on the place of arbitration, opts instead of a system that treats all international arbitral awards uniformly. 695

Actually under the mechanism and framework of the New York Convention, international commercial arbitral awards are divided into several types. The terminology of “foreign award”, “non-domestic award” and “domestic award” has caused difficulties in applying the Convention for recognition and enforcement of international commercial arbitral awards. Additionally, Article I (3) of the New York Convention authorizes two separate reservations, the reciprocity and commercial reservation. Parties that the arbitral awards favored will encounter with difficulties in the recognition and enforcement proceedings when the reluctant parties raise those objections on the general nature of the arbitral awards, or on the various interpretations of the reservation article. Considering the background, the Model Law distinguishes “international” and “non-international” awards, instead of relying on the traditional criteria of “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which seems inappropriate because it proposes limited importance of the place of arbitration in international cases. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions. 696

Such an approach taken by the Model Law will greatly reduce the uncertainty of various national courts in applying and interpreting the legal framework of international commercial arbitration, especially the New York Convention. If domestic arbitration laws are drafted or amended pursuant to article 35 (1) of the Model Law, the previous controversial problems faced by different jurisdictions will be reduced. Then recognition and enforcement of international commercial arbitral awards may be promoted in a smoother way.

3.4 Promote Unification of Contemporary Domestic Arbitration Legislation

The unification of contemporary arbitration legislation of different states according to the text of the Model Law is another outstanding contribution of the UNCITRAL Model Law to International Commercial Arbitration. Each country has its own legislation history on international commercial arbitration, and it is not strange if conflicts arose between different countries. Apart from those several influential international and regional arbitration conventions, the importance of different domestic arbitration legislation could not be ignored. On account of the nature of international commercial disputes, only international arbitration conventions cannot ensure the smoothly organization and practice of international arbitration activities. As is discussed above, the crucial merit of contemporary international commercial arbitration system lies in its effectiveness in realization of recognition and enforcement of arbitral award. But it is commonly known that foreign arbitral awards

should sometimes be finally recognized and enforced in other jurisdictions other than where they are decided. Thus not only the law of the arbitral tribunal, but also the laws where such arbitral awards are implemented need to be complied with.

In legal practice, as discussed in the former chapter, most decisions of refusals of recognition and enforcement of arbitral awards were made according to different domestic arbitration-related laws. Thus, how domestic arbitration legislation will affect enforcement of international commercial arbitral awards deserves careful and detailed discussion. During the past century, the arbitration-related legislation in major developed countries had been amended and gradually improved. For example, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Germany, France, Japan, Singapore had promulgated or amended their domestic arbitration-related laws in the past century. Besides, some developing countries, like India and People’s Republic of China, have got great progress in international commercial arbitration practice, together with the improvement of domestic legal framework for international commercial arbitration system. All of those domestic arbitration-related laws are influenced by the New York Convention, particularly concerning with the recognition and enforcement of international commercial arbitral awards. Moreover, some of these countries have improved their domestic arbitration laws according to the Model Law, and promoted further reduction of the barriers to recognition and enforcement of international commercial arbitral awards in their territories. In this Section, the legislation history of domestic arbitration laws in several influential jurisdictions will be chosen and compared specifically. Synthesis of international arbitration conventions, regional arbitration conventions and various domestic laws, the basic legal framework for contemporary recognition and enforcement of international commercial arbitral awards has been established, which has made great contributions to the development of both academic research and legal practice of international commercial arbitration nowadays. The increasing importance of domestic arbitration-related laws should be paid more attentions to, in order to reduce or eliminate those still existing barriers to recognition and enforcement of international commercial arbitral awards, and enlarge the application of commercial arbitration as an effective resolution for resolving commercial disputes in the future.

3.4.1 Non-incorporation of the Model Law into Domestic Arbitration Laws

Recognition and enforcement of commercial arbitral awards was not always so smooth as the situation today, especially during the long period up to the early twentieth century when multilateral conventions for recognition of cross border commercial arbitration agreement and awards were gradually promulgated. In order to make understand clearly the positive effect and contribution of the Model Law, and to make a persuasion of the increasing importance of domestic arbitration-related laws for reducing or eliminating those obstacles to recognition and enforcement of international commercial arbitral awards, it is better to get an overview of the selected domestic arbitration laws of the relevant countries in the time prior to those international arbitration conventions and the Model Law. As summarized by the
famous arbitration professor Gary B. Born, the world’s leading international arbitration centers have generally not adopted the UNCITRAL Model Law. This is true, in particular, for France, Switzerland, England, the United States, the Netherlands, Belgium and Sweden. 697 Considering the topic of this part, the relevant discussions will concentrate on recognition and enforcement of foreign, international or cross border arbitral awards under those early domestic arbitration laws.

3.4.1.1 United Kingdom

The arbitration practice and legislation has a long history in England. Many arbitration acts had been promulgated before the 1923 Geneva Protocol. Commercial arbitration in English common law was founded for centuries. As introduced by a commentator, the English Parliament enacted one of the world’s first extant arbitration statutes, adopting what was sometimes called the 1698 Arbitration Act (9 &10 Will 3, c.15). 698 However, even under the early provisions, arbitration agreement was still not well protected according to the English common law. It is also provided by the same professor that “common law enforcement of arbitration agreements was made more problematic by the decision in Kill v. Hollister, where the court permitted an action on an insurance policy to proceed, notwithstanding an arbitration clause, on the grounds that the agreement of the parties cannot oust this court. In subsequent centuries, that doctrine—which appeared to raise a broad-based public policy objection to arbitration (and forum selection) agreements—provided ample support for both English and U.S. proponents of judicial hostility to arbitration.” 699

Subsequently, legislative reforms in England gradually introduced greater support for commercial arbitration agreements and arbitral tribunal’s powers. 700 The 1833 Civil Procedure Act (3 &4 Will 4, c.42) developed this theme further, as it supplemented the process of contempt by making the appointment of the arbitral tribunal irrevocable except where the leave of the court was given. However, the result was that arbitrations required the support of the courts and then courts had the opportunity to review and scrutinize the conduct of the arbitration. 701 Nevertheless, the courts’ powers to intervene the arbitral process remained to be limited. Although the courts would review an award where a principle of natural justice was breached, they were not so ready to re-examine questions of fact and law. 702

After that, the Common Law Procedure Act 1854 (the 1854 Act) was a keystone of modern arbitration law, which brought the practice of commerce into an effective part of the ordinary law of the land, and brought the commercial tribunal under the

697 See supra note 1, Gary B. Born, p. 121.
698 See supra note 1, Gary B. Born, p.33. It refers to English Civil Procedure Act, 1698. It is said that “not a mandatory requirement of the 1698 Act that a submission to arbitration should contain a provision that it be made as a rule of court. However, where the arbitration submission was made a rule of court then a breach of the submission agreement would amount to a contempt of court.” see Andrew Tweeddale, Keren Tweeddale, Arbitration of Commercial Disputes, International and English Law and Practice, Oxford University Press 2007, p.482.
699 See supra note 1, Gary B. Born, pp.34-35.
700 Id. p.35.
702 Id. p.483.
control of the ordinary courts. As summarized by the professor, the 1854 Act provided for the irrevocability of any arbitration agreement, by permitting it to be made a rule of court, regardless whether the parties had so agreed. At the same time, however, the statute introduced new limits on the arbitral process by providing for fairly extensive judicial review of the substance of arbitrators’ awards, through a “case stated” procedure that permitted any party to obtain judicial resolution of points of law arising in the arbitral proceedings.

The following arbitration acts were promulgated gradually between 1889 and 1934, including (a) the Arbitration Act 1889 (52 &53 Vict, c.53); (b) the Arbitration Clauses (Protocol) Act 1924 (14 & 15 Geo 5, c.15); (c) the Arbitration (Foreign Awards) Act 1930 (20 &21 Geo 5, c.15); and (d) the Arbitration Act 1934 (24 & 25 Geo 5, c.14). Those Acts became known collectively as the Arbitration Acts 1889-1934. Those Arbitration Acts were enacted in response to the failure by the courts to deal effectively with commercial matters. This failing by the courts and judiciary was generally accepted as a valid criticism. As is stated, the 1889 Arbitration Act granted English courts the discretion to decide whether or not to stay litigations brought in breach of such agreements (effectively permitting specific performance of arbitration agreement to be ordered). At the same time, the 1889 Act preserved the previous features of English arbitration law, including the “case stated” procedure for judicial review and the powers of English courts to appoint arbitrators and assist in taking evidence. The 1889 Act remained in force for more than half a century, until eventually replaced by 1950 Arbitration Act.

Accordingly, no specific contents of the recognition and enforcement of foreign arbitral awards were referred to in those early Arbitration Acts of England. The main purpose of the former list of arbitration acts was to promote the recognition of the validity of arbitration agreement, and to provide courts’ supporting or favoring attitudes towards arbitration system. It was properly that cross border arbitration activities were not so active, connecting with the economic background and limited transactions between different countries. Moreover, the recognition of the validity of domestic arbitral awards was still questionable and faced with many obstacles, let alone such type of international or foreign awards. The provisions for recognition and enforcement of international commercial arbitration awards were gradually legislated and promulgated during the past century, particularly after the series of international arbitration conventions were published, and relevantly the domestic jurisdictions were required to address such new important issue. For instance, Part I (sections 1-34) of the English Arbitration Act 1950 dealt predominantly with domestic arbitrations.
whereas Part II (sections 35-43) of the Arbitration Act 1950 dealt with the enforcement of foreign awards. The Arbitration Act 1996 did not repeal Part II of the Arbitration Act 1950 (apart from section 42 (3)) or the two schedules to the Arbitration Act 1950. The Arbitration Act 1975 was enacted to give effect to the New York Convention, of which Section 3 provided that a Convention award was enforced by virtue of section 26 of the Arbitration Act 1950. And Section 5 of the Arbitration Act 1975 set out the grounds on which a court could refuse to enforce a Convention award. This section mirrored the grounds for refusal as set out in Article V of the New York Convention.708

The latest arbitration legislation for both domestic arbitration and international arbitration system included the 1979 Arbitration Act and the 1996 Arbitration Act. The arbitration legal system has gradually been promoted since the 1979 Act. As a professor states that “in particular, English legislation prior to 1979 provided for a widely-criticized ‘case stated’ procedure, which had granted parties to arbitrations seated in England a mandatory right of access to the English courts to review de novo issues of English law that arouse in the course of arbitration proceedings (without the possibility of exclusion agreements to contract out of such review). The 1979 Act revised this historic approach and established a more acceptable, if by no means ideal, regime for international arbitrations in England.709 Because the 1979 Act amended, but did not eliminated, the historic ‘case stated’ procedure: the Act permitted parties to enter into exclusion agreements, which waived the right to judicial review of the merits of the arbitrators’ award (save for cases involving shipping, commodities and insurance).”710

Another commentator summarizes the main features of the 1979 Arbitration Act, saying “(a) it leaves unchanged the control of the courts over the ‘misconduct’ of arbitrators and arbitrations; (b) it abolishes the special case procedure, with the result that all arbitral awards will become final and binding as soon as they are made; (c) in ‘standard type’ arbitration (a term used here for convenience and discussed below), it substitutes for the Special Case procedure a rigidly controlled and limited procedure of appeal on points of law, but only with the leave of the Commercial Court or the consent of the parties, and subject to (f) below; (d) in order to achieve (b) and (c), it abolishes the old power of the courts to set aside (or to remit to the arbitral tribunal) any award on the ground of an error of fact or law on its face, and introduces a system whereby reasoned awards can be required; (e) again subject to (f) below, it permits references to the court of any question of law arising in arbitrations in certain cases, but only if the arbitral tribunal or all the parties consent; (f) in ‘non-standard’

709 Another commentator introduces that” the 1979 Arbitration Act has transformed the relationship between the courts and arbitrations in England and Wales. For well over a century our courts have exercised control over issues of law arising in arbitrations by means of the ‘Special Case’ or ‘Case Stated’ procedure. This Act abolishes this and substitutes for it what may be described as a system of filtered appeals on points of law."See Michael Kerr, Statutes: The Arbitration Act 1979, 43 Mod. L. Rev. 45, 1980.
710 See supra note 1, Gary B. Born, pp.128-129.
arbitration, it permits ‘exclusion agreement’ (i.e. agreements excluding any resort to the court under (c) and (e) above) at any time. It also permits such exclusion agreements in all cases (other than statutory arbitrations) after the commencement of the arbitration; (g) it empowers the Secretary of State for Trade to make orders (subject to annulment by a resolution of either House of Parliament) permitting exclusion agreements in relation to ‘standard-type’ arbitrations in the future, subject to any conditions which may appear appropriate; (h) it introduces a number of other procedural improvements into arbitrations to cure certain defects and weakness as discussed below; (i) it adapts the existing statutory provisions to the new regime.711

According to the summary of the previous commentator, the 1979 Arbitration Act was an important turning point for the arbitration legislation of England, which provided more liberal and pro-arbitration trends, and tried to eliminate court interventions on arbitration procedures. This great change in the relationship between the court procedure and arbitration procedure had further influence on later reform and amendments of the English Arbitration Act, even on perfection of arbitration laws and practices of other jurisdictions.712

The recent amendment of English arbitration law was the promulgation of the 1996 Arbitration Act, which was not based directly on the UNCITRAL Model Law. As one famous professor states, the English Arbitration Act 1996 was based roughly on the UNCITRAL Model Law, while introducing a number of formal and substantive innovations.713 However, he also admits that the English Arbitration Act 1996 has not generally adopted the UNCITRAL Model Law.714 In fact, during the legislation process, in response to the interest in the UNCITRAL Model Law, the English government set up a Department Advisory Committee on Arbitration Law (the DAC) to give advice to the question whether England should adopt the UNCITRAL Model Law or not. In June 1989, the DAC published its first report, which strongly recommended against adopting the UNCITRAL Model Law but made some recommendations for a new and improved Arbitration Act, of which one suggestion indicated that “Consideration should be given to ensure that any such new statute should, as far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.”715

After half a decade for drafting and revising, the draft Bill of the 1996 Arbitration Act was accomplished in 1995 and passed through the Parliament with very few amendments and then came into force on January 31 1997. This newest Arbitration Act is divided into four parts, Part I provides the most basic sections of arbitration pursuant to an domestic arbitration agreement; Part II relates to other

712 It is concluded by one commentator that “the English experience may provide a catalyst for the world community. Should the English arbitration tribunals manage their new autonomy well, other nations may consider similar reforms. New sophisticated methods of arbitration and a growing body of experience in the field will, perhaps, prove that arbitration is an effective, efficient and fair means of resolving disputes under international contracts.” Ellen Jane Abromson, The English Arbitration Act of 1979: A Symbiotic Relationship between the Courts and Arbitration Tribunals, 5 Suffolk Transnat’l L.J. 93, 1980-1981.
713 See supra note 1, Gary B. Born, p.127.
714 See supra note 697.
provisions relating to domestic arbitration\textsuperscript{716}, consumer arbitration agreements and statutory arbitrations; Part III enforces the New York Convention into the domestic arbitration law, which is entitled “Recognition and Enforcement of Certain Foreign Awards”; and Part IV provides several general provisions for the whole Act.

Although the 1996 Arbitration Act did not directly incorporate the Model Law, it can be inferred from the use of language and format that the UNCITRAL Model Law has played a major part in the shape that the Arbitration Act has taken.\textsuperscript{717} As concluded by a professor, “the Model Law and the Arbitration Act 1996 share a great number of similarities. However, they also evidence significant divergence of approach towards arbitration. The Arbitration Act 1996 is also an attempt to modernize arbitration law in England and concords to a great extent with the Model Law, although it goes further than the Model Law in that it is a comprehensive restatement of English arbitration law. Judicial interference in the arbitration process, albeit greatly reduced, is still a feature of English arbitration law. Both the Model Law and the English Arbitration Act attempt to rationalize, modernize and clarify arbitration law in their respective sphere of influence. They have both very successful in achieving their diverse but interconnected aims. Both regimes can be improved and it is increasingly likely that the two systems will converge in the future.”\textsuperscript{718}

However, as criticized by another professor, who argues that “notwithstanding its substantial equality, the 1996 Act does not achieve absolute perfection. For example, it retains a version of the right of judicial appeal of the merits of arbitral awards and a restricted right of appeal on questions of law during the proceeding. For good or ill, England remains one of the few national jurisdictions that allow judicial supervision of arbitration on the merits. Moreover, the statute is less limpid about the place and standing of international commercial arbitration within its regulatory scheme. It still employs a nationality based definition of international or nondomestic arbitration and allows ‘exclusion agreement’ as long as the New York Convention or other treaties do not govern enforcement. The treatment of international arbitration is less unified and suffers from the complication of internal and external cross-references. These attributes bring confusion rather than clarity to the regulation of the subject area.”\textsuperscript{719}

Although the 1996 Arbitration Act is not absolutely perfected, it has taken into the latest improvements of international commercial arbitration system, especially try to coincide with the Model Law, despite not wholly incorporate the latter. Another commentator indicates that the 1996 Arbitration Act has taken a delocalized attitude towards arbitration system in England, arguing that “prior to the current arbitration regime (the 1996 Act), the prevailing attitude was that it was theoretically impossible and practically unreasonable to suggest that delocalized arbitration could be agreed, processed and enforced under English law. Arbitration, it was argued must always

\textsuperscript{716} Id.p.492. It is introduced here that those provisions relating to domestic arbitration agreement have not been brought into force.
\textsuperscript{717} Id.
have a ‘seat’ rooted in a municipal law.” However, “adopting a commendable sense of pragmatism and respect for party autonomy the new Arbitration Act of 1996 in the writer’s view uniquely recognizes the concept of delocalized arbitration. Parliament has indicated its intent to respect and support the practice under the Act. Quite contrary to early juridical beliefs, delocalized arbitration is now to be recognized and enforced in England in its own right rather than as a ‘normal’ or ‘English’ arbitration under the Act. It will therefore be inappropriate to demand that there be a ‘proper law of the arbitration agreement’ or to claim that delocalized arbitration is approximated to English law and is controlled by it.”

Whether being delocalized or not, it is doubtless that the 1996 Arbitration Act has been further improved, comparing to the 1979 Arbitration Act. It is a synthesized legislation for both domestic arbitration and international arbitration, which reflects the latest development of the arbitration practice in England, inherits the arbitration evolution and revolutions during the past centuries, together with the latest trends, academic accomplishments. It has thus been a great promotion for the development of historical international commercial arbitration system in the Kingdom, and created a new era for international commercial arbitration since its promulgation and operation thereafter.

3.4.1.2 United States

As summarized by Professor Gary B. Born, a quite similar course was followed with regard to commercial arbitration in the United States during the 18th and 19th centuries as in England and France. Over the course of the 19th century, significant judicial (and legislative) hostility to arbitration agreements developed, as American courts developed a peculiarly radical interpretation of historic English common law authority. Importantly, the resulting judicial hostility to the arbitral process did not prevent the use of extra-judicial and commercial mechanisms to enforce arbitration agreements and awards, but it nonetheless obstructed use of arbitration in the 19th century’s United States. This hostility was not fully overcome until the early 20th century, when determined efforts by America’s business community resulted in enactment of the Federal Arbitration Act and similar state arbitration legislation. As introduced by another professor, “before 1925 there was no federal statutory law on arbitration. Many states had arbitration legislation and there was an ill-formed common law of arbitration. With the exception of the New York Arbitration Act of 1920, however, agreements to arbitrate future disputes were not enforceable by a specific performance decrees. For a variety of reasons, American courts were unwilling to order or compel parties to arbitrate dispute that arose after the conclusion of an otherwise enforceable agreement to arbitrate. Courts, however, did enforce arbitration agreements made after a dispute arose and awards made after disputes

721 Id. p.54-55.
723 See supra note 1, Gary B. Born, p.40.
were submitted to and decided by arbitrators.\textsuperscript{724}

The United States passed the first federal arbitration act on February 12 1925. It was an act pretending to make valid and enforceable written arbitration clauses or agreements, for resolving disputes arising out of contracts, maritime transactions, or commerce among the states, territory or with foreign nations. According to section 14 of this arbitration act, it was named “the United States Arbitration Act”.\textsuperscript{725} Accordingly, disputes of maritime transactions and commerce could be solved through arbitration, where section 2 clearly provided that written contracts for arbitration of controversies of maritime or commerce transactions were enforceable.\textsuperscript{726} In order to protect smooth practice of arbitration proceedings, this arbitration act had also regulated the suspension of court actions and reference to arbitration, the competence of the arbitrators, seizure of vessels or property and confirmation of arbitral awards. Besides, the courts were also given judicial control on arbitral awards, for instance, confirmation of the awards\textsuperscript{727}, or authorized substantial challenge to the decisions of the arbitral tribunal, which could deny fundamentally the validity of arbitral awards through section 10.\textsuperscript{728} This arbitration act had also provided the rehearing of vacated arbitral awards, and numerated specific grounds for modifying or correcting the arbitral awards. However, as one of the earliest arbitration law, the 1925 Act did not contain any provision for recognition and enforcement of foreign or international arbitral awards, or that for their counterparty of domestic awards.

Subsequently, the Federal Arbitration Act (FAA) was firstly codified and enacted on July 30 1947, which was cited as title 9 of the United States Code, entitled “Arbitration”. FAA was mainly based on the contents of the 1925 Arbitration Act, which was composed with 14 sections, as it removed section 14 of the previous act. As codified to be one title of the U.S. Code, the FAA gave brief summary of each section and added each section a title. It also concentrated on the maritime and commercial arbitration. It recognized the validity of the arbitration agreement\textsuperscript{729}, court support for the arbitral proceedings, and court control of arbitral awards. As the contents of the FAA were almost the same as the former 1925 Act, thus no provision on the recognition and enforcement of arbitral awards was legislated.

On July 31 1970, the United States began to implement the New York Convention, and enacted Chapter 2 of the FAA, which concerned the incorporation of the New York Convention into the domestic law system of America. Although the American delegates had joined in the conference on discussing and drafting the New York Convention, the United States had waited for a long time to accede to it.

\textsuperscript{724} Edward Brunet, Richard E. Speidel, Jean R. Sternlight, Stephen J. Ware, \textit{Arbitration Law in America, A Critical Assement}, Cambridge University Press 2006, p.36.
\textsuperscript{725} Chapter 213, United States Arbitration Act, 12 February 1925, public, no.401.
\textsuperscript{726} \textit{Id.} Section 2 indicates “that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
\textsuperscript{727} See supra note 712, Section 9.
\textsuperscript{728} See supra note 712, Section 10.
\textsuperscript{729} See Federal Arbitration Act, section 1 and section 2.
According to §201 of Chapter 2, which indicates “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter”.\textsuperscript{730} It is clear that instead of directly invoking the provisions of the Convention, the U.S approach firstly incorporated the New York Convention into domestic legal system, and as a great matter under the FAA, recognition and enforcement of foreign arbitral awards procedures would be organized according to US domestic law. The 1970 Act had added Chapter 2, mainly pointing out the arbitration agreement falling under the New York Convention, and providing some procedural supporting for smoothly organization of arbitral proceedings, or the following recognition and enforcement of foreign arbitral awards procedure. The United States made both reciprocity and commercial reservations when acceded to the New York Convention.\textsuperscript{731}

Section 208 provides clear reference to Chapter 1 of FAA, indicating “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”.\textsuperscript{732} Accordingly, section 1 through 14 of Chapter 1 may also be invoked to recognition or enforcement of foreign arbitral awards. Further, there is no special article or provision designated for recognition and enforcement of foreign arbitral awards through section 201 to 208, thus the relevant parts of the New York Convention will be directly referred to when applying for recognition and enforcement of international commercial arbitral awards pending the competent U.S. courts under the mechanism of Chapter 2 of the FAA.

Another chapter was added on the FAA on August 15, 1990, which was Chapter 3 for implementing the Panama Convention into the U.S. domestic law. There were seven sections under Chapter 3. The incorporation of the 1975 Panama Convention had referred to the relevant sections of Chapter 2, as section 302 provides that “Section 202, 203, 204, 205 and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purpose of this chapter ‘the Convention’ shall mean the inter-American Convention.”\textsuperscript{733} According to section 304 of this chapter, reciprocity reservation was also announced by the United States. The relationship between the New York Convention and the 1975 Panama Convention on application to arbitral awards under both conventions was clearly stated. It decided the application order of the two conventions on the criterion of the nationality of the parties, holding “(1) if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply; (2) in all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply”.\textsuperscript{734} Simultaneously, residual application of Chapter 1 of the FAA was also

\textsuperscript{730} See Federal Arbitration Act, section 201.
\textsuperscript{732} See Federal Arbitration Act, section 208.
\textsuperscript{733} See section 302 of the Federal Arbitration Act.
\textsuperscript{734} See section 305 of the Federal Arbitration Act.
provided in section 307 of Chapter 3.

This is the federal arbitration law of the United States, and it is obvious that the basis of this federal arbitration law was originated in 1925. It has been exemplified when the United States acceded to the two important multilateral arbitration conventions, and incorporated both of them as a separate chapter of the FAA. After the adoption of Chapter 3 in 1990, it has not been changed or amended any more till now. Thus the United States federal arbitration law has not directly taken the UNCITRAL Model Law by amending its domestic law. Nevertheless, as the federal legal system of the US, different states have their own legislation power, including the promulgation of arbitration law. According to the status of the Model Law, there are eight states of the United States that have already drafted or amended their internal arbitration law, including California (1988), Connecticut (1989), Texas (1989), Oregon (1991), Illinois (1998), Louisiana (2006), Florida (2010) and Georgia (2012), of which Florida has legislated its arbitration law based on the text of the Model Law with amendments adopted in 2006.735 In a work, the Model Law has gradually affected different states legislation and arbitration practice on the one hand, and has not yet been incorporated at the federal level.

Different commentators have separate arguments on the question whether or not to adopt the Model Law into the Federal Arbitration Act. For instance, one opinion states that “to a great extent the UNCITRAL model law parallels existing United States law in that many of its provisions and basic concepts are similar. Both the UNCITRAL and the United States systems are ideally suited for international commercial arbitration as the limit judicial interference, recognize the principle of party autonomy and have an effective mechanism for the enforcement of foreign awards. Therefore, since the United States already has a comprehensive body of national arbitration law, it is unlikely that it will adopt the UNCITRAL model law in its entirety. Rather, the United States might consider selective amendment of its federal arbitration laws to reflect certain beneficial provisions of the model law. Most importantly, since the United States system is already largely consistent with the model law approach, this country’s failure to adopt it in its entirety will not hinder efforts towards global uniformity of national arbitration laws.”736

While another commentator argues that “the problems summarized herein- the gaps in the present FAA, the uncertain relationship between federal and state law, and the multiplicity of state laws- provide difficulties even for U.S. lawyers and judges. Adoption of the Model Law would cut the Gordian knot. Immediately, the United States would have an internationally accepted arbitration procedure which addresses the key issues of international arbitrations while eliminating the tension between federal and state law by preempting the latter. As the increasing number of jurisdictions enacting the Model Law evince, the concept of an internationally recognized and comprehensive code which also provides maximum party autonomy

must necessarily triumph over limited amendments to a 1925 law.”

Nowadays there are not new trends on amending the FAA to incorporate the Model Law at the federal level. With the fast development of international arbitration research and practice in the United States, together with the growing adoption of the Model Law into various states internal law systems, the unified federal arbitration law may be affected in the future, to promote more liberal and ideal arbitration legal system for recognition and enforcement of international commercial arbitral awards in the United States.

3.4.1.3 France

Arbitration legislation and activities has also endured a long history of development in France. As summarized by one of the most famous arbitration professor, during a long period before the French Revolution, arbitration had been widely practiced as a dispute resolution for commercial disputes, which was legislatively declared to be the most reasonable means for the termination of disputes between citizens. However, during the 18th and 19th century, the legislation and judicial practice took a hostile attitude towards arbitration, when the French Revolution soon turned on those progeny, with arbitration eventually being considered (ironically) a threat to the rule of law and the authority of the revolutionary state. The following legislation of the 1806 Napoleonic Code of Civil Procedure reflected this hostility. And it was also reflected in the parallel commentary and judicial decisions of the French courts. The judicial decisions that followed upon these observations significantly limited the practicality and usefulness of arbitration agreements in 19th (and early 20th) century France. Indeed, it was only with France’s ratification of the Geneva Protocol of 1923, and then agreements to arbitrate future international commercial disputes became fully enforceable in French courts.

During several decades of the 19th and early 20th century, the arbitration-related law of France was not amended or perfected, until the early 1980s. As introduced by one professor, “prior to May 1980, the French domestic law on arbitration had not been subjected to any substantial legislative reform since the early nineteenth century. The procedural part of that law, which contained practically all of the French legislative provisions applying to arbitration, was out of date and in need of reconsideration. Despite the considerable French procedural law reforms enacted in 1975, articles 1005 through 1028 of the Nouveau Code de procedure civile had not been revised to any significant extent since the enactment of the Code de procedure civile in 1806”. As referred previously, a series of multilateral arbitration conventions have been negotiated and promulgated since 1920s. And France has ratified all of those influential international treaties on promoting the development and practice of international commercial arbitration, including the 1923 Geneva

738 It indicates the 1806 Napoleonic Code of Civil Procedure. See supra note 1, Gary B. Born, p.38.
739 See supra note 1, Gary B. Born, pp.37-39.
Protocol (ratification date 1928/6/7), the 1927 Geneva Convention (1931/5/13), the 1958 New York Convention (1959/6/26) and the 1961 European Convention (1966/12/16). With the regulations of these international arbitration conventions, international commercial arbitration system developed faster in France, which was exemplified, widely invoked and practiced, leaving the defect that such new changes and trends in legal practices was not timely reflected in the French arbitration legislation.

As summarized by some jurists in their treaties or academic publications, although the French arbitration legislation amendments had not been organized more than one and half century, the judicial practices of the French courts and theoretical research works played a vital role in promoting the development of international commercial arbitration system in France. For example, the former professor indicates that “despite the absence of modern legislation, contemporary French courts exhibited a remarkably receptive attitude towards arbitration, and recourse to arbitration was frequent in commercial practice. As a consequence, a sophisticated body of French case law and scholarly commentary pertained to the practice of arbitration and there arose a need for legislation on arbitration which would correspond to these developments.”

Another commentator states that “the use of privately created arbitral tribunals, though resting in the last analysis on practical considerations, requires theoretical explanation and justification. On both scores, French jurists and institutions have made enormous contributions. The stereotype of a civil law system such as that of France suggests that these issues will over time be addressed and resolved by the legislature or, at least since the Constitution of 1958 came into force, by the executive. But here, as in so many areas of French law, it was the courts, assisted by legal scholarship that led the way.”

He also insists that not only the courts, but also the legal scholars have made invaluable contributions to creating and grounding a legal regime that rendered international commercial arbitration an attractive and effective dispute-resolution process. Private institutions like the International Chamber of Commerce (ICC) also play a vital role. The last-and most remarkable characteristic of the legal regime recognized by French law for international commercial arbitration results from the collaboration of these three agents: courts, scholars and private institutions.

Having waited for more than one and half century, the arbitration-related provisions of France was first time reformed and perfected in 1980 and 1981 respectively for domestic arbitration and international arbitration. As introduced by the famous professor, international arbitration in France is governed by the French New Code of Civil Procedure, principally as adopted in decrees promulgated on May 14 1980 and May 12 1981. The two decrees added Articles 1442-1507 to the French New Code of Civil Procedure. Articles 1442 to 1491 of the New Code of Civil Procedure applied to domestic arbitrations, while Articles 1492 to 1507 applied to

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741 Id. pp.275-276.
743 Id. pp.1056-1057.
“international” arbitrations.\footnote{744}{See supra note 1, Gary B. Born, p.122.}

It is summarized by a practitioner that “the 1980 Decree regulates private arbitration law generally without expressly referring to arbitration in private international law and repeals the articles of the old Code of Civil Procedure regulating arbitration and replaces them by a new and more elaborate set of provisions which gives effect to legal principles and practices developed over the years by the French courts and arbitral tribunals and in doctrinal writings. The new set of provisions includes a number of original rules as regards the duration and constitution of the arbitral tribunal, the procedural rules to be applied by the arbitrators, methods of review of the arbitral awards and other matters. Not the least of the merits of the 1980 Decree is that it replaces outdated enactments, legal principles and case law by a succinct, but intelligible, set of rules for the arbitration of domestic disputes.”\footnote{745}{Id. It is also argued by another professor before the 1981 Decree on international arbitration provisions had been promulgated, stating that “there are no French statutory provisions or codal texts dealing directly with matters of international arbitration. Consequently, French courts have had the option of applying by analogy the relevant provisions of the domestic arbitration law or devising special rules to meet the unique needs of international commercial arbitration.” See Thomas E. Carbonneau, \textit{The Elaboration of A French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity}, 55 Tul. L. Rev. 3-4, 1980-1981.}

Besides, it is said that “since the nineteenth century, the French courts have relied upon their own perceptive assessment of the needs of international commercial arbitration and have not neglected opportunities to foster the growth and continued development of international commercial dispute resolution through arbitration. In any event, the jurisprudence in this area could serve as a lucid substantive basis upon which to construct a statutory codification in France regarding matters of international commercial arbitration.”\footnote{746}{Id. Thomas E. Carbonneau, \textit{The Elaboration of A French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity}, 55 Tul. L. Rev. 61-62, 1980.}

The promulgation of the international arbitration provisions was realized one year later, which was published through Decree No.81.500 Amending the Code of Civil Procedure. The articles 1492 through 1507 was divided into two titles, of which Title V was concerned with definition of international arbitration, the contents of international arbitration agreement and power of the arbitrators, while Title VI regulated the recognition, enforcement and challenge of arbitral awards rendered abroad or in international arbitration procedures in France. As introduced by other commentators, “competition to attract international commercial arbitration cases has also attracted the attention of the national legislatures of leading nations. In 1981 France promulgated an arbitration law limiting judicial intervention by defining the grounds upon which a party to an international commercial arbitration conducted in France may seek to set aside an arbitrator’s award in the French courts.”\footnote{748}{Steven J. Stein and Daniel R. Wotman, \textit{International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules}, 38 Bus. Law. 1686, 1982-1983.}
In the recent period, theoretical research works and judicial practices in France; while on the other hand, these tremendous alterations have further enhanced the efficiency and success of the pro-arbitration trends of French judicial institutions and arbitration culture. It is obvious that these amendments was prior to the publication of the UNCITRAL Model Law, and thus did not completely take the provisions of the Model Law into the domestic arbitration laws of France. Nevertheless, it deserves high level appreciation that France has taken a liberal legislation and judicial interpretation for international commercial arbitration during the past century, which has simultaneously affected that of other jurisdictions.

The latest amendment of the arbitration-related provisions in France was the Decree No.2011-48 of 13 January 2011 for reforming the law governing arbitration. According to this reform, Book IV of the Code of Civil Procedure was redrafted, containing articles 1442 through 1527, of which two titles were used distinctively on domestic arbitration and international arbitration. As a commentator states, “Given that France already had one of the most progressive international arbitration laws in the world, one could reasonably wonder why a new law was necessary. The purpose of the new law, however, is not to fix something that was broken. Rather, it is principally designed to capture the pro-arbitration case law the French courts have developed over the past thirty years and reflect in the Code. This is a welcome development, as it makes the law more accessible.”

Such an opinion is shared by another commentator, who argues that “France was one of the first states to have adopted a very favorable law on arbitration in 1981. The admittedly more conservative UNCITRAL Model Law was adopted in 1985. French courts had in turn shown an extreme pro-arbitration bias as regards all aspects of arbitration. The primary impetus for the reform was therefore not so much the necessity of improving the existing rules- which had already made France one of the preferred places where an international arbitration can be conducted- but the perceived need after 30 years of abundant case law, to render French law on arbitration even more readily accessible to foreign practitioners.”

Because it is generally believed that Arbitration Law of France is more favorable and liberal than the UNCITRAL Model Law, the latest amendment did not take the approach of incorporating the provisions of the Model Law into the domestic arbitration legislation. The latest perfection of the French Arbitration Law introduced several innovations. The structural improvement deserves appreciation, as the Arbitration Law is clearly divided into two Titles, one for Domestic Arbitration, and the other for International Arbitration. It is worth paying close attention to the part that provisions of Title II on International Arbitration have separated the international arbitration procedures organized in France and abroad, especially for the recourse of arbitral awards.

Specifically, as summarized by the above commentators Jennifer Kirby, the new law reflects three significant innovations: First, the new law provides that an action challenging an award shall not suspend enforcement of that award, unless French

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courts decide to stay enforcement because a party’s rights could be severely prejudiced (Article 1526); Second, the new law expressly permits parties, by way of a specific agreement, to waive their right to bring an action to set aside an arbitral award rendered in France (Article 1522); Finally, the new law also takes an innovative position with respect to the presumption of confidentiality in international arbitration—it eliminates it.751

Other comments on the innovations of the latest arbitration law indicate to broaden the scope of the parties’ freedom with respect to all aspect of arbitration, emphasizing court support of arbitration, no court interference on arbitral process, non-significant change of enforcement and review of arbitral awards. It also provides that other than assisting in the constitution of the arbitral tribunal or in evidentiary matters vis-a-vis third parties, French courts will not interfere in the conduct of the arbitral process. Moreover, the reversal of traditional confidentiality presumption as regards the international arbitration is discussed.752 According to the latest reform and perfection, the French Arbitration Law has been more favorable for both domestic and international commercial arbitration, which is based on the various international arbitration conventions, the predecessor legislation and the updated judicial practice through the territory of France. It has greatly promoted the effectiveness of international commercial arbitration system in France. Just as the previous commentator states, “the international arbitration in France had been the leading position, and for other countries considering revisions to their arbitration laws, France’s new law will almost certainly serve as a source of inspiration and discussion.”753

3.4.1.4 People’s Republic of China

Since the founding of People’s Republic of China, arbitration has been recognized as a valid and favorable way for resolving disputes. The Foreign Trade Arbitration Commission, which was the predecessor of CIETAC, was set up in April 1956 under the auspices of China Council for the Promotion of International Trade (CCPIT), in accordance with the Decision Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade adopted on May 6 1954 at the 215th session of the Government Administration Council.754 However, for some historical reasons, arbitration legislation was not commenced at that time. Since the adoption of “Reform and Opening-up” policy in the later 1970s, arbitration-related legislation and arbitration practice developed dramatically, especially after China’s accession to the New York Convention which took effect on 22 April 1987.

Under the Chinese legislation system, similar as Germany, Japan and France, the arbitration-related laws and regulations has been drafted as one chapter of the Civil

Procedure Law. The first version of the Civil Procedure Law (for Trial Implementation) was promulgated on March 8, 1982, and became effective on October 1, 1982, of which Chapter 20 was mainly dealing with arbitration. However, there were only four articles contained in this chapter, which only adjusted the foreign-related arbitration conducted in the territory of P.R.C. The regulation for recognition and enforcement of foreign arbitral awards was provided in Chapter 23 of the judicial assistance with foreign courts, of which Article 204 provided the principle of execution final foreign judgments or arbitral awards. Accordingly, recognition and enforcement of foreign arbitral awards was based on the international conventions which China had ratified or acceded to, or the reciprocity principle. In addition, recognition and enforcement of the foreign arbitral awards would not violate the basic principle of the Chinese law, the national or social interests of China. Otherwise, the foreign arbitral awards would be dismissed and returned back to their home courts.

China decided to ratify the New York Convention on December 2, 1986, based upon the decision of the Standing Committee of the National People’s Congress on acceding to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which announced both the reciprocity and commercial reservations according to Article I (3) of the New York Convention. In order to fulfill the treaty obligation, the first Civil Procedure Law was promulgated on April 9, 1991, which replaced the Trial Implementation version of Civil Procedure Law. The same approach as the aforementioned Trial Implementation version, provisions for recognition and enforcement of foreign arbitral awards was arranged in the chapter of judicial assistance. Accordingly, it was firstly draft a separate article, which had divided the recognition and enforcement of foreign arbitral awards from that of foreign judgments. Article 269 of the 1991 Civil Procedure Law indicated almost the same principle, including international treaty obligation or reciprocity, for recognition and enforcement of arbitral awards rendered by foreign arbitration institutions.

Since China had acceded to the New York Convention, all of the provisions of the Convention would be directly invoked and used when recognition and enforcement of foreign arbitral awards pending any people’s court.

Subsequently, separate arbitration legislation was planned and the first Arbitration Law of China was promulgated on August 31, 1994, and became effective on September 1, 1995. Therefore, the basic root for perfecting legal framework for international commercial arbitration in China is the same as Japan, because the separate arbitration law detaches from the civil procedure law.

However, unlike Japan, the arbitration legislation of China does not directly incorporate the UNCITRAL Model Law. There are several differences comparing

755 Civil Procedure Law of the People’s Republic of China (for the trial implementation), passed on the 22nd Meeting of the Fifth Executive Committee of the National People’s Congress on March 8, 1982, Chapter 20: Arbitration.
756 Id. Article 204.
with the Arbitration Law of Japan. For example, the 1994 Arbitration Law of China is only legislated for the purely domestic arbitration procedure and the foreign-related arbitration procedure. The annulment of foreign-related arbitral awards, recognition and enforcement of foreign-related arbitral awards and recognition and enforcement of the foreign arbitral awards should still be regulated by the relevant provisions of the PRC Civil Procedure Law. Although the PRC Civil Procedure Law has endured twice amendments separately in 2007 and 2012, such an approach has not been changed. The distinction of different standards for recognition and enforcement of the three kinds of arbitral awards may cause confusion for commercial arbitration practices in China. When application for recognition and enforcement of foreign arbitral awards is filed with the people’s court, it should be adjudicated according to Article 283 of the effective PRC Civil Procedure Law, under which Article V of the New York Convention will be directly invoked to judge the case. In addition, the Supreme People’s Court of China has published a series of judicial interventions for instructing judicial proceeding connected with arbitration procedures, or recognition and enforcement of international commercial arbitration agreements or arbitral awards.

Notwithstanding the legal framework for recognition and enforcement of foreign or international commercial arbitration in China has been gradually perfected and improved, there are still many controversial problems existed under the contemporary arbitration-related laws. As discussed in the former chapters, there are still a lot of refusals of foreign arbitral awards decided by different people’s courts of China, which are finally affirmed by the Supreme People’s Court. Most of those refusals of recognition and enforcement of international commercial arbitral awards are resulted from the deficiencies of the relevant provisions of the Chinese arbitration-related laws. In order to promote further improvement of the international commercial arbitration system in China, it is suggested that more attentions should be paid to the growing importance of the relevant domestic arbitration laws and regulations. Especially when more and more states have amendment or legislated their domestic arbitration laws based upon the UNCITRAL Model Law, incorporating the Model Law for resolving the existed problems of the Chinese arbitration law will be an appropriate and efficient solution.

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760 See Article 70 and 71 of the Arbitration Law of People’s Republic of China, which concern Article 274 of the effective Civil Procedure Law of China.
761 See Article 283 of the effective Civil Procedure Law of China, which is completely the same as article 269 of the 1991 Civil Procedure Law. see supra note 735.
762 For instances, those judicial interpretations including, but not limited to, the following:
3.4.2 Incorporation of the Model Law into Domestic Arbitration Laws

Some other States, including the well developed and the burgeoning ones, where international commercial arbitration is widely practiced, have amended their domestic arbitration-related laws by incorporating to the UNCITRAL Model Law during the past two decades. Since the Model Law was promulgated in 1985, these four countries discussed below have realized the fast development of international commercial arbitration, and scanned their domestic arbitration laws for eliminating existing barriers to the future progressing of international commercial arbitration in their territories. Two countries did not revise their arbitration-related regulations for more than a century, while the other two developing nations got independence at the 1940s. They have taken a practicable and efficient method to catch up with the mainstream of legislation and legal practice of international commercial arbitration system, by directly taking the Model Law into their domestic legal systems. It is a speedy way to get rid of the existing regulations which has already caused, or may cause further barriers to the international commercial arbitration system, especially to the highly expected goal of smoothly executing of international commercial arbitral awards in the relevant jurisdiction.

3.4.2.1 Germany

Arbitration system has been historically practiced by merchants in Germany, perhaps particularly because of the lacking of a centralized government (until comparatively recent) and the actual demands of international commerce. Therefore, a German commentator at the beginning of the 20th century observed, with regards to historic German experiences, that “arbitration tribunals have at all times been regarded as an urgent necessity by the community of merchants and legislation has always granted them a place alongside the ordinary courts.” As overviewed by other research, the first codification of arbitration law on a federal level was the promulgation of the 10th Book of the Code of Civil Procedure (Zivilprozessordnung-ZPO) in 1879, which adopted a favorable approach to arbitration. This relevant liberal law was consisted of only 24 sections, and was to a large extent already based upon the same principles of arbitration- party autonomy and limited court intervention, which underlined the critical parts of UNCITRAL Model Law on International Commercial.

Specifically, the comment provided that arbitration agreements were respected no matter what signed before or after disputes arose, which could effectively exclude the courts’ jurisdiction. Then arbitral awards were treated the same as courts’ judgments, which would be rejected for execution only through few grounds certified. Furthermore, no reviewing of the merits of the awards was accepted. The disputes parties had been authorized with great freedom arranging their arbitration proceedings. All of those basic principles formed the general principles recognized nowadays. Thus

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763 See supra note 1, Gary B. Born, p. 49.
764 Karl-Heinz Bockstiegel, Stefan Kroll, Patricia Nacimiento, Germany as a Place for International and Domestic Arbitrations- General Overview, Transnational Dispute Management, Vol.6, issue 1, March 2009, p.5.
even under few modifications, in particular the rules for recognition and enforcement of foreign arbitral awards, the initial Arbitration Law 1879 were effective during the long period of time, until the latest perfection of it on January 1, 1998.\textsuperscript{765}

Since the uniform arbitration legislation was promulgated in the late 19\textsuperscript{th} and early 20\textsuperscript{th} century, the German courts gave active support to the arbitral process simultaneously, including pioneering the development of what would later termed as the separability doctrine to facilitate the enforcement of arbitration agreements. However, in the following decades, the German courts acted to guard their rights with extreme jealousy. For instance, the courts were too inclined to set aside arbitral awards basing on even a slight failure to comply with the provisions of the Civil Procedure Code. The mistrust of arbitration and commentary developed with particular vigor by German courts between the two World Wars.\textsuperscript{766} Nevertheless, besides the hostile attitudes of the domestic courts, Germany ratified the Geneva Protocol on November 5 1924 and the Geneva Convention on September 1 1930, which had been a relevant promotion for recognition and enforcement of cross border commercial arbitration clauses and arbitral awards basing upon its treaty obligations. Subsequently, Germany participated in the negotiation of the 1958 New York Convention, and became one of the signatory parties on June 10, 1958. It then ratified the Convention on June 30, 1961. Further, German signed and ratified the 1961 European Convention on October 27, 1964. Under these multilateral arbitration conventions, Germany has gradually changed its previous practice and reduced judicial obstacles to both domestic and international commercial arbitration under its territory.

However, different view was emerged. As a commentator criticized that “prior to the enactment of Garman Arbitration Act 1998, the law was considered anachronistic. The German Arbitration Act 1998, which came into force on January 1 1998, was therefore adopted to better facilitate domestic and international arbitration proceedings in Germany, in order to create an arbitration-friendly jurisdiction that would be also attractive to foreign practitioners.”\textsuperscript{767}

It was reviewed by the legislator that the Federal Law Reform Commission had to carefully balance the freedom of the parties to practice arbitration and the means of control by the State. Remembering the experience of 120 years’ legislation and jurisprudence, together with emphasizing the present state of the art and the perspectives, the Reform Commission and the legislator sought and finally reached a feasible solution.\textsuperscript{768} The latest 1998 Arbitration Act of Germany was codified in the Tenth Book of the German Code of Civil Procedure, sections1025 thorough1066, 

\textsuperscript{765} Id. p.5. It was also argued and concluded that “the 1877 Code of Civil Procedure incorporated provisions that freed arbitrators from the obligations to apply strict legal rules (and concurrently, form judicial review of the substance of awards)”. See supra note 1, Gary B. Born, p.49.

\textsuperscript{766} See supra note 1, Gary B. Born, p.50.

\textsuperscript{767} Noussia, K. Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law, 2010, p.15. Such purpose of the amendment of the arbitration law of Germany has also been indicated by other commentators, who state that “the revision was intended to make German arbitration law more user friendly and to bring it into line with international practice.” See Id. p.5.

\textsuperscript{768} Ottoarndt Glossner, The Cooperation Between Arbitrators and the Courts: Examples Drawn from the New German Law, General editor Albert van den Berg, Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, Kluwer Law International 1999, p.422.
which was modeled by the UNCITRAL Model Law. Referring to the specific contents of the new arbitration law, the basic framework and contents of the Model Law has been incorporated in. It is appreciated that “from the various provisions of the law, some characteristic features of the German arbitration law can be deduced. These include the principle of territoriality, the prevailing role of party autonomy, the guarantee of due process and effective proceedings and the limitation of court interference. In concert with the generally arbitration friendly approach adopted by German courts, these features shape the practice of arbitration in Germany.” With perfected arbitration law, and the efficient court assistance which insists invoking the more-favorable-right provision under Article VII (1) of the New York Convention, barriers to international commercial arbitration will be further reduced or eliminated in Germany.

3.4.2.2 Japan

The arbitration-related law was historically legislated in Japan. The early arbitration regulation was drafted and inserted into Book VIII of the Civil Procedure Code on April 21, 1890. These provisions on the arbitration procedure were composed in 20 articles, which provided the basic contents for arbitration system. For instance, conditions for arbitration agreement validity, selection and the challenge procedure of arbitrators, voidance of arbitration agreement, arbitration trial procedure and court assistance, illegitimate arbitration procedure and power of arbitrators, the verdict of arbitral awards and its validity conditions, the final validity of arbitral awards, setting aside arbitral awards and compulsory execution of arbitral awards, and the jurisdictions of courts concerning arbitration procedures, etc. Accordingly, the most basic structures for the practice of arbitration had been established, which recognized and protected the validity of arbitration as an alternative dispute resolution.

However, as argued by a Japanese professor, the arbitration-related provisions were not initially contained in the draft bill of the Civil Procedure Code. It was suddenly inserted in the Meiji 23 Code in 1890. Comparing with the draft bill of the Civil Procedure Code, it was provided that if considering the closeness with the

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769 See supra note 764. Karl-Heinz Bockstiegel, Stefan Kroll, Patricia Nacimiento, Germany as a Place for International and Domestic Arbitrations- General Overview, Transnational Dispute Management, Vol.6, issue 1, March 2009, pp.17-18. The similar opinion had been argued by other commentator, who provided that “the reason for this trend (suitable for arbitration) is not only the acceptance of the well known and arbitration-friendly Model Law. Germany as the designated place of arbitration compares favorably with its international competitors given its very efficient court system that willingly supports arbitral tribunals, if required.” See Jorg Risse, Arbitration in Germany: Schieds VZ journal Promotes Arbitration in Germany, 4 German L.J. 199, 2003.


771 Id. Article786 and 787.

772 Id. Article786~792.

773 Id. Article793.

774 Id. Article794~796.

775 Id. Article797.

776 Id. Article798 and 799.

777 Id. Article 800.

778 Id. Article 801 and 802.

779 Id. Article 805.
contemporary German Code of Civil Procedure, the Japanese arbitration legislation in 1890 was nothing but the direct translation of the relevant contents of the German Code of Civil Procedure. Thus the specific provisions of the Japanese arbitration law were therefore outdated, which was the same as the relevant German arbitration law before the several amendments.\footnote{It was also summarized by another commentator who provided the same statement, providing “under Japanese law there is no distinction between international and domestic arbitration. Both are governed by Book VIII of the old Code of Civil Procedure which was enacted as Law No. 29 of 1899 and based on the German Code of Civil Procedure. For a century this law has not been changed in substance. In 1996 when the old Code underwent wholesale amendments, Book VIII remains as it was and, together with Book VII, was renamed the Public Notices and Arbitration Procedure Law.” See Russell Thirgood, \textit{A Critique of Foreign Arbitration in Japan}, Journal of International Arbitration, Vol.18, 2001.} It was also surprising that comparing with other parts of the Civil Procedure Code which had been largely revised subsequently, the arbitration procedure concerned provisions had absolutely no been changed since then, and had become “fossil” existence in the Civil Procedure Code.\footnote{Matsuura Kaoru, Aoyama Yoshimitsu, \textit{Gendai Chusaiho No Ronten (Issues of the Contemporary Arbitration Law)}, Kabushiki Kaisha Yuhikaku 1998.5.30, p.4.}

During the whole 20th century, the arbitration legislation had not seen any amendment. Japan acceded to both the Geneva Protocol on June 4 1928 and Geneva Convention on July 11 1952, and became member state of the New York Convention on June 20 1961. Nevertheless, it was questioned by the former Japanese professors that it was largely uncertain on what extent such international agreements were meaningful for the daily life of contemporary Japanese people.\footnote{Id. p.5.} However, he also admitted that the accession to the New York Convention was an important turning point for the development of arbitration system in Japan, because it was clearly expressed that Japan had incorporated itself into the rapidly exemplified interactions of international economy.\footnote{Id. p.6-7.} During the past decades, comparing with other developed countries in the west world, development of international commercial arbitration system seemed lagged behind in Japan. However, several new types of institution arbitrations, such as arbitration for construction work, transportation accidents, etc. had been established and widely practiced in Japan.\footnote{Id. p.7-8.} While ratification of the New York Convention passed more than 30 years, the contents of the Arbitration Law of Japan was not substantially redrafted or amended despite the promulgation of the new Civil Procedure Code on June 26 1996. The new Civil Procedure Code only rearranged the legal framework for arbitration procedure according to the supplementary provision Article 2. Accordingly, the title of arbitration procedure was changed to be \textit{Act on Public Summons Procedure and Arbitration Procedure}.\footnote{Heisei 8, June 26 Gougai Law No.109: Minji Soshoho Husoku Nijyo Ni Yoru Kaisei (Amendment according to Article 2 of the Supplementary Provisions) Daimei Kaisei: “Kouji Saikoku Tetsuduki Oyobi Chusai Tetsuduki Ni}


Referring to the specific contents of the \textit{Act on Public
Summons Procedure and Arbitration Procedure, excepting some minimal vocabulary change, the provisions of the revised law were almost the same as the first version of arbitration procedure in Book VIII of the 1890 Civil Procedure Code, particularly, even the ranking of the articles was not changed at all, referring to articles 786 through 805 of the Civil Procedure Code.  

With the fast development of international commercial arbitration system all over the world, this influential alternative dispute resolution was however not so actively practiced in Japan. Another significant turning point to the stagnancy of both legislation and legal practice of arbitration system was originated from one part of the Japan-American Framework Consultation, where the torpid international commercial arbitration system in Japan was criticized. Therefore the Japanese government faced the problems, and gave clear answer to American, for reforming and promoting the international arbitration system which should cover the foreign parties. After that, Japan conducted active research on international commercial arbitration system, and finally promulgated its separate domestic arbitration law. The Arbitration Law of Japan was published through Law No.138 on August 1 2003, and came into force on March 1 2004. It was based upon the UNCITRAL Model Law, which was intended to promote domestic and international arbitration practice in Japan, and reflected the latest trends of international commercial arbitration system. This separate arbitration legislation was carried out some decades later subsequent to the ratification of the New York Convention.

Specifically, the Arbitration Law of Japan was mainly promulgated for arbitration proceedings organized in Japan. It nevertheless considered the important parts of international commercial arbitration. As reflected in Article 45 and Article 46 of the Arbitration Law, grounds of refusing recognition and enforcement of both domestic and international arbitral awards were legislated, which resembled the Article V of the New York Convention and Article 36 of the Model Law. After the incorporation of the Model Law, Japan has greatly improved the legal framework for international commercial arbitration, which is well composed of the most influential New York Convention and the Model Law.
In a word, the outdated and less satisfied provisions of arbitration procedures contained in the Civil Procedure Code, which were substantially not been perfected more than a century, have been completely revised and amended since the promulgation of separate arbitration law in the past decade. The Arbitration Law was finally revised through Law No.147 in 2004. Under the well formed legal framework, international commercial arbitration has been firstly promoted at the legislation level. In addition, future supports of the juridical authorities are necessary for increasing the business parties to choose international commercial arbitration to resolve their disputes in Japan. It is suggested that Japan should pay more attention to the judicial interpretations of the well formed arbitration law in the next stage, to establish a more-favorable environment for the recognition and enforcement of international commercial arbitration agreements and arbitral awards.

3.4.2.3 Singapore

The independent history of Singapore arbitration legislation was not long, since it had been a colony of the United Kingdom. At that time, separate arbitration legislation was unnecessary, because the arbitration system was regulated by arbitration laws of its suzerain. After Singapore got independence on August 9 1965, it was gradually turned into one of the most outstanding centers of international commercial arbitration at the Asian-Pacific area, growing with tremendous international transactions and fast economy development. Since then, international commercial arbitration has been one of the most important ways of dispute resolution in Singapore. The Singapore government has made great effort to legislate and improve both domestic and international arbitration acts.

According to the history of legislation on arbitration procedure, Singapore first enacted a uniform arbitration act which prescribed both domestic and foreign arbitration procedures. The first domestic arbitration act was enacted in 1953, which was based on the English Arbitration Act 1950. As one Singaporean comments that “the 1953 Act was amended from time to time, until its latest edition in 1985. It is now entirely replaced by the Arbitration Act 2001 (No.37 of 2001)”. The 2001 Arbitration Act on domestic arbitration procedure came into force on March 1 2002, which has been slightly amended since then. Thus the 2001 (domestic) Arbitration Act is still in effect nowadays.

As for the international arbitration procedure, Singapore prepared and successfully acceded to the New York Convention on August 21 1986, it had simultaneously begun to amend its domestic arbitration laws since 1985, to adapt to the requirements of the New York Convention. The initial version of international arbitration law was commenced on December 19 1986, called the Arbitration (Foreign Awards) Act 1986, which was contained in Chapter 10 A of the 1985 Revised Edition. Subsequently, the first separate international arbitration act was promulgated as Act 23 of 1994, which was intended to provide stipulations for the conduct of international commercial arbitrations based on the UNCITRAL Model Law, and for

conciliation proceeding, in order to give effect to the New York Convention and for matters connected therewith.\footnote{International Arbitration Act 1994, No.23 of 1994, date of Commencement: January 27 1995.} After the 1994 International Arbitration Act was enacted, the arbitration law of Singapore was divided into domestic Arbitration Act and International Arbitration Act separately.

The International Arbitration Act 1994 (IAA) is based on the specific contents of the Model Law. It is the first time a legislation of international commercial arbitration that takes a different approach from its traditions.\footnote{For example, as one professor indicates that “Singapore’s arbitration laws have been modeled on English legislation and still remain the basis of arbitration in Singapore. But parties to international disputes have now been given the option of submitting their dispute to an alternative regime provided by the UNCITRAL Model Law. The adoption of the Model Law is a significant departure, which was made after a report of a Committee set up to study the question of the adoption of the Model Law in Singapore. How the Model Law, which contains civilian notions of arbitration, will mesh with English commercial law and English notions of arbitration will be an interesting phenomenon to study in the future.” See M. Sornarajah, The Adoption of the UNCITRAL Model Law on Arbitration in Singapore, 1 Y.B. Int’l Fin. & Econ. L. 249-250, 1996.} With the exception of Chapter VIII, the IAA has incorporated almost all the contents of the Model Law.\footnote{See Article 3 (1) of the 1994 IAA, providing “ Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.”} As stated by one scholar, “it is evident from this section that the Act (1994) makes some slight changes to the Model Law, but the principal change is the Chapter VIII of the Model Law, which relates to enforcement of awards, is left out altogether. This chapter is replaced by provision taken from earlier legislation in Singapore, the Arbitration (Foreign) Awards Act 1986, which incorporated the New York Convention. The reason for this change was the view that enforcement provisions should be based on the principle of reciprocity that is central to enforcement under the New York Convention, and that there must not be the creation of a general obligation to enforce foreign arbitral awards.”\footnote{See supra note 793, M. Sornarajah, The Adoption of the UNCITRAL Model Law on Arbitration in Singapore, 1 Y.B. Int’l Fin. & Econ. L. 252, 1996.} The reciprocity preservation declared by Singapore when ratified the New York Convention in 1986 influences the legislation approach of the IAA,\footnote{See the Status of the New York Convention 1958, \url{http://www.uncitral.org/uncitrall/en/uncitral_texts/arbitration/NYConvention_status.html} last visit: 2014/2/20.} because the Model Law takes a more liberal approach which permits the recognition and enforcement of arbitral awards no matter where they are rendered.\footnote{See Article 35(1) of the UNCITRAL Model Law on International Commercial Arbitration.} According to Section 31 (2) through (4) of the IAA, it provides grounds for refusal of recognition and enforcement of foreign arbitral awards which are absolutely the same as Article V of the New York Convention.\footnote{See Article 31 (2), (3) and (4) of the Singapore International Arbitration Act of 1994.}

The International Arbitration Act has been revised for several times, and the latest amendment was made by Act 12 of 2012, which came into force on June 1 2012. It was contended that several changes were made under the amendment bill, including, (a) relaxing the current requirement in the IAA that the arbitration agreement must be in writing; (b) allowing the Singapore courts to review rulings by arbitral tribunals that these tribunals do not have jurisdiction to hear the dispute (review of negative jurisdictional rulings); (c) defining the scope of the arbitral tribunals’ powers to award interest in arbitral proceedings, such as granting simple or compound interest on monies claimed in arbitrations and the orders to pay legal costs including powers to
award interest post the date of an Award up to the date of payment; (d) according emergency arbitrators with the same legal status and powers as that of any arbitral tribunal, to ensure that orders made by such emergency arbitrators (whether appointed under the SIAC rules or the rules of any other arbitral institution) are enforced under the IAA regime.

All of the efforts on perfecting the international arbitration-related laws, together with the pro-arbitration supports of the competent authorities have made Singapore to be one of the most famous international arbitration hubs all over the world in a relevant short time, comparing with those arbitration centers seated in UK, France, US, etc. where international arbitration had developed for centuries. And with historical depositions, world-wide famous international arbitration centers were finally established in these jurisdictions. Of course many other elements, such as language or geographical location, have contributed to the success of Singapore among the impetuous competition for getting international commercial arbitration cases. However, the contribution of the well-established legal framework based upon the New York Convention and the UNCITRAL Model Law is the most critical elements for promoting the prosperity of international commercial arbitration practice in Singapore. The successful experience of Singapore for booming international commercial arbitration which is deeply rooted in the fertilized environment of pro-arbitration legislation will be discussed in detail in the next chapter. And the experience will be served as some significant suggestions for further eliminating those controversial barriers to recognition and enforcement of international commercial arbitral awards in other jurisdictions.

3.4.2.4 India

India is one of the Asian countries where international commercial arbitration has developed for a long time, especially with rapid progress in recent years. The legislation and juridical practice of international commercial arbitration could be divided into two periods, pro-independent time and after-independence since 1947. During the colonial time, arbitration legislation was substantially influenced by the English arbitration laws. As an Indian advocate summarizes the brief history of the modern arbitration law in India, “the first arbitration law in India was the Arbitration Act 1899 which was based on the English Arbitration Act 1899. Thereafter through Schedule II of the Code of Civil Procedure, 1908, the provisions relating to the law of arbitration were extended to the other parts of British India. Later, based on the English Arbitration Act 1934, the Arbitration Act 1940 (the 1940 Act) was enacted in India to consolidate and amend the law relating to arbitration effective from 1 July 1940. The 1940 Act was an exhaustive law relating to the domestic arbitration. The 1940 Act empowered the Indian courts to modify the award, remit the award to the arbitrators for reconsideration and to set aside the award on specific grounds.”

The 1940 Act was promulgated for only domestic arbitration procedure, which was the basic legal framework for arbitration practice of India during the next decades. As a commentator states, “the year 1940 is an important year in the history of the law of Arbitration in British India. This (1940) Act extended to the whole of India except J & K. This Act dealt with broadly three kinds of Arbitration viz., (1) Arbitration without intervention of Court; (2) Arbitration with intervention of Court where there is no suit pending and (3) Arbitration in suits. Except as providing by the said Act or any other Act, it applied to all Arbitration including statutory arbitration.”\(^{801}\) Moreover, another commentator indicates, “under the 1940 Act, each interim award could be appealed to successively higher courts so that arbitration could be entangled in the Indian courts for many years. Further, the 1940 Act permitted an Indian court to modify, remit or set aside a domestic award for any one of ten reasons. Under Section 35 of the Act, simply having an arbitration agreement did not take away the jurisdiction of the court to entertain a suit or a proceeding relating to the subject matter of the arbitration between the parties. Once a notice of a suit was given to the arbitrator, any further action in the arbitration became invalid because the proceeding in a court of law prevailed over the proceedings before the arbitrator. The enforcement of arbitral awards by the courts under the 1940 Act left much to be desired. The courts often showed a willingness to scrutinize arbitral awards on their merits.”\(^{802}\)

At the same time, the international commercial arbitration system was adjusted by the multilateral arbitration conventions to which India had acceded, including both the Geneva Protocol and the Geneva Convention. The Arbitration (Protocol and Convention) Act 1937 had been enacted in India to give effect to the two conventions.\(^{803}\) Under this mechanism, India had provided the basic guidelines for both international and domestic arbitrations, which had ensured the smooth recognition and enforcement of foreign arbitral awards in India.

Since India had got independence from the United Kingdom, the international arbitration system entered a new era. India was one of the first signatory countries to the New York Convention and subsequently ratified the Convention on July 13 1960. In order to give effect to the New York Convention, one new arbitration act called the Foreign Awards (Recognition and Enforcement) Act 1961 was enacted by the Indian parliament. Therefore, prior to the latest enactment of the 1996 Arbitration and Conciliation Act, the legal framework for commercial arbitration in India, both domestic and international, was composed of the 1937 Protocol and Convention Act, the 1940 Arbitration Act and the 1961 Foreign Awards Act.\(^{804}\)

Considering the newly promulgated UNCITRAL Model Law in 1985, and reviewing the criticized problems of the previous legislation and the judicial interpretations of India, a new arbitration act was drafted to consolidate and amend

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\(^{803}\) See supra note 800, Vijay Goel & Jitender Jain.

\(^{804}\) *Id.*
the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. The Arbitration and Conciliation Act 1996 (the 1996 Act) was promulgated and enacted by the Indian Parliament on August 16 1996 through No.26 of 1996. This act was also drafted to define the law relating to conciliation procedure and for matters concerned therewith or incidental thereto. The latest amendment of the arbitration act incorporated the UNCITRAL Model Law and unified the domestic arbitration act and the foreign awards act to be a systematic one. The 1996 Act was composed of four parts, of which the former two parts were mainly on the arbitration procedure. Part I dealt with domestic arbitration provisions which should be applied to arbitration procedure seated in India. Part II referred to enforcement of certain foreign awards, including the New York Convention awards and the Geneva Convention awards. Specifically, as the reciprocity and commercial preservations were declared by India when acceded to the New York Convention, these two preservations were reflected in the 1996 Act at the relevant parts of recognition and enforcement of the New York Convention Awards. Accordingly, such parts were not directly guided by the Model Law. To sum up, the basic framework for international commercial arbitration in India has been updated since 1996, which reflects the pro-arbitration attitudes of the India and the practical necessities of international commercial arbitration system.

Nevertheless, there are still some critics on the international commercial arbitration system even after the latest amendment of the Indian arbitration law. Particularly, these criticisms are concentrated on the judicial interpretations of the 1996 Act, which have also been discussed in detail in the former part on the barriers to recognition and enforcement of international commercial arbitral awards in India. One commentator argues, “the Indian courts are still hyper active but not being minimal interference in arbitration, such as their defense on raising public policy as one of the grounds for setting aside of final award; the continuing fall in the trap of looking backwards that judicial interference is desirable and necessary which has been totally given a go by under the new Act and in particular in international commercial arbitration awards; the unhealthy way of remanding the matter back to their trial court and forgetting that by continuously interfering in such matters these purpose (of the 1996 Act) defeated.”

Another opinion refers to the unsuccessful experience of making the Model Law used for both domestic and international commercial arbitration practice in India, providing “the experiment has not been successful. Applying the Model Law to both domestic and international arbitration has created confusion and disorder. Domestic awards in each country have peculiar features and the peculiar feature of a domestic award in India is that its finality is not respected by the parties not looked upon too seriously by courts: for over fifty years (from 1940 to 1996) courts in India had become accustomed to supervising arbitral awards, and setting them aside for errors apparent on their face (a jurisdiction done away with only under the 1996 Act). Old

habits die hard.”\textsuperscript{806} The same critical view is shared by another commentator, who argues that “another major controversy is arbitral law (of India) has been with regard to the merging of the acts with provisions relating to foreign and domestic arbitration. While the UNCITRAL rules were only applicable to international commercial dispute resolution, the law has been drafted in a way as to ensure that it could be used for domestic as well as commercial arbitration. As a result of judicial interference, thus, there seems to be shift of legal opinion-calling for a separation of the Acts, rather than consolidation.”\textsuperscript{807}

As discussed in the former part, obstacle of public policy exception was once a very difficult element hampering the smoothly recognition and enforcement of international arbitral awards in India. Just as one Indian commentator admits, “on the grounds of refusal for enforcement of foreign awards, apart from the general grounds, there is one that surely would deserve your close attention and that is the ground of public policy. Evaluation of public policy ground is a bit wide but it covers broadly three aspects and these are (i) if it is contrary to the fundamental policy of Indian law or (ii) if it is seen to be detrimental to the interests of the country or (iii) it is contrary to justice and morality.”\textsuperscript{808} With those barriers of judicial interventions of the Indian courts, international commercial arbitration system has not yet been well established. Promoting judicial supports of the Indian courts, especially developing general case law jurisprudence by the Supreme Court, seems critical for eliminating these existed barriers and achieving favorable recognition and enforcement of international commercial arbitral awards in the future.

3.5 Remarks on the Significance and Defects of the UNCITRAL Model Law

According to the previous discussion and the comparison of the legislation history of those selected countries, it is obvious that the all of those merits of the UNCITRAL Model Law have served as a significant promotion for the advancement of contemporary international commercial arbitration, particularly for the improvement of recognition and enforcement of international commercial arbitral awards. The draft of the Model Law, which has provided guidance to the domestic legislation of international commercial arbitration procedure, was another significant event besides the promulgation of the New York Convention in the international commercial arbitration field.

Nonetheless, it is far from perfect. Some defects are still existed, even after the amendment of the Model Law in 2006. First, it is not sure how far the effect of the

\textsuperscript{806} Fali S. Nariman, \textit{India and International Arbitration}, 41 Geo. Wash. Int’l L. Rev. 378, 2009-2010. Another commentator also concludes like this opinion, states that “despite the enactment of the new arbitration law in India, the role of the judiciary in matters relating to appeal remains vastly interventionist. The judiciary had given an exorbitant interpretation of laws, which is mostly hostile towards the very purpose of arbitration, the court could not properly appreciate the purpose and the difference between the old arbitration law and the new one.” See Tushar Kumar Biswas, \textit{Right to appeal in arbitration under Indian laws: an interpretive cirtic of judicial response}, Commonwealth Law Bulletin, Vol.38, No.2, June 2012, p. 319.


Model Law will pass on. The Model Law is only a sample version for the legislators of various jurisdictions. It has not brought compulsory obligations as provided by the multilateral arbitration conventions. Therefore, arbitration laws of those countries without incorporating the provisions of the Model Law may still conflict with those ones which have already done. It is unclear whether more and more countries will subject themselves to the Model Law in the nearly future.

Second, the provisions of the Model itself are still very general, abstract and vague. For instance, most of the critical articles, like Article 34 and Article 36, are almost the same as the corresponding provisions of the New York Convention. Therefore, more countries may feel uncertain whether it is necessary to legislate or amend their domestic arbitration laws pursuant to the Model Law, because they have already acceded to the New York Convention.

Third, only incorporating the provisions of the model law into domestic arbitration system will not absolutely ensure the elimination of those existed barriers to recognition and enforcement of international commercial arbitral awards, as the experience of some relevant countries has demonstrated the failure. More critical point was the explanations or interpretations on those favorable legal rules by the competent authorities of different jurisdictions. Thus the increasing importance of domestic case laws should be emphasized simultaneously, which will promote the expected efficiency of the Model Law. Fortunately, the UNCITRAL has already realized this issue and published the first case law guidance named the 2012 Digest of Case Law on the Model Law.

Based on all those contributions of the UNCITRAL Model Law, in order to eliminate those barriers to international arbitral awards, more attentions should be paid to the increasing importance of domestic arbitration-related laws, together with the sustainable guidance of other future progressive research works of the United Nations Commission on International Trade Law on the relevant topics of international commercial arbitration system.
CHAPTER IV EFFECTIVE MEASURES FOR FURTHER ELIMINATING REFUSALS OF RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS

Recognizable and enforceable international commercial arbitral awards serve as the original impetus for the rapid development of international commercial arbitral system all over the world, especially under the auspices of the several critical multilateral international arbitration conventions on the recognition or enforcement of arbitration agreements and the related arbitral awards for commercial disputes. Since the early 20th century, commercial arbitration system has been gradually improved and exemplified from the few arbitration centers to every corner, which has been recognized as a valuable and effective dispute resolution by more and more private parties and the administrative entities. The former would like to choose arbitration but not court litigation to resolve their commercial disputes, while the latter have expressed their increasing interest in negotiating or acceding to these international or regional arbitration treaties.

Even with the establishment of contemporary legal framework composed with international conventions and various domestic arbitration laws, particularly under the mechanism of the New York Convention, there were still many barriers to recognition and enforcement of international commercial arbitral awards in various jurisdictions. The main obstacles have been picked up and specifically discussed in the previous chapter. In order to maintain the effectiveness and efficiency of the New York Convention, which has been recognized as the most successful multilateral convention in the past decades, it is with urgent necessity to reduce and further try to eliminate those obstacles to recognition and enforcement of international commercial arbitral awards in different domestic judicial systems.

According to the overview of those controversial problems in the recognition and enforcement of international arbitral awards, proposals for eliminating existing barriers will be provided here, with focus on the suggestion of amending or promoting the relevant domestic arbitration-related laws under the influential UNCITRAL Model Law. Other feasible and effective methods, such as the competition of arbitration service market, and restriction of excessive judicial involvement on arbitration procedures, or limitation of invoking public policy doctrine at the stage of recognition and enforcement procedure pending the competent courts of the selected jurisdictions, will also be proposed and specifically explained here.

4.1 Systematically Interpretation of International Arbitration Legal Framework: Importance of Domestic Arbitration Laws

As discussed in the first chapter on the New York Convention, of which the “more-favorable-right” provision issue of Article VII(1) has been interpreted by different academic scholars and competent judicial institutions. Referring to the more-favorable-right provision, disputed parties may apply to invoke the more-liberal domestic arbitration-related laws of the relevant country, or require the application of
other more-favorable bilateral or multilateral conventions on the recognition and enforcement international commercial arbitral awards.

Specifically, referring to the domestic obstacles of the invalidity of arbitration agreement, excessive judicial interventions and the misuse of public policy doctrine, more and more domestic arbitration-related laws have provided more liberal conditions and requirements than that of the New York Convention. On the contrary, there are still some countries whose domestic standards are stricter than that of the Convention, resulting in many refusals to international arbitral awards. Just as one commentator states, “Still, the role for national law has been left relatively open in the structure of the New York Convention, and not surprisingly, has contributed to the failure in reaching a truly international standard for international commercial arbitration. Interestingly, with respect to the substantive defense to enforcement, where national laws is given a prominent role, such as arbitrability (Article V(2) (a)) and public policy (Article V (2) (b)), national courts have not been parochial in using national law applicable under these Articles, and national courts have acknowledged the need to take account of international and not merely domestic norms. Accordingly, these Convention exceptions for national law have not created great disharmony where one might have thought they would.” 809

However, continually argued by the commentator, “there are other areas involving arbitration agreements and awards where national law plays a predominant role and has given rise, and will continue to give rise, to an increase in litigation with respect to both arbitration agreements and awards, including, the treatment of annulled arbitral awards, procedural requirements for enforcement of arbitral awards and the appropriate choice of law rule for determining whether an agreement is null and void under Article II of the Convention.” 810 Therefore, in order to eliminate those barriers, systematically interpretation of the relevant provisions of the New York Convention and the referred domestic arbitration laws seems more important than only revise the Convention.

Reconsidering the most important and simultaneously controversial provisions of the New York Convention respectively, that are Article I, II,V and VII(1), the different attitudes of various jurisdictions may result in different conclusions at recognition and enforcement of international commercial arbitration agreement and arbitral awards pending before their courts. As discussed before, in order to refer to the legislation and judicial practices of different countries, the first task is making sure of interpreting the relevant provisions systematically, and the second step is reviewing these domestic arbitration laws, to confirm whether they are more-favorable or not. Then finally it is able to decide whether the domestic arbitration laws are referable.

Accordingly, the obstacles which have been discussed include the application sphere of the New York Convention to both foreign and non-domestic arbitral awards; the formal and substantive validity of arbitration agreements, and validity of other new types of arbitration agreements, such as incorporation of chapter-party arbitration agreements into bill of lading; the hesitated judicial support on the reference of

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810 Id. p.27.
arbitration, and excessive judicial interventions on arbitral awards, such as recognition and enforcement of annulled arbitral awards; the public policy barriers recognized by those competent courts, etc. Firstly, it is necessary to make those courts of different jurisdictions abided by the pro-arbitration goal of the New York Convention, which has been admitted as a convention for recognition and enforcement of both international commercial arbitration agreements and arbitral awards. It seems that the drafters of the Convention had predicted the fast development of technology after the promulgation of the Convention, thus only the concise and abstract provisions of the Convention would not be enough for further recognition and enforcement of arbitral awards. As a result, they had added the provision of Article VII (1).

For the competent authorities of the contracting states of the New York Convention, when disputed parties raise those grounds for refusing recognition and enforcement of arbitration agreement and arbitral awards, while the opposite parties raise their objections and simultaneously raise the application for using the more-favorable provision of Article VII (1) of the New York Convention, they should permit and authorize such a defense of the relevant parties. Because the purpose of the New York Convention was to promote smoother recognition and enforcement of international commercial arbitral awards, but not to add more obstacles or burdens on the final stage of arbitration procedure. The theoretical basis of this approach forms the basic character of the Convention, which has only provided the maximal grounds for refusing recognition and enforcement of international commercial arbitration agreements and arbitral awards. Therefore, it shall not restrict various domestic laws to provide limited reasons or conditions for rendering the arbitration agreement and arbitral awards to be invalid. Accordingly, there will be some arbitration agreement or arbitral awards which may be recognized as invalid under the New York Convention, while may still be admitted as valid under the more-favorable regulations of the relevant domestic arbitration laws. It is believed that recognizing the validity of such arbitration agreements and awards will not cause chaos or other controversial problems in those countries. Once those arbitration agreements and arbitral awards have been recognized and enforced, the disputes have been settled completely, which will not cause any further problems to the disputed parties on the relevant matters.

Specifically, if we interpret the most controversial provisions of the New York Convention systematically, through the more-favorable-right provision of Article VII (1), then some vague and out of date provisions of the New York Convention will not cause more refusals to international commercial arbitration agreements and awards, including the validity of non-domestic arbitral awards; the conditions for determining the formal and substantive validity of arbitration agreements; the requirements for referring to arbitration procedure; the unified grounds for refusing recognition and enforcement of international commercial arbitral awards, especially on the criticized problem of enforcement of nullified arbitral awards, and the vague problem of public policy. It is clear that the systematical interpretation of Article VII (1) and other articles of the New York Convention seems more appropriate than directly revising the whole provisions of the Convention. Considering the potential cost, difficulties and risks for amending an influential multilateral arbitration convention, and the fact
that it may be well repaired by subjecting to the more-favorable provision of Article VII (1), it is submitted that there is no need to revise the New York Convention, but more credit should be given to the various domestic arbitration-related legislation at present.

After the first important step to make sure of the validity of the more-favorable provision of Article VII (1), there is another important task to examine the relevant arbitration laws of different contracting states of the Convention, to determine whether they are more favorable than the contents of the New York Convention. Specifically, for those regulations which are directly contained in the Convention, it is easy to compare them with the relevant domestic laws, however, for the substantive contents of most of the controversial issues, the New York Convention has not provided the specific contents, but only provided the applicable law rules. Under such situation, comparison of different domestic arbitration laws is critical. The same international commercial arbitration agreement or arbitral award may be recognized and executed in one country under its more favorable domestic arbitration-related laws, while may be rejected and treated as invalid in another. Such a comparison would support the argument of the increasing importance of domestic arbitration-related laws, because, even under the New York Convention mechanism, each country may take a different approach on international commercial arbitration law besides the Convention. It seems more important to decide whether the domestic laws are more-favorable than the contents of the New York Convention, and then decide whether the relevant domestic arbitration-related laws should be invoked. It is significant to make sure that the reluctant party should be strictly prohibited invoking the less-favorable provisions of domestic arbitration-related laws to reject execution of international commercial arbitration agreement and arbitral awards under the contemporary legal framework.

According to the previous comparison of different domestic arbitration laws, the more favorable domestic arbitration laws which are mainly based on the UNCITRAL Model Law, have provided more favorable provisions on the validity conditions for the arbitration agreements, less judicial interventions and the restricted public policy exception. The domestic arbitration legislation of some other countries which are not guided by the Model Law is also favorable for international commercial arbitration system. However, under some other domestic arbitration laws which have not yet been amended, there are many potential obstacles to the smooth recognition and enforcement of foreign arbitral awards due to the strict requirements and conditions thereof.

Thus, besides the systematical interpretation of the controversial provisions of the New York Convention, more attention should be paid to the more critical domestic international commercial arbitration-related laws. For those countries which have short arbitration histories and less perfected arbitration legislation, it is advisable to take the research achievements of the UNCITRAL into their domestic arbitration legal systems. It may be a great promotion for modernization of their domestic arbitration laws, and particularly for further decreasing of refusals of recognition and enforcement of international commercial arbitral awards. Moreover, with the fast
development of technology and arbitration practice, the latest work and publications of the UNCITRAL on Arbitration and Conciliation, and Online Disputes Resolution may be a good guidance for their renewal or amendment of domestic arbitration laws, by establishing their appropriate arbitration laws consistent with the international development.

4.2 Sustainable Guidance of the UNCITRAL on Domestic Arbitration System

As discussed in detail previously, the UNCITRAL Model Law has made important contributions for promoting recognition and enforcement of international commercial arbitration agreements and arbitral awards, therefore, it should naturally rely more on the research works of the UNCITRAL for further promoting of international commercial arbitration system. As one commentator states, “it is certainly desirable to obtain a unified, or at least harmonic, treatment of central arbitral issues by national legislators because it would certainly safeguard international commercial arbitration autonomy from the unwarranted national courts interference. However, such harmonization cannot be attained merely through the worldwide adaption of similar legal texts by national legislators. Rather, those texts must also be uniformly interpreted and applied by national courts in a manner that reflects the same liberal approach in favor of international arbitration. This approach may require a differentiated legislative treatment of domestic and international commercial arbitration.” 811 The commentator has recognized the difficulties for harmonizing the treatment for international commercial arbitration system in various jurisdictions, arguing that “whether attaining such harmonization falls within the realm of fantasy or not remains to be seen, but it seems unquestionable that such harmonization is all the more desirable. After all, international commercial arbitration can only progress under the benevolent shadow of national legislators and of courts fully cognizant of the positive role played by international commercial arbitration in the world economy.” 812

In order to improve the various domestic arbitration-related laws, the reference to UNCITRAL Model Law and maintenance of its unified interpretation seems never so important than ever. The summarization and discussion here will concentrate on the example of improvement of Chinese arbitration-related legislation, and its further perfection for promoting smoother recognition and enforcement of international commercial arbitral awards. Further, considering the fast development of online dispute resolution, especially with the deep research by the Group III (Online Disputes Resolution), the continuing guidance of the latest research works of the UNCITRAL, and its impact on domestic arbitration laws is critical for further harmonization of the legal framework for recognition and enforcement of international commercial arbitral awards.

812 Id. p.15.
4.2.1 Appropriate Improvement of Domestic Arbitration-Related Legislation: Take P.R.C as an Example

As compared and discussed, there are still many controversial obstacles to recognition and enforcement of foreign arbitral awards in China. It is urgent to improve the domestic arbitration-related laws of P.R.C, which will contribute to future elimination of those obstacles to recognition and enforcement of cross border commercial arbitral awards in China. In order to accomplish such goal, China should incorporate the Model Law and promote more arbitration-favorable legal system for international commercial arbitration procedures therein.

4.2.1.1 More-liberal Conditions for Validity of Arbitration Agreement

To summarize the former discussed arbitration cases reported by the Supreme People’s Court of China, most of those cases rejecting recognition and enforcement of international commercial arbitral awards were relied on the ground of invalid arbitration agreement according to the Arbitration Law of China. This situation has also been mentioned by the judges of the Supreme People’s Courts of China.\textsuperscript{813} The main reason for those barriers is the less supportive and favorable provisions under the Arbitration Law of China. As discussed previously, Article 16 and Article 18 of the Arbitration Law of China have provided strict conditions for deciding the validity of arbitration agreements, which may cause refusals of both domestic and international arbitration agreement and arbitral award in the people’s courts, and may cause refusal of arbitral awards rendered in China in other contracting states of the New York Convention. The compulsory requirement on selection of an arbitration commission in the arbitration agreement beforehand seems inappropriate for practicing arbitration activities in China. As one Chinese professor indicates, “according to the arbitration legislation of various countries, it is seldom finding that agreement of an arbitration institution as a compulsory condition for arbitration agreement. Generally, arbitration laws only require the written form of arbitration agreement. As for the contents of arbitration agreement, these arbitration laws emphasize the expressed intentions of the parties for submitting to arbitration at most.”\textsuperscript{814}

This strict condition for determining the validity of arbitration agreement may cause at least three problems for recognition and enforcement of international commercial arbitration agreement and arbitral awards both in China and abroad. Firstly, if the disputed parties agree to commence arbitration in China, but have only made a written arbitration agreement or an arbitration clause which expressly state their arbitration intentions, while lacking selection of arbitration commission; or if the disputed parties have chosen the Chinese arbitration law as the application law for their arbitration agreements, then the competent People’s courts of China will judge such arbitration agreement as invalid and refuse to refer to arbitration according to


Article II (3) of the New York Convention, because these disputed arbitration agreement will be treated as substantively null and void under the Arbitration Law of China.

Secondly, such a strict condition for determining the validity of arbitration agreement may cause refusal of foreign arbitral awards. Article V(1) (a) of the New York Convention has clearly provided that the invalidity of arbitration agreement may cause refusals of recognition and enforcement of arbitral awards in the courts where the awards are relied upon. If the relevant arbitral awards are rendered in other contracting states of the New York Convention, and have been applied to the competent people’s courts for recognition and enforcement; or, if the choice of law clause indicates the application of arbitration-related laws of China, then the competent people’s courts of China may rejected the application for recognition and enforcement of these foreign arbitral awards according to Article 16 and 18 of the Arbitration Law of China. It is because the arbitration agreements will be recognized as void according to the above provisions of the Chinese arbitration regulation, and subsequently it would make the following arbitral awards being unacceptable under the Chinese jurisdiction.

Thirdly, it may cause a more confusing problem under the strict condition for determining the validity of an arbitration agreement. In the international arbitration field, there are two types of arbitration, one is *ad hoc* arbitration and the other is institution arbitration. According to the requirement of Article 16 and Article 18 of the Arbitration Law of China, *ad hoc* arbitration has been completely excluded in the territory of China, due to the compulsory requirement of a chosen arbitration commission contained in the arbitration agreements. It would cause the disputed parties losing the opportunity to arbitrate their commercial differences if they pretend to choose *ad hoc* arbitration to be organized and tried in the territory of China. According to the Arbitration Law of China, such an arbitration agreement is invalid, and the parties cannot resolve their controversies through arbitration in China.

However, other contracting states of the New York Convention have generally admitted the validity of *ad hoc* arbitration and parties may choose *ad hoc* arbitration to solve their disputes. If such arbitral awards should be recognized and enforced in China, the competent authorities of China should recognize and enforce the validity of foreign arbitral awards which was rendered through *ad hoc* arbitration procedure abroad. It is obvious that the standards for domestic arbitration awards and foreign arbitration awards are different, which will cause injustice for the parties who intend to resolve their commercial disputes through arbitration.

As for the formal conditions of a valid arbitration agreement under the Chinese Arbitration Law, there is a general written form requirement in the first paragraph of Article 16 of the Arbitration Law of China, which indicates “an arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise”. 815 Further, according to the judicial interpretation of Supreme People’s Court in 2006, Article 1 gives more specific explanation for the other written

agreements, providing “for the purpose of Article 16 of the Arbitration Law, ‘other written agreements’ shall mean those agreements on arbitration requests concluded in the form, such as a written contract, letter, or electronic data text (including telegraph, telex, facsimile, electronic data interchange, and e-mail’).

This explanation for the written form requirement of arbitration agreements has exemplified and liberalized the formal validity condition, therefore will promote more arbitration agreement being recognized as valid in judicial practice. However, comparing to the domestic arbitration laws which have incorporated the UNCIYRAL Model Law, the judicial interpretation of the Supreme People’s Court is still not as liberal as the former.

In order to solve those potential problems and promote future recognition and enforcement of international commercial arbitral awards in China, one effective method is the improvement of the out of date arbitration legislation of China by incorporating into the latest version of the UNCITRAL Model Law. Considering the history of legislation and arbitration practices in China, it seems more appropriate to take Option 1 of Article 7 of the Model Law when amending the Arbitration Law of China.

Both merits will be achieved from the amendment of the relevant provisions on arbitration agreement of the Arbitration Law of China. The first one is promoting to respect the principle of party autonomy in international commercial arbitration practice. As Option 1, Article 7 (1) of the Model Law only requires the basic valid condition of arbitration agreement, which has not compulsory required the selection of a specific arbitration commission. Thus, it respects maximally the intentions of the disputed parties for submitting to arbitration. After amending Article 16 and 18 of the effective Arbitration Law of China, and taking into the definition of “arbitration agreement” in Option 1 of Article 7 (1) of the Model Law, these controversies on the validity of arbitration agreement will be greatly reduced or eliminated in future international arbitration practices in China. The second one is the exemplification of the formal validity conditions of an arbitration agreement. It is discussed in detail above that Option 1 Article 7 (1) of the Model Law has provided more liberal interpretation on the written form requirement of an arbitration agreement in sub-articles (3) through (6). After the amendment of the Arbitration Law of China and incorporation of the previous sub-articles, higher possibility for recognition of international commercial arbitration agreement will be achieved in the nearly future in China, which would substantially reduce the refusals of both domestic commercial arbitral awards and international commercial arbitral awards simultaneously.

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816 Article 1 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”.
817 For example, one Chinese commentator suggest to amend Article 16 and 18 of the Arbitration Law of China with reference to English Arbitration Act 1996 section 5 and section 6, who believes that according to the current arbitration practice in China, it is easier and smoother to revise China Arbitration Act 1994 with particular reference of relevant judicial interpretations of the Supreme People’s Court. See Kun Liang, The Comparative Analysis of the Existing Chinese and English Arbitration Systems from Arbitration Agreement Perspectives, 3 US-China Law Review 44, 2006.
4.2.1.2 Change the Odd Criteria for Distinction of Arbitral Awards

Since the first legislation on the Civil Procedure Law of China in 1982, the following 1991 Civil Procedure Law and the 1994 Arbitration Law of China had created the distinctions of three types of arbitral awards. The criteria for determining each type of arbitral award were different from the mainstream of the international commercial arbitration practice. This approach has not been changed even through the latest amendment of the Civil Procedure Law on August 31, 2012. Accordingly, commercial arbitral awards have been divided into three groups: the pure domestic arbitral awards, the foreign-related arbitral awards and arbitral awards made by a foreign organ. In the international arbitration practice, such an approach has caused many problems and should be urgently revised.

For instance, the historical distinction of pure domestic arbitral awards and foreign-related arbitral awards is meaningless. With the early international commercial arbitration practice in China, only the foreign-related arbitration institutions, which refers to the predecessors of the CIETAC and the China Maritime Arbitration Commission (CMAC), were authorized to accept and try disputes arising from international economy, trade, transportation and maritime which had foreign-connections or foreign-elements. While the other arbitration institutions of China could not accept such kind of disputes. However, the basis for distinction of pure domestic and foreign-related arbitral awards was eliminated by the 1991 Civil Procedure Law and the 1994 Arbitration Law, which allowed the parties submitting their disputes with foreign elements to both foreign-related arbitration institutions and other arbitration institutions of the People’s Republic of China. Since then, not only the foreign-related arbitration commissions could accept arbitration cases with foreign elements. Arbitral awards both rendered by the domestic arbitration institutions and foreign-related arbitration institutions should be recognized as the domestic arbitration arbitral awards of China according to the general academic theory and international arbitration practice, which has recognized the nationality of arbitral awards based upon the place of arbitration.

However, the distinction between the pure domestic arbitral awards and the arbitral awards with foreign-elements has not been eliminated till now. In addition, there are different conditions for setting aside and refusing recognition and enforcement of pure domestic arbitral awards and foreign-related arbitral awards separately. It is difficult to understand this approach, because both types of arbitral awards are domestic awards in nature, but the criteria for annulment and rejection of recognition and enforcement are different from each other. It will cause confusion to the competent courts on authorizing judicial intervention over the international commercial arbitration system in China, which may further cause injustice to the disputed parties, because the different criteria for vacating and refusing execution of the two kinds of arbitral awards should be the same.

Moreover, the criterion for determining the category of foreign arbitral awards is

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818 See Article 257 of the Civil Procedure Law of the People’s Republic of China, the 1991 version. It was also referred to Article 65 of the Arbitration Law of the People’s Republic of China.
819 See Article 58, 70 and 71 of the Arbitration Law of the People’s Republic of China.
also at odds, and has caused some refusals of recognition and enforcement of international commercial arbitral awards. According to the relevant provision of the Civil Procedure Law of China, the definition of foreign arbitral award has been translated as “an award made by a foreign organ”, which is intended to recognize only institution arbitration, but not the *ad hoc* arbitration. This provision had caused many problems for recognition and enforcement of foreign or international commercial arbitral awards. As the New York Convention has clearly provided that the provisions of the Convention should not only be applied to arbitral awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies. Thus the criterion for determining foreign arbitral awards under the Civil Procedure Law of China is conflict with the standard of the New York Convention.

However, as China has been one member state of the New York Convention, the relevant people’s courts of China should recognize and enforce arbitral awards rendered both in *ad hoc* arbitration proceeding and institution arbitration proceeding. In judicial practices, the New York Convention should be directly used in the specific cases. Judges of the relevant courts have referred to the regulation of the New York Convention, and not so many foreign arbitral awards rendered by *ad hoc* arbitration procedures have been rejected recognition and execution. Nevertheless, the legislation terminology should be changed, in order to prevent further confusions originated from the interpretation of this criterion when applications of recognition and enforcement of international commercial arbitral awards pending various people’s courts of China.

In order to solve the above problems of the arbitration-related laws of China, incorporating the Model Law is a practical method for future perfection. As the Model Law has clearly stated in Article 1 on the scope of application, providing that the Model Law applies to international commercial arbitration. In order to guide various countries to comprehend the term “international commercial arbitration”, Article 1 (3) has provided specific explanation, “an arbitration is international if (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”

The Model Law has clearly interpreted the type of international arbitration, which will be a specific guidance on the division of domestic arbitral awards and international awards in China. Taking the Model Law approach will help eliminate the controversies originated from the distinction of purely domestic arbitral awards and foreign-related arbitral awards in China. Furthermore, it will improve the relevant provisions on the recognition and enforcement of foreign arbitral awards, and to

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820 See supra note 30, Article I (2) of the New York Convention indicates “the term ‘arbitral awards’ shall included not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

821 See Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration.
enlarge the foreign arbitral awards to cover both _ad hoc_ awards and institutional arbitral awards, by referring to Article 2 of the Model Law which provides “for the purpose of this law, (a) ‘arbitration’ means any arbitration whether or not administered by a permanent arbitral institution”. 822 The proposed amendment to the current provisions of the Civil Procedure Law and the Arbitration Law of China may help to decrease the confusions on the criteria of rejecting recognition and enforcement of international commercial arbitral awards.

### 4.2.1.3 Systematical Integration of Arbitration-related Laws

As discussed above, the arbitration related laws under the present Chinese legal system include the Civil Procedure Law, the Arbitration Law and the Judicial Interpretations of the Supreme People’s Court. The Chinese Arbitration Law has been executed for almost twenty years, and such a legal framework for arbitration in China has still not been changed. There are many problems, for example, the provisions of setting aside domestic arbitral awards, which are contained in the Arbitration Law and the Civil Procedure Law, are different from that of foreign-related arbitral awards. 823 Further, the provisions of refusal of recognition and enforcement of domestic and foreign-related arbitral awards have been duplicated in the Civil Procedure Law and the Arbitration Law, while the provision of recognition and enforcement of foreign arbitral awards has been contained in the last chapter of the Civil Procedure Law. Before the Arbitration Law started to be executed in 1995, such a legal framework for both domestic and foreign arbitration was reasonable. However, after the arbitration law has been legislated and came into effect for almost two decades, such a legal framework has not been changed, while the Civil Procedure Law was amended for twice in 2007 and 2012. The disorder of arbitration legislation may cause many more confusions, accompanying the rapid development of the arbitration practice in China recently, and may cause much more difficulty for smooth run of recognition and enforcement of foreign or international commercial arbitral awards in China.

Accordingly, incorporation of the UNCITRAL Model into the Chinese Arbitration Law of China is necessary. Such an approach will help to reduce inconsistence and disorder of the legal framework for commercial arbitration system in China, and to make the Arbitration Law to be friendlier to international commercial arbitration system. Specifically, it should integrate of the relevant provisions among the Civil Procedure Law, the Arbitration Law and the Judicial Interpretation of the Supreme People’s Court into one legislation system, for both domestic and international commercial arbitration. And it should contain the proceeding from drafting the arbitration agreement to the recognition and enforcement of arbitral

822 See Article 2 (a) of the UNCITRAL Model Law on International Commercial Arbitration.
823 Article 58 of the Arbitration Law of China regulates the grounds for setting aside of domestic arbitral awards, while Article 274, paragraph 1 of the Civil Procedure Law is provided for the annulment of foreign-arbitral awards, and the annulment grounds for each type of arbitral awards are different from each other. As for setting aside of foreign-related arbitral awards, those grounds resembles Article V (1) (a) through (d) of the New York Convention, which mainly concerned on the procedural reasons, while Article 58 of the Arbitration Law provides that the arbitral awards were rendered on the forged evidences, or the other parties had withheld the evidence which is sufficient to affect the impartiality of the arbitration. Further, the violation of public interest would lead to the set aside of domestic arbitral awards but not affect the validity of the foreign related arbitral awards.

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awards, which is similar to the structure of the UNCITRAL Model Law. Particularly, the following three aspects require attention during the perfection of the current arbitration-related laws.

First, it is necessary to unify the grounds for setting aside arbitral awards made in China, including awards rendered both by domestic arbitration institutions or foreign arbitration institutions, such as the Arbitration tribunals of ICC. This unification should base on Article 34 (2) of the UNCITRAL Model Law, which should contain only procedural reasons and no reviewing the merits of the arbitral awards. Article 58, Article 70 of the PRC Arbitration Law and Article 274, paragraph 1 of the PRC Civil Procedure Law should be redrafted, to form a signal provision for nullifying arbitration awards. Specifically, Article 58 (4) through (6) should be deleted, because these sub-articles authorize interference with the merits of the arbitration proceeding, or the contents of which may be separated and categorized into other grounds, indicating “(4) the evidence of which the award is based was forged; (5) the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or (6) the arbitrators have committed embezzlement, accept bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case.”

Further, the other two grounds are for setting aside arbitral awards *ex officio*, including the arbitrability problem and the public policy issue contained in Article 34 (2) (b) of the Model Law. It is clearly regulated in the current Arbitration Law of China that violation of social and public interest of China would not lead to an annulment of foreign-related arbitral awards, but would bring about nullification of domestic arbitral awards. Such a distinction between domestic arbitral awards and foreign-related arbitral awards should be eliminated and the provision could generally states that violation of public policy may be one of the grounds for vacating arbitral awards rendered in China.

Second, the power of arbitral tribunal to order interim measures under Article 17 of the Model Law should be incorporated into the Arbitration Law of China. Considering the importance of interim measures, which could promote the possibility of recognition and enforcement of final arbitral awards, the Model Law had authorized the arbitral tribunal the power to order interim measures. There are four kinds of interim measures: “(a) maintain or restore the statu quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.”

On the other hand, under the present PRC Arbitration Law and Civil Procedure Law, assets preservation and evidence preservation could only be ordered by the competent people’s courts. For instance, if the disputed parties have urgent reasons for requiring evidence preservation, they may first apply to the arbitration

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824 Article 58 (4), (5) and (6) of the Arbitration Law of the People’s Republic of China.
825 See Article 17 of the UNCITRAL Model Law on International Commercial Arbitration.
826 See Article 101 of the Civil Procedure Law, and Article 46 and Article 68 of the Arbitration Law of China.
commissions, and the arbitration commissions should submit the application of the parties to the district people’s courts or intermediate people’s courts, for domestic arbitral proceedings or foreign-related arbitral proceedings separately. As to application for property preservation, the relevant party should only submit their requests before commencement of the arbitration proceedings. These two interim measures may promote the smooth run of organization of the followed arbitration proceedings or the successful recognition and enforcement of arbitral awards at a relevant level. However, as the people’s courts have the exclusive rights to authorize property and evidence preservation, it may cause delay of preservation when situation is urgent and important. Since the Model Law has regulated the relevant provision on the power of order interim measures by the arbitral tribunal, such newest trends for authorizing the arbitral tribunal to order interim measures may be beneficial to the international commercial arbitration practice in China, if such regulation drafted under the Model Law could be incorporated into the Arbitration Law of China.

Third, the relevant provisions for refusing recognition and enforcement of domestic arbitral awards and foreign arbitral awards should be amended. The effective provisions--Article 237, Article 274 and Article 283 of the PRC Civil Procedure Law, together with Article 63 and Article 71 of the PRC Arbitration Law have regulated different standards for refusing recognition and enforcement of domestic arbitral awards, foreign-related arbitral awards and foreign arbitral awards. It is a situation like providing different grounds for nullifying the pure domestic arbitral awards and the foreign-related arbitral awards. Similarly, the grounds for refusals of recognition and enforcement of pure domestic arbitral awards and foreign-related arbitral awards are different, which have been provided almost the same as those grounds for setting aside domestic arbitral awards and the foreign-related arbitral awards.827

As argued previously, both pure domestic arbitral awards and the foreign-related arbitral awards are domestic arbitral awards of China, of which, the grounds for refusals should not be different. The reasons for refusals of recognition and enforcement of foreign arbitral awards are more important. The procedure of refusal should be conducted under the sole provision containing in Article 283 of the latest PRC Civil Procedure Law. Besides this provision, there is no any other regulation in the PRC Arbitration Law for recognition and enforcement, or the counterpart of refusals, of foreign or international commercial arbitral awards. This sole provision provides the principle of recognition and enforcement of foreign arbitral awards under the cross border judicial assistance of the relevant part of the PRC Civil Procedure Law. As China one of the member states of the New York Convention, recognition and enforcement of foreign or international commercial arbitral awards should not

827 According to Article 63 of the Arbitration Law of China, which regulates that if the party against whom the enforcement of the arbitral award was made can demonstrate any contents of Article 237, paragraph 2 of the Civil Procedure Law of China existed, the domestic arbitral awards may not be executed. Under Article 237 of the Civil Procedure Law, which paragraph 2 provides the grounds for refusals of execution and provides the same grounds as those contained in Article 58 of the Arbitration Law of China which is concerning on the setting aside of purely domestic arbitral awards. As for the foreign-related arbitral awards, Article 71 of the Arbitration Law has directly indicated to Article 274, paragraph 1 of the Civil Procedure Law which provides the grounds for rejecting enforcement of foreign-related arbitral awards which should be certified by the party against whom the execution is made.
only be commenced by judicial cooperation, but practiced through the fulfillment of treaty obligation. Therefore, it should add the relevant provisions for recognition and enforcement of foreign arbitral awards into the PRC Arbitration Law.

The accomplishment of the integration of the arbitration-related legislation, especially for establishment of those three important items, incorporation of the UNCITRAL Model Law, as an ideal method for perfection of the Arbitration Law of China, would be a speedy and effective way. In like manner, the Model Law has provided relevant contents for unifying the grounds of annulment of arbitral awards, by supporting the power of arbitral tribunal to order interim measures and providing the relevant articles for refusal of recognition and enforcement of arbitral awards no matter where they are made. The Model Law intends to establish a uniform treatment of all arbitral awards irrespective of the country of origin. This approach is critical for amending and perfecting the commercial arbitration legal system in China, specifically on the annulment of arbitral awards and refusal of recognition and enforcement procedures, which would promote the further progress of international commercial arbitration activities in China.

4.2.1.4 Reduce the Judicial Influence on International Arbitral System

According to the current legal framework of judicial interventions of international commercial arbitration system in China, the judicial reporting system that has been established through the judicial intervention by the Supreme People’s Court, for deciding the validity of foreign-related arbitration agreements and arbitration agreements refers to Hong Kong, Macau Special Administrative Region and Taiwan province, and determining the rejection of recognition and enforcement of foreign arbitral awards is controversial. The judicial reporting system has caused adverse knowledge about the judicial authorities, because excessive judicial interventions have been permitted, although the main purpose of such a reporting system is to strictly implement the PRC Civil Procedure Law and the relevant international treaties that China has entered into, and to guarantee the legality of litigious and arbitral activities, such as the acceptance of foreign-related economic dispute cases by a people’s court, refusal of enforcement of foreign-related arbitral awards and denial of or refusal of recognition and execution of foreign arbitral awards, etc.

Two articles are contained in the 1995 Notice of the Supreme People’s Court on the Handing of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People’s Courts. The first article is about the acceptable of court lawsuits with respect to any foreign-related, or Hong Kong, Macau or Taiwan-related economic or maritime dispute cases filed to a court. If the parties have signed an arbitral clause or a separate arbitration agreement, while the competent people’s court where the action is filed renders the arbitration agreement to be null, void or unclear


to the extent of being non-executable, and decides to accept the case, then the lower people’s court must report such kind of cases to the higher people’s courts and finally to the Supreme People’s Court, requesting for confirmation and reply. The lower people’s court may temporarily not accept the action before it has received the reply from the higher people’s courts or the Supreme People’s Court.

The second article is concerned with the refusal of recognition and enforcement of foreign-related arbitral awards and foreign arbitral awards. If the lower people’s court intends to reject recognition and enforcement of the two types of arbitral awards, reasoning that the foreign-related arbitral awards have violated the relevant provision of the PRC Civil Procedure Law 830, or the application for recognition and enforcement of foreign arbitral awards is not complied with the international conventions which China has acceded to, or is conflicted with the reciprocity principle, the ruling of refusals of recognition and enforcement could not be directly made by the lower people’s court. It must first report its rejection opinion to the higher people’s courts. If the higher courts affirm the rejection opinion, then the cases should be finally reported to the Supreme People’s Court for instruction. The lower courts could rule for refusal of recognition and enforcement of the foreign-related arbitral awards and foreign arbitral awards only after the Supreme People’s Court has affirmed the refusal opinion and replied to them. 831

During a special period when both the legislation and judicial practices on international commercial arbitration system were at the start stage in China, such a reporting system may be necessary and be positive for ensuring the pro-arbitration attitudes of the relevant judicial authorities. However, during the past two decades, great changes have taken place in both academic research and judicial practices on international commercial arbitration in China, if it is understandable that the reporting system may be insisted on the refusal of foreign arbitral awards, for unifying the judicial interpretations to foreign arbitral awards, this approach for determining the validity of domestic arbitration agreements and arbitral awards is not necessary at all, which should be eliminated as soon as possible. It will also promote the efficiency of arbitration proceedings because this time consuming judicial review proceeding is not required.

Generally, the UNCITRAL Model Law will be a great promotion for perfecting the Arbitration Law of China, because it has obvious limited the judicial intervention of the pertinent national courts. As stated in the Explanatory Note by the Secretariat of UNCITRAL, “recent amendments to arbitration laws reveal a trend in favor of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.“832 Further, incorporation of the Model Law into domestic arbitration legislation of China will help making progress to the

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830 Id. Article 2. In the original version of the Notice of the Supreme People’s Court, it referred to Article 260 of the Civil Procedure Law at that time, however, with the amendment of the Civil Procedure Law on August 31, 2012, the relevant article had been changed to Article 274 of the current Civil Procedure Law of China.

831 Id. Article 2.

relevant provisions of the validity conditions of arbitration agreements, grounds for annulment and refusal of recognition and enforcement of arbitral awards, which will be another promotion for reducing the excessive and unnecessary judicial involvement of the Supreme People’s Court on the international commercial arbitration system in China.

Further, the restricted and limited judicial explanation or interpretation on the application of the social and public interest doctrine in the arbitration field should be continued, which should resemble the concept of public policy doctrine under the Model Law, and should not be exemplified in international arbitration practice.

4.2.2 Latest Research of UNCITRAL Group III: Online Commercial Arbitration

International commercial arbitration system develops with high speed with the fast progression of high technology nowadays. Except those traditional obstacles to recognition and enforcement of international commercial arbitral awards under the different domestic arbitration legislation, the New York Convention has also faced some new challenges for recognition and enforcement of new type of international commercial arbitration agreement and award, referring to the presentation of online commercial arbitration and online commercial arbitral awards in the past few years. In fact, it could not be imagined that electronic commerce developed so fast and online disputes resolution would happen when the predecessors drafted the New York Convention 55 years ago. Thus there was not any provision of the Convention designated for the online disputes resolution, specifically for online cross border commercial arbitration agreement and recognition and enforcement of online commercial arbitral awards. Nevertheless, this new phenomenon in the international commercial arbitration system has gradually founded during the past decades, and the UNCITRAL has concerned with this issue for years, which established a separate group, indicating the Working Group III (Online Dispute Resolution or abbreviated as ODR) after the forty-third session of the UNCITRAL on 21 June to 9 July 2010, for deeper and further research of this new type of arbitration.833

According to the report of Group III in January 2011, it indicated that “the Working Group recalled the mandate of the Commission that work on that topic should focus on the ODR relating to cross-border e-commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. The view was generally shared that there was an absence of an agreed international standard on ODR, and that a need existed to address in a practical way disputes arising from the many low-value transactions, both B2B and B2C, which were occurring in very high-volumes worldwide and required a dispute resolution response which was rapid, effective and low-cost.”834 As the report indicated that traditional court litigation was not appropriate for resolving such kind of commercial disputes, and there was generally agreed that any standard proposed by the Working Group should become, as appropriate, consistent with existing UNCITRAL standards in arbitration, conciliation

834 Id. p.4.
and electronic commerce. Specifically for the form of online commercial arbitration, it was suggested that arbitration should not be the primary method for resolving online commercial disputes, holding “arbitration was a necessary component of ODR (since without it there could be no final resolution of those cases which were not settled in earlier stages) but several delegations urged that in any ODR most disputes would need to settle prior to the arbitration phase so that arbitration would occur in only a small percentage of cases that could not be resolved otherwise”.

Even being provided as the stand-by online disputes resolution, there is still a critical issue should be considered for smoothly practicing of online commercial arbitration proceeding, providing “in the context of enforcement and the validity of the arbitration agreement, whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was appropriate and applicable to those ODR cases leading to an arbitral award, as they dealt with disputes involving consumers. Reference was made to treaty obligations under the New York Convention.” Before answering the former question that whether the online arbitration agreement and arbitral award should be covered by the New York Convention, there is a preliminary task to make a clear understanding of the definition of cross border online commercial arbitration, and there is a series of questions on such a new type of international commercial arbitration should be further considered and researched.

As for the definition of ODR, paragraph 20 of A/CN.9/WG.III/WP.105, which is a report of Working Group III on Online dispute resolution for cross-border electronic commerce transactions, has provided a relevant broad definition of ODR. Referring to paragraph 3 of the same document, which gives an introduction on the term of ODR, indicating “ODR is a means of dispute settlement which may or may not involve a binding decision being made by a third party, implying the use of online technologies to facilitate the resolution of disputes between parties. Online dispute resolution has similarities with offline conciliation and arbitration, although the information management and communication tools which may be used during all or part of the proceedings can have an impact on the methods by which disputes are resolved. ODR may be applied to a range of disputes affecting B2B and B2C transactions. It could be logical to apply ODR for the resolution of disputes relating to transactions involving the use of Internet. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.” Further in the follow paragraph 4, the concept of ODR has been specifically explained to particularly relevant in addressing disputes arising out of low value, high volume transactions that require an efficient and affordable dispute resolution process.

On this basis, paragraph 20 considers the definition of ODR that whether it is

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835 Id. p.5.
836 Id. p.7.
837 Id. pp.5-6.
840 Id. paragraph 4.
sufficient or whether it should be expanded to also cover informal private negotiation, automated or assisted negotiation (using negotiation software or an online service). In the latter case, the Working Group may wish to consider text along the following lines:” Online dispute resolution usually refers to alternative dispute settlement methods using information and communication technology and, in particular, electronic forms of interaction on the Internet. ODR can be conducted in whole or in part online. ODR is a means of settling disputes that incorporates the use of the e-mail communications, streaming media, ODR online platforms such as websites and other information technology as part of the dispute resolution process. 841 Such definition of ODR has been argued by some delegates who believe that such an definition is overly broad, and suggest that ODR be limited to instances where procedural aspects of a case are conducted online, while there is a broad agreement that consideration of a definition of ODR could more usefully be deferred to a later point in the discussion, when the components of the concept have been more fully elaborated. 842

Specifically for online arbitration, there is still not a uniform definition and the Working Group III has listed several examples of online arbitration in its report, which has been actually practiced in different legal systems. Here the Working Group has listed the example of online arbitration by the joint project of the International Centre for Dispute Resolution (ICDR) and General Electric for the online resolution of disputes between manufacturers and suppliers. It has also provided the online arbitration that conducted under the American Arbitration Association Commercial Arbitration Rules and the China Council for the Promotion of International Trade and the China Chamber of International Commerce, which has adopted the CIETAC Online Arbitration Rules in 2009. 843

Accordingly, at the present time, the specific organization and progression of online commercial arbitral awards are made pursuant to the arbitration rules or other regulations of each arbitration institution which provides the online commercial arbitration procedure. Taking the CIETAC Online Arbitration Rules as an example, Article 1 of provides the scope of application, indicating “these Rules are formulated in order to independently, impartially, efficiently and economically resolve, by means of online arbitration, disputes arising from economic and trade transactions of a contractual or non-contractual nature; These Rules shall apply to the resolution of electronic commerce disputes and may also be applied to the resolution of other economic and trade disputes upon the agreement of the parties.”844 The following contents of the Online Arbitration Rules specifically include the general provisions, the communication methods, the arbitration proceedings, summary procedures, expedited procedures and miscellaneous. The whole proceeding of the online arbitration procedure has been clearly regulated by the Online Arbitration Rules of

841 Id. paragraph 20.
843 A/CN.9/WG.III/WP.105, Online dispute resolution for cross-border electronic commerce transactions, paragraph 9, 13 October 2010.
844 See Article 1 of the China International Economic and Trade Arbitration Commission Online Arbitration Rules, adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on January 8, 2009, which became effective as from May 1, 2009.
CIETAC.

On the other hand, as the Working Group stated in its report on the future work to be undertaken, the most important task is drafting generic procedural rules of ODR. One of the critical issues is indicated as the application of the New York Convention to ODR system, especially for online commercial arbitration. Although the report of the Working Group III provides that “there was a general consensus that it would be assumed the New York Convention would be applicable to enforcement of arbitral awards under ODR cases in B2B and B2C cross-border disputes,” such consideration may be too optimistic, since both the international arbitration conventions and domestic arbitration legislation have not regulated any provision for recognition and enforcement of this type of cross border commercial arbitral awards. Therefore, the recognizable and enforceable issue of online arbitral awards should be further discussed and researched.

Since the beginning of the research work by Working Group III of UNCITRAL in 2010, eight sessions have been organized and held during the past few years. According to those documents by Working Group III, it has concentrated on the preparation of the draft procedural rules for ODR. As the Working Group has deemed that online cross-border arbitral awards could be recognized and enforced through the New York Convention, while relying on that mechanism alone was insufficient. It has published a latest research work on the private enforcement mechanisms for ODR on 13 September 2013, which considered the term of “private enforcement mechanism” to mean an alternative to a court-enforced arbitration award or settlement agreement, and which can either (i) create incentives to perform or (ii) provide for the automatic execution of the outcome of proceedings.

In order to make sure of the effectiveness of cross-border online arbitral awards and to ensure their final recognition and enforcement in more jurisdictions, it is necessary to do more research on the improvement of domestic arbitration laws. There are still quantities of doubt and lacking confidence on the online commercial arbitral awards. It is not completely a well established arbitration mechanism. Therefore, it needs the perfection of domestic arbitration laws for providing specific regulations on the recognition and enforcement of international or cross-border online commercial arbitral awards, which are particularly urgent in those jurisdictions where online arbitration mechanism have been established and substantially practiced, such as the People’s Republic of China. Well protection of the finality and validity of online commercial arbitral awards in their original country may promote smoother recognition and execution in other territories, especially in those jurisdictions where

847 Id. The additional methods for promoting enforcement had been divided into three options, “one option was to emphasize the use of trust marks and reliance on merchants to comply with their obligations there under. Another was to require certification of merchants, who would undertake to comply with ODR decisions rendered against them. Finally, it was stressed that an effective and timely ODR process would contribute to compliance by the parties.”
849 Id. paragraph 3.
treaty obligations (of the New York Convention) should be performed. The continuing research work of UNCITRAL Working Group III on other aspects of the online dispute resolution, emphasizing the online arbitration procedure, would be further promotion to enlarge the sphere where online international arbitral award may be accepted as valid and efficient.

4.3 Less Judicial Interventions on International Commercial Arbitral Awards

As deeply discussed previously, restricted judicial interventions on annulment of international commercial arbitral awards is a valid and crucial element for reducing refusals of arbitral awards. On the contrary, recognition and enforcement of annulled arbitral awards which has been compared and examined above, is also very dangerous for the international commercial arbitration system. It may reduce the reluctance to select international commercial arbitration as the primary method for resolving cross-border commercial disputes. It seems that prohibition recognition and enforcement of vacated arbitral awards is a significant method for reducing or eliminating conflicts among contracting states of the New York Convention on the recognition and enforcement of international commercial arbitral awards.

Remembering the purpose of designating the New York Convention to reduce the barriers to recognition and enforcement of international commercial arbitration agreements and arbitral awards, it is generally believed that Article V of the New York Convention should be interpreted as absolutely refusals, but not authorizing permissive discretion for the competent authorities of each jurisdiction. Therefore, arbitral awards which have already been set aside in their country of origin should not further be recognized and enforced by other contracting states of the New York Convention, even according to the argued application of Article VII (1) of the more-favorable right provision. Competent authorities of each jurisdiction should pay attention to the balance between the pro-arbitration attitudes and its obligation under the New York Convention, which should give a correct explanation of the relevant provisions of the New York Convention on the recognizable and enforceable of annulled arbitral awards.

As summarized above, the latest judicial practices of the United States federal courts have changed their precedents on recognition and enforcement of annulled arbitral awards. Comments have been raised by some commentators on the Chromalloy case, “Does this mean that every time an American corporation has an award set aside in the country where made it can still obtain recognition and enforcement in the United States if the award would have been confirmed under Chapter 1 of the FAA? This result has been resisted by the commentators on the grounds that Article V (1) (e) gives primary jurisdiction of the award to the courts of the country where made and recognizes that other and even lesser grounds under the law of that country may be invoked to vacated the award. If it is clear that the arbitration law of the place where the award was made applied and that the decision appears to follow that law, there is at least a presumption that the award should be denied recognition and enforcement in the United States. It is not enough to rebut the
presumption simply by showing that the party seeking recognition and enforcement would have greater rights under the arbitration law of the place of enforcement. Arguably, the presumption is rebutted if there was a flagrant denial of due process or a failure of integrity by the court with primary jurisdiction.”

It is clearly understood the importance on taking the balance between pro-arbitration procedure laws and the limitations on the excessive judicial interventions on international commercial arbitral awards, under the framework of the New York Convention and the relevant jurisdictions.

Another aspect for decreasing the excessive judicial intervention is limiting the recourse of arbitral awards. As discussed in the previous chapters, there are different kinds of recourse of international commercial arbitral awards, particularly in the country where those awards are made, including, but not limit to, authorizing appeal of the decisions of the arbitral tribunal, or setting aside of the arbitral awards. It is appreciated to take the limited approach of the UNCITRAL Model Law on the restriction of judicial interventions from national courts, which has provided that the only way of recourse to a court against an arbitral award should be application for setting aside in accordance with paragraph (2) and (3) of Article 34. Thus arbitral awards will not be appealed, and the finality of the decision of the arbitral tribunal could be preserved.

Further, under the mechanism of the New York Convention, the grounds for annulment of a foreign or international arbitral awards have not been unified under the Convention, but being authorized to separate jurisdictions. So the judicial interventions on nullification procedures in each contracting state may vary from one to another, and may cause more barriers to the following recognition and enforcement proceeding. However, it has been completely changed by the UNCITRAL Model Law, because the unification of the specific grounds for setting aside of international commercial arbitral awards has been regulated, which will reduce the confusions caused by different interpretations of various jurisdictions. It will promote the stability and finality of the arbitral awards, and increase the possibility of smoother recognition and enforcement of international commercial arbitral awards.

Moreover, the mechanism of the Model Law on the uniform treatment of arbitral awards, no matter where they are rendered, may be beneficial for resolving the other problem of judicial intervention on the said “non-domestic” arbitral awards. During a long period of time, the “non-domestic awards” issue has confused different judicial authorities, especially on the arguments that in which jurisdiction could this type of awards be vacated, and what is the application law for determining recognition and enforcement, or rejections of such kind of arbitral awards. Academic arguments and judicial practice confusions have continued for decades since the publication of the New York Convention. If the approach of the Model Law has been taken into consideration by more and more jurisdictions when they prefect or amend their domestic arbitration-related laws, then no matter what category the arbitral awards have been divided into, the relevant simple mechanism for recognition and

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851 See Article 34 (1) of the UNCITRAL Model Law on International Commercial Arbitration.
enforcement of international commercial arbitration awards will only consider the point that whether the award falling into the arbitration laws and then should be recognized and enforced pursuant to the relevant provisions under such laws, no matter where they were rendered. It will potentially unify the criterion for recognition and enforcement of international commercial arbitral awards, and reduce the barriers of those existed vague and meaningless issue.

4.4 Future Unification on Application of International Public Policy

As the public policy doctrine being one of the vague and abstract grounds for nullification and refusal of recognition and enforcement of international commercial arbitral awards, it may cause further obstacles to the smoothly practices of international commercial proceeding. Thus it is significant to get relatively unified interpretation on the public policy exception in international commercial arbitration practices, and it will be appropriate if limiting the term of public policy by indicating only international public policy. This approach will benefit the international commercial arbitration system, because it will relatively prevent parochial and frequent invoking of public policy exceptions to reject recognition and enforcement of valid international commercial arbitral awards.

In 2000, the Interim Report on Public policy as a Bar to Enforcement of International Arbitral Awards by the International Law Association on its London Conference stated that “it is notoriously difficult to provide a precise definition of public policy (in the context of enforcement of arbitral awards). The definitions which have been articulated have, however, not changed markedly over the years.”852 In this interim report, various definitions on violation of public policy were summarized, including “violation of basic notions of morality and justice”, “international public policy”, “transnational or truly international public policy”. 853 Specifically, the definition of public policy most often quoted is that of Judge Joseph Smith in Parsons & Whittemore (United States of Appeals, 1974), in which he held that enforcement of a foreign arbitral award might be denied on public policy grounds “only where enforcement would violate the forum state’s most basic notions of morality and justice”854; as for the definition of international public policy, Dr. van den Berg has commented that the public policy defense rarely leads to a refusal of enforcement: one of the reasons being a distinction drawn between domestic and international public policy.855 Further, international public policy is understood to be narrower than domestic public policy: not every rule of law which belongs to the ordre public interne is necessarily part of ordre public externe or international856; the concept of transnational public policy or truly international public policy is even more restricted

853 Id. pp.4-7.
854 Id. p.5.
scope, but of universal application-comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as “civilized nations”.  

It is clear that all of the most influential New York Convention has not give unified definition of the term of “public policy”, and even the UNCITRAL Model Law has not give specific interpretation on the concept of “public policy”. Thus each jurisdiction has been authorized to interpret the concept of “public policy” separately, in the setting aside proceedings and the refusal of recognition and enforcement stages, which has caused various explanations and confusions on the application of public policy doctrine. This approach has caused numerous barriers to recognition and enforcement of international commercial arbitral awards in the past few decades.

For future decreasing or eliminating the obstacles of public policy during the proceedings of recognition and enforcement of international commercial arbitral awards, the uniform interpretation on public policy doctrine is a practicable and appropriate perfection method. It should be common for all of those contracting states of the New York Convention to refer the public policy only indicating international public policy. And it should also reflect this interpretation in the amendment or perfection of domestic arbitration-related laws simultaneously.

As discussed above, the final recommendations on application of public policy as a ground for refusing recognition and enforcement of international arbitral awards should be a reasonable and basic guidance for interpreting the term of “public policy”. It has specifically indicated that the exception circumstances may be particularly found if recognition and enforcement of the international arbitral award would violate international public policy. The Committee on International Commercial Arbitration of the International Law Association has further interpreted that international public policy includes both procedural and substantive public policy, which could be divided into three categories: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or public policy rules and (iii) the duty of the State to respect its obligations towards other States or international organizations.

The future application of the public policy exception should base on this restricted interpretation, which will greatly reduce the current confusions. The limitation of the contents of public policy to be sole international public policy should be invoked in both nullification procedures of international arbitral awards, and procedures of refusing recognition and enforcement of these arbitral awards fallen into the category of international commercial arbitration. This clarification of the public policy doctrine will be particularly beneficial for those developing nations where international commercial arbitration practices grow rapidly on the one hand, while the potential risks connected with excessive invoking of public policy exception to set aside of international commercial arbitral awards, or to refuse recognition and enforcement of international arbitral awards.

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857 *Id.* pp.6-7.

858 *International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, article1(b) through 1(d), Resolution 2/2002, at the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002.
enforcement of them on the other hand. Thus it is very urgent to continue research the final report and the recommendations of the ILA at its 70th Conference in 2002, and tries to make more progress on the unification and interpretation of international public policy.

**4.5 Efficiency of Competition to be the Most-Favorable Arbitration Centre: Experience of Singapore for Japan and China**

Another effective method will be the competitions to be the most-favorable arbitration centre, which will largely promote the perfection of domestic arbitration-related legislation and the judicial supports on establishing pro-arbitration legal system therein. During the past three decades, the Singapore International Arbitration Centre (SIAC) has grown rapidly, which has been one of the bright stars among the worldwide famous international arbitration centers (see Chart No.1). The successful experience of SIAC has directly certified the growing importance of domestic arbitration-related legislation, both statute and case laws. It has provided feasible experience for both Japan and China, in order to eliminate the barriers to international commercial arbitral awards separately, and improve their international commercial arbitration practices in the nearly future.

**Chart No.1: Total Number of New Cases Handled by SIAC (2001-2012)**

![Total No. of New Cases Handled by the SIAC from 2001-2012](http://www.siac.org.sg/why-siac/facts-figures/statistics)

As a Japanese advocate summarizes the meaningful of choosing Singapore as the place of arbitration, indicating that the main reasons promoting the disputed parties to select Singapore as their arbitration venue could refer to the following elements: (1) the perfection of the legislation framework; (2) the legitimately restricted court interventions; (3) the transparency as a jurisdiction and the status as a neutral third Country; (4) the supports of the government for achieving the arbitration hub goal; (5) the arbitration institutions; (6) the resources of arbitrators and advocates; (7) the

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function as area unification centre; (8) the geography location and diversity of languages. Of those merits, the perfection of the international commercial arbitration law and the court support of Singapore form the most critical elements.

4.5.1 The Latest Perfection of the International Arbitration Act

According to the previous brief introduction of the legislative history of Singapore, the separation of domestic and international arbitration regimes is a unique character of the Singapore arbitration system. Other countries have gradually integrated the domestic and international arbitration law into a synthesized one. Nevertheless, the separation of the domestic and international arbitration law has its unique advantage, which has reflected in the frequent amendments of the arbitration laws.

Taking the International Arbitration Act of Singapore as an example, since the first 1994 IAA was commenced, it has already endured several amendments, including the 1995 revised edition of IAA (1995/3/15), Act 38 of 2001 on the IAA (Amendment 2001/11/1), Act 28 of 2002 IAA (Amendment 2002/10/25) and the 2002 Revised Edition (2002/12/31), Act 26 of 2009 IAA (Amendment 2010/1/1) and the latest Act 12 of 2012 IAA (Amendment 2012/6/1). In the past two decades after the original version of IAA was published, it has already been revised for five times. This high frequency of perfection of the International Arbitration Act reflects the latest development of both theoretical research and arbitration practice in the international arbitration field, and has immediately incorporated these new changes into the international arbitration law. With such a legislation-perfection approach, it has perfectly formed the basic and most appropriate legal framework for both domestic awards under the IAA and foreign arbitral awards requested recognition and enforcement in Singapore. From the next Chart No. 2, it is clearly stated that more and more foreign parties have chosen SIAC as their arbitration institution. Comparing to other worldwide famous arbitration institutions, the international arbitration cases administered by SIAC have grown with a rapid speed in the recent decade.

Specifically referring to the latest International Arbitration Act of Singapore, there are four parts and two schedules in entire act, of which Part II and Part III are separately provided on international commercial arbitration in Singapore, and recognition and enforcement of foreign arbitral awards. As discussed above, excepting Chapter VIII of the UNCITRAL Model Law, other parts of the Model Law shall have the force of law in Singapore. Therefore, all of those pro-arbitration features of the Model Law have been incorporated into the IAA of Singapore. Some of those merits have been reflected in the cases reported by the Singapore courts which have been discussed previously. Moreover, some other critical innovations of the IAA have been introduced in 2012, including the following aspects, which are departed from the Model Law.


861 Legislative History International Arbitration Act (Singapore), Chapter 143A.
First, the more liberal written form requirement of international arbitration agreement has been added in Section 2A. Article 7 of the Model Law has not been directly incorporated into Section 2A. Accordingly, Section 2A of the IAA 2012 resembles Option 1, Article 7 of the Model Law, specifically including that no matter through what manners to designate an arbitration agreement, recognition of the electronic communication for determining arbitration agreement, the validity of implied arbitration agreement and the validity of reference to other arbitration clause.\textsuperscript{863} Besides, it has also recognized the validity of a referenced arbitral clause in a bill of lading, no matter to a charterparty or to other document which contains an arbitration clause.\textsuperscript{864} The additional sub-sections reflect the practical necessity of Singapore, where a large number of international cases concern with the validity of arbitration clauses which are incorporated into the bill of lading. This sub-provision has not yet provided in the domestic arbitration-related laws in both Japan and China, contrarily, the judicial interpretations of the Supreme People’s Court of China have almost rendered such kind of international arbitration clauses to be void, and rejected recognition and enforcement of the relevant arbitral awards.

Second, judicial review of negative jurisdictional rulings has been inserted in Section 10 of the IAA 2012, which includes: (1) this section shall have effect notwithstanding Article 16 (3) of the Model Law. (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings. (3) If the arbitral tribunal rules- (a) on a plea as preliminary question that it has jurisdiction; or (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the

\textsuperscript{862} See the website of Singapore International Arbitration Centre, http://www.siac.org.sg/why-siac/facts-figures/statistics Last visit: 2014/3/2. Notes: All statistic published here have been obtained from the respective institutions named. The ICC International Court of Arbitration does not maintain separate statistics for international and French domestic cases administered by them.

\textsuperscript{863} See Section 2A of the 2012 International Arbitration Act of Singapore, subsection (3) through (7).

\textsuperscript{864} Id. Subsection (8).
High Court to decide the matter.\textsuperscript{865} And according to subsection (6), which regulates that if the High Court or the Court of Appeal decides that the arbitral tribunal has jurisdiction, then the arbitral tribunal shall continue the arbitration proceedings and make an award. If an arbitrator is unable or unwilling to continue the arbitral proceedings, the mandate of that arbitrator shall be terminated and a substitute arbitrator shall be appointed in accordance with Article 15 of the Model Law.\textsuperscript{866} This new provision on the judicial review of negative jurisdiction rulings is an innovation with controversial arguments, as one Singaporean commentator states “the same perhaps cannot be said of the other two amendments in the Bill concerning judicial review of negative jurisdictional rulings and the legal status of the emergency arbitrator, on which certain reservations were raised by some practitioners.”\textsuperscript{867} This regulation has reflected the strong pro-arbitration intention of the Singapore Government, which is criticized and doubted on the violation of less judicial interventions on arbitration proceedings. However, as the commentator argues that “what can be said, though, is that these two amendments reveal the pragmatic mindset of the Singapore lawmakers in adapting and even innovating legal mechanism to meet the demands and needs of the arbitral process, and may even herald the beginning of a ‘Singapore way’ in the development of Singapore’s arbitration regime, albeit one that continues to hew closely to the Model Law”.\textsuperscript{868}

Third, it contains the first legislative protection of emergency arbitrator all over the world.\textsuperscript{869} According to Section 2 (1) of the 2012 IAA on the interpretation of the terminology of “arbitral tribunal”, where it provides that “in this Part, unless the context otherwise requires, ‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organization”.\textsuperscript{870}

It is stated that the Act amends the definition of ‘arbitral tribunal’ to clarify the status of emergency arbitrators. It aims to accord emergency arbitrators with the same legal status and powers that of any arbitral tribunal and ensures that orders made by such emergency arbitrators are enforceable in Singapore under the IAA.\textsuperscript{871} It is indicated by another commentator, “In 2010, the SIAC Rules introduced new interim measures by vesting in Emergency Arbitrators the authority to issue awards and grant interim measures, thus affording parties emergency relief.\textsuperscript{872} Although the SIAC Rules assisted in providing parties with emergency relief prior to the constitution of

\textsuperscript{865} See Section 10, subsection (1) through (3) of the 2012 International Arbitration Act of Singapore.

\textsuperscript{866} Id. subsection (6)

\textsuperscript{867} Calvin Chan, The Upcoming Amendments to Singapore’s International Arbitration Regime—Some Preliminary Observations, Singapore International Arbitration Centre, \url{www.siac.org.sg}.

\textsuperscript{868} Id.

\textsuperscript{869} It is summarized by one commentator that at least five arbitral institutions now have “emergency arbitrator” provision in their rules—the ICDR’s International Rules, SCC, SIAC, NAI and the recently-released ICC’s arbitration rules. Yet, few if any notable jurisdictions have to date expressly legislated to provide legal recognition and support to the status and orders of emergency arbitrators. Likewise, the UNCITRAL Model Law currently does not expressly address the emergency arbitrator procedure. See Id.

\textsuperscript{870} See Section 2 (1) of the 2012 International Arbitration Act of Singapore.

\textsuperscript{871} See Singapore makes key amendments to the International Arbitration Act, 26 June 2012.

\textsuperscript{872} Rule 26 of Singapore International Arbitration Centre 2010: Interim and Emergency Relief, 26.2 “A party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.”
the tribunal, there remained a great deal of uncertainty with regards to the enforceability of the Emergency Arbitrator’s orders and awards. This was due to the exclusion of Emergency Arbitrators from the definition of ‘arbitral tribunal’, which had created a lack of clarity as to the status of an Emergency Arbitrator and the authority of its decisions.” According to the latest revision, the IAA will provide legitimate protection for the decisions of the emergency arbitrators, which will greatly improve the efficiency of arbitrator-granted interim measures under the UNCITRAL Model Law, which had been incorporated by the IAA in its 2009 amendment. And it will further ensure the effectiveness of the final international commercial arbitral awards, which would be actualized with higher possibility.

4.5.2 The Pro-International Arbitration Support of the Singapore Courts

Except the incorporation of the Model Law, and with frequent amendments of the International Arbitration Act in Singapore, there is another critical element for the successful of international commercial arbitration practice there—referring to the efficiency of the Singapore Courts which have taken a positive interpreting and supporting of the IAA and the Model Law in the relevant proceedings. Sometimes the pro-international commercial arbitration attitudes of the Singapore courts and the distinction between domestic and international arbitration are criticized by some commentator, who indicate that even the disputes connected with domestic elements, the Singapore courts prefer to recognize them as international arbitration when they have been satisfied with the international nature (of the dispute), while such distinction itself will prolong the resolving of disputes and it is expected that such situation should be restricted to happen.

Nonetheless, it has been generally admitted that the courts of Singapore for promoting international commercial arbitration system is critical, which have contributed to the rapid growing of arbitration system and made Singapore being one of the world-wide famous international commercial arbitration centre. Particularly, those courts have taken correct and appropriate interpretation of the International Arbitration Act, limited inappropriate judicial interventions and high motivation for recognition and enforcement of international commercial arbitral awards.

As introduced by the judges of Supreme Court of Singapore, that “the Singapore Court of Appeal in AJU v. AJT [2011] (SGAC 41) weighed down on a different side of the same coin. The Singapore High Court had set aside an international arbitration

874 The arbitral tribunal under the IAA has power to order interim injunctions, which the domestic tribunal does not have.” See Chan Leng Sun, The Arbitration Laws of Singapore, Singapore International Arbitration Centre, www.siac.org.sg.
875 As appreciated by the commentator, that “the inclusion of Emergency Arbitrators in the IAA will have a significant impact on the enforceability of awards in Singapore and will further enhance Singapore’s Desirability as a seat for arbitration. However, there is still uncertainty as to the enforceability of such awards outside of the jurisdiction.” See supra note 873, Julian Wallace & Glen Rosen. The same comment can be found by a Japanese lawyer, See Kurita Tetsuro, Shingaporu Kokusai Chusai Chusai (Ka) (International Commercial Arbitration of Singapore: Part 2), Kokusai Shoji Homu Vol.40, No.6 (2012), p.864.
award on public policy grounds for the first time, by finding that the underlying contract was illegal. Chief Justice Chan Sek keong, writing for the Court of Appeal, reversed that decision. The judgment engaged the vexed issue of how a court can reopen a tribunal’s finding that the settlement agreement was valid and decide for itself that the agreement was illegal. In opting for what commentators call a standard of ‘minimal review’, the Court of Appeal’s decision reflects its continued commitment to the autonomous nature of the arbitral process.”

It is also a substantial change by the court-ordered interim measures under the amendment of the IAA in 2009, which has permitted courts to decide interim measures to assist arbitration procedures seated abroad. It is clearly regulated in Section 12A (1) (b), “This section shall apply in relation to an arbitration (b) irrespective of whether the place of arbitration is in the territory of Singapore”. According to one Singaporean commentator, whether grant the Singapore court assisting the arbitration proceedings seated outside the territory of Singapore endured many debates and discussion, “at the heart of this issue is a choice between two approaches to promoting Singapore as a centre for international arbitration: the ‘competition’ approach and the ‘reciprocal’ approach. The competition approach believes that denying the assistance of the Singapore court to foreign seated arbitrations encourages commercial parties to choose to seat their arbitration in Singapore. The reciprocal approach takes a broader view. It believes Singapore enhances its reputation as a centre for international arbitration by being a good global citizen. This includes assisting foreign seated arbitrations, in the hope that other jurisdictions will similarly assist arbitrations seated in Singapore.” According to the latest amendments, the Singapore parliament moves decisively in favor of the ‘reciprocal’ approach by passing the recent amendments to the IAA, which has reflected the pro-court assistance in international commercial arbitration, no matter seated in Singapore or abroad. It has been appreciated that such a new change makes the international arbitration law of Singapore adapting with international norms, and affirms Singapore’s intention to be a responsible and cooperative player in international arbitration field. It is a significant progression of the court assistance with international commercial arbitration in Singapore, since the amendment of the IAA has authorized assistant of interim measures by Singapore court to foreign arbitration procedure. Such an approach will indirectly ensure the smoothly recognition and enforcement of international commercial arbitral awards in Singapore.

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878 See Section 12A (1) (b) of the 2012 International Arbitration Act of Singapore.
880 It is also indicated that “court assistance of arbitrations can be a mixed blessing. There is a thin line between a court ‘assisting’ and a court ‘interfering’. This is more than just an academic question in some Asian countries. Historically, the Singapore courts have avoided undue interference in arbitral proceedings. There is a long list of Singapore cases where the court articulate exactly this concern. Nonetheless, when moving the recent amendments in the Singapore parliament, the Law minister stressed that in keeping with Singapore’s policy of minimal curial intervention in arbitration proceedings, the court’s powers under the amendment do not extend to procedural or evidential matters dealing with the actual conduct of the arbitration itself, such as discovery, interrogatories, or security for costs.” See Id. KC Lye.
881 Id.
if it is necessary to organize the final proceeding of execution therein.

Another aspect of court assistance mentionable is the enforcement of international arbitration agreement by staying the litigation proceedings of the Singapore courts. Section 6 of the IAA specifically regulates the compulsory requirement, without discretion, for the competent court to stay court proceedings.\textsuperscript{882} As commented by a Japanese lawyer, “there is not any permitting on staying of court procedure like this. If the subject matter of an arbitration agreement has filed into the Japanese court, the plea for dismissing the action is necessary before the defendant ‘had presented his statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute’.\textsuperscript{(Article 14 of the Japanese Arbitration Law). The court will trial and decide whether there is any ground for dismissal, if any, dismiss the action; if not at all, dismiss the plea by the applicant and make a intermediate ruling for continuing the court proceeding. There is not any legal framework for the Japanese court to wait for the decision of the arbitral tribunal on whether the arbitration agreement exists or not.\textsuperscript{883}

The pro-arbitration attitudes reflected in the legislation on international commercial arbitration and the Singapore courts’ judicial practice could be attribute to its tremendous willingness to catch up with the competition to be the most-favorable arbitration centre, which has affirmed and further enabled its perfection of the legal framework for international commercial arbitration, both statutes and case law. As appreciated by a commentator, “the first case involving the IAA, now known memorably as Re an Arbitration, set the tone for the outcome of future cases on enforcement of international arbitral awards and presents the context by which subsequent enforcement cases should be understood. The story of court support for international arbitration and the enforcement of arbitral awards has been, so far, about the importance that Singapore places not only in developing itself as an arbitration venue but in recognizing that part of that development lies in the regard that others have of her as a facilitative participant on the world stage of international arbitration”.\textsuperscript{884}

Moreover, as for authorization of anti-arbitration injunctions, it is said that the Singapore courts have shown restraint on several occasions, with particular emphasis on a measured approach and judicial common sense.\textsuperscript{885} In order to answer the question to what extent should courts intervene in the arbitration procedures, a balance or ‘equilibrium’ is necessary. The law on the anti-arbitration injunction is another fertile area for the courts to explore in their quest to achieve that equilibrium.\textsuperscript{886} According to the previous discussion, it is submitted that the laws for international commercial arbitration in Singapore have provided the balance under the provisions of the pro-arbitration and necessary anti-arbitration injunctions, which

\textsuperscript{882} See Section 6 of the of the 2012 International Arbitration Act of Singapore.


\textsuperscript{886} Id. p.294.
have been strictly obeyed by the relevant courts. A brighter future would be expected
lying on the continual perfection of international commercial arbitration legislation
and judicial support by the Singapore courts.

4.5.3 Experience of Singapore for Necessary Improvements in Japan and China

Referring to the relevant legislation and practice of international commercial
arbitration in Japan and China, some defects are still existed in both countries. In
Japan, during a long history, as introduced by a Japanese professor, the legal resources
for recognition and enforcement of foreign arbitral awards in Japan included the
multilateral international conventions, the bilateral trade agreements signed by Japan,
when the relevant provisions in Book VIII of the Civil Procedure Code was only used
for execution of domestic awards. There was not any domestic law for the
incorporation of those international treaties, which has caused not only the uncertainty
of procedure in domestic laws, but also unclear about the application among those
international treaties or bilateral agreements.\footnote{Kobayashi Hideyuki, Gaikoku Chusai Handan No Shonin Oyobi Shikko (Recognition and Enforcement of Foreign Arbitral Awards), Jyurisuto, p.255.} As summarized above, it should be
appreciated that the latest reform of arbitration law was based upon the UNCITRAL
Model Law in 2003. However, international commercial arbitration practices are still
not as active as other developed countries, especially comparing to the latest
developed arbitration centre of Singapore. Many commentators and professors have
theoretically researched the possibility and future growth of international commercial
arbitration in Japan. All of those opinions have expected the activation of the
international commercial arbitration practice from now on. They suggest that Japan
should catch up with the leading arbitration centers all over the world, and be one of
benefit both Japanese parties and foreign parties in international commercial
transactions and other cross border commercial activities.

In China, arbitration practices have been greatly improved during the past three
decades, together with the rapid increasing of case loading by both foreign-related
arbitration institutions and the domestic arbitration commissions. For example, the
CIETAC, as one of the most famous international commercial arbitration institutions
in China, has a fast increasing of international commercial arbitration cases loading
during the past decades. According to the statistic of CIETAC as explained in Chart
No.3 and Chart No.4 below, the total cases accepted has exceeded 1000 since 2007, in
which the foreign-related cases taking up nearly half each year. During a long time CIETAC could only accept foreign-related arbitration cases according to the relevant laws of China. After the 1991 Civil Procedure Law and the 1994 Arbitration Law were promulgated, such limitation has been abolished, and the number of domestic arbitration cases accepted by CIETAC has been rapid increased since then.

Chart No.3 Total cases accepted by CIETAC Beijing Headquarter and Sub-Commissions (Both Foreign-Related and Domestic)\(^{889}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Beijing</th>
<th>Shanghai</th>
<th>South China</th>
<th>Tianjin</th>
<th>Southwest</th>
<th>Total</th>
</tr>
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<td>159</td>
<td>18</td>
<td>10</td>
<td>11</td>
<td>1256</td>
</tr>
<tr>
<td>2012</td>
<td>975</td>
<td>37</td>
<td>16</td>
<td>19</td>
<td>13</td>
<td>1060</td>
</tr>
<tr>
<td>2011</td>
<td>668</td>
<td>523</td>
<td>218</td>
<td>21</td>
<td>5</td>
<td>1435</td>
</tr>
<tr>
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<td>476</td>
<td>182</td>
<td>12</td>
<td>10</td>
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<tr>
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<td>427</td>
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<td>-</td>
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<td>180</td>
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Chart No.4 Foreign-Related cases accepted by CIETAC Beijing Headquarter and Sub-Commissions\(^{890}\)

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<th>Year</th>
<th>Beijing</th>
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<th>Tianjin</th>
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Comparing the situations of both Japan and China with Singapore on the international commercial arbitration legislation and judicial practices, it is obvious that the successful experience of Singapore may be a good model for the innovation of the two countries. Specifically, the promotion aspects for Singapore to achieve the goal of being one of the arbitration hubs would be referred by both China and Japan. Since the domestic arbitration laws of Japan has already been perfected according to the UNCITRAL Model Law, more efforts should be concentrated on the case law.

As specifically discussed previously, the recent judicial practice of nullification of arbitral awards on the ground of public policy in Japan has been criticized by some commentators. If it is expected to establish an efficient and frequent-selected international commercial arbitration centre in Japan, less judicial interventions in both international arbitration agreements and arbitral awards is necessary. Except the traditional court litigations, international commercial arbitration has been certified as a valid and world-wide practiced alternative dispute resolution, which will be more invoked in the future. Therefore, if Japan intends to join into the globally competition for the most-favorable arbitration centre, the legislative perfection on supporting the international arbitration system and the judicial interpretations by the relevant courts are critical for reaching the goal. It is believed that the role of the Japanese government is important for substantively starting this contest. As a Japanese commentator introduces the successful experience of Singapore, one of those important elements is the assistance from the government, indicating that “The Whole country of Singapore has expected to realize the goal of establishing the status as an arbitration hub. This is under the campaign for the ‘hub of intellectual industry’ as a national policy in Singapore, as a country with stricture of land and little natural resource. To be an intellectual industrial centre with high level of legal service, acting as the legal headquarters for more international enterprises and inviting more law firms to locate in Singapore, it is required to establish a synthesized system of national courts and arbitration centre with high level function therein.”

Similarly, the same work should be burdened by the Japanese government, which shall be reflected in the amendment of domestic arbitration-related legislation and the forming of pro-international arbitration bias when perfecting of the court procedures connected

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with the international arbitration proceedings.

In China, more urgent efforts should be paid to both the domestic arbitration-related legislation and the judicial practices, which have already been specifically discussed in the previous part. As reflected in the statistics of CIEAC that the rapid increasing of arbitration case loading are faced by the Chinese arbitration institutions, the domestic arbitration laws are more critical for reducing barriers to the international commercial arbitration practices in both the territory of China and abroad. Referring to the domestic aspect, the court assistance for smoother organization and progressing of arbitration proceedings in the whole stages, particularly in the judicial control on the annulment of the awards and the recognition and enforcement procedure. Another more significant aspect is the enforcement of Chinese arbitral awards abroad, which will be more frequently provided in the new century, with the rapid growth of China’s economy and enlarged international commercial and investment activities all over the world. More and more foreign parties may choose the Chinese arbitration institutions to try their disputes, and finally these Chinese international commercial arbitral awards may be recognized and enforcement in other jurisdictions.\textsuperscript{892} The outdated arbitration-related legislation of China and the inappropriate judicial involvements on arbitration proceedings of both foreign-related and domestic arbitration institutions will cause future obstacles to the recognition and enforcement of international commercial awards. This may derogate the reputation of the Chinese arbitration institutions, and may reluctant more foreign parties to choose arbitration proceedings being seated in China. It will potentially hinder China to be one of the outstanding arbitration centers, which has specifically reflected in the decreasing of foreign-related arbitration cases from Chart No.4 above.\textsuperscript{893}

Accordingly, the urgent work for Chinese competent authorities, legislators and academic researchers is perfecting the domestic arbitration-related laws, changing the less pro-arbitration judicial practices by the people’s courts, and adapting the less favorable domestic rules as soon as possible to the general accepted criterion for pro-international commercial arbitration system. It is suggested that joining in the impetus competition to be one of the top-ranking commercial arbitration centers may enhance the possibility of achieving the goals easily. The successful experience of Singapore is a feasible model for China, particularly, taking the first significant step to incorporate the UNCITRAL Model Law, and then frequently amending the international commercial arbitration laws, together with ensuring the competent courts to take more-favorable attitudes towards the international arbitration procedure in the whole sense.


\textsuperscript{893} See supra note 890, See Statistics of CIETAC, \url{http://cn.cietac.org/AboutUS/AboutUS4Read.asp}. Last visit: 2014/3/1. Such decreasing of foreign-related arbitral cases accepted by CIETAC in the past two years may due to the termination of accepting and administering arbitration cases by the CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission since August 1 2012, which refused to use the lawfully revised CIETAC Arbitration Rules 2012, and had caused a relevant confusions for the foreign parties who had chose or intend to choose arbitration in China, and indirectly affect the number of foreign-related arbitration cases.
CONCLUSION

International commercial arbitration system has developed for centuries, which was particularly improved during the past century, benefited from the gradually perfected legal framework for international commercial arbitration law, composing with multilateral international arbitration conventions and various domestic arbitration-related laws. All those efforts have greatly increased the possibility of recognition and enforcement of international commercial arbitral awards extraterritorially. Nonetheless, under the present legal framework, no matter that the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been widely accepted by most nations all over the world, the duality character of conventions and domestic laws had affected the effectiveness and execution of international commercial arbitral awards. It is confirmed that the contributions of various international arbitration conventions should not be denied, which represents the first time formed the basic principles and mechanisms for recognition and enforcement of international commercial arbitral awards. However, fifty-five years past after the promulgation of the New York Convention, and the contemporary situations has been significantly changed in international commercial arbitration practice. Additionally, with the latest drafted and revised UNCITRAL Model Law on International Commercial Arbitration, which has greatly affected the domestic arbitration legislation or amendments, the increasing importance of domestic arbitration-related laws should not be ignored.

In this dissertation, it firstly gives an overview of the historical evolution of the multilateral international conventions on promoting the recognition and enforcement of international arbitration agreement and cross border commercial arbitral awards. It provides a clear understanding on the gradually formulation of those contemporary obstacles to recognition and enforcement of international commercial arbitral awards, especially the ones under the most influential and successful New York Convention, and tries to pick out the most difficulty and with high frequency argued barriers to the international commercial arbitration awards. It is necessary to make an overview at the very beginning, because general understanding on the status of the contemporary legal framework for international commercial arbitral awards forms the basis of the comparative study herein.

The second step is specifically analyzing and discussing the controversial barriers to recognition and enforcement of international commercial arbitral awards in several jurisdictions. It is believed that comparing as more judicial practices as possible can devote to understand the problems more correctly and deeply. Three main obstacles to recognition and enforcement of international arbitral awards, including the invalidity of international commercial arbitration agreement, excessive judicial interventions on international commercial arbitration and contrary to public policy doctrine as an exception to set aside or reject of international commercial arbitral awards, has been discussed in detail. It explains how the domestic arbitration-related laws affected the efficient and final execution of international commercial arbitral awards. Nowadays, the practice of international commercial arbitration has
relevantly uniformed on the one hand, no matter in the common law countries or the
civil law countries, or in the most developed countries and those still in fast
developing period. While on the other hand, subjecting to the various traditions of
arbitration legislation and case laws, utterly unified approach for recognition and
enforcement of international commercial arbitral awards is yet to be established. The
main source of those controversial barriers originates from the relevant domestic laws
or their precedents.

The variety in domestic legislation skills and the pro-arbitration attitudes had
reflected directly in their arbitration-related laws separately, and guided their practices
on treating the relationship between national courts and arbitral tribunals. It then
affected their understandings on the necessity to liberal the strict and outdated
conditions for deciding the validity of international commercial arbitration
agreements, and exercising excessive judicial involvements on the international
commercial arbitration proceedings and arbitral awards. It simultaneously authorized
the enlarged invoking of the vague and versatility exception ground of public policy.

Basing on the comparison of those obstacles generated from different selected
jurisdictions, the significant function of the domestic arbitration-related laws can be
ascertained. Particularly, some countries had amended their domestic arbitration laws
according to the 1985 UNCITRAL Model Law, which was updated in 2006; while
some other States had contributed to the formation of contemporary international
commercial arbitration system, relying on their advanced and practical domestic
arbitration laws. Getting well known of the contributions of the Model Law is critical
for future eliminating those existed obstacles which had blocked up the repayment of
those reimbursements contained in various international commercial arbitral awards.

According to a general comparison on the legislation history of the selected
countries, it promotes more specific explanations on the evolvement of those most-
frequently advocated barriers to recognition and enforcement of international
arbitration awards in the relevant jurisdiction. The two separate parts of the domestic
arbitration-related laws, statutes and case laws, had deeply affected the finality and
effectiveness of international commercial arbitral awards. Contrary to the well
established legal framework of the New York Convention and other regional
conventions, together with the UNCITRAL Model Law, different approaches of the
domestic arbitration laws and judicial practice caused confusions and conflicts on the
recognition and enforcement of the international commercial arbitration awards,
especially in some developing countries like China and India, where the less
developed arbitration legislation and not yet well established friendly judicial
allegiance for international commercial arbitration procedures, had been a big
challenge to the mainstream mechanism for recognition and enforcement of
international commercial arbitral awards exterritorialy.

Upon those specific theoretical arguments and case study, the effective method
for elimination those indicated problems shall emphasize on the increasing
importance of domestic arbitration-related legislation, concentrating on their
perfection and relevant unification. It is feasible for those countries where legislation
skill and international commercial arbitration system were immature, to incorporate
the UNCITRAL Model Law, for which has provided a valuable and systematical model for amending their problematic domestic arbitration laws. Through such an approach, the harmonization of international practices on commercial arbitration will be accomplished at a higher level, which specifically will contribute to the fulfillment of gradually removing those barriers to recognition and enforcement of international commercial arbitral awards. Here, taking the arbitration legislation perfection of China basing on the Model Law as an example demonstrates the significance of this approach.

Additionally, restricting the excessive judicial interventions and amplified application of the public policy exception is necessary. Therefore it is urgent to reach the balance between the pro-arbitration attitudes and the appropriate judicial involvements, and try to relevantly unify the interpretation on public policy as only indicating international public policy. Another effective and valuable suggestion is encouraging the competition for the most-favorable arbitration centre among those globally influential venues of international commercial arbitration. The successful experience of Singapore gives many feasible hints for China and Japan. All these proposals will accelerate the elimination of existed refusals, and even newly generated obstacles to smoothly recognition and enforcement of international commercial arbitral awards in the future.
APPENDIX

I Protocol on Arbitration Clauses (Geneva 1923)

The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions:

Article 1
Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting states by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

Article 2
The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

Article 3
Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

Article 4
The tribunals of the Contracting Parties on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

Article 5
The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

**Article 6**
The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

**Article 7**
The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

**Article 8**
The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under mentioned territories: that is to say, their colonies, overseas possessions or territories protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

A certified copy of the present Protocol will be transmitted by the Secretary-General to all the Contracting States.

Done at Geneva on the twenty-fourth day of September, one thousand nine hundred and twenty-three in a single copy of which the French and English texts are both authentic, and which will be kept in the archives of the Secretariat of the League.

**II Convention on the Execution of Foreign Arbitral Awards (Geneva 1927)**

**Article 1**

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24,
1923 shall be recognized as binding and shall be enforced in accordance with the rules
of the procedure of the territory where the award is relied upon, provided that the said
award has been made in a territory of one of the High Contracting Parties to which the
present Convention applies and between persons who are subject to the jurisdiction of
one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is
valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under
the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the
submission to arbitration or constituted in the manner agreed upon by the parties and
in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the
sense that it will not be considered as such if it is open to opposition, appeal or
pourvoi en cassation (in the countries where such forms of procedure exist) or if it is
proved that any proceedings for the purpose of contesting the validity of the award are
pending;

(e) That the recognition or enforcement of the award is not contrary to the public
policy or to the principles of the law of the country in which it is sought to be relied
upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and
enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of
the arbitration proceedings in sufficient time to enable him to present his case; or that,
being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling
within the terms of the submission to arbitration or that it contains decisions on
matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the
competent authority of the country where recognition or enforcement of the award is
sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

**Article 3**

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

**Article 4**

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in the Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

**Article 5**

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

**Article 6**

The present Convention applies only to arbitral awards made after the coming-into-force of the Protocol on Arbitration Clauses, opened at Geneva on September 24 1923.

**Article 7**
The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified. It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

**Article 8**

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

**Article 9**

The present Convention may be denounced on behalf of any Member of the League or Non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present Convention.

**Article 10**

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, applies, can be affected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.
The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

**Article 11**

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every Non-Member State which signs the same.

In faith whereof the above-named Plenipotentiaries have signed the present Convention.

Done at Geneva on the twenty-sixth day of September one thousand nine hundred and twenty-seven, in a single copy, of which the English and French texts are both authentic, and which will be kept in the archives of the League of Nations.


**Article I**

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

**Article II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

**Article III**

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

**Article IV**

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

**Article V**

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 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.

Article VI
If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII
1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.


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Article VIII
1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX
1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X
1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI
In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional
system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

**Article XII**
1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

**Article XIII**
1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

**Article XIV**
A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**Article XV**
The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;
(b) Accessions in accordance with article IX;
(c) Declarations and notifications under articles I, X and XI;
(d) The date upon which this Convention enters into force in accordance with article XII;
(e) Denunciations and notifications in accordance with article XIII.

**Article XVI**
1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

**IV European Convention on International Commercial Arbitration**

*(Geneva 1961)*

THE UNDERSIGNED, DULY AUTHORIZED,
Convened under the auspices of the Economic Commission for Europe of the United Nations.

Having noted that on 10th June 1958 at the United Nations Conference on International Commercial Arbitration has been signed in New York a Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

Desirous of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries,

Have agreed on the following provisions:

**Article I - Scope of the Convention**

1. This Convention shall apply:
   (a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;
   (b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above.

2. For the purpose of this Convention,
   (a) the term: "arbitration agreement" shall mean either an arbitral clause in a contract
or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws;

(b) the term "arbitration" shall mean not only settlement by arbitrators appointed for each case (ad hoc arbitration) but also by permanent arbitral institutions;

(c) the term "seat" shall mean the place of the situation of the establishment that has made the arbitration agreement.

**Article II - Right of Legal Persons of Public Law to Resort to Arbitration**

1. In cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.

2. On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.

**Article III - Right of Foreign Nationals to be Designated as Arbitrators**

In arbitration covered by this Convention, foreign nationals may be designated as arbitrators.

**Article IV - Organization of the Arbitration**

1. The parties to an arbitration agreement shall be free to submit their disputes:

   (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution;

   (b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia

   (i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;

   (ii) to determine the place of arbitration; and

   (iii) to lay down the procedure to be followed by the arbitrators.

2. Where the parties have agreed to submit any disputes to an ad hoc arbitration, and where within thirty days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration. This paragraph shall also apply to the replacement of the arbitrator(s) appointed by one of the parties or by the President of the Chamber of Commerce above referred to.

3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by
one or more arbitrators and the arbitration agreement contains no indication regarding
the organization of the arbitration, as mentioned in paragraph 1 of this Article, the
necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties
are able to agree thereon and without prejudice to the case referred to in paragraph 2
above. Where the parties cannot agree on the appointment of the sole arbitrator or
where the arbitrators appointed cannot agree on the measures to be taken, the claimant
shall apply for the necessary action, where the place of arbitration has been agreed
upon by the parties, at his option to the President of the Chamber of Commerce of the
place of arbitration agreed upon or to the President of the competent Chamber of
Commerce of the respondent's habitual place of residence or seat at the time of the
introduction of the request for arbitration. Where such a place has not been agreed
upon, the claimant shall be entitled at his option to apply for the necessary action
either to the President of the competent Chamber of Commerce of the country of the
respondent's habitual place of residence or seat at the time of the introduction of the
request for arbitration, or to the Special Committee whose composition and procedure
are specified in the Annex to this Convention. Where the claimant fails to exercise the
rights given to him under this paragraph the respondent or the arbitrator(s) shall be
entitled to do so.

4. When seized of a request the President or the Special Committee shall be entitled as
need be:

(a) to appoint the sole arbitrator, presiding arbitrator, umpire, or referee;
(b) to replace the arbitrator(s) appointed under any procedure other than that referred
to in paragraph 2 above;
(c) to determine the place of arbitration, provided that the arbitrator(s) may fix another
place of arbitration;
(d) to establish directly or by reference to the rules and statutes of a permanent arbitral
institution the rules of procedure to be followed by the arbitrator(s), provided that the
arbitrators have not established these rules themselves in the absence of any
agreement thereon between the parties.

5. Where the parties have agreed to submit their disputes to a permanent arbitral
institution without determining the institution in question and cannot agree thereon,
the claimant may request the determination of such institution in conformity with the
procedure referred to in paragraph 3 above.

6. Where the arbitration agreement does not specify the mode of arbitration
(arbitration by a permanent arbitral institution or an ad hoc arbitration) to which the
parties have agreed to submit their dispute, and where the parties cannot agree thereon,
the claimant shall be entitled to have recourse in this case to the procedure referred to
in paragraph 3 to determine the question. The President of the competent Chamber of
Commerce or the Special Committee, shall be entitled either to refer the parties to a
permanent arbitral institution or to request the parties to appoint their arbitrator within
such time-limits as the President of the competent Chamber of Commerce or the
Special Committee may have fixed and to agree within such time-limits on the
necessary measures for the functioning of the arbitration. In the latter case, the provisions of paragraphs 2, 3 and 4 of this Article shall apply.

7. Where within a period of sixty days from the moment when he was requested to fulfil one of the functions set out in paragraphs 2, 3, 4, 5 and 6 of this Article, the President of the Chamber of Commerce designated by virtue of these paragraphs has not fulfilled one of these functions, the party requesting shall be entitled to ask the Special Committee to do so.

**Article V - Plea as to Arbitral Jurisdiction**

1. The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral procedure. Where the delay in raising the plea is due to a cause which the arbitrator deems justified, the arbitrator shall declare the plea admissible.

2. Pleas to the jurisdiction referred to in paragraph 1 above that have not been raised during the time-limits there referred to, may not be entered either during a subsequent stage of the arbitral proceedings where they are pleas left to the sole discretion of the parties under the law applicable by the arbitrator, or during subsequent court proceedings concerning the substance or the enforcement of the award where such pleas are left to the discretion of the parties under the rule of conflict of the court seized of the substance of the dispute or the enforcement of the award. The arbitrator's decision on the delay in raising the plea, will, however, be subject to judicial control.

3. Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

**Article VI - Jurisdiction of Courts of Law**

1. A plea as to the jurisdiction of the court made before the court seized by either party to the arbitration agreement, on the basis of the fact that an arbitration agreement exists shall, under penalty of estoppel, be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance.

2. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.
(a) under the law to which the parties have subjected their arbitration agreement;
(b) failing any indication thereon, under the law of the country in which the award is to be made;
(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.

3. Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

4. A request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

**Article VII - Applicable Law**

1. The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

2. The arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.

**Article VIII - Reasons for the Award**

The parties shall be presumed to have agreed that reasons shall be given for the award unless they

(a) either expressly declare that reasons shall not be given; or

(b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

**Article IX - Setting Aside of the Arbitral Award**

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a
State in which, or under the law of which, the award has been made and for one of the following reasons:

(a) the parties to the arbitration agreement 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 requesting the setting aside of the award 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 need not be set aside;

(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, with the provisions of Article IV of this Convention.

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

**Article X - Final Clauses**

1. This Convention is open for signature or accession by countries members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference.

2. Such countries as may participate in certain activities of the Economic Commission for Europe in accordance with paragraph 11 of the Commission's terms of reference may become Contracting Parties to this Convention by acceding thereto after its entry into force.

3. The Convention shall be open for signature until 31 December 1961 inclusive. Thereafter, it shall be open for accession.

4. This Convention shall be ratified.

5. Ratification or accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

6. When signing, ratifying or acceding to this Convention, the Contracting Parties shall communicate to the Secretary-General of the United Nations a list of the Chambers of Commerce or other institutions in their country who will exercise the functions conferred by virtue of Article IV of this Convention on Presidents of the
7. The provisions of the present Convention shall not affect the validity of multi-
lateral or bilateral agreements concerning arbitration entered into by Contracting
States.

8. This Convention shall come into force on the ninetieth day after five of the
countries referred to in paragraph 1 above have deposited their instruments of
ratification or accession. For any country ratifying or acceding to it later this
Convention shall enter into force on the ninetieth day after the said country has
deposited its instrument of ratification or accession.

9. Any Contracting Party may denounce this Convention by so notifying the
Secretary-General of the United Nations. Denunciation shall take effect twelve
months after the date of receipt by the Secretary-General of the notification of
denunciation.

10. If, after the entry into force of this Convention, the number of Contracting Parties
is reduced, as a result of denunciations, to less than five, the Convention shall cease to
be in force from the date on which the last of such denunciations takes effect.

11. The Secretary-General of the United Nations shall notify the countries referred to
in paragraph 1, and the countries which have become Contracting Parties under
paragraph 2 above, of

(a) declarations made under Article II, paragraph 2;
(b) ratifications and accessions under paragraphs 1 and 2 above;
(c) communications received in pursuance of paragraph 6 above;
(d) the dates of entry into force of this Convention in accordance with paragraph 8
above;
(e) denunciations under paragraph 9 above;
(f) the termination of this Convention in accordance with paragraph 10 above.

12. After 31 December 1961, the original of this Convention shall be deposited with
the Secretary-General of the United Nations, who shall transmit certified true copies
to each of the countries mentioned in paragraphs 1 and 2 above.

IN WITNESS THEREOF the undersigned, being duly authorized thereto, have signed
this Convention.

DONE at Geneva, this twenty-first day of April, one thousand nine hundred and sixty-
one, in a single copy in the English, French and Russian languages, each text being
equally authentic.
V Inter-American Convention on International Commercial Arbitration  
(Panama 1975)

The Governments of the Member States of the Organization of American States desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

   a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

   b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

   c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or
b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

**Article 6**

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guarantees.

**Article 7**

This Convention shall be open for signature by the Member States of the Organization of American States.

**Article 8**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

**Article 9**

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

**Article 10**

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

**Article 11**

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of
signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the lumber States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

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